

ARTICLE 13

EXPROPRIATION

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- 1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
 - a. for a purpose which is in the public interest;
 - b. not discriminatory;
 - c. carried out under due process of law; and
 - d. accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the 'Valuation Date').

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

- 2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).
- 3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

COMMENTARY¹

- 13.01** Various arbitral tribunals constituted under the Energy Charter Treaty (ECT) have interpreted and applied Article 13.²
- 13.02** Article 13 has furthermore been the object of scholarly analysis.³
- 13.03** The customary international law applicable in ECT arbitrations comprises the law of treaties, as codified in the Vienna Convention on the Law of Treaties

- 1 The author is grateful to Ali Al-Khasawneh and Christine Sim for their valuable comments on an earlier draft.
- 2 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC), Award, 16 December 2003 (*Nykomb*); *Petrobart Ltd v. The Kyrgyz Republic* (SCC), Award, 29 March 2005 (*Petrobart*); *Plama Consortium Ltd v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award, 27 August 2008 (*Plama*); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC V(064/2008)), Final Award, 8 June 2010 (*Al-Bahloul*); *Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan* (SCC Arbitration V (116/2010)), Award, 19 December 2013 (*Stati*); *Hulley Enterprises Ltd (Cyprus) v. The Russian Federation* (PCA AA 226), Final Award, 18 July 2014 (*Hulley*); *Veteran Petroleum Ltd (Cyprus) v. The Russian Federation* (PCA AA 228), Final Award, 18 July 2014 (*Veteran*); *Yukos Universal Ltd (Isle of Man) v. The Russian Federation* (PCA AA 227), Final Award, 18 July 2014 (*Yukos*); *Electrabel SA v. The Republic of Hungary* (ICSID ARB/07/19), Award, 25 November 2015 (*Electrabel*); *Charanne BV Construction Investments Sàrl v. Kingdom of Spain* (062/2012), Final Award, 21 January 2016 (*Charanne*) [Dissenting Opinion of Tawil of 21 December 2015 (in Spanish) (*Charanne* Dissenting Opinion)]; *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain* (SCC V2013/153), Award, 12 July 2016 (*Isolux*); *Eiser Infrastructure Ltd and Energia Solar Luxembourg Sàrl v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Award, 4 May 2017 (*Eiser*).
- 3 Thomas W. Wälde, 'European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects' (1995) 34(2) *International Legal Materials* 360 [Wälde (1995)]; Gaetan Verhoosel, 'Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a 'Reasonable' Balance between Stability and Change' (1998) 29(4) *Law and Policy in International Business* 451 [Verhoosel (1998)]; Zeyad A. Alqurashi, 'Indirect Expropriation in the Field of Petroleum' (2004) 5(6) *Indirect Expropriation in the Field of Petroleum* 897 [Alqurashi (2004)]; Andrei Konoplyanik and Thomas W. Wälde, 'Energy Charter Treaty and Its Role in International Energy' (2006) 4 *Journal of Energy & Natural Resources Law* 523 [Konoplyanik and Wälde (2006)]; Alex M. Niebruegge, 'Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law' (2007) 8(1) *Chicago Journal of International Law* 355 [Niebruegge (2007)]; Christoph H. Schreuer, 'Selected Standards of Treatment Available under the Energy Charter Treaty, Part I – Fair and Equitable Treatment (FET): interactions with other standards' in Coop and Ribeiro (2008) p 63 [Schreuer (2008)]; Thomas Roe, Matthew Happold, James Dingemans, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011) [Roe, Happold, Dingemans (2011)]; Rachel A. Nathanson, 'The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis' (2013) 98(2) *Iowa Law Review* 863 [Nathanson (2013)]; Frank Hoffmeister and Gabriela Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT' (2014) 15 *The Journal of World Investment & Trade* 379 [Hoffmeister and Alexandru (2014)]; Chester Brown, 'The End of the Affair? *Hulley Enterprises Ltd (Cyprus) v Russian Federation*; *Yukos Universal Ltd (Isle of Man) v Russian Federation*; *Veteran Petroleum Ltd (Cyprus) v Russian Federation*, UNCITRAL, PCA Nos AA 226, 227, 228, Final Awards, 18 July 2014 (Yves Fortier, Charles Poncet, Stephen Schwebel)' (2016) *The Journal of World Investment & Trade* 126 [Brown (2016)]; Conor McCarthy, 'The Problems of Fragmentation and Diversification in the Resolution of Complex International Claims: *OAO Neftyanaya Kompaniya Yukos v Russia*, European Court of Human Rights, Application No. 14902/04, Judgment (Just satisfaction), 31 July 2014' 17(1) *The Journal of World Investment & Trade* 140 [McCarthy (2016)]; Juan Jorge Piernas López, Elena López-Almansa

(VCLT),⁴ and the law of state responsibility, as codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ASR).⁵ In particular, the *Hulley*, *Veteran* and *Yukos* tribunals discussed the application of the law of treaties to the interpretation of Article 13. The interpretation of treaty provisions is subject to VCLT Article 31.⁶ VCLT Article 31 sets out ‘the general rule of interpretation’ according to which relevant treaty provisions have been interpreted.⁷ An ECT provision, ‘[l]ike any provision in an international treaty [...] must be interpreted in good faith’.⁸ An interpretation in good faith may lead to a certain ‘conclusion’ as to the operation of an ECT provision ‘under the circumstances of a specific case’.⁹ An interpretation of a relevant provision ought not to ‘defeat the object and purpose’ of the ECT.¹⁰ Where a ‘meaning’ established through an interpretation according to VCLT Article 31 is ‘neither ambiguous nor obscure and does not lead to a result which is manifestly absurd or unreasonable’, no ‘aid’ of other rules of interpretations is necessary.¹¹ As for guidance drawn from the ECT’s *travaux préparatoires*, the replacement of a term by another term may be insufficient to establish a motivation to limit the scope of a provision employing the latter term, absent ‘some additional expression in the record’.¹² The existence of ‘a “middle ground of varying practices”’ in other treaties may be of no assistance to the interpretation of the ECT.¹³

Beaus, José Elías Esteve Moltó, ‘Decisiones de los órganos judiciales españoles en materia de Derecho internacional público’ (2016) 32 *Anuario Español de Derecho Internacional* 505 [Piernas López, López-Almansa Beaus, Esteve Moltó (2016)]; Fernando Dias Simões, ‘*Charanne and Construction Investments v. Spain*: Legitimate Expectations and Investments in Renewable Energy’ (2017) 26(2) *Review of European, Comparative & International Environmental Law* 174 [Dias Simões (2017)]; Juan Jorge Piernas López, Elena López-Almansa Beaus, José Elías Esteve Moltó, ‘Decisiones de los órganos judiciales españoles en materia de Derecho internacional público’ (2017) 33 *Anuario Español de Derecho Internacional* 421 [Piernas López, López-Almansa Beaus, Esteve Moltó (2017)].

⁴ Concluded on 23 May 1969, and entered into force 27 January 1980. 1155 UNTS 331, 8 ILM 679 (1969).

⁵ Adopted by the UN General Assembly (GA) in 2001. GA Res 56/83, UN Doc A/RES/56/83 (2001), Annex. See Article 10, para 15.

⁶ *Hulley*, para 1412; *Veteran*, para 1412; *Yukos*, para 1412 (quoting VCLT Art 31).

⁷ *Hulley*, para 1414; *Veteran*, para 1414; *Yukos*, para 1414 (referring to the interpretation of Art 21).

⁸ *Hulley*, para 1424; *Veteran*, para 1424; *Yukos*, para 1424 (referring to Art 21(5)(b)(i)).

⁹ *Hulley*, *ibid.*; *Veteran*, *ibid.*; *Yukos*, *ibid.* (in this instance, as to whether a referral pursuant to Art 21(5)(b)(i) is required, in light of its eventual futility in a ‘specific case’).

¹⁰ *Hulley*, para 1413; *Veteran*, para 1413; *Yukos*, para 1413 (stating that a certain interpretation of Art 21(5) ‘would defeat the object and purpose of the claw-back and of the ECT itself’).

¹¹ *Hulley*, para 1415; *Veteran*, para 1415; *Yukos*, para 1415 (referring to the interpretation of Art 21).

¹² *Hulley*, *ibid.*; *Veteran*, *ibid.*; *Yukos*, *ibid.* (referring to Respondent’s allegation regarding a ‘replacement of “Taxation Measures” with “taxes” in a draft of Article 21(5) of the ECT circulated in June 1993’).

¹³ *Hulley*, para 1414; *Veteran*, para 1414; *Yukos*, para 1414 (referring to Respondent’s allegations concerning ‘a number of treaties that contain a taxation carve-out, but that either do not contain any claw-back provision or limit the claw-back to certain substantive protection standards’).

- 13.04** The operation of Article 13 in connection with conduct of a Contracting Party regarding taxation raises various issues.¹⁴ In particular, while Article 21(1) contains a ‘carve-out’ whereby ‘taxation measures’ fall outside the scope of protections under the ECT, Article 13 is applicable to ‘taxes’, pursuant to Article 21(5), which contains a ‘claw-back’.¹⁵ The issues raised in this vein, in addition to those regarding the interpretation of the ECT,¹⁶ concern procedural and jurisdictional aspects of an arbitration involving determinations as to the operation of Articles 13 and 21.
- 13.05** The procedural stage of a decision regarding the operation of Article 13 may vary. The *Hulley, Veteran* and *Yukos* tribunals deferred their decision on the ‘definitive interpretation’ of, ‘characterization of claims’¹⁷ and objections under,¹⁸ Article 21(5) ‘claw-back’, to a phase of the arbitration in which they could form a fuller view of the facts and the nature of the claims. Objections under Article 21 raised an ‘important threshold issue’ in these arbitrations.¹⁹
- 13.06** The nature of and basis for jurisdiction of a tribunal over Article 13 claims may relate to the type of conduct at issue and whether it falls within the scope of operation of Article 13. The *Hulley, Veteran* and *Yukos* tribunals considered that they had jurisdiction to rule on Article 13 claims for two independent reasons, each affording a sufficient basis for jurisdiction.²⁰
- 13.07** A tribunal has ‘indirect’ jurisdiction over Article 13 claims arising out of ‘measures excluded’ by Article 21(1) carve-out from, but ‘brought back’ by Article 21(5) claw-back within, protection under the ECT, according to the

14 Various arbitral tribunals have addressed these issues. See *EnCana Corporation v. Ecuador* (LCIA UN3481), Award, 3 February 2006 (*EnCana*), para 177. See also Roe, Happold, Dingemans (2011) 191 n 20 (citing *EnCana*).

15 *Hulley* Jurisdiction and Admissibility, para 570; *Veteran* Jurisdiction and Admissibility, para 582; *Yukos* Jurisdiction and Admissibility, para 571 (setting out the parties’ arguments on ‘the scope of this claw-back in case of an expropriation’); *Hulley*, para 1376; *Veteran*, para 1376; *Yukos*, para 1376 ([‘t]he relevant provisions of Article 21 of the ECT for present purposes are paragraphs 1 (the “carve-out”), 5 (the “claw-back”) and 7 (definitions)’).

16 See *supra*, para 13.3.

17 *Hulley* Jurisdiction and Admissibility, para 570; *Veteran* Jurisdiction and Admissibility, para 596; *Yukos* Jurisdiction and Admissibility, para 585 (namely, ‘to the next phase of the arbitration, when it will have a complete record on the nature of the claims themselves and a fuller understanding of the facts’).

18 *Hulley*, *ibid.*; *Veteran*, *ibid.*, para 597; *Yukos*, *ibid.*, para 586 (namely, ‘the issue of whether Respondent’s objection based on Article 21 goes to jurisdiction or admissibility and, if it goes to jurisdiction, whether it was made in a timely manner by Respondent’).

19 *Hulley*, para 1375; *Veteran*, para 1375; *Yukos*, para 1375.

20 *Hulley*, para 1406; *Veteran*, para 1406; *Yukos*, para 1406.

Hulley, Veteran and *Yukos* tribunals.²¹ The establishment of indirect jurisdiction is independent of findings on the applicability of Article 21.²² A tribunal may have indirect jurisdiction even if Article 21(1) applies.²³

A determination that a tribunal has indirect jurisdiction in the event that Article 21(1) applies is based on the relative scopes of operation of the Article 21(5) claw-back and the Article 21(1) carve-out.²⁴ The *Hulley, Veteran* and *Yukos* tribunals held that '[a]ny measures' covered falling under Article 21(1) are covered by Article 21(5).²⁵ Article 21(7) defines the terms employed in Article 21.²⁶ Article 21(7) defines the term 'Taxation Measures', used in Article 21(1), whereas Article 21(7) does not define the term 'taxes', used in Article 21(5).²⁷ The proposition that the term 'taxes' should be given a 'narrow meaning' was rejected.²⁸ An interpretation giving 'taxes' a "narrow meaning" would have excluded from the scope of the claw-back 'Taxation Measures' such as 'collection and enforcement measures'.²⁹ Such an interpretation would have resulted 'in a wide carve-out and a narrow claw-back', thus fully depriving an Investor from 'expropriatory taxation' by a Contracting Party.³⁰ Such an interpretation would have defeated the object and purpose of Article 21(5) and the ECT at large.³¹

A determination of indirect jurisdiction also results from the 'futility' of a referral to a Competent Tax Authority under Article 21(5)(b).³² Such a referral would not have been of any assistance.³³ Under Article 21(5)(b)(i), interpreted in good faith,³⁴ a referral would not be required in the circumstances faced by the *Hulley, Veteran* and *Yukos* tribunals, since such a referral

21 Ibid.

22 Ibid.

23 *Hulley*, para 1409; *Veteran*, para 1409; *Yukos*, para 1409.

24 Ibid.

25 *Hulley*, para 1416; *Veteran*, para 1416; *Yukos*, para 1416 ('any measures falling under the taxation carve-out of Article 21(1) of the ECT are also covered by the scope of the expropriation claw-back in Article 21(5) of the ECT').

26 *Hulley*, para 1376; *Veteran*, para 1376; *Yukos*, para 1376.

27 *Hulley*, para 1411; *Veteran*, para 1411; *Yukos*, para 1411.

28 *Hulley*, para 1410; *Veteran*, para 1410; *Yukos*, para 1410.

29 *Hulley*, para 1413; *Veteran*, para 1413; *Yukos*, para 1413.

30 Ibid. (agreeing with the claimant's submission to this effect).

31 Ibid.

32 *Hulley*, para 1409; *Veteran*, para 1409; *Yukos*, para 1409.

33 *Hulley*, para 1423; *Veteran*, para 1423; *Yukos*, para 1423.

34 *Hulley*, para 1424; *Veteran*, para 1424; *Yukos*, para 1424. See also Roe, Happold, Dingemans (2011) 192 (noting that '[t]o an extent, what paragraph 5(a) gives substantively, paragraph 5(b) takes away procedurally').

would have been futile at any stage of the arbitrations.³⁵ The tax authorities would have lacked ‘an opportunity to provide timely and pertinent guidance’ to the *Hulley*, *Veteran* and *Yukos* tribunals, given the implausibility of reducing ‘the gist’ of the cases to a size and scope to ‘a meaningful submission’ which could be ‘digested’ by the tax authorities.³⁶ Furthermore, tax authorities would have to confine themselves to ‘discrete’ taxes and cognate issues, whereas an arbitral tribunal reaches conclusions upon ‘consideration of the totality of the evidence presented to it’.³⁷ In any case, a determination by a competent tax authority upon referral would not be binding on an arbitral tribunal, under Article 25(5)(b)(iii).³⁸ Generally, according to the *Hulley*, *Veteran* and *Yukos* tribunals, a procedure may be dispensed with under circumstances in which the procedure ‘would not produce’ its intended result.³⁹ This is recognized in relation to exhaustion of local remedies in connection with diplomatic protection and similar to findings of arbitral tribunals in relation to ‘cooling-off periods’⁴⁰ and requirements to submit disputes to litigation before domestic courts.⁴¹

- 13.10** A tribunal has ‘direct jurisdiction’ over Article 13 claims arising in connection with conduct not excluded by Article 21(1) from protection under the ECT, according to the *Hulley*, *Veteran* and *Yukos* tribunals.⁴² Since Article 21(1) is applicable only to ‘*bona fide* taxation actions’, a tribunal has jurisdiction over claims arising in connection with ‘actions [...] taken only under the guise of taxation’.⁴³ The inapplicability of the Article 21 carve-out results is due to the

35 *Hulley*, para 1423; *Veteran*, para 1423; *Yukos*, para 1423. See also Roe, Happold, Dingemans, *ibid.*, 194 (suggesting that the referral procedure would ultimately ‘extend the length and increase the cost of legal proceedings’).

36 *Hulley*, para 1422; *Veteran*, para 1422; *Yukos*, para 1422.

37 *Hulley*, para 1423; *Veteran*, para 1423; *Yukos*, para 1423.

38 *Hulley*, para 1427; *Veteran*, para 1427; *Yukos*, para 1427.

39 *Hulley*, para 1425; *Veteran*, para 1425; *Yukos*, para 1425 (quoting Art 15(a) of the 2006 ILC Draft Articles on Diplomatic Protection).

40 *Hulley*, *ibid.*; *Veteran*, *ibid.*; *Yukos*, *ibid.* (referring to the findings of ‘[t]ribunals adjudicating claims of investors under international investment treaties’). See also Roe, Happold, Dingemans (2011) 194 (noting that the referral ‘procedure seems akin to a requirement to exhaust domestic remedies, a requirement which does not, of course, apply in relation to other claims under the Treaty’).

41 *Hulley*, *ibid.*; *Veteran*, *ibid.*; *Yukos*, *ibid.* (more specifically, ‘the requirement to submit a dispute to litigation in the host State’s domestic courts for a certain period of time’).

42 *Hulley*, para 1407; *Veteran*, para 1407; *Yukos*, para 1407.

43 *Hulley*, *ibid.*; *Veteran*, *ibid.*; *Yukos*, *ibid.* See *RosInvestCo UK Ltd v. Russian Federation* (SCC 79/2005), Final Award, 12 September 2010 (*RosInvestCo*), para 628 (‘it is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation’); *Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA, ALOS 34 SL v. Russian Federation* (SCC 24/2007), Award, 20 July 2012 (*Quasar de Valores*), para 179 (‘investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When

fact that measures at issue are not 'a *bona fide* exercise' of a Contracting Party's tax powers.⁴⁴ A *bona fide* tax action includes an action 'motivated for the purpose of raising general revenue for the State'.⁴⁵ An interpretation of Article 21 not confining it to *bona fide* measures would imply that a mere 'labelling' of a measure as taxation suffices for the measure so labelled to fall within the scope of application of Article 21(1).⁴⁶ Such an interpretation would be a 'loophole in the protective scope of the ECT'.⁴⁷ This result would be inconsistent with the 'purpose of Part III of the ECT'.⁴⁸

The proposition that Article 21(1) is applicable only to *bona fide* taxation measures is not a conflation of the conditions for application of the carve-out under Article 21(1) and the standard set out in Article 13, respectively.⁴⁹ According to the *Hulley*, *Veteran* and *Yukos* tribunals, a measure which meets the conditions for application of Article 21(1) may not meet the conditions for being lawful under Article 13: a taxation measure may be *bona fide*, and yet expropriatory.⁵⁰ The character of conditions for application of an 'exception to the protection standards under the ECT' and of 'the protection standards themselves' is not conflated by the aforementioned proposition.⁵¹ Furthermore, the characterization of an action as a taxation measure for the purposes of Article 21(1) depends on 'the motivation underlying it', as opposed to its effects.⁵² In this particular connection, a preliminary examination by competent tax authorities regarding the motivation of a measure 'would add little value for an arbitral tribunal'.⁵³ **13.11**

A conclusion that a Contracting Party has breached Article 13 may render it 'unnecessary' to 'consider the application of Article 10'.⁵⁴ Accordingly, Article 10 claims are not considered in that event,⁵⁵ although a tribunal may decide to **13.12**

agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels'). See also Brown (2016) 136 (commenting that the *Hulley*, *Veteran* and *Yukos* tribunals 'also agreed with the *RosInvestCo* and *Renta 4* tribunals' as to their 'jurisdiction to decide whether a taxation measure had been implemented for improper reasons').

44 *Hulley*, para 1430; *Veteran*, para 1430; *Yukos*, para 1430.

45 *Hulley*, para 1431; *Veteran*, para 1431; *Yukos*, para 1431 (using the word '*i.a.*').

46 *Hulley*, para 1433; *Veteran*, para 1433; *Yukos*, para 1433.

47 *Ibid.*

48 *Ibid.*

49 *Hulley*, para 1434; *Veteran*, para 1434; *Yukos*, para 1434.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Hulley*, para 1435; *Veteran*, para 1435; *Yukos*, para 1435.

54 *Hulley*, para 1449; *Veteran*, para 1449; *Yukos*, para 1449.

55 *Hulley*, para 1585; *Veteran*, para 1585; *Yukos*, para 1585. See also Brown (2016) 133–4 (commenting on *Hulley*, *Veteran* and *Yukos*).

set out the parties' arguments 'for the sake of completeness'.⁵⁶ Similarly, a tribunal may decide that it is appropriate to consider claims in an order in which expropriation claims precede claims under 'the FET standard' and FET claims, in turn, precede claims under 'the ECT's other standards'.⁵⁷ In this vein, the FET standard has been found to be a more appropriate means 'to provide redress' to an investor whose rights under a treaty have been breached, where 'the facts of the dispute do not clearly support the claim for direct expropriation'.⁵⁸ Relatedly, the burden of proof to establish an expropriation tends to be higher than that required to establish a breach of other standards of treatment.⁵⁹

13.13 Article 13 sets out rules concerning expropriation.⁶⁰ Like other provisions of Part III, Article 13 contains various obligations.⁶¹ Article 13 is divided into three parts.

13.14 Article 13(1) provides that Investments are not to be subjected to nationalization, expropriation or a measure or measures having an effect equivalent to nationalization or expropriation.⁶² Article 13(1) refers to these three types of conduct as 'Expropriation'.

13.15 Article 13(1) 'provides investments of investors with protection from both direct and indirect expropriation'.⁶³ Indirect expropriation under Article 13(1) is characterized by having an 'effect' which is 'defined as "equivalent to

⁵⁶ *Hulley*, para 1449; *Veteran*, para 1449; *Yukos*, para 1449.

⁵⁷ *Electrabel Jurisdiction, Applicable Law and Liability*, para 6.50 (referring to the Claimant's 'subsidiary case under the ECT's other standards').

⁵⁸ *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Ltd Sirketi v. Republic of Turkey* (ICSID ARB/02/5), Award, 19 January 2007 (*PSEG*), para 238 ('[t]he standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate').

⁵⁹ Schreuer (2008) 95–6 (quoting and discussing *PSEG*).

⁶⁰ Verhoosel (1998) 466; Alqurashi (2004) 899; Niebruegge (2007) 361; Schreuer (2008) 95 ('Article 13 of the ECT contains a detailed provision on expropriation'); Nathanson (2013) n 167; Hoffmeister and Alexandru (2014) 393–4; McCarthy (2016) 143–4; Dias Simões (2017) 176.

⁶¹ *Al-Bahloul Jurisdiction and Liability*, paras 98, 278–279 (adding, at para 279, that '[t]he legal standard for indirect expropriation has been discussed in many investment treaty arbitrations' and referring to 'the formulation of this standard that is found in the *Tecmed v. Mexico* award').

⁶² Roe, Happold, Dingemans (2011) 134 (referring to these three elements in Art 13 as 'mirroring widespread and long-established provisions in many other treaties').

⁶³ *Electrabel Jurisdiction, Applicable Law and Liability*, para 6.51. See also Alqurashi (2004) 899; Hoffmeister and Alexandru (2014) 393–4 (stating that 'EU agreements will try to follow the mainstream of treaty practice to a very large extent' and that '[t]he standard clause is likely to refer to both direct and indirect expropriation [...] among other aspects of an 'approach [...] enshrined in article 13 of the Energy Charter Treaty', among other treaties).

nationalisation or expropriation”.⁶⁴ Both direct and indirect expropriation involve a ‘test for substantial deprivation’.⁶⁵ This threshold of substantiality is predicable of both forms of expropriation ‘whether unlawful or lawful (subject to appropriate compensation)’.⁶⁶

As for direct expropriation, no breach of Article 13(1) may be claimed in the absence of a ‘taking’ by a respondent ‘for itself’ or a transfer by a respondent ‘to any third party’.⁶⁷ In this vein, a claimant is required to ‘establish that the effect of a respondent’s conduct ‘was materially the same as if its investment [...] had been nationalised or directly expropriated by’ the respondent.⁶⁸ Such conduct includes measures variously referred to as ‘indirect, creeping, or *de facto* expropriation’.⁶⁹ Such conduct also comprises ‘regulatory takings’.⁷⁰ **13.16**

According to the *Plama* tribunal, conduct may be in breach of Article 13(1) where ‘parts’ of an Investment or rights to an Investment are affected, provided that they are ‘distinct’ and ‘identifiable’.⁷¹ Nevertheless, for the *Electrabel* tribunal, ‘the test for expropriation is applied to the relevant investment as a whole, even if different parts may separately qualify as investments for jurisdictional purposes’.⁷² Commenting on the *Metalclad* tribunal’s approach, the *Electrabel* tribunal noted that, if an Investor ‘could always meet the test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test’, it would be meaningless to require that a **13.17**

⁶⁴ Ibid. See Constitutional Court, Plenary Session, Judgment 270/2015, 17 December 2015 (*Judgment 270/2015*); Spanish Supreme Court, Contentious-Administrative Chamber, 3rd Section, Judgment 1265/2017, 14 July 2017, Case 749/2014 (*Judgment 1265/2017*). See also Verhoosel (1998) 472 (‘Article 13 largely copies NAFTA Article 1110; hence it also covers “measures equivalent to expropriation.”’); Piernas López, López-Almansa Beaus, Esteve Moltó (2016) 528–30 (commenting on the invocation of Art 13 in support of a claim that an indirect expropriation was committed through a regulation governing financial instability in the electric system (RS 9/2013) in constitutional proceedings challenging the constitutionality of RS 9/2013); Piernas López, López-Almansa Beaus, Esteve Moltó (2017) 439, 444 (commenting on the discussion of indirect expropriation in *Eiser*, in connection with *Judgment 1265/2017*, holding that the Award in *Eiser* is not enforceable in Spain pursuant to Law on Civil Procedure (*Ley de Enjuiciamiento Civil*) Art 271(2)).

⁶⁵ *Electrabel* Jurisdiction, Applicable Law and Liability, para 6.63 (noting that ‘the Tribunal also interprets the terms of Article 13(1) ECT as requiring Electrabel to meet the test for substantial deprivation both for direct expropriation and indirect expropriation having the equivalent effect to direct expropriation or nationalisation’).

⁶⁶ Ibid., para 6.64.

⁶⁷ Ibid., para 6.52.

⁶⁸ Ibid.

⁶⁹ *Petrobart*, p 77.

⁷⁰ *Nykomb*, p 33.

⁷¹ *Plama*, para 193 (referring to ‘the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof’).

⁷² *Electrabel* Jurisdiction, Applicable Law and Liability, para 6.58 (adding that this is so ‘both in applying the wording of Article 13(1) ECT and under international law’).

respondent's conduct be proven to constitute a 'radical deprivation' or 'deprivation of any real substance'.⁷³ Thus, according to the *Electrabel* tribunal, a given right of a claimant is not 'an autonomous investment set apart from' other rights or 'interests'⁷⁴ which are part of an 'aggregate collection'⁷⁵ and constitute 'one integral investment'.⁷⁶

13.18 The 'test under international law' for indirect expropriation has been described as 'equally applicable to the ECT'.⁷⁷ The 'standard' contained in Article 13(1) may be breached by conduct of a Contracting Party which affects the use or economic value of an Investment, without interfering with ownership or possession.⁷⁸ In the absence of a deprivation of the use of objects such as a 'power plant, equipment or other real property', no indirect expropriation takes place.⁷⁹ A claimant 'must prove [...] that its investment lost all significant economic value' as a result of a respondent's conduct.⁸⁰ The requirement that deprivation be 'substantial' is, according to the *Electrabel* tribunal, part of the definition of 'taking',⁸¹ and accepted in the decisions of various arbitral tribunals.⁸² Hence, where a claimant's 'business, taken as a whole, was not rendered financially worthless' by a respondent's conduct, remaining 'still operational and operated by' a claimant, no indirect expropriation has occurred.⁸³

73 *Ibid.*, para 6.57 (so as to establish that the respondent's conduct is 'similar in effect to a direct expropriation or nationalisation').

74 *Ibid.*, para 6.58.

75 *Ibid.*

76 *Ibid.*, paras 6.57–6.58 (noting, at para 6.57, that 'the wording in the Metalclad award as to "significant part" qualifies the required gravity of deprivation and not the investment', and interpreting 'that phrase as describing in different terms the same approach later described by the *Tecmed* tribunal').

77 *Ibid.*, para 6.53, n 2, citing J. Paulsson and Z. Douglas, 'Indirect Expropriation in Investment Treaty Arbitration', in N. Hornand and S. Kröll (eds), *Arbitrating Foreign Investment Disputes* 145, 148 (2004).

78 *Plama*, para 191 (citing *Starrett Housing Corp v. Iran* and *Tecmed v. Mexico*, and stating that 'expropriation can result from State conduct that does not amount to physical control or loss of title but that adversely affects the economic use, enjoyment and value of the investment').

79 *Electrabel* Jurisdiction, Applicable Law and Liability, para 6.53.

80 *Ibid.*

81 *Ibid.*, para 6.61 (citing that Second Restatement of the Foreign Relations Law of the United States of America, published in 1965, in support of the proposition that 'taking' is 'conduct which (inter alia) effectively deprived an alien 'of substantially all benefit of his interest in property ... even though the state does not deprive him of his entire legal interest in the property', and adding that the restatement 'reflected the relevant definition under international law at the time of the decision in *Starrett* (1983) and *Tippett* (1984)').

82 *Ibid.*, para 6.62 (noting that '[i]n addition to *Metalclad* and *Tecmed* (above), arbitral decisions and awards to such effect include *Pope and Talbot* (2000), paras 102–104; *S.D. Myers* (2000), paras 282–285; *Lauder* (2001); paras 200–201; *CME* (2001), paras 603–604; *GAMI* (2004), paras 123–126; *Telenor* (2006), paras 63–67; *Sempra* (2007), paras 284–285; and *Parkerings-Compagniet* (2007), para 455. Conversely, arbitral tribunals have rejected claims for expropriation under international law where the investor has failed to meet this test for "substantial" deprivation, including: *CMS* (2005), paras 260–264; and *Azurix* (2006), para 321.').

83 *Ibid.*, para 6.53.

The elements for assessing whether conduct of a Contracting Party is in breach of Article 13(1) include the degree of deprivation,⁸⁴ the permanence of the conduct and irreversibility of its effects,⁸⁵ and the extent of loss of economic value suffered by the Investor.⁸⁶ Irreversibility implies, in the particular case of ‘contractual rights’, that ‘a temporary non-fulfilment of the State’s contractual obligations is not sufficient to constitute an expropriation’.⁸⁷ Since, in the absence of a ‘permanent taking’ of contractual rights no right of an Investor is ‘destroyed’,⁸⁸ such ‘temporary deprivation will not suffice to constitute expropriation’,⁸⁹ without prejudice to any breach of ‘obligation under the umbrella clause of Article 10(1)’,⁹⁰ or any ‘claim of damages for losses sustained’ by virtue of the deprivation.⁹¹ In addition, emphasis has sometimes been placed on the significance of the extent of economic loss suffered;⁹² sometimes it is placed upon the degree of deprivation.⁹³ Conduct of a Contracting Party which, in spite of having ‘negative effects’ for an Investor, neither is ‘directed specifically against’ an Investment nor has ‘the aim of transferring economic values’ from an Investor to a Contracting Party, has been held to fall outside Article 13(1).⁹⁴ Where conduct is not found to have amounted to an expropriation, a tribunal is not required to determine whether such conduct ‘would constitute a “measure” within the meaning of Article 13.’⁹⁵ 13.19

Article 13(1) further provides that Expropriation may not be carried out except where four conditions are met.⁹⁶ The violation of the conditions entails 13.20

84 *Plama*, para 193 (referring to ‘substantially complete deprivation [...] (i.e., approaching total impairment)’); *Nykomb*, p 33 (‘The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail’).

85 *Plama*, *ibid.* (referring to ‘the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary)’).

86 *Ibid.* (referring to ‘the extent of the loss of economic value experienced by the investor’).

87 *Al-Bahloul* Jurisdiction and Liability, para 281.

88 *Ibid.*, para 282.

89 *Ibid.*, para 281.

90 *Ibid.*, para 280 (recalling the tribunal’s prior finding that such a breach occurred).

91 *Ibid.*, para 281 (namely, ‘damages for losses sustained during the period when the investor has been deprived of the use or enjoyment of his contract rights’).

92 *Isolux*, para 841 (adding that this is prior to a determination of the amount of damages, if any.).

93 *Charanne*, para 460 (stating that in order to establish that an indirect expropriation has taken place, it is necessary to determine ‘whether the measures in dispute had the effect of depriving totally or partially’ an Investor.). See also Dias Simões (2017) 176 (commenting on this finding of the *Charanne* tribunal).

94 *Petrobart*, p 77.

95 *Al-Bahloul* Jurisdiction and Liability, para 283 (referring to ‘[...] Section 13 of the Treaty’).

96 *Hulley* Jurisdiction and Admissibility, para 437; *Veteran* Jurisdiction and Admissibility, para 494; *Yukos* Jurisdiction and Admissibility, para 438 (referring to ‘prescribed conditions’); *Hulley*, para 1580; *Veteran*, para 1580; *Yukos*, para 1580 (referring to ‘[t]he four conditions specified in Article 13 (1) of the ECT’). See also Brown (2016) 126 (commenting on *Hulley*, *Veteran* and *Yukos* and describing Art 13(1) as setting out an ‘obligation not to expropriate investments unless certain conditions are met’); Hoffmeister and Alexandru (2014) 393–4 (stating that EU agreements largely follow ‘[t]he standard clause’ in treaty practice, which ‘is

that a Contracting Party ‘stands in breach of its treaty obligations under Article 13 of the ECT’.⁹⁷ The sufficiency of a set of violations of the conditions in question for a finding of a breach of Article 13 has been pointed out.⁹⁸

- 13.21** Article 13(1)(a) requires that Expropriation be carried out for a purpose in the public interest.⁹⁹ Where measures amounting to a destruction of a company in a sector are in the interest of a state-owned company in the same sector, the interest of the state-owned company is not the same as ‘the public interest of the economy, polity and population of the state in question’.¹⁰⁰
- 13.22** Article 13(1)(b) requires that Expropriation be not discriminatory.¹⁰¹ Treatment of companies in a sector may include the Contracting Party’s treatment in relation to advantages enjoyed by the companies which derive from ‘investments in low-tax jurisdictions’.¹⁰²
- 13.23** Article 13(1)(c) requires that Expropriation be carried out under due process of law.¹⁰³ That an Investor is ‘subjected to processes of law’ may not suffice to satisfy this condition.¹⁰⁴ Where, in a Contracting Party, the ‘courts bent to the will’ of ‘the executive authorities’, among other circumstances, the Contracting Party’s conduct fails to satisfy this condition.¹⁰⁵
- 13.24** Article 13(1)(d) requires that Expropriation be accompanied by payment of prompt, adequate and effective compensation. The adjectival phrase ‘prompt,

likely to [...] enumerate the four conditions for a lawful expropriation’, among other aspects of an ‘approach [...] enshrined in article 13 of the Energy Charter Treaty’, among other treaties).

97 *Hulley*, para 1585; *Veteran*, para 1585; *Yukos*, para 1585.

98 *Hulley*, para 1584; *Veteran*, para 1584; *Yukos*, para 1584 ([i]n order for the Russian Federation to be found in breach of its treaty obligations under Article 13 of the ECT, the foregoing violations of the conditions of Article 13 more than suffice’).

99 Hoffmeister and Alexandru (2014) 394.

100 *Hulley*, para 1581; *Veteran*, para 1581; *Yukos*, para 1581 (referring to Yukos as ‘Russia’s leading oil company and largest taxpayer’ and to ‘the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free’, respectively).

101 Hoffmeister and Alexandru (2014) 394.

102 *Hulley*, para 1582; *Veteran*, para 1582; *Yukos*, para 1582 (referring to ‘the treatment of Yukos and the appropriation of its assets by Rosneft (and to a much lesser extent, another State-owned corporation, Gazprom), when compared to the treatment of other Russian oil companies’ equally investing in low-tax jurisdictions).

103 Wälde (1995) 363; Konoplyanik and Wälde (2006) 534 ([t]his is probably the current standard of customary international law (based on the so-called “Hull formula”)); Hoffmeister and Alexandru (2014) 394 (stating that, in the EU, ‘all Member States’ BITs refer to the well known “Hull formula”, among other aspects of an ‘approach [...] enshrined in Article 13 of the Energy Charter Treaty’).

104 *Hulley*, para 1583; *Veteran*, para 1583; *Yukos*, para 1583 (‘the Tribunal does not accept that the effective expropriation of Yukos was “carried out under due process of law” for multiple reasons’).

105 *Ibid.* (referring to the ‘Russian courts’ and ‘Russian executive authorities’).

adequate and effective', which qualifies the form of compensation, corresponds to the Hull formula.¹⁰⁶ Findings of breach of this condition include circumstances where expropriation 'was not "accompanied by [...]" any compensation whatsoever'.¹⁰⁷

Article 13(1) sets out directions applicable to 'the case of a lawful expropriation'.¹⁰⁸ Article 13(1) further requires that compensation amount to the fair market value of the Investment at the time of the valuation date.¹⁰⁹ In addition, compensation is to include interest at a commercial rate on a market basis, to be accrued from the date of Expropriation until the day of payment. **13.25**

The valuation date is the time immediately before the Expropriation took place or, where impending, the time when it became known in a way which affected the value of the Investment. The valuation date forms the basis for determining the market rate of exchange of a currency in which the fair market value is to be expressed, if so requested by the Investor. **13.26**

The determination of the exact valuation date in the event of an illegal expropriation gives rise to various questions. Article 13 affords arbitral tribunals 'latitude' in this regard.¹¹⁰ A tribunal is not required 'to assess damages as of the time of the expropriation'.¹¹¹ Neither the text of Article 13 nor its *travaux préparatoires* 'provide a definitive answer' as to which date is to be taken into account in the valuation of damages.¹¹² While Article 13 specifies 'the four conditions that must be met to render an expropriation lawful' and provides that damages caused by a lawful expropriation are calculated as of the date of taking, there is no rule on unlawful expropriations.¹¹³ **13.27**

The choice between 'the expropriation date and the date of an award' for the purposes of valuation may be the object of an Investor's entitlement.¹¹⁴ An entitlement to choose the date of valuation in principle flows from the **13.28**

106 Hoffmeister and Alexandru (2014) 393–4 (stating that, in the EU, 'all Member States' BITs refer to the well known "Hull formula" of "prompt, adequate and effective" compensation', among other aspects of an 'approach [...] enshrined in Article 13 of the Energy Charter Treaty', among other treaties).

107 *Hulley*, para 1584; *Veteran*, para 1584; *Yukos*, para 1584 (referring to 'the effective expropriation of Yukos').

108 *Hulley*, para 1650; *Veteran*, para 1650; *Yukos*, para 1650.

109 *Hulley*, para 1591; *Veteran*, para 1591; *Yukos*, para 1591. See also Hoffmeister and Alexandru (2014) 394 (noting that a provision for 'fair market value' is another common element in all the BITs concluded by EU Member States.).

110 *Hulley*, para 1766; *Veteran*, para 1766; *Yukos*, para 1766.

111 *Hulley*, para 1765; *Veteran*, para 1765; *Yukos*, para 1765.

112 *Ibid.*

113 *Ibid.* (adding that '[a] contrario, the text of Article 13 may be read to import that damages for an unlawful taking need not be calculated as of the date of taking').

114 *Hulley*, para 1766; *Veteran*, para 1766; *Yukos*, para 1766.

unlawfulness of the expropriation.¹¹⁵ The *Hulley*, *Veteran* and *Yukos* tribunals concluded that an Investor does have such an entitlement, and expressly noted that this position found support in decisions of other arbitral tribunals 'dealing with illegal expropriation', including in *Kardassopoulos v. Georgia*.¹¹⁶ Whether an Investor is the holder of such an entitlement is best determined by 'considering which party should bear the risk and enjoy the benefits of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award'.¹¹⁷ An Investor does not 'bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period'.¹¹⁸ An unanticipated event which decreases the value of the right to restitution or compensation in lieu of restitution does not affect 'an investor's entitlement to compensation of the damage "not made good by restitution" within the meaning of ASR Article 36(1)'.¹¹⁹ An example of a damage not made good by restitution includes any decrease in the value of an asset from its expropriation until its restitution, whether the asset could be returned or not.¹²⁰ The 'reason' for an Investor's entitlement to 'the difference in value' is that 'in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value'.¹²¹

- 13.29 The criterion for determining the exact date of expropriation, for the purposes of valuation, is whether a loss occurred which 'marked a substantial and irreversible diminution of Claimants' investment'.¹²² Such a loss may most likely involve a claimant's 'main production asset', as a result of a loss of a claimant's 'power to govern [...] financial and operating policies' of a company constitutive of the main asset '[...] so as to obtain the benefits from its activities' from the corporate asset, and the attendant condition of the corporate asset as being 'incapable of operating as a business'.¹²³

115 *Hulley*, para 1763; *Veteran*, para 1763; *Yukos*, para 1763.

116 *Hulley*, para 1769; *Veteran*, para 1769; *Yukos*, para 1769 (referring also to *Siemens and Amoco*).

117 *Hulley*, para 1766; *Veteran*, para 1766; *Yukos*, para 1766.

118 *Hulley*, para 1768; *Veteran*, para 1768; *Yukos*, para 1768.

119 *Ibid.*

120 *Ibid.* (adding that '[t]he same analysis must also apply where the asset cannot be returned, allowing the investor to claim compensation in the amount of the asset's higher value').

121 *Ibid.*

122 *Hulley*, para 1763; *Veteran*, para 1763; *Yukos*, para 1763.

123 *Ibid.*

The rules on reparation under the law of state responsibility, as set out in the ASR, are relevant in relation to the determination of the valuation date in the event of an illegal expropriation.¹²⁴ **13.30**

There are various causation issues which may arise in connection with a finding of breach of Article 13. Where an expropriation is found to be in breach of Article 13, causation is established by reference to 'the heads of damages' identified as consequences of the expropriatory measures.¹²⁵ Where 'multiple causes' are involved in relation to the same damage, and a cause or causes among such multiple causes 'for the same damage' are in part attributable to the respondent, various issues as to the legal consequences of 'concurrent causation' arise.¹²⁶ Such legal consequences may concern both a determination of causation and its related *onus probandi*.¹²⁷ As for causation, the *Hulley*, *Veteran* and *Yukos* tribunals, relying on ASR Article 31, and its commentary,¹²⁸ concluded that where a breach and 'concurrent action that is not a breach' cause a damage, such 'mere fact' of concurrent causation 'does not interrupt' the 'relationship of causation' between the breach and the damage, unless the concurrent action is 'severable in causal terms' or 'too remote', so as to be unable 'to give rise to Respondent's duty to compensate'.¹²⁹ Severability is established where 'intervening actions' by the claimant or a third party take place.¹³⁰ As for *onus probandi* of causation, a respondent has to demonstrate the causal severability or remoteness of 'a particular consequence of its actions [...] with regard to any of the heads of damages'.¹³¹ **13.31**

With regard to mitigation, where it has been established that a respondent's 'primary objective' is to 'appropriate' a claimant's assets and the respondent is 'determined' to undertake 'whatever [...] necessary to achieve this purpose', **13.32**

¹²⁴ *Hulley*, para 1766; *Veteran*, para 1766; *Yukos*, para 1766.

¹²⁵ *Hulley*, para 1772; *Veteran*, para 1772; *Yukos*, para 1772 (referring to '[a]ll of the heads of damage subsequently identified by the Tribunal are consequences of the 2000–2004 tax assessments that led to the expropriation of Claimants' investment, and this expropriation was clearly a breach of Article 13 ECT').

¹²⁶ *Hulley*, para 1773; *Veteran*, para 1773; *Yukos*, para 1773 (referring to 'concurrent causation of a particular line of damage', under the heading 'Multiple Causes for the Same Damage').

¹²⁷ *Ibid.* (referring to the respondent's allegations that conduct of third parties and the claimant or the respondent's non-wrongful conduct 'should exclude Respondent's responsibility for that damage, and that Claimants bear the burden of showing that no such causation exists').

¹²⁸ *Hulley*, para 1774; *Veteran*, para 1774; *Yukos*, para 1774.

¹²⁹ *Hulley*, para 1775; *Veteran*, para 1775; *Yukos*, para 1775.

¹³⁰ *Ibid.*

¹³¹ *Ibid.* (holding that 'causation exists between the damage and Respondent's expropriation of Claimants' investment').

the claimant's actions 'would not ultimately have made a difference to' the respondent's 'enforcement measures'.¹³²

13.33 The obligations of restitution and compensation, set out in ASR Articles 35 and 36, respectively, have a bearing on the question of the exact valuation date. ARS Article 35 sets out an obligation of 'putting the injured party into the position that it would be in if the wrongful act had not taken place'.¹³³ The 'obligation of restitution applies as of the date when a decision is rendered'.¹³⁴ ASR Article 36 sets out an obligation to compensate.¹³⁵ The obligation of compensation arises only and to the extent that the former is insufficient to 'make good the damage caused'.¹³⁶ A 'right to compensation' may arise 'in lieu of a 'right to restitution' in relation to 'unanticipated events that increase the value of an expropriated asset up to the date of the decision [...] *as of that date*'.¹³⁷ This right of compensation requires that a tribunal establishes 'the total value of damages caused by Respondent's actions on each of the two valuation dates identified', so as to award 'the higher' of the two amounts.¹³⁸ The amount awarded may be subject to a 'deduction [...] for contributory fault'.¹³⁹ There are no grounds for 'any further deductions' in addition to contributory fault.¹⁴⁰ In particular, 'any advantages that Claimants may have obtained through their investments prior to Respondent's expropriatory actions can not have any impact on the damages they have suffered'.¹⁴¹ The fact that such advantages may accrue to a claimant poses 'no risk of "double-recovery"'.¹⁴² '[T]he basis for the calculation of the damages awarded' is 'the value of the expropriated investment on the date of the Award'.¹⁴³ Therefore, 'the amount originally invested by Claimants'¹⁴⁴ and 'the rate of return that Claimants may realize on their original investment [...] as a result of the damages that the Tribunal has awarded to them for the expropriation of their shares'¹⁴⁵ are 'irrelevant'.¹⁴⁶

132 *Hulley*, para 1776; *Veteran*, para 1776; *Yukos*, para 1776 (this finding concerned, specifically, 'paying the taxes then assessed or re-filing VAT and tax returns in early 2004').

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 *Hulley*, para 1767; *Veteran*, para 1767; *Yukos*, para 1767 (italics in the original).

138 *Hulley*, para 1777; *Veteran*, para 1777; *Yukos*, para 1777 (referring to 'the date of the YNG auction and the date of this Award').

139 *Ibid.* (namely a 'deduction of 25 per cent').

140 *Hulley*, para 1828; *Veteran*, para 1828; *Yukos*, para 1828.

141 *Ibid.*

142 *Ibid.*

143 *Hulley*, para 1829; *Veteran*, para 1829; *Yukos*, para 1829.

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

The assessment of a claimant's damages is effected on the basis of 'balance of probabilities'.¹⁴⁷ The *Hulley, Veteran* and *Yukos* tribunals based their assessment of the claimant's damages on their shareholding.¹⁴⁸ The *Hulley, Veteran* and *Yukos* tribunals rejected the claimant's 'first damages scenario' in which an 'envisaged merger' would have been completed 'in the absence of Respondent's expropriatory actions' as being 'too speculative'.¹⁴⁹ Likewise, a 'potential listing [...] on the NYSE and the benefits that Claimants might have derived from such a listing' were discarded as 'too uncertain'.¹⁵⁰ The choice of 'the specific methodology of establishing the damages' in an arbitration is preceded by 'determinations in respect of the valuation dates, causation and mitigation', where relevant.¹⁵¹ The object of a claimant's entitlement may include values associated to various 'heads of damages', including the values of 'shares [...] valued as of the valuation date',¹⁵² 'dividends that the Tribunal determines would have been paid to Claimants [...] up to the valuation date but for the expropriation',¹⁵³ and 'pre-award simple interest on these amounts'.¹⁵⁴ 13.34

The 'consequences' of applying the rules on restitution and compensation, in turn, have a bearing on the 'calculation of damages' for an 'illegal expropriation'.¹⁵⁵ An Investor's right to compensation would imply the Investor's entitlement to 'enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision',¹⁵⁶ namely the award. Hence, an increase in the value of an asset, if any, 'also increases the value of the right to restitution'.¹⁵⁷ Such an increase would also be predicable of an eventual right to compensation, in lieu of restitution.¹⁵⁸ An Investor not only is entitled to benefits in the event of unanticipated events. Furthermore, an Investor does not 'bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period'.¹⁵⁹ The value of an Investor's right to compensation of damages 'not made good by restitution' within the meaning of ASR 36(1) is unaffected, even where 'such events decrease the 13.35

147 *Hulley*, para 1780; *Veteran*, para 1780; *Yukos*, para 1780.

148 *Ibid.* ('the assessment of Claimants' damages must be based on their shareholding in *Yukos*, without taking into account the potential effects of a completed merger').

149 *Ibid.* ('assuming a completed merger in the "but for" scenario is too speculative').

150 *Hulley*, para 1779; *Veteran*, para 1779; *Yukos*, para 1779 (referring to 'a potential listing of *Yukos*').

151 *Hulley*, para 1777; *Veteran*, para 1777; *Yukos*, para 1777.

152 *Hulley*, para 1778; *Veteran*, para 1778; *Yukos*, para 1778 (referring to 'shares in *Yukos*').

153 *Ibid.* (referring to 'dividends' to be 'paid [...] by *Yukos*').

154 *Ibid.*

155 *Hulley*, para 1767; *Veteran*, para 1767; *Yukos*, para 1767 (noting that such consequences 'are twofold').

156 *Ibid.* ('investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision, because they have a right to compensation in lieu of their right to restitution of the expropriated asset as of that date').

157 *Ibid.*

158 *Ibid.*

159 *Hulley*, para 1768; *Veteran*, para 1768; *Yukos*, para 1768.

value of the right to restitution'.¹⁶⁰ Hence, in the event of restitution, where an 'asset could be returned to the investor on the date where a decision is rendered', an Investor would be entitled to any 'difference in value' between the 'previous higher value' of the asset and its value as 'decreased since the expropriation'.¹⁶¹ In the event of compensation in lieu of restitution, 'where the asset cannot be returned', an Investor would be entitled to 'claim compensation in the amount of the asset's higher value'.¹⁶²

13.36 The various methods for the valuation of an expropriated company include:¹⁶³ discounted cash flow (DCF) 'method',¹⁶⁴ '[c]omparable companies method',¹⁶⁵ '[c]omparable transactions method',¹⁶⁶ 'market capitalization', which may be 'adjusted' pursuant to developments of various price indexes as of the relevant valuation date,¹⁶⁷ and a method of '[i]mplied value [...] based on share swap between' related companies.¹⁶⁸

13.37 The suitability of a method involving a comparison is the existence of comparable elements. Thus, in the absence of comparable elements, there is 'no basis that would allow a useful comparison'.¹⁶⁹ Such a lack of comparable elements is a fact which may be inferred from the parties' agreement.¹⁷⁰ The character of a method as 'a suitable independent basis for determining the value of an expropriated asset may also relate to the use of 'secondary valuations primarily in support of their main valuation'.¹⁷¹ In particular, the introduction of figures derived from secondary valuations 'at a very late stage of the proceedings' by a claimant may prevent a respondent from 'properly addressing the figures'.¹⁷² The suitability of a method may be inferred from the agreement of the parties as to a method's ability to yield 'a useful valuation', even where a party has not conducted an analysis allowing it to 'fully endorse' a

160 Ibid. (a decrease is predicable of both 'the value of the right to restitution (and accordingly the right to compensation in lieu of restitution)').

161 Ibid.

162 Ibid.

163 *Hulley*, para 1782; *Veteran*, para 1782; *Yukos*, para 1782 (listing 'methods and the valuations of Yukos derived from them (in USD billion)' in a table).

164 Ibid.

165 Ibid.

166 Ibid.

167 Ibid.

168 Ibid.

169 *Hulley*, para 1785; *Veteran*, para 1785; *Yukos*, para 1785 (referring to 'Claimants' calculations based on the comparable transactions').

170 Ibid. (noting that 'both Parties agree that, in fact, there were no comparable transactions').

171 *Hulley*, para 1786; *Veteran*, para 1786; *Yukos*, para 1786 (referring to 'the remaining valuation methods put forward by Claimants, and the valuations of Yukos generated by them').

172 Ibid. (referring to figures introduced 'through demonstrative exhibits at the Hearing and in Claimants' Post-Hearing Brief by the Claimants').

figure derived from corrections to the valuation derived by the other party using the method on which the parties agree.¹⁷³ A suitable valuation method forms a tribunal's 'starting point' for its valuation analysis.¹⁷⁴

The reliability of a method may be determined '[o]n balance'.¹⁷⁵ In particular, 13.38 considerations militating against the reliability of a given method may include a party's expert's admission during a hearing as to the influence of the expert's 'own pre-determined notions as to what would be an appropriate result' on an analysis of value on the basis of a method.¹⁷⁶

The valuation methods may be put forward by the claimant alone, and the 13.39 respondent may confine itself to providing a 'corrected' version of one among the methods proposed by the claimant, alongside any adjustments to the value derived from a given method.¹⁷⁷ The 'corrected' value may be deemed 'the best available estimate' of an expropriated company's value where supported by 'extensive expert evidence' in the form of 'written evidence' set out in 'expert reports', and testimony given during hearings.¹⁷⁸

Where a value is determined by reference to a 'development of a relevant 13.40 index', the 'next step' of a tribunal's analysis is to determine which, among 'the various options in this regard', is 'the most appropriate index for that purpose'.¹⁷⁹ The appropriateness of a method may include elements such as the method's: basis on 'prices of trades executed in securities admitted to trading on' the relevant stock exchange,¹⁸⁰ the transparency and public availability of the 'methodology for establishing the index as well as its current and historical values',¹⁸¹ and its use by both parties as a 'reliable indicator reflecting the changes in the value of companies in the relevant country and

173 *Hulley*, para 1787; *Veteran*, para 1787; *Yukos*, para 1787 (concluding that, in those 'circumstances', 'the comparable companies method' was 'the most tenable approach to determine Yukos' value as of 21 November 2007').

174 *Ibid.*

175 *Hulley*, para 1785; *Veteran*, para 1785; *Yukos*, para 1785.

176 *Ibid.*

177 *Hulley*, para 1783; *Veteran*, para 1783; *Yukos*, para 1783 (adding that the Respondent's expert 'provided a "corrected" version of Claimants' comparable companies analysis, making adjustments for what he considered to be the principal errors' of the Claimant).

178 *Hulley*, para 1784; *Veteran*, para 1784; *Yukos*, para 1784.

179 *Hulley*, para 1788; *Veteran*, para 1788; *Yukos*, para 1788 (referring to its 'adjusting Yukos' value as of November 2007 on the basis of the development of a relevant index', and its finding that 'the RTS Oil and Gas index is the most appropriate index for that purpose').

180 *Ibid.* (namely, 'the Moscow Stock Exchange', in addition to that fact that the index 'presently includes preferred or common shares of nine Russian oil and gas companies, the most important of which are Gazprom, Lukoil, Novatek, Rosneft and Surgutneftegas').

181 *Ibid.* (most notably given its availability 'on the webpage of the Moscow Stock Exchange').

sector, among other calculations.¹⁸² The actual calculation may take into account 'practical' considerations, including the avoidance of 'the effects of random fluctuations of the index on the amount to be awarded'.¹⁸³ In this vein, a tribunal may choose 'to use the average of the values of the index over the period' relevant to the valuation 'as the basis for its calculations'.¹⁸⁴

- 13.41** The valuation of 'the loss of dividends' concerns the 'second element of the damages suffered by Claimants as a result of Respondent's expropriation of their investment'¹⁸⁵ and which 'would otherwise have been paid to them as [...] shareholders'.¹⁸⁶ The value of lost dividends is determined 'up to each date' taken into account for valuation.¹⁸⁷ The 'Claimants' calculation of [...] lost cash flows is merely a starting point for the Tribunal's determination of [...] the correct estimate of the dividends that Claimants would have earned [...] in the "but for" scenario'.¹⁸⁸ Cash flows estimations may be impacted by 'corrections' regarding, among others, 'the interpretation of the historical information' on which the cash flows may be based.¹⁸⁹ In turn, aspects on how 'historical information' may be misinterpreted include the possibility that the claimant underestimates 'transportation costs' or that the claimant's DCF model 'overlooks certain operating expenses'.¹⁹⁰
- 13.42** In addition, discrepancies may result from failing to take into account that by virtue of an expropriation an Investor, albeit deprived of the value of the expropriated asset, is relieved 'of the risk associated with owning it'.¹⁹¹ The risks to cash flows which expropriation eliminates 'must be factored back into the cash flow model in the "but for" scenario'.¹⁹² Such risk may include 'the real risk of substantially higher taxes', all the more in the cases of companies for which 'taxes other than income taxes (also referred to as "non-income taxes") consistently account for well over 50 percent of [...] net income from year to year'.¹⁹³ For such companies, 'cash flows could be significantly affected

182 Ibid. (referring to the parties use of the index in relation to 'the value of Russian oil and gas companies').

183 *Hulley*, para 1821; *Veteran*, para 1821; *Yukos*, para 1821.

184 Ibid.

185 *Hulley*, para 1791; *Veteran*, para 1791; *Yukos*, para 1791.

186 Ibid.

187 Ibid. (recalling that those dates are 'the date of the YNG auction (19 December 2004) and the date of this Award (deemed to be 30 June 2014 for valuation purposes)').

188 *Hulley*, para 1798; *Veteran*, para 1798; *Yukos*, para 1798.

189 *Hulley*, para 1800; *Veteran*, para 1800; *Yukos*, para 1800.

190 *Hulley*, para 1801; *Veteran*, para 1801; *Yukos*, para 1801.

191 *Hulley*, para 1803; *Veteran*, para 1803; *Yukos*, para 1803 (quoting and agreeing with the respondent's proposition that 'an expropriation relieves the owner not only of the value of the asset on the date of expropriation, but also of the risk associated with owning it').

192 Ibid.

193 *Hulley*, para 1805; *Veteran*, para 1805; *Yukos*, para 1805 (with particular reference to *Yukos*).

by any increases in the tariffs and rates relating to the non-income taxes'.¹⁹⁴ The risk of taxation may be underestimated where a calculation is based on the assumption that the expropriated company would have operated as a state-owned company.¹⁹⁵ Other risks may derive from the complexity and opaqueness of 'a vast offshore structure' operating in connection with the expropriated company and 'set up by Claimants, or by others on their behalf, in order to transfer money earned [...] out of the' respondent state.¹⁹⁶ The complexity and scale of the structure may be evidenced by indications that 'corporate governance reforms', including most notably the adoption of 'standards of transparency and protection of minority interests', are a mere 'façade'.¹⁹⁷ The likelihood of the aforementioned offshore structures' continued use in the absence of an expropriation is an additional aspect of a tribunal's analysis of the above 'additional risks'.¹⁹⁸

The 'principles of compensation' set out in Article 13(1) are not applicable in respect of damage or loss caused by breaches of Article 10.¹⁹⁹ When an Investor's claim of breach of FET under Article 10(1) 2nd Sentence prevails, and the conduct breaching FET 'resulted finally in a taking' of an Investor's Investment, Article 13(1) 2nd Sentence may be taken into account, as 'guidance [...] regarding the date and measure for the calculation of damages'.²⁰⁰ Rather than a 'taking', as aptly put by the *Eiser* tribunal, 'a violation of a treaty obligation causing injury entitles an injured party to compensation for the injury sustained'.²⁰¹ In particular, Article 13(1) 2nd Sentence provides guidance regarding the amount to be awarded where conduct 'found [...] to be not a lawful expropriation' causes damages.²⁰² On the basis of this piece of guidance, the quantum of damages caused by a breach of the ECT not constitutive of a lawful expropriation 'shall not be lower than what the ECT prescribes for a lawful expropriation'.²⁰³ 13.43

The rule regarding interests due for expropriation has been applied by analogy to breaches of Article 10(1).²⁰⁴ 13.44

194 Ibid.

195 *Hulley*, para 1804; *Veteran*, para 1804; *Yukos*, para 1804 (agreeing with the respondent's view that the claimants had 'effectively valued Yukos as if it were a State-owned strategic enterprise, which it never was').

196 Ibid. (referring to Yukos offshore structure.).

197 *Hulley*, para 1809; *Veteran*, para 1809; *Yukos*, para 1809 (agreeing with the respondent's assessment of Yukos' corporate governance).

198 *Hulley*, paras 1810–1811; *Veteran*, paras 1810–1811; *Yukos*, paras 1810–1811.

199 *Nykomb*, p 38.

200 *Stati*, para 1460.

201 *Eiser*, para 420.

202 *Stati*, para 1461.

203 Ibid.

204 *Eiser*, para 475; *Novenergia II*, para 844.

- 13.45** Article 13(2) provides for the right of an Investor to prompt review of the valuation of its Investment and the payment of compensation. The review is to be conducted in accordance with the principles set out in Article 13(1) by a judicial or other competent authority of, and under the law of, the party making the Expropriation.
- 13.46** Article 13(3) provides, for the avoidance of doubt, that where an Investment is held through ownership of shares, the expropriation of assets of the company or enterprise whose shares are held, is deemed an Expropriation.
- 13.47** The determination of costs is decided in the exercise of a tribunal's discretion and in light of various factors.²⁰⁵ The amount of costs awarded to a claimant may take into account a tribunal's finding as to the egregiousness of a breach of the ECT.²⁰⁶

205 *Hulley*, para 1887; *Veteran*, para 1887; *Yukos*, para 1887.

206 *Hulley*, para 1886; *Veteran*, para 1886; *Yukos*, para 1886.