Case No: A3/2011/1790

Neutral Citation Number: [2012] EWCA Civ 855

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION COMMERCIAL COURT
MR JUSTICE HAMBLEN
2010 FOLIO 315 and 316

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE LONGMORE
and
LORD JUSTICE DAVIS

- -

Between :

YUKOS CAPITAL S.A.R.L **(A COMPANY INCORPORATED IN LUXEMBOURG)**	**Claimant / Respondent**
- and -	
OJSC ROSNEFT OIL COMPANY **(A COMPANY INCORPORATED IN THE RUSSIAN FEDERATION)**	**Defendant / Appellant**

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Lord Grabiner QC and Mr Ciaran Keller and Mr Conall Patton (instructed by **Travers Smith LLP**) for the **Appellant**
Mr Gordon Pollock QC and Mr Jonathan Nash QC and Mr James Willan (instructed by **Byrne and Partners LLP**) for the **Respondent**

Hearing dates : Tuesday 20th March 2012
Wednesday 21st March 2012
Thursday 22nd March 2012

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Judgment

Lord Justice Rix :

Introduction

1. This is the judgment of the court, to which each of its members has contributed.

2. We are concerned in this appeal with arbitration and litigation on an international scale, but also with allegations which go to the heart of questions of the rule of law in a friendly foreign state.

3. The problem is this. A claimant, incorporated in Luxembourg but originally part of a Russian group, obtains a Russian arbitration award under a Russian contract against a Russian company, part of a Russian resources group now within majority Russian state ownership and control. At the time when the contract between the original parties was entered into, both parties had been members of the same Russian group, then in private hands. By the time the award is issued, however, the defendant company, to which the liability has passed by a process of universal company succession, is within Russian state control, while the claimant company has survived in private hands outside the state takeover. It is now said by the defendant company (but had not been said at the arbitration) that the contract under which the award had been made was part of an unlawful tax scheme operated by the original parties to the contract when they were associated companies within a single group.

4. Following the making of the arbitration award, there are proceedings in the Russian courts which lead to the setting aside of the award. The claimant contends that those judicial proceedings are a travesty of justice but typical of the campaign of state interference which has been waged by the Russian state.

5. The claimant seeks to enforce the award, despite its having been set aside by the courts of the country where it was made, in another foreign nation, namely The Netherlands, pursuant to the New York Convention.

6. The Dutch court at first instance refuses enforcement, on the ground that the award has been set aside in Russia; but on appeal in the Amsterdam court of appeal the award is recognised for enforcement, while the Russian court's decision setting aside the award is refused recognition. The refusal of recognition is on the ground that it can be inferred, from the general nature of the subservience of the Russian courts to state influence in matters of state importance, that the decision of the Russian court in setting aside the award was "partial and dependent", in other words was dictated by bias or intimidation. As a result the Russian award is enforced in The Netherlands.

However, there remains an outstanding claim for post-award interest, albeit the award itself does not provide for post-award interest.

7. Meanwhile the claimant proceeds to England, where it also seeks to enforce the award and post-award interest, both pursuant to the New York Convention and at common law. Enforcement proceedings are therefore commenced in the commercial court in London.

8. The defendant says: the award has gone, it has been set aside by the Russian courts; and the allegations of bias which the claimant makes, or at any rate a large part of the claimant's case which is concerned to allege a conspiracy on the part of the Russian state to steal the assets of the private group to which the claimant company originally belonged, and ultimately to purloin the group itself, by forcing it into bankruptcy by unlawful tax demands and/or by buying its assets in rigged auctions, raises issues about the executive or administrative acts of a foreign sovereign within its own territory upon which the courts of England cannot adjudicate. That is said in reliance on the act of state doctrine, and/or on the associated doctrine of judicial abstinence, the doctrine of non-justiciability. The defendant also says that the award should in any event not be enforced in England because it wrongly gives effect to an unlawful scheme of fraudulent tax evasion.

9. The claimant says: the award has not gone, for the Russian courts' setting aside of the award was partial and dependent, as the Dutch court has correctly found in proceedings which in any event bind and estop the defendant under the doctrine of issue estoppel. As for the doctrines of act of state and of non-justiciability, they do not apply. The act of state doctrine does not apply because there is no attempt here to challenge the validity of any act of state. The doctrine of non-justiciability does not apply because the case is concerned with judicial standards, which are justiciable. As for the new allegation of unlawful tax evasion, that allegation is itself said to be part of the Russian state's unlawful campaign, with the assistance of the tax and judicial authorities, to strip and acquire control of the assets of the private group to which the claimant originally belonged.

10. In the commercial court, Hamblen J agreed with the claimant on two preliminary issues which are concerned with issue estoppel and the act of state doctrines. He held that the defendant is estopped by the decision of the Amsterdam court of appeal from saying that the Russian court's decision setting aside the arbitration award is not partial and dependent. The claimant therefore sees its way open to argue in England that there is no impediment so far as that Russian court decision is concerned to enforcing the award in England. He also held that there is no room in this case for the application of the doctrines of act of state or non-justiciability. Hamblen J's judgment is reported at [2011] EWHC 1461 (Comm), [2012] All ER (Comm) 479. The judge treated the two issues entirely separately, and determined the estoppel issue first.

11. On this appeal the parties have renewed their submissions below. Those submissions raise complex and intriguing issues. Thus what is the rationale of the act of state doctrine? Is it a narrow doctrine which requires the *validity* (as distinct from the lawfulness, morality or motives) of the foreign sovereign's acts to be impugned, or else requires some positive remedy to be sought from the English court which is predicated on an attack on those sovereign acts? Or is it a broader doctrine which prevents the English court "sitting in judgment" on those acts? Does the doctrine apply to judicial acts at all? How is it that the English court does appear regularly to consider the quality of justice in foreign states in cases concerned with the English long-arm statute and issues of *forum non conveniens*, or in cases concerned with extradition? How is it that the English court does regularly consider the persecutory acts of foreign sovereigns, both in the past and potentially in the future, in the context of cases concerned with claims to asylum? How do the act of state doctrines fit with the doctrine of estoppel, where there may be a conflict between rules of public policy? When, on a claim to enforce a foreign arbitration award, there is competing reliance on decisions of the state where the award was made and of another state where the award is taken for enforcement, and when issues of public policy may be said to be involved, should the English court be deciding any issue of public policy for itself, or should it be content to abide by the foreign courts' decisions, and if so, which one?

The awards

12. There are in fact four awards, made between Yukos Capital S.a.r.L ("Yukos Capital") as claimant and OJSC Yuganskneftegaz ("YNG") as respondent. They were issued by a tribunal acting under the rules of the International Commercial Court at the Chamber of Commerce of Trade and Industry of the Russian Federation. The defendant in these proceedings, in this court the appellant, OJSC Rosneft Oil Company ("Rosneft"), is the universal successor to the rights and liabilities of YNG, pursuant to an amalgamation that took place on 1 October 2006. The awards were made a little earlier, on 19 September 2006. The amount awarded by the four awards was about US$ 425 million, which has now been paid pursuant to Yukos Capital's enforcement proceedings in The Netherlands. However, Yukos Capital now seeks, in these further enforcement proceedings in England, to recover post-award interest, in the further sum of more than $160 million.

13. Yukos Capital was at one time a member of the Yukos Group, a well-known Russian group of companies involved in oil production and trading. I will refer to "Yukos" as the group, and to Yukos Capital as the claimant in the awards, the Dutch proceedings and these proceedings respectively.

14. After the forced break-up of Yukos in Russia, Rosneft acquired the majority of Yukos's assets. At that time Rosneft was wholly owned and controlled by the Russian state. It remains so owned and controlled, not wholly but by a majority. The break-up of Yukos and the acquisition of its assets by Rosneft has been referred to as the "re-nationalisation" of Yukos or its assets. However, Yukos Capital remained in private hands.

15. YNG was a former production subsidiary of Yukos, and was incorporated in Russia. However, by the time that the awards were made, YNG had been acquired by Rosneft. Thus the awards when made and when subsequently set aside by the Russian courts were against an award debtor effectively controlled by the Russian state.

16. The awards were in respect of loan agreements which Yukos Capital alleges but Rosneft denies YNG had accepted in the arbitrations to be valid. Rosneft now pleads that the loan agreements were part of an illegal scheme of tax evasion (see para 23(2) of Rosneft's defence). In brief, Rosneft says that the scheme involved the manipulation of Yukos's oil trading in order to accumulate profits in Russia's low tax regions, thereby depriving YNG of revenues to which it should have been entitled. It is said that this scheme has been held to be illegal and fraudulent by the Russian courts. It is also said that a recent decision of the European Court of Human Rights in *OAO Neftyanaya Kompaniya Yukos v. Russia* (Application no 14902/04, 20 September 2011, and thus post Hamblen J's judgment) has found that the Russian courts properly found Yukos's tax arrangements to be unlawful based on well-founded findings and an application of the law that was neither arbitrary, unreasonable, nor unforeseeable, and that Russia's tax assessments pursued a legitimate and non-discriminatory aim.[3]

17. The awards were subsequently set aside by the Russian Arbitrazh Courts on Rosneft's applications. There were two first instance decisions dated 23 May 2007 by the Moscow Arbitrazh Court, which is the supervisory court with jurisdiction to consider annulment of awards under Russian law. The judge observed:

> "9…The challenge was entertained notwithstanding the expiry of the 3 month period in which challenge could be brought. The Awards were set aside on what Yukos Capital contends were the flimsiest of grounds including, for instance, that Yukos Capital had been permitted to amend its claim and that one of the arbitrators had spoken at a major conference of which Yukos' lawyers were co-sponsors."

[3] See paras 659-666 of the Strasbourg court's judgment. Thus the court rejected any violation of article 18 of the ECHR. However, it found a violation of article 6 in that Yukos was given insufficient time to prepare a response to a 2000 tax assessment, a violation of article 1 of Protocol No 1 in relation to the imposition and calculation of penalties pursuant to 2000-2001 tax assessments, and a violation of article 1 of Protocol No 1 in the failure to strike a fair balance between the legitimate aim of enforcement proceedings and the measures employed.

The decisions to set aside were upheld on appeal on 13 August 2007 by the Federal Arbitrazh Court (Moscow District), and permission to appeal to the Supreme Arbitrazh Court was refused by that court on 10 December 2007.

18. Yukos Capital contends that these decisions (the "annulment decisions" as they have been called) should not be recognised by the English court because they were the product of a judicial process that was partial and dependent and therefore offend against English principles of substantial justice.

The Dutch enforcement proceedings

19. Yukos Capital applied in The Netherlands for "exequatur" (ie leave to enforce) under Dutch codes and the New York Convention. It started those proceedings on 9 March 2007, at which time the awards still stood in Russia. Following the decisions in the Moscow Arbitrazh Court of May 2007, Yukos Capital amended its application to complain that those decisions should be ignored as being neither impartial nor independent. Rosneft responded by relying on the annulment decisions and invoking public policy to resist enforcement. The Dutch court's judgment at first instance was rendered on 28 February 2008. Enforcement was refused on the ground that an annulment decision by the courts of the seat of the arbitration should only be disregarded in "extraordinary circumstances" and such circumstances had not been sufficiently asserted.

20. There was a complete re-hearing on appeal to the Amsterdam court of appeal. Yukos Capital undertook to prove that the annulment decisions were the result of partial and dependent proceedings and therefore should not be recognised. On this occasion Yukos Capital made a detailed statement of appeal, which ran to 100 pages, and submitted 124 exhibits. It also offered to prove further matters by live witnesses, including expert witnesses, if necessary. Rosneft also submitted a lengthy document by way of defence, but no documentary evidence. However, it too offered to produce live testimony. It took the view that only evidence (from Yukos Capital) directed at the particular judges and decisions concerned could be relevant, and that there was no such evidence. Yukos Capital's approach was rather to invite an inference to be drawn as to the annulment decisions from broader considerations of Russian justice in circumstances where Russian state interests were concerned.

21. The Amsterdam court of appeal agreed with the approach of Yukos Capital. Thus it rejected the need for direct evidence of the partiality and dependence of the individual judges concerned (for such "by their very nature take place behind the scenes" at para 3.9.4). It found that Rosneft had insufficiently refuted or contested, but Yukos Capital had properly substantiated, its submission and evidence that the Russian judiciary is

"not impartial and independent but is guided by the interests of the Russian state and is instructed by the executive" (para 3.9.3). It concluded that it was so likely (or "plausible") that the annulment decisions were the result of "an administration of justice which is to be qualified as partial and dependent, that it is not possible to recognize those judgments in the Netherlands" (at para 3.10). Accordingly, Yukos Capital was given leave to enforce the awards. In coming to these conclusions the court considered itself to be applying "rules of general private international law" and "Dutch public order" (paras 3.4/5). Its decision was made on 28 April 2009.

22. In coming to these conclusions the Amsterdam court of appeal relied on findings in the courts of various European countries that "the criminal prosecution of executives of Yukos Oil Company in Russia is politically inspired" (para 3.8.8). It cited some expert testimony given in *Cherney v. Deripaska*[4] (3 July 2006, Commercial Court) to this effect:

> "Professor Stephan does not dispute that in the Yukos case serious irregularities occurred. The principal criticism concerns the criminal proceedings brought in the courts of general jurisdiction against the leading figures. But the arbitrazh court also failed to exercise a sufficient stringent review of the tax assessments. There are also grounds for concern as to whether the arbitrazh court overseeing the Yukos bankruptcy was sufficiently proactive in limiting the discretion of the receiver. But the Yukos case, in which the principal target, Mr Khordorkovsky was a prominent oligarch, involved the renationalization of critical energy resources carried out by administrative agencies acting on behalf of the Russian State, that renationalization being a central policy of the Putin administration."

23. A further appeal by Rosneft to the Dutch Supreme Court did not bear fruit. It was rejected on jurisdictional grounds, on the basis that Dutch law does not permit a second appeal against the grant of an *exequatur*. There is currently an application to Strasbourg by Rosneft, to the effect that such a rule had never been previously imposed in an international arbitration enforcement case and amounted to an unfair denial of justice.

The English proceedings

24. On 11 March 2010 Yukos Capital issued two claims in England. One is an arbitration claim seeking permission to enforce the awards pursuant to section 101 of the Arbitration Act 1996 (the "1996 Act") (and thus pursuant to the New York Convention); the other is a Part 7 claim claiming the amount awarded as debt and/or damages plus post-award interest. Both claims were issued on the basis that no part of

[4] We will have to refer to the *Cherney v. Deripaska* jurisprudence below

the awards had been paid. Now that the awards themselves have been paid, it would seem that only the Part 7 claim is in issue. Interest is claimed pursuant to article 395 of the Russian Civil Code and/or section 35A of the Senior Courts Act 1981. In due course particulars of claim in respect of both claims were served in a single document. Para 10 of the particulars of claim asserts Yukos Capital's case that the annulment decisions "are not to be recognised as a matter of English private international law".

25. Rosneft's defence disputes any obligation to honour an award which has been set aside by the supervisory court, and relies both on common law and on section 103(2)(f) of the 1996 Act for this purpose. The awards "no longer exist in a legal sense", and in any event Yukos Capital is issue estopped by the annulment decisions from asserting that the awards are valid and binding on the parties. Further, it would be "contrary to the public policy of the United Kingdom" to recognise or enforce the awards either at common law, or pursuant to section 103(3) of the 1996 Act, "because the Loan Agreements were part of an illegal and fraudulent tax scheme and/or amounted to an abuse of right and/or were sham or otherwise void transactions under Russian law" (para 23(2) of the defence).

26. Yukos Capital's reply is an important document, and has gone through various amendments. In its latest form (a re-re-amended reply plus Annex 1, dated March 2011, for which Hamblen J gave permission to amend in his order dated 14 June 2011 pursuant to his judgment under appeal) it sets out its latest case for explaining why the annulment decisions should not be recognised. First, it relies on the decision of the Amsterdam court of appeal for an issue estoppel that the annulment decisions were, or were likely to be, the result of a partial and dependent judicial process and were accordingly procured in circumstances contrary to natural justice, substantial justice, and article 6's guarantee of a fair trial. Alternatively it sets out anew its case why the annulment decisions were tainted by bias, with the same consequences. That case is particularised or expanded in paras 6, 6A (referring to Annex 1) and 7 of the reply. The critical allegations to which objection is taken by Rosneft on act of state grounds are set out below.

27. Hamblen J's judgment, which in this respect reflects an element of common ground, refers to three allegations, the "first", "second" and "third" allegations (see paras 175ff, 191ff, and 196ff of his judgment). We emphasise that Yukos Capital's allegations are yet to be proved in these courts.

28. The first allegation is labelled "the campaign against Yukos". The judge helpfully summarises it as follows (at para 177):

> "(1) Entirely unsubstantiated tax demands were made, after Yukos had previously been given a clean audit by the tax authorities; and that those demands were

pursued in such a manner as was intended to impede their discharge by Yukos. Thereafter, the tax demands were upheld by the Russian courts in proceedings which were grossly unfair and involved a manifestly improper application of Russian tax law; and any judge who found in favour of Yukos was summarily removed. Enforcement of the tax demands was then carried out in a manner intended not to maximise recovery, but to ensure that Yukos' assets were transferred at the lowest possible price to Rosneft. This process included enforcing against Yukos' critical production facilities first; the admission by the courts of manifestly unsubstantiated claims by Rosneft; and rigged auctions by the bankruptcy manager. All challenges by Yukos to these manifestly inappropriate acts were dismissed by the courts.

(2) This needs to be put in the political context of the Russian Federation's desire to re-nationalise strategic energy assets and to destroy Mr Khordorkovsky (who was a political opponent) so as to explain why these were not the ordinary application of Russian law and practice uninfluenced by executive interference, but that the Russian government procured each of the steps taken against Yukos Oil.

(3) Against that background and in the light of the clear examples of interference by the Russian state in the judicial process, it is unthinkable that the Russian government would have allowed the Russian courts (or that the Russian courts would have dared) to uphold awards worth over US$400 million against Rosneft (i.e. the recipient of Yukos' assets) in favour of, effectively, Yukos' former shareholders, including Mr Khordorkovsky. On that basis, the court will be invited to infer that the Annulment Decisions were the result of a partial and dependent judicial process."

29. This first allegation is alleged by Rosneft to be outlawed for adjudication by the act of state doctrine. In particular Rosneft objects to the following passages in Yukos Capital's pleadings:

(i) part of para 6(1)(b) of the reply: "and having regard to the campaign against the Yukos group and its former CEO Mr Mikhail Khordorkovsky referred to hereafter and the fact that cases against Yukos are perceived in Russia as raising important issues of State policy, a fair minded and informed observer would conclude that there was a real possibility or real danger that the Russian Courts were biased against the Claimant";

(ii) para 6(4) of the reply: "formed part of a wider campaign waged by the Russian state for political reasons against the Yukos Group and its former CEO, Mikhail Khordorkovsky;

(iii) para 7(6) of the reply: "Since at least December 2003 the Russian state has conducted a campaign intended to deprive Yukos of its assets and render it insolvent; to transfer Yukos' assets to enterprises under state control; and to detain its former owner Mr Khordorkovsky in prison. Full

particulars of this campaign will be provided in expert evidence in due course, but its principal features include unwarranted tax assessments for enormous sums accompanied by demands for payment within days; dismissal with no or no adequate reasoning of all attempts to challenge the relevant assessments; refusals to engage in any negotiation to settle the alleged tax liabilities; preventing or impeding payment of the tax demands notwithstanding that Yukos had sufficient assets to do so; the conduct of rigged auctions where the only bidders were companies fronting for state owned enterprises; the imprisonment of Mr Khordorkovsky on trumped up charges and (as his sentence approached its conclusion in 2007) the laying of further charges against him inconsistent with the charges on which he had previously been convicted";

(iv) para 10(2)(c) of the reply: "at all material times Yukos operated its businesses in accordance with all relevant tax laws and paid all sums properly due to the appropriate tax authorities. Insofar as it has been found liable in Russian Courts to pay enormous sums by way of additional tax and penalties the tax assessments and judicial decisions supporting them were procured by the Russian State as part of the campaign referred to at paragraph 7(5)[5] above and/or should not be recognised by the English Court for the reasons set out in paragraphs 6 and 7 above".

30. The second allegation has been labelled "Specific instances of unjust Yukos-related Proceedings". It charges that there are numerous other instances of unfair proceedings or perverse judicial decisions in Yukos-related proceedings being conducted at about the same time before the same courts to support an inference that the annulment decisions are similarly likely to be the product of partiality or bias. The relevant pleading for these purposes is para 6A of the reply and Annex 1. Para 6A reads:

> "More generally, the Russian Arbitrazh Courts have, when adjudicating proceedings involving Yukos or companies associated with it, acted in a manner which demonstrates that the cases have not been decided in accordance with the relevant law and/or in a fair manner, but involved bias and/or deliberate misapplication of the law. It is to be inferred that there was, or was a real risk of, a similar bias and/or deliberate misapplication of the law against Yukos Capital (which was also a Yukos interest) in the case at issue. Yukos Capital shall rely on the examples set out in Annex 1."

31. The first ten pages of Annex 1 are objected to (paras 1/2 of Annex 1), but not the last 8 pages. It is not clear what the difference is between them, but in the course of the appeal Lord Grabiner QC on behalf of Rosneft explained the objection as follows: Rosneft's case is that these allegations offend against the act of state doctrine because, by challenging as a "deliberate misapplication" of Russian law the Russian court decisions upholding the tax assessments, Yukos Capital necessarily requires the

[5] Sic, but probably an error for para 7(6).

English court to hold that the tax assessments levied by the Russian state were unlawful under Russian law. On this basis, the judge's label probably needs reformulating, and this second allegation appears to be regarded as lying down very closely with the first allegation but as concentrating on unlawful tax assessments. So perhaps the label should be "Unlawful tax assessments".

32. As for these first two allegations, Rosenft's rejoinder pleads that "the English court should not adjudicate upon [the averments] or investigate or call into question such acts of a sovereign state within the limits of its own territory, by reason of the doctrines of Act of State and/or non-justiciability".

33. The third allegation ("Bias in cases involving matters of importance to the Russian Federation") is a more generalised case that Russian judges tend in matters of significant interest to the Russian state to act, or indeed to be instructed by the executive to act, in a biased manner in support of the state interest. In this connection objection is taken solely to para 7(1) of the reply, which reads:

> "The Judges of Russian Courts are susceptible to improper influences where significant state interests are, or are perceived to be, in issue, whether by way of indications made out of court to Judges (known colloquially in Russia as 'telephone justice' and decisions 'to order') or the tendency of Judges assigned to such matters to act in accordance with the perceived interests of the Russian Federation irrespective of the merits of the case."

34. As for this third allegation, objection is made by Rosneft not in terms of the act of state doctrine itself, but in terms of the doctrine of judicial abstinence on the ground of non-justiciability (para 6(1)(i) of Rosneft's rejoinder).

35. Rosneft has nevertheless accepted that it is open to the English courts to find that the individual decisions of the Russian supervisory courts (the "annulment decisions") were obtained by fraud, corruption, bias or lack of independence on the part of those courts. The concession has been put in the following way. In his judgment Hamblen J recorded that Rosneft "acknowledges that the court can determine whether the Annulment Decisions were partial and dependent" (at [185]). (The judge regarded that concession as being contradictory, for it did not extend to other decisions such as the tax assessments (*ibid*).) No such acknowledgment is stated in Rosneft's skeleton argument to this court, but on the contrary the act of state doctrine is alleged to extend to the acts of a government "including through its courts" (citing *Philippine National Bank v. United States District Court* 397 F 3d 768 (9th Cir 2005)). However, at the hearing of this appeal Lord Grabiner stated within minutes of opening as follows:

> "Yukos Capital's response is to assert that the Russian annulment decisions were reached by a partial and dependent process…Now, it is open, we accept, to Yukos to try to prove that assertion by reference to evidence about the annulment proceedings themselves, for example by saying that they did not get a fair hearing or that the judge was biased or that his reasoning was perverse. In principle, we accept that that would not be objectionable. But Yukos wants to pray in aid a very much wider contention that there was a concerted political campaign by the Russian state…"

36. The distinction between what is objected to and what is not objected to is not entirely clear. But we suppose that it is essentially this: that the annulment decisions and the courts which made them can be attacked on the basis of any complaint which might be made in any dispute between private citizens; but they cannot be attacked on the basis either that Russian courts are generally not independent of the Russian state where state interests are concerned, or that in this particular case the annulment decisions were part of a campaign of expropriation and political enmity.

37. Thus, as to that campaign, the judge expressed Rosneft's case in outline in the following summary:

> "[112] Rosneft contended that the allegations made by Yukos Capital engage the Act of State principle. It submitted that the essence of the allegation requires the English court to adjudicate upon and call into question the legitimacy and legality of the acts of a recognised (and friendly) foreign state or government within its own territory, including the legitimacy and legality of the decisions of its courts. The allegation made is that all the events relating to the Yukos matter (for example, the tax claims, their pursuit through the Russian courts, the resulting judgments of the Russian courts, the enforcement of those judgments under Russian law in Russia by the relevant arm of the executive, the decisions of the Russian courts upholding that enforcement process, the auction of the YNG shares effected by the Russian state, and even extending, so it is alleged, to the Russian decisions annulling the Awards in this case) are part of a governmental and political campaign involving, it is effectively alleged, the expropriation of assets from Yukos by illegitimate and illegal means, arranged and directed by the Russian state or government."

The two preliminary issues

38. By his order of 22 July 2010 Mr Justice David Steel ordered preliminary issues to determine:

> "(a) Whether the Defendant is issue estopped by the judgment of the Amsterdam Court of Appeal dated 28th April 2009 from denying that the judgments of the Russian civil courts annulling the arbitral awards which are the subject of these claims were the result, or likely to be the result, of a partial and dependent judicial process…
>
> (c) The issues relating to Act of State / non-justiciability pleaded in the Defendant's Rejoinder (on the assumption that the facts pleaded in the Claimant's Reply are true) and whether paragraph 7(1) of the Claimant's Reply should be struck out."

39. Hamblen J answered these issues as follows, in his order:

> "1. Rosneft is estopped, by the decision of the Amsterdam Court of Appeal dated 28 April 2009, from denying that the decisions referred to in paragraphs 11 to 14 of Rosneft's Amended Defence were the result of a partial and dependent judicial process.
>
> 2. Yukos Capital is not prohibited from alleging, and the Court is not prohibited from adjudicating, any of the issues raised by Yukos Capital's Re-Re-Amended Reply on the grounds of Act of state and/or non-justiciability and/or comity."

Act of State: the jurisprudence

40. The act of state doctrine is a long-standing doctrine of Anglo-American jurisprudence (Hamblen J commented that there is nothing similar in the civil law). It can be traced back to decisions in our courts such as *Blad v. Bamfield* (1674) 3 Swans 605 and *Duke of Brunswick v. Hanover* (1848) 2 HL Cas 1, *per* Lord Cottenham at 17). In the former case Lord Nottingham said at 607 that it would be "monstrous and absurd" to pretend to judge the validity of the King of Denmark's patent in Denmark or to try whether the English have a right to trade in Iceland. In the latter case Lord Cottenham LC said at 17 that the courts of England "cannot sit in judgment upon the act of a Sovereign, effected by virtue of his Sovereign authority abroad".

41. Some 100 years ago the doctrine was given new impetus in a series of three cases in the United States Supreme Court. In *Underhill v. Hernandez* 168 US 250 (1897) at 254 Chief Justice Fuller said:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances

by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

In *Oetjen v. Central Leather Co* 246 US 297 (1918) Justice Clarke said this (at 245/6):

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another…rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations"."

And in *Ricaud v. American Metal Company Limited* 246 US 304 Justice Clarke observed (at 304):

> "when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision."

42. These Supreme Court authorities were applied in England by the court of appeal in *Luther v. Sagor & Co* [1921] 3 KB 532 and *Princess Paley Olga v. Weisz* [1929] 1 KB 718 (see, for instance, at 724/725 and 728/729). In the latter case Russell LJ at 736 put the matter in this way:

> "This Court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory."

That limitation to "its own subjects" is controversial. These authorities may however, have to be reassessed today, as matters concerned with private rights and private international law principles rather than sovereign authority: see *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 972H/973C.

43. In *Buck v. Attorney General* [1965] 1 Ch 745 (CA) Diplock LJ emphasised the international aspects of the principle, and its analogy to the doctrine of sovereign immunity (at 770):

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state

which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity…For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do."

44. In *Attorney-General v. Nissan* [1970] AC 179 at 237 Lord Pearson said this about acts of state, albeit the state he was there talking about was the Crown and not a foreign sovereign. In such a case it appears that the doctrine of act of state differs, in that it is a narrower class of act which falls within the doctrine. When, however, a relevant act of state is determined, a similar doctrine of non-justiciability prevails. Lord Pearson said:

"As to the alleged act of state, it is necessary to consider what is meant by the expression "act of state", even if it is not expedient to attempt a definition. It is an exercise of sovereign power. Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessations of territory. Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court. An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of; the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it. This is a very unusual situation and strong evidence is required to prove that it exists in a particular case."

45. We come now to *Buttes Gas and Oil Co v. Hammer (No 3)* [1982] AC 888, from which the modern law of foreign act of state may be said to take its impetus. Lord Wilberforce there also discerned a separate but analogous doctrine of non-justiciability, albeit he traced it back to old underpinnings in the same anthology of cases.

46. *Buttes Gas* concerned a defamation action, the issues in which embraced two conflicting oil concessions which neighbouring states in the Arabian Gulf had granted over their territorial and offshore waters. The foreign relations of the United Kingdom and of Iran were also involved. At the heart of the defamation dispute was a boundary issue which made it impossible to say what the territorial limits of the neighbouring states were. The defendants submitted that the action raised issues which were non-justiciable by the English courts and should therefore be stayed. It was for the purpose of that submission that the act of state doctrine and its jurisprudence were reviewed. Lord Wilberforce, with whose speech the other members of the judicial committee agreed, drew from the English and American authorities at least two principles: one specific, a territorial act of state principle, the other general, the principle of non-justiciability. The former did not apply, but the latter did.

47. Lord Wilberforce expressed each doctrine in the following terms. Of the former he said (at 931B):

> "A second version of "act of state" consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property. Mr Littman gave us a valuable analysis of such cases…suggesting that these are cases within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied…"

In that context issues might still arise as to whether effect would be given in England to the foreign law or act, if it was contrary to public policy or international law. It appears that Lord Wilberforce was here perhaps seeking to narrow the territorial principle, for instance by referring to "legislation". However, this version of the doctrine did not apply because what the *Buttes* case was concerned about was not so much a foreign municipal law as "an act or acts operating in the area of transactions between states" (at 931D/E).

48. Lord Wilberforce therefore turned to a wider and general principle, which on our current understanding is not so much a *separate* principle as a more *general and fundamental* principle, the principle of non-justiciability. Thus he said (at 931G):

> "So I think that the essential question is whether, apart from such particular rules as I have discussed…there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of "act of state" but one for judicial restraint or abstention."

49. Lord Wilberforce then derived that more general principle from the very cases which we have examined above. It is not entirely clear to us whether that more general principle is confined, as some of the expressions in those cases would seem to confine it, to what transpires territorially within a foreign sovereign state: but we are of the view, expressed in the judgment of this court in *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [287] and [319], that the principle may even extend to extra-territorial (or perhaps one might speak of transnational) acts, as in *Buttes Gas* itself, with its international boundary disputes. However, in the present case, we are concerned only with what has occurred within Russia itself.

50. At 937 Lord Wilberforce considered some of the issues which would arise in that case, if it was allowed to proceed. He emphasised first, the question of the boundary dispute between four nations; and secondly, that the dispossession of any rights depended on a series of interstate transactions, an examination of the motives of sovereigns, and questions of unlawfulness under international law. He then concluded with this well-known passage (at 938A/C):

> "It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are – to follow the Fifth Circuit Court of Appeals – no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law."

51. Earlier in his speech, Lord Wilberforce had also indicated some concepts which could be used to paint the contours of the doctrine or doctrines. Thus a question as to foreign land "may arise incidentally or collaterally to some other question, and may be decided" (at 926H). That is then contrasted with the questions which arose in *Buttes Gas* itself, which were said to be "at the heart of the case" (at 927B). Nor was the doctrine avoided simply because there was no allegation of unlawfulness under the local (Sharjah) law itself: on the contrary, it was all the more problematic that the issue arose "in a different, and international dimension" (at 927C). And then this:

> "This cannot be decided simply as a fact upon evidence: it calls, on the contrary, for adjudication upon the validity, meaning and effect of transactions of sovereign states."

52. In *Williams and Humbert Ltd v. W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 the defendant's application to strike out the plaintiff's action by reason of the act of state doctrine failed. It was alleged that the plaintiff was seeking to rely indirectly on Spanish expropriatory decrees in order to prove its title: but it was held that the plaintiff's title did not depend on the decrees but on the general law anterior to those decrees. What was said about the act of state doctrine was therefore obiter. Nevertheless, Lord Templeman, with whose speech the other members of the House of Lords agreed, said this (after considering cases such as *Luther v. Sagor* and *Princess Paley Olga v. Weisz*) at 431D/E:

> "These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition. In their pleadings the appellants seek to attack the motives of the Spanish government and to question the good faith of the Spanish administration in connection with the enactment, terms and implementation of the law of the 29 June 1983. No English judge could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Union."

It was common ground before us that any implied limitation of those propositions to members or future members of the EU would not be sustainable. In our respectful view, it was not intended.

53. In *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 269 Lord Millett said this about the act of state doctrine and its closeness to an aspect of state immunity *ratione materiae*:

> "Immunity ratione materiae is very different. This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1; *Hatch v. Baez,* 7 Hun 596; *Underhill v.*

Hernandez (1897) 168 U.S. 250. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another…

Given its scope and rationale, it is closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine. As I understand the difference between them, state immunity is a creature of international law and operates as a bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state."

54. Lord Phillips of Worth Matravers also covered this ground, at 286 as follows:

"There would seem to be two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine. Two citations well illustrate the principle…"

and Lord Phillips proceeded to cite the classic statements of Chief Justice Fuller from *Underhill v. Hernandez* at 252 and of Diplock LJ from *Buck v. Attorney-General* at 770.

55. The subject of the act of state doctrine played an important role in *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, although there it was held that its application, as well as any reliance on Iraqi law as the *lex situs* or the *lex loci delicti*, was excluded by an exception founded in international law or English public policy. I will deal with the exceptions to the doctrine separately below. For the present it will suffice to cite the terms in which their Lordships described the act of state doctrine.

56. Thus Lord Nicholls of Birkenhead referred to the act of state principle through the submissions of IAC's counsel ("An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic law or international law. For a court to do so would offend against the principle that the

courts will not adjudicate upon the transactions of foreign sovereign states" at [24]), but continued:

> "[25] My Lords, this submission seeks to press the non-justiciability principle too far. Undoubtedly there may be cases, of which the *Buttes* case is an illustration, where the issues are such that the court has, in the words of Lord Wilberforce, at p938, "no judicial or manageable standards by which to judge [the] issues"…
>
> [26] This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law…Nor does the "non-justiciable" principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged…"

Thus Lord Nicholls did not for himself formulate the doctrine other than in terms of Lord Wilberforce's more general principle.

57. Lord Steyn said (at [112]) that "it is well established that courts must not sit in judgment on the acts of a foreign government within its own territory."

58. Lord Hope of Craighead, under the heading of "Justiciability", said this:

> "[135] Important questions of principle are raised by the highly unusual facts of this case. There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised sovereign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny. The rule gives effect to a policy of "judicial restraint or abstention": see *Buttes Gas and Oil v Hamer (No 3)* [1982] AC 888, 931F-934C per Lord Wilberforce…"

Lord Steyn and Lord Hoffmann agreed with Lord Nicholls (as well as giving reasons of their own); Lord Steyn also agreed with Lord Hope.

59. *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2011] 4 All ER 1027 concerned an attempt by a claimant to enforce a Kyrgyz judgment against the defendants, and a counterclaim by the defendants, against the claimant and others, for

a declaration that the judgment had been obtained by fraud, and for damages for that fraud. The question was whether the defendants should be given leave to serve their counterclaim out of the jurisdiction. The Privy Council held that leave should be granted, since it had been sufficiently shown that there was no prospect of justice being done in the courts of Kyrgyszstan.

60. In reliance on the act of state doctrine, the claimant and intended defendants to the counterclaim submitted that the court should abstain from sitting in judgment on the independence of the Kyrgyz judicial system. Lord Collins referred (at [90]) to two questions: the first was as to the standard of proof to be satisfied by a party which asserts that justice will not be done in the foreign jurisdiction: did that have to be proved, or did only the *risk* of it have to be proved? The second question was whether it was open to allege that "as a result, for example, of endemic corruption, justice cannot be obtained in the foreign legal system in general".

61. Lord Collins proceeded to demonstrate that the earliest cases of relevance had arisen during the period of Nazi control in Germany: it had been open to a Jewish refugee to sue his German employer in England by showing that he could not get justice in Germany: *Oppenheimer v. Louis Rosenthal & Co AG* [1937] 1 All ER 23 (CA). In *The Abidin Daver* [1984] AC 398 at 411 Lord Diplock said that a stay of an English action on the ground of *forum non conveniens* could be resisted on the ground that justice could not be obtained in the otherwise more appropriate forum but that such a claimant "must assert this candidly and support his allegations with positive and cogent evidence". Lord Collins concluded, after citation of other authority, that, on the first question, it was only a real risk that had to be shown. He said:

> "[95] The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice 'will not' be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

Lord Collins was there speaking in the context of the seeking and disputing of long-arm jurisdiction, where issues arise at an interlocutory stage and do not require to be judged by the standard of proof applicable at trial.

62. Lord Collins then turned to the second question, concerning the act of state doctrine. Despite two Australian cases in which a doctrine of judicial restraint in such circumstances was said to be applicable (*Voth v. Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, and *Mokbel v. A-G for the Commonwealth of Australia* [2007] FCA 1536, (2007) 244 ALR 517), Lord Collins relied inter alia on the decision in this court

in *Al-Koronky v. Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, [2007] 1 Costs LR 57 for his conclusion that the act of state doctrine did not apply. In *Al-Koronky* this court said that it was entitled to take into account evidence about the lack of independence of the judiciary in the Sudan for the purposes of requiring security for costs in English proceedings. Lord Collins also found support for his conclusion in "many cases in the United States courts in which the standard of justice in the foreign court has been examined in the context of forum non conveniens questions" (at [102]). Lord Collins expressed the relevant principles as follows:

> "[97] Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the appellants' submission, even in what they describe as endemic corruption cases (ie where the court system itself is criticised) there is no principle that the court may not rule…
>
> [101] The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas and Oil v Hammer (Nos 2 and 3)*, is the basis of Lord Diplock's dictum in *The Abidin Daver* and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less would it be permissible to make adverse findings on it."

63. Most recently, in *Lucasfilm Ltd v. Ainsworth* [2011] UKSC 39, [2012] 1 All ER (Comm) 1011, the Supreme Court was concerned with the question whether a breach of foreign copyright was justiciable in England. The act of state doctrines in play in the present case were not directly invoked, but, in their judgment with which Lord Phillips and Lady Hale concurred, Lord Walker and Lord Collins SCJJ discussed them in the context of analogous jurisprudence regarding the justiciability of foreign intellectual property rights. The conclusion was that claims for breach of US copyright were justiciable. On the way to that conclusion Lord Walker and Lord Collins considered whether the grant of intellectual property rights was an act of state for the purposes of the act of state doctrine. They cited a decision (by a majority) of the US federal circuit court to the effect that it was: *Voda v. Cordis Corp* (2007) 476 F 3d 887 where Gajarsa CJ (Prost CJ concurring) said (at 904):

> "In this case, none of the parties or amicus curiae have persuaded us that the grant of a patent by a sovereign is not an act of state…Therefore, assuming arguendo that the act of state doctrine applies, the doctrine would prevent our courts from inquiring into the validity of a foreign patent grant and require our courts to adjudicate patent claims regardless of validity or enforceability."

However, Newman CJ, dissenting, was said by Lord Walker and Lord Collins (at [85]) to be right to point out (at 914) that not every governmental action and not every

ministerial activity is an act of state; and they cited *Mannington Mills Inc v. Congoleum Corp* (1979) 595 F 2d 1287 at 1293-1294 (3d Cir) in support, rejecting the proposition that the mere issuance of patents by a foreign power constitutes an act of state.

64. Lord Walker and Lord Collins continued:

> "[86] It has been said that the grant of a national patent is "an exercise of national sovereignty" (Jenard Report on the Brussels Convention (OJ 1979 C59 pp 1, 36)), and the European Court has emphasised that the issue of patents necessitates the involvement of the national administrative authorities (*Gesellschaft für Antriebstechnik mbH & Co KG v Lamellen und Kupplungsbau Beteiligungs KG* Case C-4/03 [2006] ECR I-6509 (para 23)). But in England the foreign act of state doctrine has not been applied to any acts other than foreign legislation or governmental acts of officials such as requisition, and it should not today be regarded as an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official."

65. It is said that there is a third doctrine, closely allied to the doctrine of non-justiciability, to the effect that the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office. The judge referred to this doctrine as the "political embarrassment principle" (at [146]-[148]). It appears to be based on Lord Wilberforce's brief comment in *Buttes Gas* at 938A; and on equally brief comments in *Korea National Insurance Corporation v. Allianz Global Corporate & Speciality AG* [2008] EWCA Civ 1355 at [32] (a paragraph which begins with the words "These statements give no support for the view that…), and in *Berezovsky v. Abramovich* [2011] EWCA Civ 153, [2011] 1WLR 2290 at [100]. None of those cases concerned such a principle, and in none of them was a communication received from the foreign office. We would be cautious about giving weight to this third doctrine, which in any event it is common ground does not arise in this case. It is acknowledged that the potential for the disruption of international relations (or what is also described as the rule of comity) is one of the philosophical underpinnings of all act of state doctrines: see, for instance, the famous dictum of Justice Clarke in *Oetjen v. Central Leather*, cited at [41] above.

66. We have confined ourselves thus far to cases, concerning the act of state doctrines, which have occurred in the House of Lords or the Supreme Court or Privy Council since *Buttes Gas*. In sum, it seems to us that Lord Wilberforce's principle of "non-justiciability" has, on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle. It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances, such as in *Buttes Gas* itself, may even go beyond

territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state.

67. However, the doctrine, although frequently expressed in the wide terms exemplified in the citations set out above, has its limitations, founded in the very language of the doctrine and in its rationale. We will examine those limitations next, for they are relevant to the submissions of Yukos Capital to the effect that the doctrine does not apply to the disputed allegations in this case. For these purposes, however, it may be necessary to observe the extent to which those submissions both rely and do not rely on such limitations.

Limitations on the act of state of doctrine

68. The first limitation is that, as stated above, the act of state must, generally speaking, take place within the territory of the foreign state itself. *Buttes Gas* is an example where, in the context of boundary disputes between states, the principle of non-justiciability was applied to acts which need not have been confined to territorial limits. Thus Lord Wilberforce appears to have contemplated that in at any rate such special circumstances the doctrine could extend beyond the territorial boundaries of the state. However, that is perhaps a unique example of such an extension. In the present case it is not suggested that any of the acts of state relied upon by Yukos Capital took place outside Russia.

69. A second limitation is that, again exceptionally, the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights. That limitation was discussed and applied in *Kuwait Airways v. Iraqi Airways*, where Lord Nicholls said this:

> "[28] The acceptability of a provision of foreign law must be judged by contemporary standards. Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times: see *Blathwayt v Baron Cawley* [1976] AC 397, 426. In *Oppenheimer v Cattermole* [1976] AC 249, 278,

> Lord Cross said that the courts of this country should give effect to clearly established rules of international law. This is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important. RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in those circumstances and for this purpose is simply not acceptable today.
>
> [29] …A breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations…Such a fundamental breach of international law can properly cause the courts of this country to say that, like the confiscatory decree of the Nazi government of Germany in 1941, a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor's own citizens will not be enforced or recognised in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law…International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law: see the discussion in *Oppenheim's International Law*, 9th ed (1992), vol I, (ed Jennings and Watts), pp 371-376, para 113."

See also Lord Steyn at [115].

70. Lord Hope agreed, but was anxious to stress the narrowness of the exception. He reasoned the matter as follows:

> "[137] IAC accepts however that the normal rule is subject to an exception on grounds of public policy. The proposition which it accepts is that the exception applies if the foreign legislation constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise the legislation as valid as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 278, per Lord Cross of Chelsea. The proposition which it disputes is that the public policy exception extends to breaches of international law…
>
> [138] It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognised in *Oppenheimer v Cattermole* [1976] AC 249, 277-278, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations. The principle normally requires our courts to recognise the jurisdiction of the foreign state over all assets situated within its own territories: see Lord Salmon, at p 282. A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may

be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.

[139] But it does not follow…that the public policy exception can only be applied where there is a grave infringement of human rights. This was the conclusion which was reached on the facts which were before the House in the *Oppenheimer* case. But Lord Cross based that conclusion on a wider point of principle. This too is founded upon the public policy of this country. It is that our courts should give effect to clearly established principles of international law…

[140] As I see it, the essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention, And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated."

71. And so Lord Hope agreed that, in the context of Iraq's flagrant beaches of international law, and the UN Security Council resolutions which marked them, judicial restraint was not called for:

"Respect for the act of state doctrine and the care that must be taken not to undermine it do not preclude this approach. The facts are clear, and the declarations by the Security Council were universal and unequivocal" (at [149]).

The rule of law required nothing else:

"It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society. Their primary role must always be to uphold human rights and civil liberties. But the maintenance of the rule of law is also an important social interest" (at [145]).

72. In this context, it should be said that the exception where English public policy is concerned embraces discrimination, at any rate where it amounts to a form of persecution as in the context of Nazi legislation or to what has been referred to as "flagrant" breaches of human rights; but it has not as yet recognised expropriation without compensation as having been outlawed by clearly established international norms. In this connection we would refer to this court's consideration of at least some of the relevant jurisprudence in *Kuwait Airways v. Iraqi Airways* at [269]-[283]. The *Kuwait Airways* case itself was exceptional in that the expropriation was achieved by a process of invasion condemned internationally through resolutions of the United Nations Security Council which have the force of law. Although Yukos Capital complains of a campaign of expropriation, aimed at Yukos and its principal, Mr

Khordorkovsky, it has not alleged, either in its pleadings or, as far as we have been told, in argument below, that its case falls outside the limits of the act of state doctrines on such grounds of exception, if those doctrines would otherwise prima facie apply. The argument has not been addressed to us. The judge merely commented:

> "[204] In the light of my conclusion that the "pure" Act of State principle does not apply it is not necessary to decide whether, if it did, Yukos Capital's case arguably comes within the exception. It was accepted that for this purpose all the allegations made by Yukos Capital must be assumed to be true and that the issue would be whether, on that basis, its claim should be struck out. I would only observe that whilst, as Rosneft submitted, the exception is a narrow one and the only example of its application[6], the *Kuwait Airways* case, was a case of extreme facts, the principle does extend to "flagrant" breaches of human rights, and that whether a breach is sufficiently "flagrant" is very fact dependent."

That might suggest that the point remained to be taken. Mr Gordon Pollock QC, who appears on behalf of Yukos Capital, accepted that there had been no respondent's notice in respect of any such point, nor did he seek to argue it.

Judicial acts

73. A third limitation, we would suggest, is that judicial acts will not be regarded as acts of state for the purposes of the act of state doctrine. Of course in certain circumstances, judicial acts will be regarded as acts for which a state may be responsible in human rights law. That is the essence of human rights law: to render the state, including its organs such as its courts, liable for acts which may be in breach of that law. However, for the most part, the vindication of such rights is either for the domestic courts or for an international court such as the Strasbourg court. Where, however, a foreign court may act in a way which is an abuse of its own responsibilities as a court of law, the courts of this country are not obliged to give effect to the potential jurisdiction or past acts of such a court, provided that the failings of the foreign court are sufficiently cogently brought home to the English court. We consider that this is the teaching of the Privy Council in *AK Investment v. Kyrgyz Mobil* [2011] 4 All ER 1027 (see at paras [59] - [62] above).

74. On behalf of Yukos Capital, Mr Pollock relies on *AK Investment* as undermining the whole of Rosneft's case on act of state. However, he nevertheless accepts, or is willing for the sake of argument to accept if not formally to concede, that court decisions are themselves acts of state. He takes his stand upon a separate footing, not that court decisions are not acts of state, but on the proposition that the act of state

[6] We do not think this is correct

doctrine may be invoked only where the validity of an act of state is in dispute, or where a judicial remedy is sought in respect of such acts. We will revert to this submission below. For the present, however, we observe that in such circumstances it is not clear to us what the distinguishing principle is supposed to be which separates court decisions which have the effect, for instance, of altering the title to property, or grant to or remove from a litigating party a financial asset or claim, and other acts of state which have the same effect.

75. Lord Grabiner's submission on behalf of Rosneft is that the *AK Investment* case is only the latest in a line of cases which allows consideration of acts of state where a future risk of injustice has to be assessed, as where a jurisdictional issue of *forum conveniens* is under consideration, but not where past acts have to be adjudicated upon and findings made. Or, as the matter is put in Rosneft's skeleton: "the Act of State principle applies only to acts which have already occurred; it does **not** apply to potential conduct of a state in the future" (para 38). The judge rejected this distinction, referring to it as unprincipled, and observing that a judgment as to the future may have to be grounded in an inquiry and findings as to the past (at [168]-[171]).

76. In this connection we have been referred to *Cherney v. Deripaska (No 2)* [2008] EWHC 1530 (Comm), [2009] 1 All ER (Comm) 333 (Christopher Clarke J) and *Berezovsky v. Abramovich* [2010] EWHC 647 (Comm) (Sir Anthony Colman), [2011] 1WLR 2290 (CA).

77. In *Cherney* the issue was whether service out of the jurisdiction should be permitted to serve the defendant in Russia. It was held that although Russia was the natural forum for the litigation, there was a risk that substantial justice would or could not be done in the natural forum so that justice required the case to be tried in England. In coming to that conclusion, the judge considered expert evidence concerning the corruption and partiality of the Russian courts and of the interference of the executive in judicial proceedings where the state's strategic interests were in play, and also evidence about other cases, such as the dispute between Yukos and Rosneft itself. The decision was upheld on appeal: *Cherney v. Deripaska (No 2)* [2009] EWCA Civ 849, [2010] 2 All ER (Comm) 456. Mr Pollock is able to say that allegations very similar to some at least of the challenged allegations in this case were there considered.

78. In his judgment below, Hamblen J set out details of those wide-ranging allegations (at [163]) and commented as follows:

> "[164] In the light of this evidence [Christopher Clarke J] concluded that he was "satisfied that, in this particular case, there is a significant risk that Mr Cherney will not obtain in Russia a trial unaffected by improper interference by state actors and that substantial justice may not be done" (at [260]).

> [165] A challenge to that conclusion was rejected on appeal. The Court of Appeal held that there was cogent evidence to support it. It referred to evidence of misuse of the criminal justice system as a tool of governmental policy (including "…the well-known proceedings against Mr Khordorkovsky of Yukos…" – at [62], of manipulation of the judicial process ("…the proceedings against Yukos and Mr Khordorkovsky provide one obvious example…" – at [64]) and of the government's willingness to interfere in the judicial process in circumstances where it considers that national interests are engaged ("…it can be said with some justification that the Yukos case involved both what might be described as the re-nationalisation of strategic assets and the damaging of a political opponent…" – at [66])."

79. Lord Grabiner, however, relies on the following observations in the judgment of Waller LJ as supporting his analysis:

> "[29] I should make clear again, having regard to points made by Mr Malek, that the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but it is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate…"

80. In our judgment, however, those observations were in no way directed to making any distinction for the purposes of the act of state doctrine, which was not in issue at all in that case, but for the different purpose of commenting on what a court has to be satisfied about for the purposes of its ultimately discretionary decision as to where a case can best be heard in the interests of justice. In such circumstances, they throw no light on the present issue.

81. In *Berezovsky*, the question was whether Mr Berezovsky's claim could be struck out. On this occasion the act of state doctrine was in issue. Mr Berezovsky alleged that he had been intimidated by Mr Abramovich into disposing of an interest at an undervalue. He supported that claim by an allegation that he had been previously threatened by President Putin in relation to the same interest (and had therefore left Russia) and that it was on this ground that he believed Mr Abramovich when he repeated similar threats, saying that he was acting on the authority of the President himself. At first instance, Sir Anthony Colman explained the structure of the argument as follows:

> "[166] …no allegation is pleaded against the sovereign state or its President as such. The substance of what is pleaded is the content of RA's threat. Whereas it is

pleaded that it was said that President Putin would or could cause BB's interests to be expropriated, it is not alleged that RA was in truth the mouthpiece of President Putin, but merely that his known relationship with the Kremlin and with the President was such that BB believed that RA was in a position to work jointly with President Putin to further a common enterprise to the mutual benefit of the President and RA…

[167] There is no allegation against the State, either as a necessary part of the tort of intimidation or for the purpose of obtaining a remedy against the Russian State, that the President or the State has already acted unlawfully or is about to do so. The ambit of the allegation is BB's understanding of what RA was telling him and his interpretation of the risk involved if he ignored RA's suggestion for the transfer of his interests in Sibneft…"

[168] The facts alleged in this case therefore differ crucially from the facts before the court in *R (on the application of Yukos Oil Co) v. FSA* [2006] EW[HC] 2044 (Admin) in which the underlying issue involved the allegation that the assets of the company seeking listing *had been* wrongly expropriated by Russia. This was alleged as an accomplished fact necessary for the relief claimed. Whether it was true would have to be determined by the FSA and subsequently the court.

[169] In the present case the allegations relating to the President and the Russian officials are simply deployed as part of the background against which RA's threat is said to have been understood by BB to be coercive. Not only are these allegations not at the heart of the cause of action, they are collateral to the conduct giving rise to the tort.

[170] The Act of State doctrine does not involve precluding the English courts from receiving evidence of this kind and evaluating its truth. In no sense can it be said that the English court is thereby trespassing on territory within the ambit of the exclusive sovereign jurisdiction of a foreign state. It is therefore unnecessary to consider the public policy submission in relation to this issue."

82. At an earlier stage of his judgment, when he was considering the submissions on act of state jurisprudence made by Mr Abramovich's counsel, Sir Anthony Colman made this observation:

"[98] It is to be observed that these authorities are concerned with the issue whether past conduct of the government of a foreign state has been unlawful and not whether future conduct would be unlawful if ever it took place. Thus in the *Yukos Case* it was an essential part of the claimant's case that the corporate assets had in truth been wrongfully expropriated."

83. In this court, the first instance judge's conclusion was upheld, but on somewhat different reasoning: not on the ground that the disputed allegations were merely

collateral (see [98]), but on the ground that all that Mr Berezovsky was seeking to show was that certain facts had occurred, not that they were invalid or wrongful (at [97]). It was in this context that Longmore LJ said this (at [87]):

> "On the basis of *Al-Koronky v Times Life Entertainment* [2006] EWCA Civ 1123 para 42, Mr Popplewell [counsel for Mr Abramovich] accepted, at this level of authority, that potential conduct of a state in the future could not fall within the first principle because the principle only applied to acts which have already occurred. The second principle could in an appropriate case, however, apply to future acts."

That, however, appears to be an obiter observation, since the essence of the ruling was that mere reliance on acts *which had occurred*, for their existence as facts, did not trespass against the act of state doctrine. Thus even though what was being referred to was past acts, they were still not within the act of state doctrine.

84. But is it the case that *Al-Koronky* is founded on the distinction between past conduct and future conduct? One would not discern this from Lord Collins' treatment of that case in *AK Investments*. What Sedley LJ (giving the judgment of this court) said in *Al-Koronky* was this:

> "[41]…He further submitted that the contents of the unidentified Sudanese lawyer's advice amounted to a general attack on a foreign country's judiciary which gave rise to an issue which, on grounds of comity, could not be entertained by the courts of this country.
>
> [42] For this last proposition Mr Shaw cited the otherwise unreported decision of *Jeyaretnam v Mahmood* (1992) *The Times* May 21, in which, for the purpose of an application to discharge an order for service on a defendant out of the jurisdiction, Brooke J (as he then was) declined to evaluate allegations of lack of independence or impartiality in the defendant's home country of Singapore on the grounds that such allegations were not justiciable, in the same way as the allegations in *Buttes Oil and Gas v Hammer* [1982] AC 888 were held to be not justiciable. While we accept that any court is always reluctant to pass judgment on the judiciary of a foreign country in the context of jurisdictional disputes, we doubt if there is any general principle that the courts of this country will never do so in any context. First, as noted by Morland J in *Skrine & Co v. Euromoney Publications Ltd* [2001] EMLR 16, para 18(1) the *Buttes Oil* case concerned past transactions of foreign states, not the likely behaviour of judges in the future. Secondly, in the context of dealing with asylum-seekers it is frequently relevant to consider whether the courts of a foreign state afford any remedy against persecution, the risk of which is said to be a reason against returning the applicant to his home state. Thirdly, any such principle would not sit happily with cases decided in relation to the law of repressive regimes such as Nazi Germany…"

85. That was said in relation to a case concerning security for costs. It rejected the application of the act of state doctrine to an allegation of state partiality of a foreign country's courts, and refused to follow *Jeyaretnam v. Mahmod* in this respect. Lord Collins in *AK Investment* also declined to follow *Jeyaretnam* or *Skrine* (at [99]). As it is, we respectfully think that Sedley LJ misstates the decision in *Skrine*, which was another case, like *Jeyaretnam*, which applied the act of state doctrine so as to strike out pleading allegations which criticised the behaviour and impugned the integrity of a foreign judiciary, on this occasion the judiciary in Malaysia. All that Morland J said at para 18(1) of *Skrine* was as follows:

> "It would not assist the parties nor is it necessary to set out in this judgment extensive citation of authority or quotations from judgments. I shall set out the principles on which my judgment is based.
>
> 1. An English court must exercise judicial restraint or abstention and not adjudicate upon in relation to a friendly foreign state the acts or transactions of its sovereign, its executive or its judiciary (see *Buttes Gas v. Hammer* [1982] AC 888 – where a stay was ordered because the defendants in a slander action were unable to justify because of this principle) (see also the judgment of Brooke J in *Jeyaretnam v. Mahmoud* (transcript 21st May 1992) a libel action).

There was plainly no attempt there to explain the act of state doctrine in terms of past as distinct from future acts of state, but simply a reliance on *Buttes Gas* (which binds us) and *Jeyaretnam* (which does not).

86. In our judgment the time has come, in accordance with the rationalisation and highly authoritative guidance of Lord Collins and the Privy Council in *AK Investment*, to hold that the act of state doctrine does not prevent an investigation of or adjudication upon the conduct of the judiciary of a foreign state, whether that conduct lies in the past, or in the future, and whether or not its conduct in the past is relied upon as the foundation for an assessment of the risk as to its conduct in the future. As Hamblen J stated in the present case, such a distinction is without principle: it is truly so, for such a distinction has never even been formulated. In our judgment the doctrinal basis of the decisions in *Jeyaretnam* and *Skrine* cannot be supported and should not be followed.

87. So the position is, to put the matter broadly, that whereas in a proper case comity would seem to *require* (at any rate as a principle of restraint rather then abstention) that the validity or lawfulness of the legislative or executive acts of a foreign friendly state acting within its territory should not be the subject of adjudication in our courts, comity only *cautions* that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence. If then the question is asked – Well, why should acts of a foreign judiciary be treated differently from other acts of state, and what is the basis of that difference? – the answer, in our judgment, is that judicial acts are not acts of state for the purposes of the act of state doctrine. The

doctrine in its classic statements has never referred to judicial acts of state, it has referred to legislative or executive (or governmental or official) acts of a foreign sovereign. Two examples will suffice for more: Lord Hope speaks of the "legislative or other governmental acts" of the foreign sovereign in *Kuwait Airways v. Iraqi Airways* at [135]; and Lord Collins speaks of "foreign legislation or governmental acts of officials such as requisition" in *Lucasfilm v. Ainsworth* at [86]. It is not hard to understand why there should be a distinction. Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law. In other words the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play. As Lord Lindley said in *Pemberton v. Hughes* [1899] 1 Ch 781 at 790:

> "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a manner with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, *unless they offend against English views of substantial justice*" (emphasis added).

Hamblen J rightly gave prominence to this famous passage as early as para [11] of his judgment.

88. It is true that at least one American case can be cited in which the act of state doctrine has been applied to the judicial acts of a foreign court. Thus in *Philippine National Bank v. United States District Court for the District of Hawaii* 397 F.3d 768, to which Rosneft refers in its skeleton argument, the US court of appeals for the ninth circuit held that the act of state doctrine applied to prevent adjudication of a claim that a judgment of the Philippine supreme court was invalid, and did so even though the judgment at least in part purported to dispose of property outside Philippine territory (see at 773). The judgment of Circuit Judge Canby states:

> "The class plaintiffs in the district court argue that the act of state doctrine is directed at the executive and legislative branches of foreign governments, and does not apply to judicial decisions. Although the act of state doctrine is normally inapplicable to court judgments arising from private litigation, there is no inflexible rule preventing a judgment sought by a foreign government from qualifying as an act of state. See *Liu v. Republic of China,* 892 F.2d 1419, 1433-34 & n.2 *(9th Cir. 1989)* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 41 cmt. D (1965) ("A judgment of a

> court may be an act of state"). There is no question that the judgment of the Philippine Supreme Court gave effect to the public interest of the Philippine government. The forfeiture action was not a mere dispute between private parties; it was an action initiated by the Philippine government pursuant to the "statutory mandate to recover property allegedly stolen from the treasury." *In the Estate of Ferdinand Marcos Human Rights Litig. 94 F.3d at 546*. We have earlier characterized the collection efforts of the Republic to be governmental. *Id.* The subject matter of the forfeiture action therefore qualifies for treatment as an act of state."

89. That statement, even if it acknowledges the exceptional nature of such an application of the act of state doctrine, clearly has resonance for what Rosneft complains about the allegations of Yukos Capital in this case. Nevertheless, and despite the fact that so much of the learning about the doctrine has crossed the Atlantic in both directions, we do not agree that that doctrine applies to prevent adjudication on an otherwise appropriate challenge to a foreign court decision. We refer to the fact that in *AK Investment* Lord Collins cites a number of US federal court decisions in which allegations of impropriety against foreign courts have been adjudicated in the context of *forum non conveniens* and enforcement of judgments (at [102]).

90. In our judgment, therefore, the act of state doctrine does not apply to allegations of impropriety against foreign court decisions, whether in the case of particular decisions or in the case of a systemic dependency on the dictates or interference of the domestic government. Nor is there an absence of justiciable standards by which to adjudicate such allegations. The courts have long been familiar with the standards by which to judge bias and other breaches of due process in the operation of courts and other tribunals. Moreover, even if there are countries in the world in which the courts are not free from interference by the state and are not independent of them in at any rate those cases in which the state takes an interest in the result, there is barely a country in the world which does not subscribe to the doctrine that justice according to the law is what is expected of its courts and judges, or does not subscribe to what is more and more being expressed as a global deference to the rule of law. Thirdly, where a state may nevertheless depart from those doctrines by requiring or engineering a perverted or biased result, it does so in the main, not by a process of legislative, administrative or executive act, for which it takes responsibility, but in secrecy. Although it must be acknowledged that there are areas of state activity which are always more or less clothed in secrecy, such as its intelligence services, the process of judgment through the courts is universally recognised (even in its breach) as an activity which has to be carried out fairly and transparently and in accordance with law.

91. For these reasons we agree with the holding of Hamblen J at [201] below that "there is no rule against passing judgment on the judiciary of a foreign country: see the *Abidin Daver* [1984] AC 398 and the subsequent decisions reviewed in the *AK Invest[ment]* case."

The commercial exception

92. We turn to another exception to or limitation on the act of state doctrine, which is not in issue in this case, but which demonstrates the way in which caution needs to be maintained when considering how far broad statements of principle, made in another era when the doctrine of absolute sovereign immunity held sway, still apply or extend in the modern world in which it is now accepted, as a matter of general international law, that there is no immunity for the state's commercial activities.

93. Thus in *The Playa Larga* [1983] 2 Lloyd's Rep 171 (CA), where the defendant to a claim in conversion was the Cuban state's sugar trading company, and the goods in question were on the high seas at the relevant time and thus not within Cuban territory, this court held, first, that the territorial act of state doctrine did not apply, secondly that the doctrine of non-justiciability did not apply, for the court was not in a judicial no-man's land, and thirdly, obiter, that even if the act of state doctrine could have prima facie applied, then –

> "that conduct was not immune from the jurisdiction of the English Courts since its activity was a trading rather than a governmental activity. What the Cuban government did was to induce breaches of contract by Cubazucar."

That decision was made in the light of the House of Lords confirming at the highest level in this country that the absolute doctrine of sovereign immunity had made way in English law, because it had done so in international law, to the qualified or restricted doctrine which made an exception for the commercial activities of states: *I Congreso del Partido* [1983] 1 AC 244. The modern history of the change from an absolute theory to the modern doctrine, now enshrined in our State Immunity Act 1978, is briefly traced in this court in *Kuwait Airways v. Iraqi Airways*, as itself throwing light on the modern ramifications of the act of state doctrine: see at [312]-[313].

94. More recently still, in the *Korea National Insurance Corporation* case, Waller LJ, giving the judgment of this court, said:

> "These statements [from *Buttes Gas* and this court in *Kuwait Airways*] give no support to the view that, where in a commercial context allegations are made against a state, not in relation to some sovereign act carried out in its own jurisdiction, but in relation to acts which affect the rights of a party under a commercial contract, that the court should exercise restraint to the extent of not being prepared to decide the same, at least without some indication from the

> executive that a decision will embarrass the diplomatic relations between the United Kingdom and the State. If a foreign state were an insured under an insurance contract the insurers cannot be precluded from alleging a fraudulent claim simply because that might embarrass the state. It cannot be any different if a state entity makes the claim and it is asserted that both the entity and the state owner were involved in the fraud."

The Kirkpatrick exception

95. Yet another exception, however, has been relied upon, and is one of the corner-stones of Yukos Capital's opposition to this appeal. Thus, it is submitted by Mr Pollock that the act of state doctrine does not apply in cases where there is no "sitting in judgment on" the acts of state alleged but only a question or acknowledgment of whether certain facts have occurred. For these purposes he submits that it does not matter that the finding or acknowledgment of such facts involves some inherent impropriety, provided that there needs to be no investigation into the validity, lawfulness, or motives of the state's acts.

96. For these purposes he relies on the following cases, beginning with the American decisions in *Sharon v. Time Inc* 599 F Supp 538 (SDNY 1984) and *Kirkpatrick v. Environmental Tectonics Corporation International* 493 US 400 (1990).

97. In *Sharon v. Time* Mr Sharon brought defamation proceedings against Time Magazine for publishing an article about his activities during a time when he had been defence minister of Israel. Time relied on the act of state doctrine as excluding the court's competency. It was not in dispute that the underlying facts concerning the massacre of civilians in refugee camps had occurred, and that such actions were "illegal and abhorrent". An Israeli enquiry (the Kahan Commission) had already taken place into the events. It was held that the act of state doctrine did not apply because (i) the defence allegation was not that Mr Sharon had acted pursuant to his ministerial authority but that he had done so outside that authority in a personal capacity (at 544); and (ii) the issue was not concerned with the propriety of those acts, but as to Mr Sharon's complicity. As Sofaer DJ put it (at 546):

> "By contrast, the litigation here involves no challenge to the validity of any act of state. With respect to Sharon's alleged acts, no one is suggesting that these acts – by which Time claims Sharon condoned the massacre of unarmed noncombatant civilians – have validity in the sense that they cannot be attacked. All agree – Israel, the United States and the world community – that such actions, if they occurred, would be illegal and abhorrent. The issue in this litigation is not whether such acts are valid, but whether they occurred."

98. In *Kirkpatrick* the claimant brought an anti-racketeering claim against a competitor on the ground that it had obtained a military procurement contract from the Nigerian government by bribery. It was common ground that Nigerian law prohibited both the payment and the receipt of bribes. The defendant relied on the act of state doctrine to exclude enquiry into the claim. The defence was rejected on the ground that the only issue was whether the alleged bribes had occurred. If they had, their legality and their consequences were a matter of US law, not Nigerian law. In any event it was common ground that any such bribes were illegal under Nigerian law. Justice Scalia delivered the judgment of the US Supreme Court. He said (at 405/6):

> "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In *Underhill v. Hernandez*, 168 U.S. 250, 254…holding the defendant's detention of the plaintiff to be tortuous would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." In *Oetjen v. Central Leather Co,, supra*, and in *Ricaud v. American Metal Co.*, *supra*, denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its territory, legally ineffective. See *Oetjen, supra*, 246 U.S., at 304…*Ricaud*, *supra*, 246 U.S., at 310…In *Sabbatino*, upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, ineffective.
>
> Petitioners point out, however, that the facts necessary to establish the respondent's claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a "*principle of decision* binding on federal and state courts alike." *Sabbatino*, *supra*, 376 U.S., at 427…(emphasis added). As we said in *Ricaud*, "the act within its own boundaries of one sovereign state…becomes…a rule of decision for the courts of this country." 246 U.S., at 310…Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. Cf. *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (SDNY 1984) ("The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred")."

99. Justice Scalia concluded (at 409/410) as follows:

> "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of sovereigns taken within their own jurisdiction shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue."

100. These American authorities have been followed in two cases in the English courts, in *A Ltd v. B Bank* [1997] 1 L Pr 586 (CA) and in *Berezovsky v. Abramovich* [2011] EWCA Civ 153 (*supra*).

101. In *A v. B Bank* the plaintiff's claim was to restrain the use in this country by the defendant commercial bank of foreign banknotes, on the ground of infringement of the plaintiff's UK patent. The central bank of the foreign country intervened, but no allegation of infringement was made against the central bank or its state and the only complaint was of use of the defendant's banknotes in the UK, for the plaintiff's UK patent gave only territorial rights in this country. The trial judge had stayed the proceedings on the ground that the claim was non-justiciable. This court reversed that decision on the twin grounds that the use of the banknotes in the UK was commercial, and that in any event the matters complained of occurred in this country and not in the territory of the foreign state. The judgments also referred to *Kirkpatrick*, as supporting, for instance, the following propositions, (*per* Leggatt LJ at 592/3) that "the Court is not asked to adjudicate upon, or even to consider the lawfulness of the issue of currency, nor is any claim made that might interfere with sovereign functions of the State of X", and (*per* Morritt LJ at 596) that "the principle…is limited to the proposition that the courts…will not adjudicate upon the validity of acts done abroad by virtue of foreign sovereign authority". It seems to us that the claim to rely on the act of state doctrine was so far outwith the principles of that doctrine as to render its citation of no help in this.

102. We have already cited *Berezovsky v. Abramovich*. For the reasons stated above, it was pertinent for this court to cite *Kirkpatrick* in support of its own conclusion that the act of state doctrine was not involved where the only issue was whether certain acts had occurred, not whether they were invalid or wrongful.

103. In the present case, however, it is plain that Yukos's case goes well beyond the situation in *Sharon v. Time*, *Kirkpatrick*, *A v. B Bank* or *Berezovsky v. Abramovich*. In the present case, Yukos does not merely seek to show that certain events occurred (and did so in Russia and as a matter of state policy), but that such events are not to be

regarded as valid or effective or lawful, but invalid, ineffective, wrongful, arbitrary, and directed by the hostile motive of a campaign of expropriation and wrongful imprisonment. The disputed allegations (set out more fully above) speak of a "campaign waged by the Russian state for political reasons", of "a deliberate misapplication of the law". That deliberate misapplication was set out at length in Annex 1 to the re-re-amended reply and started with "massive tax re-assessments in respect of Yukos, ultimately in excess of US$24 billion, which were arbitrary, manifestly not consistent with Russian law and practice, and usually based on doctrines applied uniquely to Yukos…". It is therefore alleged that the annulment decisions themselves have to be regarded as ineffective to set aside and nullify the arbitration awards as they otherwise purport to do. The judge himself, in describing Yukos's case, does so in these terms (taken from [175]-[177]): "a campaign against Yukos with the aim (in particular) of re-nationalising Yukos' assets and destroying a political opponent"…"Entirely unsubstantiated tax demands…any judge who found in favour of Yukos was summarily removed…rigged auctions…All challenges to these manifestly inappropriate acts were dismissed by the courts…the political context of the Russian Federation's desire to re-nationalise strategic energy assets and to destroy Mr Khordorkovsky (who was a political opponent) so as to explain why these were not the ordinary application of Russian law and practice uninfluenced by executive in[ter]ference, but that the Russian government procured each of the steps taken against Yukos Oil."

104. In our judgment, whatever might otherwise be the width or narrowness of the act of state doctrines, we cannot agree that these four authorities (or any others) support treating the allegations in this case as simply being concerned with proving what occurred and not with castigating what occurred as wrongful and therefore to be regarded as ineffective. Moreover, in as much as Yukos Capital submits, as it does, that "it is no part of Yukos Capital's case that any act of state was illegal or wrongful", or that "It is no part of Yukos' case in these proceedings, let alone a necessary part, that anything done by the Russian state was invalid and lacked any legal effect…It simply does not follow…that if a judgment is shown to be a manifest misapplication of Russian law then it is not "valid"" (Yukos Capital's skeleton argument at paras 79/80), those submissions are not understood and seem to us to fly in the face of Yukos Capital's pleading. That pleads that Russian law was deliberately misapplied as a matter of state policy, and inter alia on that ground the English court is asked to find that the tax assessments and decisions and the annulment decisions are to be regarded as ineffective and invalid. In this respect at least, it is like the position in *Kuwait Airways v. Iraqi Airways* where, but for the application of an exception based upon international law and English public policy, the act of state doctrine may have been applied to the acquisition pursuant to Iraqi decree of the stolen Kuwaiti aircraft. Or it is like *Luther v. Sagor*, where the act of state doctrine was applied to hold that the Russian decree declaring Russian sawmills to be the property of the Russian Soviet Republic "could not be impugned" (to cite the headnote).

Challenge to validity

105. We come finally, therefore, to Yukos Capital's most fundamental formulation as to the narrow limits of the act of state doctrines, and that is that they are engaged only where there is a challenge to the *validity* of an act of state or where the English court is requested to grant a *remedy* in respect of such acts. Before the judge, the submission was confined to the first half of that proposition, namely to the need for a challenge to the validity of an act of state. For this purpose, "validity" was contrasted with any wider formula which might speak, instead, of lawfulness or, on the other side, unlawfulness, wrongfulness or any such concept. However, in this court Mr Pollock accepted that his formula before the judge, which the judge accepted, was too narrow, and amended it as set out above. In doing so, it remained unclear whether Mr Pollock was continuing to use "validity" in some narrow sense. However, he took the trouble to set out his reformulated submission in the following written terms:

> "4. The doctrine is only engaged where the English Court is required to adjudicate upon the actions of the foreign sovereign by determining that they are invalid or by granting a remedy in respect of those actions.
>
> 5. The reason why the doctrine is limited in this way is that it is founded upon a principle of jurisdiction. By adjudicating upon the foreign sovereign's actions in the way described, the English Court is arrogating to itself a jurisdiction over those actions: it is claiming to have authority to judge the foreign sovereign's actions within his own territory and to grant remedies in respect of them. This is impermissible.
>
> 6. By contrast, the English court is not *adjudicating upon* the foreign sovereign's actions (in the way described in 4 above) by receiving evidence as to what the sovereign in fact did and evidence that those actions were not justified by reference to the established law of the state, and making findings of fact to this effect (on the civil standard of proof). In doing this the English Court is not exercising any jurisdiction over the sovereign or his actions and the doctrine is not engaged."

106. Mr Pollock's ammunition for this submission, to the extent that it did not extend across the whole of the act of state jurisprudence, was again focussed on *Kirkpatrick* in the United States and on *Berezovsky v. Abramovich* in England. In *Kirkpatrick* Mr Pollock emphasised the opening sentence of the passage from Justice Scalia's judgment which we have cited above at [98] ("In every case…the relief sought or the defense interposed would have required the court to declare invalid the official act of a foreign sovereign performed within its own territory" at 405). In *Berezovsky* he emphasised the following passage from the judgment of this court, which begins (at [95]) with a reference to *A v. B Bank* as being based on a triple ratio, the third of which is that "on the authority of *Kirkpatrick*, there was no challenge to the validity of any act of the foreign state." (So there was not, neither in *Kirkpatrick*, nor in *A v. B Bank*, nor in *Berezovsky*, as explained above.) This court then continued:

> "[95] ….All three reasons were treated as having equal weight and Mr Rabinowitz correctly submitted that we are, therefore, now bound by authority to say that the act of state doctrine only applies to challenges to the validity of the act of state relied upon, unless there is subsequent higher authority to a different effect.
>
> [96] Nevertheless some caution may be appropriate. Lord Hope has, subsequently to *A Ltd*, in *Kuwait Airways* reiterated the traditional English law formulation that the court will not "adjudicate upon or call into question" acts of a foreign state within its own territory. If it were an essential part of an English litigant's case that an act of state was "wrongful" whether by its own law or by international law, and if that was disputed by the other side, it could well be said that that argument (and any decision upon it) was indeed "adjudicating upon or calling into question" that act, even if it was not specifically alleged that the act was "invalid". It is worth remarking that *Dicey, Morris & Collins, Conflict of Laws,* 14th ed (2006) para 5-045 cites *Kirkpatrick* without any endorsement and does not even refer to it in the Table of Cases.
>
> [97] This perhaps difficult question does not, however, need to be resolved in the present case because not only is it no part of Mr Berezovsky's case to say that the acts on which he relies were invalid; it is no part of his case either to say that they were wrongful. His concern is only to prove that they occurred as appears to have been the case in *Sharon v. Time Inc* quoted in the above citation from *Kirkpatrick*. In these circumstances I cannot think that any question of act of state can arise…"

107. So ultimately, that issue raised in *Berezovsky*, which can perhaps be expressed as to whether it makes a critical difference to reliance on the act of state doctrine whether the challenge is to the act's *validity* or its general *wrongfulness*, was left unresolved.

108. The judge below, Hamblen J, sought to resolve it, albeit Mr Pollock no longer relies on his formulation. The judge said this:

> "[134] However, that comment [a reference to *Berezovsky* at [96]] does not alter the fact that the Court of Appeal held that it was bound to hold that "the act of state doctrine only applies to challenges to the validity of the act of state relied upon" and that I am equally so bound. In any event, I consider that it is important that the limits of the Act of State principle are defined with reasonable clarity. Limiting it to necessary challenges to the validity of an act does so. Extending it to cases where such validity is merely called into question, or to wider issues of legality or wrongfulness, makes it of a potentially broad and uncertain application. In this connection it is worth noting that the Act of State principle is a common law doctrine and does not exist in the civil law. Further, in a number of cases where it has been applied the same result can be reached through the application of ordinary rules of conflicts of laws - *Dicey, Morris & Collins* at para 5-045.

> [135] I accordingly hold that the "pure" Act of State principle only applies to challenges to the validity of the act of state relied upon. I further hold that guidance as to what this requires is to be found in the *Kirkpatrick* case, as the Court of Appeal has held. I further hold, in line with that guidance, that as a general rule "validity" in this context means determining that the act is of no legal validity or effect and that "challenges" to such validity means that it is an issue which the court must decide in order to reach its decision in the case before it."

109. Now in our judgment we would agree that challenges to foreign acts of state, in order to invoke the act of state doctrine, must, as Lord Wilberforce put it, lie at "the heart" of a case, and not be a matter of merely ancillary or collateral aspersion: and that a test of necessity to a decision may therefore be a useful test. That is as long as it is remembered that the purpose of the doctrine is to prevent such challenge at the outset, as a matter of immunity *ratione materiae*. However, now that the matter has been fully argued in this case, we would not, with respect, agree that anything turns on the particular words in which the principle is expressed: as if the words "challenges" or "validity" were sacrosanct. This can be seen from the reasoning of Justice Scalia itself, as well as from the jurisprudence in general.

110. Thus we would again emphasise: the teaching of *Kirkpatrick* (and the cases which follow it) is *not* to do with any difference, were there to be any, between concepts of validity, legality, effectiveness, unlawfulness, wrongfulness and so on. Validity (or invalidity) is just a useful label with which to refer to a congeries of legal concepts, which can be found spread around the cases. Similarly, the word "challenge" is not sacrosanct: the cases refer to the prohibition on adjudication, sitting in judgment on, investigation, examination, and so on. What *Kirkpatrick* is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to enquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory. As to the last possibilities, there can be a still further distinction to be made between the act of state which *cannot* be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore *can* be challenged.

111. In this respect the relevant paragraph of Justice Scalia's judgment in *Kirkpatrick* which begins with the sentence relied upon (see at [98] above) makes perfectly clear what he meant by that statement ("In every case…the relief sought or the defence

interposed required a court…to declare invalid the official act of a foreign sovereign"). Thus he proceeded to illustrate that statement by referring to the four most famous previous act of state cases in the United States, namely *Underhill v. Hernandez*, *Oetjen v. Central Leather*, *Ricaud v. American Metal* and *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964).

112. In *Underhill* the plaintiff claimed for false imprisonment and assault against the commander of a revolutionary Venezuelan army. The revolutionary forces had gone on to form a government recognised by the United States. The act of state doctrine was pleaded by the defendant and the action failed. It did so because the plaintiff's action could not succeed without "denying legal effect" (*per* Justice Scalia) to the defendant's actions. It is odd to think of the acts of Commander Hernandez as "valid" or "invalid": however the act of state doctrine meant that their legal effect could not be enquired into, or as Chief Justice Fuller said: "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". Clearly, by "to declare invalid" Justice Scalia meant the same as to find wrongful or unlawful and on that ground ineffective. In *Oetjen*, a military commander of the Mexican revolutionary government seized and sold hides belonging to a Mexican citizen. The hides were shipped to the United States, and their original owner or his assignees sued to recover them, but failed, since, as Justice Scalia said, to deny the title of the purchaser from the commander in Mexico would have required finding "the government's prior seizure…legally ineffective". As Justice Clarke there said: the action of the Mexican government "is not subject to reexamination and modification by the courts of this country". To similar effect was *Ricaud*, where Justice Clarke said that "the details of such action and the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision". Finally, in *Sabbatino* the Cuban government sought to recover the price of expropriated sugar from the expropriated owner's US receiver, whom the purchaser of the sugar had been persuaded to pay. The claim succeeded, because the receiver could not, by reason of the act of state doctrine, show that the expropriation without (sufficient) compensation was unlawful under international law. The receiver was not seeking any remedy, but was resisting the Cuban government's claim, and to do so was asking the court to find that the transfer of title in Cuba was unlawful and ineffective. As Justice Scalia said in *Kirkpatrick*: "the defendant's claims to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void". Or as Justice Harlan put it in *Sabbatino* at 428:

> "rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the judicial branch will not examine the validity of a taking of property within its territory by a foreign sovereign government, extant and recognised by this country at the time of suit, in the absence of treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

113. In our judgment, the act of state doctrines cannot be reduced to a single formula such as the judge adopted (distinguishing validity or invalidity from all other forms of

lawful or wrongful conduct) or such as Mr Pollock has sought to reformulate on this appeal. Such formulae accord with neither the English nor the United States jurisprudence. On the contrary, we consider that the act of state doctrines ultimately reflect more complex considerations, and would refer to the analysis in this court in *Kuwait Airways v. Iraqi Airways* concluding in its [317]-[323]. This court there reasoned that –

> "[317] In our judgment, these authorities indicate that English law is seeking to balance (at least) three separate insights as to the appropriate role of national courts when faced with reliance on foreign legislative or executive acts by way of defence to what might otherwise be a wrong for which those courts are called upon to provide a remedy.
>
> [318] First, there is the prima facie rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts. This rule reflects concepts of both private and public international law as to territorial sovereignty. As such, we think that the rule is founded primarily on a view as to the comity of nations…each sovereign says to the other: "We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extraterritorial or exorbitant acts."
>
> [319] The second insight, however, is that, whether the sovereign acts within his own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of our municipal courts. This is the principle of non-justiciability. It is or leads to a form of immunity ratione materiae…In essence the principle of non-justiciability seeks to distinguish disputes involving sovereign authority which can only be resolved on a state to state level from disputes which can be resolved by judicial means.
>
> [320] The third insight is that the rule whereby there is a principle of judicial restraint in so far as a sovereign acts within his own territory is only a prima facie rule. It is subject to certain exceptions…
>
> [323] We think that behind these three competing insights, which between them strive to produce a balanced answer to the conflicting needs of private rights, sovereign immunities and international relations, there is the constant theme of the role of universal, or at least generally accepted, principles of private and public international law…"

114. In the House of Lords in *Kuwait Airways v. Iraqi Airways*, despite the large measure of agreement for the speeches of both Lord Nicholls and Lord Hope, a possible tension between the two can be observed. To recapitulate what we have set out above, Lord Nicholls did not seek so much to formulate the act of state doctrines, as to regard the question of Kuwait Airways' claim in conversion as being prima facie subject to the double actionability rule of private international law, and to treat Iraqi Airways' reliance on the principle of non-justiciability as being subject to established principles of international law. In these two respects, he considered that –

> "[28] The acceptability of a provision of foreign law must be judged by contemporary standards…An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today."

Lord Nicholls therefore stressed that these principles must move with the times. *Tempora mutantur et nos mutamur in illis*. Lord Hope, on the other hand, set out his understanding of the act of state doctrine in a paragraph which began with the sentence "Important questions of principle are raised…" (at [135]) and went on (at [140]) to caution that "The golden rule is that care must be taken not to expand its application [that is, the application of the public policy exception] beyond the true limits of the principle…These limits demand that, where there is any room for doubt, judicial restraint must be exercised". Lord Steyn, commending the "internationalism" of the court of appeal's judgment (at 1102G), developed that idea as follows:

> "[115] This conclusion on English public policy does not reflect an insular approach…In recent years, particularly as a result of French scholarship, principles of international public policy (l'ordre public véritablement international) have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth…Similarly, there may be an international public policy requiring states to respect fundamental human rights…"

115. We recognise these differences of emphasis. Lord Hope's broad restatement as to the general effect of the act of state doctrine – that "It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English court will not adjudicate upon, or call into question, any such acts" – is the clearest modern formulation of the doctrine at the highest level, but it perhaps needs to be understood as qualified by Lord Wilberforce's two insights that his principle of non-justicability can also extend beyond international boundaries, and that the principle is one of restraint rather then abstinence (as Lord Hope himself commented). However, it is also proper to have regard to the various limitations on that broad doctrine, only one of which was in issue in that case. We think that on the whole we prefer to speak of "limitations" rather than "exceptions". The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly commonplace to adjudicate or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters mentioned by Lord Steyn. That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law. The idea that the

rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era: see the analysis of *Oppenheimer v. Cattermole* [1976] AC 249 in the *Kuwait Airways* case in this court at [273]ff (and compare the reasoning of this court in *Oppenheimer v. Cattermole* itself [1973] Ch 264).

The earlier Yukos FSA case

116. The allegations which have surfaced in this case have been the subject-matter of prior judicial attention in *R (on the application of Yukos Oil Company) v. Financial Services Authority* [2006] EWHC 2044 (Admin) (Charles J, the *Yukos FSA* case). OJSC Rosneft and OJSC Rosneftegaz were interested parties. Charles J concluded that the act of state doctrine applied and that therefore the FSA's decision could not be judicially reviewed. He regarded the contrary argument as unarguable (at [90]-[91]).

117. The *Yukos FSA* case arose out of the decisions or proposed decisions of the FSA and the London Stock Exchange to approve the prospectus of Rosneft and its parent Rosneftegaz regarding the proposed listing and offering of shares in Rosneft GDRs. Yukos Oil Company and another Yukos company sought judicial review in an attempt to prevent such listing and offering. Their case was similar to the case made by Yukos Capital in this court as to how the Russian state had campaigned to expropriate the Yukos assets and pass them into the arms of Rosneft. They had earlier made similar representations to the FSA and the LSE, but the latter had rejected them on the ground of advice from Michael Brindle QC that the act of state doctrines prevented any account being taken of them. Charles J explained:

> "6. In the skeleton argument put in on behalf of Rosneft, the claimants' assertions of dishonest expropriation are described as a conspiracy theory. The three main elements of the expropriation allegation or conspiracy theory are, in my view accurately summarised in a very truncated form in paragraph 9 of the skeleton argument of Rosneft which reads as follows, with some omissions:
>
> > "There are three main elements. First, it is alleged that a series of arbitrary purported tax assessments were issued against Yukos by the Russian tax authorities and that Yukos's assets were then frozen by the Russian court preventing it from paying those tax assessments. Secondly, complaint is made about the conduct of the bailiff appointed by the Russian court and of the court itself in enforcing the tax liabilities. Thirdly, Yukos complains about the auction of its shares in YNG in respect of which it alleges that there are reasonable grounds to suspect, if not more, that there was a

concerted plan to deprive Yukos of its interest in YNG by unlawful means."

7. On the claimants' case that plan involved the participation of officers of the Russian state and of the Russian courts.

8. The allegations are therefore, extremely serious ones and at their heart are allegations against various parts or emanations of the Russian Federation including its courts."

118. Charles J went on to conclude that Mr Brindle's advice was correct. He rejected the submission that earlier authority might have been decided differently in modern times because of the existence and effect of the European Convention of Human Rights. He referred in particular to *Oetjen*, *Luther v. Sagor*, *Buttes Gas* and *Williams and Humbert*. He allowed that there might be room for development of the principles, but said that it was not for a first instance court to attempt to do so. There was no appeal.

119. On this appeal, Lord Grabiner submits that Charles J was right, and that in any event it would be an abuse of process to allow Yukos now to go behind that decision. He submits that although the Yukos company involved in this litigation is different from the Yukos company involved in that case, it should be regarded as a privy to that company; and that this case involves an abusive collateral attack on Charles J's decision. He acknowledges that there is no estoppel, on the ground that estoppel does not operate in judicial review, but he relies on the modern principles of abuse of process, such as are found described in *Johnson v. Gore Wood* [2002] 2 AC 1. Lord Bingham there said in an already classic passage at 31:

"I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

120. Hamblen J rejected the submission on the basis that the issues in the two cases were different. He reasoned that Charles J applied the act of state doctrine in its "pure" form, in that the challenge there was as to the validity of the transfer of Yukos assets to Rosneft: the relevant allegation by Yukos to the FSA and the LSE was that the listing should not be allowed to proceed in that it would involve the laundering of the proceeds of crime, contrary to the Proceeds of Crime Act 2002. Such an allegation was inconsistent with the idea that the assets had been validly transferred by the exercise of sovereign authority. In the present case, however, he accepted the submission of Yukos Capital that "the decision which is required to be made is

whether the Annulment Decisions offend against English principles of substantial justice".

121. That distinction leads directly to the essential reasoning which determined the judge's decision in this case. We will revert to *Yukos FSA* below.

The judge's reasoning

122. The judge's essential reasoning is contained in the following passage of his judgment, dealing with Yukos's so-called first allegation, the allegation of a campaign against Yukos:

> "[180] In order to reach its determination in the present case the court will not need to declare that the Annulment Decisions, or any other acts relied upon, were invalid or ineffective.
>
> [181] As Yukos Capital submitted, its case involves inviting the court to find only that – as a matter of fact – there was a co-ordinated activity aimed at re-nationalising Yukos' assets which, in fact, involved the executive intervening in the judicial process. Whether such intervention was 'valid' or 'invalid', 'lawful' or 'unlawful', is not an issue which the court was required to decide. For the purpose of Yukos Capital's case in these proceedings what matters is whether it happened.
>
> [182] Rosneft further submitted that even if the case does not "turn on" the issue of validity, nevertheless the allegations relied upon are in themselves non-justiciable. In this conection it stressed in particular the allegations made in relation to the "three main elements" of the campaign identified in the *Yukos FSA* case; namely, unwarranted tax assessments; the conduct of the bailiffs and the courts in enforcing those assessments which resulted in forced insolvency, and the rigged auctions. Even if no declaration of invalidity of these acts was sought, Yukos Capital's case nevertheless involved an inquiry into and at least inferential determination of the legality of those acts.
>
> [183] This is very similar to the argument rejected by the Supreme Court in the *Kirkpatrick* case. There too it was said that findings would necessarily be made which bore on the legality of the acts of state. However, the Supreme Court made it clear that that was insufficient to engage the Act of State principle. The "factual predicate" was the need to rule upon that legality and to declare the act invalid or ineffective.
>
> [184] The irrelevance of legality/illegality to Yukos Capital's case was well illustrated by the example that it would make no difference to its case if Russian law expressly permitted the executive to instruct the judiciary how to resolve

cases of strategic importance. Despite that being the legal act of the executive, to do so would still offend against English principles of substantial justice.

[185] Rosneft's case is also contradictory. It acknowledges that the court can determine whether the Annulment Decisions were partial and dependent. If so, it must similarly have to acknowledge that Yukos Capital can support that case with examples of other partial and dependent decisions. However, inquiry into the subject matter of those other decisions (for example, the tax assessments) is apparently not permissible. So, Yukos Capital can seek to show that the court decisions relating to the tax assessments were partial and dependent, as borne out by the unwarranted nature of the tax assessments, but not invite the court to inquire into the tax assessments themselves.

[186] For all these reasons I find the allegations concerning the campaign against Yukos Capital do not engage the "pure" Act of State principle. In particular, I find that its case does not concern the validity of any Acts of State. I further find that even if the principle extends to wider issues of legality its case does not require the court to decide upon or determine such issues.

[187] I further find its case does not engage the judicial abstention principle. It does not involve allegations in respect of which "the court has no measurable standard of adjudication" or which puts it in a "judicial no-man's land".

[188] The case does not involve issues of acute political sensitivity, diplomacy or international law, which are beyond the English court's competence as a (domestic) judicial body. The court is well able to assess and determine what, in fact, took place between 2003 and 2006; to analyse (with the assistance of expert evidence) whether those events were consistent with ordinary taxation and judicial processes; and to draw appropriate inferences as to whether the acts were performed as part of a scheme controlled by the Russian government, as Yukos Capital alleges.

[189] Further, as Yukos Capital points out, the allegations now being made have already been subjected to judicial scrutiny applying manageable standards as borne out by:

(1) the Yukos-related extradition cases;

(2) the fact that the ECHR is considering very similar allegations under the aegis of the European Convention of Human Rights – see the admissibility of the complaint to the ECHR (*Yukos v Russian Federation* [2009] ECHR 287).

(3) the award issued by a Tribunal (Prof Bockstiegel, Lord Steyn and Sir Franklin Berman QC) in *Rosinvestco UK Ltd v Russian Federation*. In *Rosinvestco*, the Tribunal considered each of the steps on which Yukos Capital now relies (eg the tax assessments, the bankruptcy auction, etc). Whilst recognising that it was not an appellate court on Russian law, it considered whether there was a manifest misapplication of Russian law (eg paras 446-455). It drew inferences from the primary facts, eg as to what occurred during the bankruptcy auctions. It was able to conclude that the tax

assessments upheld by the Russian courts were not *bona fide* (paras 489-497) and that the auction process (paras 518-524) was set up under the control of the Russian Federation to bring Yukos' assets under Respondent's control. From its findings, the Tribunal was able to conclude that the acts of the Russian state were not *bona fide* (para 567), were not justified by enforcement of tax laws (para 574), were linked to the strategic objective of returning petroleum assets to the control of the Russian state and to an effort to suppress a political opponent (para 617), were part of a scheme to deprive Yukos of its assets (para 620) and (cumulatively) were structured and intended to remove Yukos' assets from its control (para 621). These conclusions were reached by the application of proper judicial standards, and this is the sort of factual and legal enquiry which the Commercial Court is well able to perform."

123. In relation to the so-called second allegation (instances of unjust Yukos-related proceedings), the judge relied on essentially the same considerations, while emphasising (i) that there was an inherent contradiction in Rosneft saying that the annulment decisions could themselves be investigated for manifest misapplications of Russian law from which an inference of partiality and dependence could be drawn, while preventing Yukos from investigating other decisions from which a wider conclusion of partiality and dependency could be drawn; and (ii) that Annex 1 is concerned solely with court bias, without allegations concerning an underlying political campaign as an explanation. In relation to the so-called third allegation (bias in cases involving matters of importance to the Russian Federation), as to which Rosneft relies solely on the principle of non-justiciability, the judge pointed out that *The Abidin Daver* and the *AK Investment* case show that allegations of even systemic corruption or partiality are not subject to act of state doctrines.

Discussion

124. As we hope will have become clear from our discussion of the jurisprudence concerning the act of state doctrines and their limitations, we agree with some but not all of this reasoning.

125. We agree, for the reasons stated above, that the act of state doctrines do not extend to prevent examination of the substantial justice available in the courts of foreign jurisdictions, whether in a particular case or on a systemic basis. If that can be done in order to secure jurisdiction in England, as the authorities demonstrate it can be done, it must follow that it can be done where there is established jurisdiction in England, as here to enforce a foreign award. Moreover, the right to examine the question of substantial justice in a foreign jurisdiction must we think be a fortiori the position when, as here, a party to litigation in England is asking the English court to recognise a decision of a foreign court. For Rosneft is asking the English court to recognise the

annulment decisions in Russia as removing the basis of Yukos's claim to be entitled to enforce the arbitration awards. An English court, subject to the requirements of any treaty or convention must, we think, always be entitled to ask and adjudicate on the issue whether a foreign court decision should or should not be recognised or enforced. Subject to treaty or convention, that is the proper business of the courts and they are armed and completely familiar with judicial standards by which to judge what are ultimately issues about judicial standards. Of course, comity demands that such enquiries are conducted with that proper respect which is owed in the international sphere to the courts of friendly foreign nations. That is why the English courts will require cogent grounds for any allegation that a foreign court decision should not be recognised on the grounds of a failure of substantial justice. However, that is a matter of evidence and argument, not a matter of any immunity or doctrine of non-justiciability.

126. We think that to some extent these conclusions were anticipated in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755, [2010] UKSC 46, [2011] 1 AC 763, albeit no act of state issues were raised in that case. Thus in this court at [91] Rix LJ said:

> "Finally, I bear in mind (see para 76 above) the problem of an award perhaps improperly set aside in the country of origin. This is a delicate matter. However, it seems to me that it is not something which can be dealt with simply as a matter of an open discretion. The improper circumstances would, I think, have to be brought home to the court asked to enforce in such a way as either, in effect, to destroy the defence based on article V(1)(e) [of the New York Convention], or, which is effectively the same thing, to prevent an issue estoppel arising out of the judgment of the courts of the country of origin. In this connection see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 947 and *Dicey, Morris & Collins, The Conflict of Laws* 14th ed (2006), vol 1, rules 41 to 45."

127. In the Supreme Court in *Dallah*, Lord Collins referred to the decision of the Amsterdam court of appeal in the current litigation between Yukos Capital and Rosneft, at [129] of his judgment, in the context of his view that that and other like cases "rest rather on the power of the enforcing court, under article VII(1) of the New York Convention, to apply laws which are more generous to enforcement than the rules of the New York Convention."

128. In this context, so far at any rate as concerns the annulment decisions themselves, Rosneft concedes that the English court may investigate the question of substantial justice and issues of bias and lack of independence, and it does so apparently without making an exception for such issues which arise out of influence brought to bear by the Russian state itself. No particular reason is given for this concession, but we suppose that it is made under the pressure of the realisation that the English court cannot be expected to lend its support to a corrupt decision of a foreign court. Rosneft

also concedes that even systemic dependency on the dictates of state demands can be investigated for the future, but not for the past. We have given our reasons for agreeing with the judge that this distinction is unprincipled. The principle which we would hold operates in this sphere is that act of state doctrines do not extend to judicial acts. A state may be regarded as entitled (within the bounds of acknowledged international immunities) to a form of immunity or abstention from adjudication upon its legislative and executive acts, at any rate where it acts within its territory and exceptionally, perhaps, even extra-territorially. What, however, falls at any time within the proper province of the courts does not come within the rationality of such doctrines. Different principles apply with respect to judicial acts. Only the more normal restraints of judicial comity hold sway in that judicial context, as well of course as other principles, such as principles of estoppel, and all the rules which govern the recognition or enforcement of foreign judgments.

129. When, however, we pass from an investigation of the substantial justice of the annulment decisions themselves, or of Yukos Capital's contention of a systemic failure of the Russian courts to resist the influence of dependency on state pressure in matters of state interest, and we come instead to Yukos Capital's separate allegations of a more personally directed campaign of expropriation or political hostility (the "campaign"), the situation is more complicated. What is the function of these allegations? They all share in the same function of going to support the overarching contention that "where, as appears hereafter, the orders purporting to annul the Awards were tainted by bias and/or were obtained contrary to the principles of natural or substantial justice and/or in circumstances which deprived the Claimant of a fair trial, the purported annulments are of no effect" (re-re-amended reply, para 2). That is a plea, in terms, that the annulment decisions are of no effect. We would accept that it is not a plea which says in terms that the campaign is of no effect, but it is all aimed at the goal of saying that the annulment decisions are of no effect. It is for this purpose that the reply refers to "unwarranted tax assessments", to "deliberation misapplication" of Russia's tax law in relation to those tax assessments, and to "rigged auctions", and to the imprisonment of Mr Khordorkovsky "on trumped up charges". If those tax assessments were lawful, if the tax decisions based on those assessments were lawful, if the recovery of tax was lawful and the auctions by which the transfer of assets were lawful, and if the charges against Mr Khordorkovsky were justified, then Yukos Capital would have nothing to complain about in these respects; and all these events would add nothing in support to the allegation that the annulment decisions were simply the last in a long line of events which amounted to a political campaign against Yukos Capital.

130. It follows that it is not accurate to say that all that Yukos Capital wants to demonstrate is that certain events occurred; or that the court need not decide (or "declare", which is not so much a reference to a discretionary remedy, but to the nature of adjudication) that the annulment decisions or any other acts relied upon were invalid or ineffective (or wrongful). If the tax assessments, tax decisions, auctions and imprisonment occurred, but were lawful and not wrongful, then they would be of no use to Yukos Capital. What Yukos Capital wishes to show is that the whole campaign was

unlawful. We do not think, therefore, that the *Kirkpatrick/Berezovsky* line of authority is of assistance to Yukos Capital.

131. Moreover, although the campaign allegation may not be necessary to the overarching contention if there is other independent material to support that contention, it is necessary to that contention as at least one, and perhaps the principal, support for it. It is therefore in no way collateral or ancillary. It lies at the heart of Yukos Capital's case, and is in that sense necessary to it.

132. In these circumstances, we consider that the question of whether the act of state doctrine applies to some at least of Yukos Capital's allegations is not an easy one. The difficulty is illustrated by the fact that those allegations have already been the subject of adjudication in a case like *Cherney* (where the doctrine was not in issue) but immune from adjudication in the *Yukos FSA* case itself (where it was in issue).

133. Ultimately, however, we have concluded that the doctrine does not bar any part of Yukos Capital's case. The essential issue is whether the annulment decisions should be recognised. That is a judicial question raised in respect of judicial acts. On the way to resolving that judicial question the court is asked to take into account, and resolve whether, other judicial decisions emanating from tax courts or tribunals are, or are not, to be recognised as in effect achieving the expropriation or destruction of Yukos. Those too are judicial acts which are said to be equally corrupt and therefore make it more likely that the annulment decisions are corrupt themselves. The tax decisions take their starting line from tax assessments. We would accept that such assessments are probably to be regarded as executive or administrative acts: but unlike legislation or decrees or the acts of commanders in the field, which are the familiar terrain of the act of state jurisprudence, such assessments function within a tax code which is designed to operate according to law and to be subject to legal and indeed judicial rulings. If the tax decisions may be the subject matter of examination for the purpose of an issue of substantial justice, we do not see how they can be divorced from the originating tax assessments. Indeed, it would probably not be possible to consider the tax decisions without inevitably considering the tax assessments as part and parcel of those decisions. It is understandable that the motives of the executive may be of a political rather than a judicial nature, but we do not think that affects a critical alteration of the situation. Just as the commercial exception to the doctrine of sovereign immunity depends on the fact of the commercial activity, rather than the motives for which the activity may have been entered into or a contract subsequently breached: so it seems to us that the motives for or with which a state operates its judicial system do not alter the fundamental point that the state is operating under the colour of that system, rather than by reference to sovereign power. Those motives may throw light on the allegations of impropriety, but they are not in themselves a ground for wresting such activities out of the judicial sphere into that of the executive.

134. We are assisted to this conclusion by the understanding that similar allegations have been adjudicated in English courts in the past, even if not upon a similar rationalisation of the act of state principles. We consider that *Yukos FSA*, where the act of state doctrine was relied on for rejecting the claim for judicial review, does not bind us. We do not consider that there is any abuse of process involved in Yukos Capital presenting the allegations which it does in this case. We are not satisfied that there is true privity between Yukos Oil Company in that case and the claimant in this case. In any event the issues are different. Here Yukos Capital claims to enforce arbitration awards, which it is entitled to seek to do. It is met with the annulment decisions of the Russian courts. It must be entitled to seek to show that such decisions are not worthy of recognition by the English court. It is accepted that no issue of estoppel arises. There is no true collateral attack on the decision of Charles J who was considering whether as a matter of judicial review the listing of Rosneft could be objected to, an entirely different issue from the issue in this case, even if similar issues of act of state arose there also. There is no dishonesty, and no unjust harassment.

135. Ultimately, and looking at the arguments in this case more broadly, the question is whether in the modern world the English court can be asked to recognise judicial decisions which a party to those decisions alleges have been brought about by judicially corrupt means. In a world which increasingly speaks about the rule of law, it should not in principle be open to another party to those decisions to claim an immunity from adjudication on the ground that an investigation into those allegations is protected by deference due to the legislative or executive acts of a foreign sovereign. As Lord Nicholls said in *Kuwait Airways* (at [28]): "As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important." Replace "international law" by "international recognition of proper judicial standards mandated by the rule of law" and that observation fits this case. We also bear in mind Lord Hope's comments on the rule of law in the same case at [145]: "It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society." Their Lordships were of course speaking about Iraq's international delinquency in invading Kuwait and despoiling it of its assets: however, their observations are equally pertinent to judicial bias and dependency in the face of state interference in the judicial process.

136. Of course, Yukos Capital's allegations have yet to be proved. We are considering only the right to ask the English court to consider those allegations on the present hypothesis that they may be correct.

137. The question might have arisen, if our conclusion had been to the contrary, as to whether some limitation on or exception to the act of state doctrine based on fundamental human rights or discrimination could be supported. No such argument has been raised before this court, and there is scant reference to this topic in the judgment below (see at [72] above). It is not clear at all to us whether this is an issue

which had to be taken at this stage, if at all, or which may be open at a later stage to the extent that the act of state doctrine has some prima facie bite upon at least some of the allegations in dispute. As it is, the problem does not arise.

Issue estoppel: background facts

138. The judge set out the course of the Dutch proceedings at paras [17]-[41] of his judgment and they are summarised at the beginning of this judgment. The salient points are as follows.

139. The district court at first instance refused leave to enforce the awards holding that an annulment decision of the law of the seat could only be disregarded in extraordinary circumstances which had not been sufficiently asserted.

140. Yukos Capital then appealed filing a lengthy statement of appeal pursuant to Dutch procedures which permitted a complete re-hearing of the case with the admission of new evidence. Paragraphs 5-157 set out the history of the relationship between the Russian state and Rosneft on the one hand and Yukos Capital on the other. Paragraphs 158-166 developed allegations relating to the "bias and dependency of the Russian courts". Paragraphs 182-232 constituted a criticism of the annulment decisions. There were 124 exhibits filed in support of the statement of appeal.

141. Rosneft submitted a lengthy defence to the submissions and exhibits of Yukos Capital but did not themselves file any expert or factual evidence in response.

142. In its judgment of 28 April 2009 the Amsterdam court of appeal set out Yukos Capital's allegations and the main elements of its evidence and said that it had to assess

> "whether the decision of the Russian civil courts to set aside the arbitral awards can be recognised in the Netherlands, more in particular whether these judgments were rendered by a judicial instance that is impartial and independent."

143. The court of appeal then recorded its findings including -

> "(i) "Rosneft and the Russian state are closely intertwined" (para 3.9.1);
>
> (ii) "the case at issue also involves considerable interests that the Russian state considers to be its own" (para 3.9.2);
>
> (iii) Rosneft had insufficiently refuted or contested (there was a dispute over the better translation) that
>
> > "… in cases pertaining to (parts of) the (former) Yukos Group or the (former) directors of this group, which involve state interests that the Russian state considers to be its own, the Russian judiciary is not impartial and independent but is

> guided by the interests of the Russian state and is instructed by the executive".
>
> The court of appeal held that this was "properly substantiated" by Yukos Capital, and that Rosneft had failed to advance any concrete facts or to submit documents to shed a different light on that evidence (para 3.9.2);

(iv) the rejection of Rosneft's argument that direct evidence of partiality and dependence of the individual judges concerned was required, pointing out that "partiality and dependency by their very nature take place behind the scenes' (paragraph 3.9.4).

144. The court of appeal then concluded as follows:-

> "3.10 Based on the foregoing, the Court of Appeal concludes that it is [so plausible/likely] that the Russian civil court judgments setting aside the arbitral awards are the result of an administration of justice which is to be qualified as partial and dependent, that it is not possible to recognise those judgments in the Netherlands. This entails that in considering Yukos Capital's application for enforcement of the arbitral awards, the setting aside of that decision by the Russian court must be ignored".

145. Accordingly, the court of appeal, having also dismissed Rosneft's other New York Convention defences to enforcement, gave leave to enforce the awards.

146. Rosneft lodged an appeal with the supreme court which held that there was no right of appeal from a decision of the court of appeal which permitted enforcement.

147. It is the decision of the Amsterdam court of appeal on which Yukos Capital relies in order to assert that Rosneft is estopped from objecting to enforcement of the awards in England. The primary requirements for the application of a foreign issue estoppel are agreed to be those set out by Lord Brandon of Oakbrook in *The Sennar (No. 2)* [1985] 1 WLR 490, 499 A-B:-

> "… in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later section in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

It was further agreed that, because the application of the estoppel must work justice rather than injustice, the court had a discretion to refuse to give effect to a foreign judgment if there were special circumstances making it unjust to recognise the decision, see *Henderson v. Henderson* (1843) 3 Hare 100 at 114-115, *Carl Zeiss Stiftung v. Rayner & Keeler* [1967] 1 AC 853, 947 D per Lord Upjohn and *Arnold v. National Westminster Bank* [1991] 2 AC 93, 107C per Lord Keith of Kinkel.

148. The judge held that the requirements of *The Sennar* were satisfied and there was no room for the exercise of any residual discretion.

149. Lord Grabiner for Rosneft accepted that the first two of Lord Brandon's requirements were satisfied but had two submissions -

i) The issue to be decided by the English court was not the same issue as that decided by the Dutch court of appeal inasmuch as the Dutch decision was a decision to allow enforcement of the awards and refuse recognition of the annulment decision as a matter of Dutch public order, whereas the decision sought from the English courts was a decision that the Russian courts (whether generally or in this particular case) were partial and dependent on the executive and that their decision should not be recognised as a matter of the public order of England.

ii) The residual discretion should be exercised in Rosneft's favour because it would be unjust to permit enforcement of the awards in England when the Dutch court never had occasion to consider Rosneft's act of state defence. More widely he submitted that an allegation attacking the integrity of the judicial system of a foreign country was a most serious matter and should be the subject of a decision of the courts of the country where enforcement was sought.

Same issue?

150. The issue in the Dutch proceedings was whether the annulment decisions setting aside the arbitral awards were "partial and dependent"; if they were, then they were not to be recognised by the Dutch courts. Mr Pollock for Yukos Capital submitted that the issue in the English proceedings is exactly the same since, if the decisions were "partial and dependent", the English courts will not recognise them. It is true that the Dutch courts treat the decision as one of Dutch public order and the English courts will treat it as a matter of English public order. But the public policy, submitted Mr Pollock, is the same in each country and the issue to be decided in accordance with that public policy is identical.

151. The difficulty with Mr Pollock's submission is that "public order" or "public policy" is inevitably different in each country. The standards by which any particular country resolves the question whether the courts of another country are "partial and dependent" may vary considerably and it is also a matter of high policy to determine the circumstances in which this country should recognise the judgments of a state where the interests of that very state are at stake. Normally such recognition will be given and, if it is to be refused, cogent evidence of partiality and dependency will be required. Our own law is (or may be) that considerations of comity necessitate specific examples of partiality and dependency before any decision is made not to

recognise the judgments of a foreign state. It is our own public order which defines the framework of any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law.

152. Lord Collins addressed this issue in *AK Investment*, a case in which it was agreed that the claimants would be unlikely to obtain a fair hearing in Kyrgyzstan and it was held that that fact militated in favour of proceedings in the Isle of Man rather than in Kyrgyzstan which might have otherwise been regarded as a more natural forum for the dispute. In relation to an argument that a judgment of the Kyrgyz court would (or might) not be recognised in a English or an Isle of Man court because justice could not be obtained in Kyrgyzstan, Lord Collins cited a dictum of Lord Diplock in *The Abidin Daver* [1984] AC 398, 411

> "the possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained."

He then said (in a passage from which we have already partially cited but bears repetition) -

> "101. The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court of the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes and Oil Co v Hammer (No 2 and 3)*, is the basis of Lord Diplock's dictum in *The Abidin Daver* and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.
>
> 102. The conclusion is also supported by the many cases in the United States courts in which the standard of justice in the foreign court has been examined in the context of forum non conveniens questions. It was said in *Blanco v Banco Industrial de Venezuela SA* (1993) 997 F 2d (para 50), quoting earlier decisions, that it "is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation". That is not the enunciation of the act of state doctrine (well known in the United States) or the doctrine of judicial restraint in foreign relations cases (which has its origin in the United States), but simply a reflection of the fact that comity considerations require the court not to pass judgment on the foreign court system without adequate evidence. Evidence of corruption in the foreign court system is admissible (as, e.g. in *Cariajano v*

> *Occidental Petroleum Corp* (2010) 626 F 3d 1137), but it must go beyond generalised, anecdotal material: see *Tuazon v RJ Reynolds Tobacco Co* (2006) 433 F 3d 1163 AND 1179 AND *Stroitelstvo Bulgaria Ltd v Bulgarian-American Enterprise Fund* (2009) 589 F 3d 417. Cases in which justice in the foreign legal system has been found wanting have been rare but they are by no means unknown: *Rasoulzadeh v Associated Press* (1983) 574 F Supp 854, affirmed (1985) 767 F 2d 908 and *Osorio v Dole Food Co* (2009) 665 F Supp 2d 1307 are examples in the contexts of forum non conveniens and enforcement of foreign judgments respectively."

153. It is thus clear that cogent evidence is required before it is possible to call a foreign court decision partial and dependent. The relevant degree of cogency may well differ in different countries.

154. The English rules about foreign judgments procured by fraud provide a possible analogy with the present case. English law is that a foreign judgment may be impeached for fraud in an English court whether by original action or in defence to an action for enforcement of that judgment, see *Abouloff v. Oppenheimer & Co* (1882) 10 QBD 295 approved by the House of Lords in *Owens Bank v. Bracco* [1992] 2 AC 443. English law could, of course, be different and say that a foreign judgment is to be recognised unless it is set aside for fraud in the country where it is given. (Lord Templeman thought that should indeed be the law in relation, at least, to those countries whose judgments the United Kingdom had agreed to register and enforce, see *Owens Bank v. Etoile Commerciale* [1995] 1 WLR 44, 50). If the judgment creditor went first of all to a third country where the law was that a foreign judgment must be recognised even if arguably obtained by fraud, an English court would presumably neither recognise that judgment nor regard it as giving rise to an issue estoppel, simply because English public policy in this case is different from the third country's public policy. Lord Collins also touched on this point in *AK Investment* in relation to an argument that the English (and Isle of Man) law on this point should be changed to accord with Lord Templeman's view in the Privy Council precisely because (inter alia) the current law ignored the doctrine of issue estoppel. He said (para 116) that, on any view, the question whether the law should be altered might require a nuanced approach depending on the "reliability of the foreign legal system" as well as the scope for challenge in the foreign court and the type of fraud alleged.

155. This can be further illuminated by supposing not merely that the Dutch courts have determined that the annulment decisions are partial and dependent (as they have) but that the courts of another state have determined that the decisions are in fact impartial and independent. By which judgment are the parties in England to be regarded as issue estopped? The answer can hardly be the judgment which happens to be the first in time but must be that the English court will make up its own mind according to its own concept of public order not that of some other state.

156. It was put to the judge that the issue decided in Holland was that the Russian judgments should not be recognised as a matter of Dutch public order and that that was not the same issue as had to be decided in England. The judge's response in para 94 was:

> "the finding that the annulment decisions were the result of a partial and dependent legal decision was both necessary and fundamental to the decision. That the Amsterdam Court of Appeal determined that issue in the context of a different legal question (i.e. by reference to Dutch public order) makes no difference."

We cannot, with respect, agree because, for the reasons given, it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order which is (or may well be) different. The point is that English public order is as explained by Lord Collins in *AK Investment* and the English court must determine the matter by reference to those considerations not by whatever considerations make up Dutch public order.

157. We would therefore hold, differing in this respect from Hamblen J, that Rosneft are not issue estopped from contradicting in England Yukos Capital's assertion that the Russian courts' decisions, setting aside the awards in their favour, were partial and dependent. That is an issue which will have to be tried.

Discretion in special circumstances

158. Strictly speaking, there is in the light of our earlier conclusions no need to consider the question of discretion. But we will deal with it briefly.

159. The trouble with the "discretionary in special circumstances" exception is that it is so amorphous. In *Arnold v. National Westminster Bank* the exercise of discretion depended on further material becoming available since the original decision. That is not the position in this case.

160. Nevertheless, if we had decided that there was an issue estoppel in this case on the basis that in truth the issue in the Dutch proceedings was the same as the issue in these English proceedings, we would be inclined to invoke the exception for rather the same reasons as we have already decided that the issue for the English court is that of English public order. It must ultimately be for the English court to decide whether the recognition of a foreign judgment should be withheld on the grounds that that foreign judgment is a partial and dependent judgment in favour of the state where it was pronounced. That is a question so central to the respect and comity normally due from one court to another that to accept the decision of a court of a third country on the matter would be an abdication of responsibility on the part of the English court. On matters of this kind, we should accept our own responsibilities just as we would expect courts of other countries to accept theirs.

161. We would therefore, if necessary, have accepted Lord Grabiner's wider submission under the head of the court's residual discretion and need not consider his narrower submission which, in the light of our earlier ruling on act of state, does not arise.

162. In the event, we have not had to consider what, if any, effect the doctrine of act of state might have had on the question of issue estoppel. If however, we had considered that the act of state doctrine had applied to Yukos Capital's allegations, in whole or in part, this might have been a further reason supporting the view that no issue estoppel arose on matters of English public policy.

Conclusion

163. In sum, we have upheld the judge on the question of act of state, but upheld Rosneft's appeal on the question of issue estoppel.

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