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1A.29/2007 /col

**Decision of August 13, 2007**  
**1st Court of Public Law**

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**Composition**

Judges: Féraud (presiding), Aemisegger, Reeb,  
Fonjallaz and Eusebio.  
Clerk: Kurz

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**Parties**

Mikhail **Khodorkovsky**, currently in detention,  
Penal Colony IK-10, Kransnokamensk, Russia,  
plaintiff, represented by Maître Philippe Neyroud and  
Maître Andreas Erb, legal counsel, rue de Hesse 8-10,  
Post Office Box 5715, 1211 Geneva 11

**against**

**Ministère public de la Confédération**  
(Swiss Federal Public Prosecutor's Office)  
Taubenstrasse 16, 3003 Berne

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**Objective**

International judicial assistance for the Russian  
Federation in criminal matters,

Administrative law appeal against the decision of  
December 21, 2006 of the Swiss Federal Public  
Prosecutor's Office.

## **Facts:**

### **A.**

On August 15, 2003, the Attorney General of the Russian Federation requested judicial assistance from Switzerland as part of the investigation underway into the named parties Golubovich and Lebedev, suspected in particular of fraud, abuse of trust, and failure to comply with a judicial order. The Menatep bank officials Lebedev and Golubovich are alleged to have fraudulently obtained, in 1994, 20% of the shares of a Russian corporation OAO Apatit (cited hereafter as Apatit, a company active in the business of apatite – calcium phosphate used as fertilizer), by way of the Volna corporation. These shares were the property of the State, and a judicial order to restore the shares was issued in 1998 by a court in Moscow, but was not complied with except partially in 2002, by a payment of 20% of the value of the shares. Between 1994 and 2002, benefiting from his control over Apatit, Golubovich allegedly organized the export of apatite, by way of the Russian companies that he also controlled, to the Swiss companies Apatit Fertilizers S.A. (cited hereafter as AFSA) and Polyfert AG, for a price of 30 USD per ton, despite the average market price being 45 USD. The Swiss companies then resold the goods for a price of between 40 and 78.5 USD per ton. The profits resulting from these transactions were then deposited in Swiss banks and laundered "via legal business dealings". The Attorney General in Russia requested documents relating to AFSA and Polyfert (articles of association, accounting files, sales contracts, activity reports, financial statements); the identification and interview of their managers; and the specification (and, if required, the blocking) of the money trail. The bank accounts of the Menatep group were targeted in particular.

On the 14th and 18th of November, 2003, the requesting authority specified that the investigation was targeting the founders and directors of the Menatep group, particularly Mikhail Khodorkovsky and Platon Lebedev. The administrative structure of the group was described, along with details on certain bank accounts. The corporation Yukos Universal Ltd., 100% owned by Menatep, is alleged to have been used for the money-laundering activities.

Additional information was supplied on January 22, 2004. It describes improper tax refunds and embezzlements in the sale of petroleum products. The organization managed by Khodorkovsky profited by support from the political authorities, and made use of corruption to eliminate its competitors.

**B.**

By its decisions of February 20, 2004, and then of March 4, 2004, the Swiss Federal Public Prosecutor's Office (the *Ministère public de la Confédération*, or MPC, entrusted with carrying out the Russian request by virtue of the decision dated October 31, 2003 of the Federal Office of Justice) began its own enquiry into the matter in response to the request and the supplements provided up until that time. The MPC discovered the existence of a recently closed bank account held by Khodorkovsky with UBS in Zurich. Significant amounts of money were frozen on a provisional basis, and the requesting authority was invited to decide on a course of action. On the 12th, and then on the 19th of March, 2004, the requesting authority produced financial custody orders issued by a Moscow judge. It also explained that the organization managed by Khodorkovsky, after it had taken control of the Yukos corporation, organized the low-price sale of petroleum products and their re-sale abroad at the prevailing market price. These accusations were specified thereafter on the 2nd, 13th and 23rd of April, and then on May 7, 2004. On March 25, 2004, the MPC responded to the request to freeze assets and ordered the custody of various bank accounts. The appeals launched against these decisions were deemed to be inadmissible, owing to the lack of irreparable damage (decisions 1A.84 and 85/2004, rendered on June 1, 2004; cf. also ATF 130 II 329, cancelling another financial custody order, owing to the lack of inter-relationship and proportionality).

**C.**

On June 17, 2004, the requesting authority restated its accusations, namely: the creation of the Menatep group, of off-shore corporations and dummy Russian corporations (specifically Volna); the appropriation by fraud of 20% of the Apatit shares offered for competition by the Russian State, by promising an investment of 283 million USD and by producing a letter of guarantee from Menatep; the refusal to supply the promised investment, and the attempt to have it believed that the shares had been resold by Volna to third parties; the seizure of control over Apatit, the setting up of a management team; the swindling of shareholders by making them believe, on the basis of forgeries, that the apatite purchased for 30 USD per ton had been resold at the same price, and by blocking their right to a dividend; the divvying up of embezzled funds among members of the organization by way of a number of dummy corporations, using the method of bogus commission payments; the embezzlement of the profits on the sale of petroleum by affiliates of the Yukos corporation; the appropriation of shares in other companies through exchanges. A new request to freeze bank assets was presented on June 22, 2004, with a detailed list of individuals and corporations. On September 9, 2004, the requesting authority announced that the financial custody orders issued in Moscow had been subject to appeals that were thereafter rejected in June and July of 2004.

In an additional announcement on September 14, 2004, the amount of embezzled funds tied to the sale of apatite was estimated at nearly 500 million USD, money that might still be located in the Swiss bank accounts; the petroleum-related transactions were alleged to have brought in 7.750 billion USD. The money trail for 5 billion USD could already be retraced; it was expected that the documents requested from Switzerland would indicate where the remainder had gone.

In an additional announcement on January 20, 2005, the requesting authority issued a statement about the intervention of the individual named Maline, the president of the "Russian Federation of Federal Assets", who, in exchange for shares belonging to AFSA, allegedly made it possible for the order to restore Apatit shares to be avoided.

On June 2, 2005, the requesting authority indicated that the managers of the Yukos group could also find themselves indicted for the murders or attempted murders of people they considered a hindrance. The overall damages to the State and to the shareholders of Yukos and Apatit were estimated at 8 billion USD. It was again specified that Khodorkovsky and Lebedev had been condemned by a Moscow court on May 21, 2005 to 9 years in prison, specifically for embezzlement of funds and misappropriation of profits from the sale of apatite. The requesting authority believed that the rights of the defendants had been respected.

**D.**

On June 24, 2005, the Federal Office of Justice addressed itself to the requesting authority, with a re-statement of grievances formulated against the Russian criminal court in a report dated November 29, 2004, issued for the attention of the Parliamentary Assembly of the Council of Europe, with regards to the indictment and arrest of high level managers in the Yukos corporation. Without taking a stand on these reproaches, the Federal Office of Justice asked the Russian authority to provide the following guarantees: the judicial authorities had to render their decision in a fully independent and impartial manner; they had to respect the rights of the defending parties; Swiss diplomatic representatives could make enquiries into the progress of the proceedings, attend the hearings and obtain a copy of the judgement. On July 6, 2005, the Embassy of the Russian Federation provided the requested guarantees.

## E.

By decision of partial closure on July 15, 2005, the MPC pronounced the submission of the collected documents to the requesting authority. The suspicions cited by the requesting authority were confirmed by the amounts paid by the companies in charge of the transportation of the apatite, by the importance of the proceeds acquired by AFSA, as well as by the considerable commissions paid on the basis of the 50/50 fiscal practice applied in Switzerland by these companies (half of the gross proceeds being automatically considered as justified charges). Under the angle of double incrimination, the appropriation by certain shareholders of proceeds gained by the companies Apatit and Yukos, as well as the payment of fictitious commissions and the exchange of shares, could constitute abuse of confidence in Swiss law or dishonest management. The acquisition of the Apatit shares by Volna and the fraudulent tax refunds may constitute scams against the State. The practice of prices inferior to the market and the embezzlement of profits impacting the profits declared by the Russian companies, the implementation of a particularly complex company structure, as well as the use of the 50/50 practice, constituted a tax scam. The offenses of money-laundering, corruption and homicide could also be charged. The incriminating facts were not of a political, nor fiscal nature.

Under the angle of Article 2a EIMP [*Loi fédérale sur l'entraide internationale en matière pénale*; Federal Law on International Cooperation in Criminal Matters], the arrest and indictment of the Yukos directors (in particular, Khodorkovsky and Lebedev) have been subject to important reservations in the report of November 29, 2004 to the European Parliamentary Assembly. There was cause to retain the opinion that the European Court of Human Rights, already engaged, could be called to rule on these matters. The plaintiff State had expressed itself, in its supplement on June 2, 2005, in regard to the rights of the defendants during the case having culminated in the judgment on May 21; it had also supplied various guarantees demanded on these points. The question in respect to Article 1a EIMP had been submitted to the Federal Justice Department and the police.

The conviction of two of the defendants (who had since filed appeals) did not bring the usefulness of these documents into question. All of the documents, examined by type, appeared appropriate to move the investigation forward, allowing an image to be constructed of the companies' activities, as well as to begin an analysis of the financial flows. The interrogations were effectuated on the basis of a questionnaire provided by the requesting authority.

**F.**

By seizure on January 4, 2006 (1A.215-217/2005) and on January 24, 2006 (1A.249 and 257/2006), the Federal Court allowed appeals under administrative law lodged by the cited companies. The complexity and the confusion of the state of the facts, the reservations issued within the framework of the Council of Europe in relation to the case, as well as the suspicions in respect to tax fraud, imposed upon the Swiss authority to step back from its usual reserve in the examination of the mutual assistance request. Under the angle of double incrimination, the appropriation of the proceeds from the sales of the apatite did not appear to constitute dishonest management in the absence of statements by the company, Apatit, and its shareholders regarding the damages incurred. Taking into account the decisions already rendered in the first instance and in appeals, there was reason to examine the offenses charged and the proofs used, and to deliver a critical examination of the case processed in the plaintiff State.

**G.**

On March 12, 2006, the MPC addressed the Russian Prosecutor, recalling the content of the seizures imposed by the Federal Court, requesting a summary of the Yukos case and the persons involved, and producing a list of the following questions. In reference to Apatit:

1. Who are the persons prosecuted, and what are the charges imposed? 2. Who are the persons convicted besides Khodorkovsky and Lebedev, and for what offenses? 3. Which elements demonstrate the necessity to obtain the Swiss documentation? 4. Who are the individuals and companies subject to the seizure request, and for what reason? 5. Are confiscation procedures being implemented in Russia, and what documents are requested from Switzerland on this matter? 6. Under what conditions is the payment of a dividend decided in Russian companies, such as OAO Apatit? 7. Do the shareholders have an unconditional claim to part of the proceeds? 8. What effects did the intrigues described have on the injured companies? 9. Were Khodorkovsky and Lebedev held responsible for the acquisition of 20% of the Apatit shares in the final judgment? Are other persons concerned? What was the interest of this acquisition for the persons charged who apparently already controlled 80% of the company? 10. For what period was the practice of inferior prices maintained? 11. Are there suspicions or accusations of tax fraud, and what are the mechanisms of these offenses? Similar questions were asked in reference to the Yukos matter. The MPC also requested information on the current status of the mutual assistance requests in reference to information already in the possession of the Russian prosecutor, about the sentencing of Khodorkovsky and Lebedev; the identity of the other persons prosecuted was especially requested. Finally, the Russian prosecutor was invited to supply any information available in respect to the alleged human rights violations in the criminal case.

On July 4, 2006, the prosecutor from the Russian Federation gave the following responses: cases were in progress against the named Gorbachev and Brudno, for appropriation on a grand scale; Brudno was occupied with the delivery of the apatite to the end clients, whereas Gorbachev was occupied with concealing the offending product. Mutual legal assistance had been granted by the other States, despite the reserves issued in respect to the Russian case. The requesting authority refuted the complaints relative to the progress of this case.

On July 13 and August 24, 2006, the MPC again addressed the requesting authority. They referred to a meeting that had taken place in Moscow on May 17 to 19, 2006, and requested specifications on the amount of the damages; it was indispensable to respond to all of the questions asked on March 12, 2006.

On September 12, 2006, the Russian prosecutor had his response delivered, point by point, to the MPC's questions. He referred back to the conditions of the acquisition of the OAO Apatit shares by Golubovich and Chernyshova, and to the embezzlement committed by Brudno, to the detriment of the Yukos group. In the Apatit case, Gorbachev, who at the time was on the run, had also been accused. All of the persons and companies subject to the mutual assistance request were mentioned, in particular the Menatep group affiliates, which were used to recycle the funds. The possibility of seizing the product of the offenses was invoked. The payment of dividends of the company Apatit was decided by the majority of the shareholders, which would have deprived the minority shareholders of a share of the proceeds, and would have prevented the company from reinvesting or increasing its capital. Khodorkovsky and Lebedev benefited from prescription regarding the acquisition of the 20% of Apatit shares, but the investigation on this point continued in regard to Chernyshova and Golubovich, as the prescription period did not run as long as the accused were fleeing justice. No tax offense was retained in the Apatit case. By judgment on May 16, 2005, the Meschansky (Moscow) District Court sentenced Khodorkovsky and Lebedev to 9 years in prison and Krainov to 5 years in prison. The penalties were reduced to 8 years, respectively, 4 years and 6 months of detention, on appeal, by the Moscow Court. In reference to the Yukos case, the authority named the persons targeted; front companies had intervened to falsify documents regarding the transactions and to take in the results of the petroleum sales, depriving the extraction companies of profit. Tax scams had been committed. The requests for assistance were still relevant in the framework of the money-laundering proceedings and against Golubovich, Chernyshova, Brudno and others. Finally, the requesting authority responded to the views expressed with respect to the proceedings in Russia, and it stated that the total financial prejudice amounted to over 8 billion USD.

## H.

On December 21, 2006, the MPC issued a new partial closure order regarding the documents detailing the opening of the account held by Mikhail Khodorkovsky at UBS Zurich, as well as statements, the client history and documents of proof. In their statements of July 4 and September 12, 2006, the requesting authority made a clear distinction between the cases of Apatit and Yukos. According to the sentence handed down by the Meschansky court on May 16, 2005, Khodorkovsky and Lebedev had been sentenced for fraud and abuse of trust, as well as for not complying with a judgment connected to the trade in apatite. In relation to the Yukos case, the same accused had been condemned for tax fraud (for undue fiscal breaks and refunds obtained between 1998 and 2000), as well as for having misappropriated the gains deriving from the resale of petroleum products to the detriment of the Yukos group. This sentence has been partially confirmed on appeal, with the exception of the charges concerning the acquisition of Apatit shares and the non-compliance with the judgment ordering the restitution of the shares. The facts concerning the sale of apatite were prescribed for the years 1997-1999, and application of Article 160 of the Russian Criminal Code was excluded for the rest. The accusations concerning taxes and embezzlement had been confirmed with regard to the Yukos case. Under the angle of double incrimination, the facts described constituted, under Swiss law, acts of disloyal mismanagement and abuse of trust and fraud, since Apatit and its shareholders were deprived of 6 billion roubles in revenues due to the actions undertaken by Khodorkovsky and Lebedev. Money laundering could also be cited, given the financial structure that was established to move the funds. Tax fraud was involved because the Swiss firms that benefited from using 50/50 accounting for tax rules (later ruled a harmful practice) had not returned the taxable benefits to the Russian firms.

Objections concerning the irregularity of the criminal proceedings (examination of evidence, detention conditions, rights to defense of the accused) had been rejected by the Moscow appeal court. The requesting authority also addressed this subject in its statements. On November 25, 2004 and May 18, 2006, the ECHR ruled on the admissibility of the claim filed by Lebedev. The claims relating to the conditions of detention were deemed to be manifestly unfounded, with the exception of the period between March 31 and April 6, 2004, for which the claimant alleged the absence of a judicial order. The claim was also declared admissible insofar as it was about various hearings (absence of counsel, absence of a summons, excessive time for ruling on the extension of the detention), the visitation denied to a lawyer. The rest of the claim (state of health and medical care of the detainee, the underlying motivation for detention, the impartiality of the appeals tribunal against detention) had been declared inadmissible. The claims concerning Article 6 of the ECHR were deemed premature since the trial was still underway. As for the petitions filed by Khodorkovsky, these had restrictions imposed on their public disclosure by reason of the rules applicable at the ECHR. As such, a good number of the faults thus denounced were not confirmed by the ECHR. The claims regarding searches, seizure of property or wire-tapping of the lawyers were not claimed in the final appeal. Thus, the doubts that were expressed by the Assembly of the Council of Europe had been countered. The alleged improprieties were not of a sufficiently grave nature to warrant refusal of mutual assistance. Nor was the existence of a political case framing the criminal proceedings demonstrated. The other tax violations were of a criminal nature.

From the perspective of proportionality, it was confirmed that Swiss firms involved in the apatite trade were implicated, as were Khodorkovsky and Lebedev. When questioned by the Ministry, the requesting authority persisted in its request, indicating that the procedure was also being carried out against the party named Gorbachev. Documentation collected in Switzerland would enable the determination of the amount of the prejudice and the investigation concerning the money laundering: the judgment was limited to the year 2002, although the largest transfers of sums were made in 2003. The investigations concerning the sale of petroleum products also required the documentation seized in Switzerland.

The account belonging to Khodorkovsky was opened in 1997, when AFSA was acquired by Menatep, and at the same time as other accounts opened by the other beneficiaries of Menatep, administered in an identical and apparently coordinated manner and closed at the time of the arrest of Khodorkovsky and Lebedev. Even if the interested party had received authorization from the Central Bank of the Russian Federation to hold such an account, the source of the funds therein was not clear. The potential usefulness of the bank documentation was thus proven.

## I.

On a legal initiative dated January 26, 2007 Mikhail Khodorkovsky filed an administrative law appeal against the closure decision. He requested the suspension of the procedure until judgment was rendered by the ECHR for claims no. 5829/04 and 11082/06. The argument centered on the inadmissibility of the request for assistance dated August 15, 2003 and its subsequent related requests, as well as the annulment of the closure decision dated December 21, 2006.

The MPC rejected the appeal. The Federal Office of Justice concluded the same, noting in particular that the decision under appeal took into account the information available regarding the proceedings pending at the ECHR. The suspension of this decision would counter the obligation to conduct proceedings speedily (Article 17a EIMP), and furthermore, it would only involve the transmittal of information and, according to an informal query to the competent authorities in Strasbourg, the ruling of the ECHR was not expected before the end of 2008.

### **The Federal Tribunal considers that:**

**1.** In accordance with Article 132 paragraph 1 of the Law on the Federal Tribunal and 110b EIMP, the appeal procedures against decisions rendered, as in the case at hand, before the entry into force of the new regulation are subject to the former law.

**1.1** The appeal in administrative law is made, at the proper time, against a decision rendered by the federal authority executing the decision, relative to the partial closure of the mutual assistance procedure (Article 80g, paragraph 1 of the Federal Law on Mutual Assistance with Criminal Cases - EIMP, RS 351.1).

**1.2** The appellant has the right to appeal since the decision being appealed orders the transmittal of information concerning a bank account of which he is holder (Article 9a letter a OEIMP).

**1.3** There are no grounds for allowing the request for suspension. Given the information provided by the Federal Office of Justice, a decision cannot be expected from the ECHR in the near future, which means that any suspension would manifestly be detrimental to the principle of conducting proceedings speedily (Article 17a EIMP). Furthermore, a decision may be rendered on the present appeal, in light of the evidence filed in the case, independently of the outcome of proceedings undertaken by the competent authorities in Strasbourg.

**2.** As the basis of his arguments, the appellant repeats the reasons that led to the annulment of the first orders of closure. He maintains that the procedures taken against him are in fact motivated by political and economic reasons: the appellant claims he has been pursued due to his "oligarch" status, considered to be a threat to the power in place in Russia, and due to a policy of the state to retake control of the country's energy resources. This is what allegedly underlay the Gusinsky case. The Russian Prosecutor had thus acted against him under orders from the President of Russia himself, after having initially closed the case. The discriminatory nature of the proceedings is what allegedly led to the rejection by British and Liechtensteinian authorities of Russian requests for mutual assistance and extradition. Allegedly, the lack of independence of the judges was egregious in the proceedings against Khodorkovsky and Lebedev, which systematically trampled on the rights to defense.

**2.1** In its judgment handed down on January 4, 2006, the Federal Tribunal had already noted the particular context of the request for mutual assistance: the complexity of the facts involved, presented in confusing fashion, the frequent questions arising out of the tax issues and the doubts expressed by the Council of Europe concerning the legal action that was taken against the executives of the Yukos group, all of which led Swiss authorities to be less conservative in their examination of the evidence presented by the requesting authority. In its resolution 1416 (2005), the Parliamentary Assembly of the Council of Europe had noted that the circumstances surrounding the arrest and indictment of the executives of Yukos (in particular, Khodorkovsky and Lebedev) were not in conformity with principles of the rule of law and that these persons had been targeted by the authorities in violation of principles of fairness.

This resolution also refers to the judgment handed down by the ECHR on May 19, 2004 in the Gusinsky case, which described the use of criminal proceedings as an instrument of intimidation. This resolution emphasized the necessity of guaranteeing the independence of the judiciary and respect for guarantees of due process. It was based on the observation of numerous violations of the rights of the defense, the accumulation of such irregularities, massive dispossession of members of the Yukos leadership through back taxes, and the fact that Khodorkovsky had been providing financial support to opposition groups. Along with the intimidation campaigns led by State institutions, it was possible to conclude that the State was not merely pursuing criminal justice, but also elements such as “the weakening of a declared political adversary, intimidation of other wealthy persons and the taking back of strategic economic assets”. In its first judgment, the Federal Tribunal therefore considered that the interconnection of the facts presented in the mutual assistance request, with the Yukos affair, justified a “critical examination” of the presentation of evidence as well as of the proceedings that led to the judgment against those persons accused.

**2.2** The doubts expressed in this judgment were essentially about the political backdrop of the foreign proceedings. Even if the offenses that were cited are not directly related to a power struggle (Article 3 EIMP), the request for mutual assistance was problematic in view of Article 2b and 2c EIMP. These provisions state that a request for mutual assistance is barred if there are reasons to conclude that the proceedings in the requesting state, while appearing to be motivated by criminal wrongdoing, are a subterfuge to pursue a person for his political opinion, social class, race, religion or nationality, or when the proceedings may aggravate the person’s situation for one of these reasons.

**2.3** Article 2 EIMP is intended to avoid Switzerland lending support, through mutual assistance or extradition, to foreign proceedings in which the accused does not benefit from guarantees of minimal standards of protection corresponding to those granted by law in democratic states, as defined by the ECHR or the UN International Covenant on Civil and Political Rights, or foreign proceedings that go against recognized norms of public international order (ATF 125 II 356 consid. 8a p. 364; 123 II 161 consid. 6a p. 166/167, 511 consid. 5a p. 517, 595 consid. 5c p. 608; 122 II 140 consid. 5a p. 142). The examination of the conditions outlined in Article 2 EIMP implies making a value judgment on the internal affairs of the requesting state, in particular concerning its political

regime, its institutions, its concept of fundamental rights and the real respect accorded them, as well as on the independence and impartiality of the judiciary (ATF 126 II 324 consid. 4 p. 326; 125 II 356 consid. 8a p. 364; 123 II 161 consid. 6b p. 167, 511 consid. 5b p. 517; 111 1b 138 consid. 4 p. 142). Even if it is doubtful whether Article 2 EIMP is directly applicable as such concerning a State that is signatory to the CMACM (Convention on Mutual Assistance in Criminal Matters), jurisprudence considers the guarantees of due process set forth in the ECHR and the UN International Covenant on Civil and Political Rights to belong to international public order, and that Switzerland would be acting in breach of its international obligations if it were to collaborate in a criminal case presenting a risk of treatment contrary to these guarantees, notably through discriminatory treatment (ATF 130 II 217 consid. 8.1 p. 227 and the judgments cited; cf. the decision in *Olaechea Cahuas v. Spain*, of August 10, 2006, par. 59-61 and the reference to the decision on *Soering v. United Kingdom* of July 7, 1989, series A no. 161, par. 89-91). The reasons for denying cooperation enumerated in Article 2a, 2b and 2c of the EIMP are also derived from national public order, which is binding on cooperation under a treaty (bilateral or multilateral) to the extent foreseen by the latter (ATF 122 II 373 consid. 2d p. 379/380; 120 1b 189 consid. 2a p. 191; 110 1b 173 consid. 2 p. 176 and the decisions cited). This is precisely the case in Article 2b of the CMACM (ATF 126 II 324 consid. 4c p. 327).

**2.4** The request for mutual assistance must therefore be set aside once there is a likelihood of a serious and objective risk of a prohibited discriminatory treatment (ATF 123 II 161 consid. 6b p. 167, 511 consid. 5b p. 517; 122 II 373 consid. 2a p. 377 and the decisions cited). In this context, it is not enough to presume that the criminal proceeding initiated abroad is a case of settling scores, through which the appellant has been eliminated from the political scene (ATF 115 1b 68 consid. 5a p. 85; 109 1b 317 consid. 16c p. 338/339). On the contrary, it is necessary to assess concrete facts that lead to the inference that the appellant is under pursuit for hidden motives, notably in relation to his political opinions (ATF 129 II 268 consid. 6.3 p. 272).

**2.5** Such motives exist in this particular case, and the various positions taken by the requesting authority after the decisions of January 2006 provide no credible arguments to the contrary. The will of the established power in Russia to fight against the prominence of rich oligarchs has since been confirmed. The MPC never disavowed this notion, since its decision mentions the steps taken by the requesting State to make it possible to fight the control of the oligarchs resulting from the privatizations which came about under unclear circumstances.

The judgment that was appealed is also a reminder of the fact that the Monitoring Commission for the obligations and engagements of the Council of Europe member states wrote in its report, dated June 3, 2005, that the efforts made by the Russian authorities to fight against these problems were to be commended. At the same time, it recalled the need to adopt solutions that met the constraining standards and principles, both judicial and political, of the Council of Europe. In its resolution 1523 (2006) of October 6, 2006, the Parliamentary Assembly of the Council of Europe recalled its previous resolutions and recommendations, expressing regret that subsequent developments demonstrated that the criticisms had been well-founded, and that the competent Russian authorities had not taken the criticisms into account (no. 21).

It is certainly not the place of the Swiss mutual assistance authority to pronounce itself on the legitimacy of reforms undertaken in the requesting State. However, mutual assistance must be denied once it is apparent that the criminal proceeding for which it is required is belied by such a political scenario.

### **3.**

The political and discriminatory nature of the proceedings in Russia was reinforced by the violations of guarantees respecting human rights and the right to a defense, apparently committed during the full length of the case, as well as by what is known about the facts, which remain unclear despite definitive judgments taken by the requesting State.

**3.1** According to the Amnesty International report of 2006, the investigation and trial of Khodorkovsky and Leberdev were marked by various breaches of norms of fairness. Many observers believed that the trial was political above all else. This affair threw light on the serious problems of the Russian justice system: the lack of an independent judiciary, limited contacts between the accused and their lawyers, poor detention conditions and the recourse to torture or abusive treatment in order to obtain confessions. According to the 2006 Human Rights Watch report, Khodorkovsky and Lebedev had been prosecuted essentially because the Kremlin considered them a political menace. International Helsinki Federation for Human Rights also notes the political motivation behind the Yukos trial in its 2006 report.

**3.2** An initial claim filed by Lebedev at the ECHR only concerned his arrest and the conditions of his preventive detention. In its decisions of November 25, 2004 and May 18, 2006, the Court considered the following claims as admissible: the absence of a judicial order concerning the period of detention from March 31 to April 6, 2004; the absence of public hearings at the Basmanyi tribunal on July 3 and December 26, 2003; preventing lawyers from participating in the hearing on July 3, 2003; the late review of the appeals made against the judgments rendered on December 23, 2003 and April 6, 2004; the failure to issue a notice for the hearing of June 8, 2004; grievances relating to the fairness of the trial overall were considered premature, and those concerning the financial harassment of Yukos were dismissed for lack of evidence. That being so, the claims that were deemed admissible are sufficiently numerous and do not only bear on ancillary aspects of the trial. It cannot be established, as was held by the MPC, that the accusations of discriminatory treatment in the trial were “simply discounted” in the decision rendered by the ECHR.

**3.3** Other claims bearing on the trial itself were made by Khodorkovsky and Lebedev. They fault the small amount of time allowed them to prepare their defense, both in the first instance and the appeals court, obstructions in access to their lawyers, appearing at the trial in a closed cage, having been judged by an incompetent tribunal, not having been able to cross-examine the experts or witnesses presented by the prosecution, not having been able to make sufficient arguments against the prosecution, and to have been subjected to unfair procedures by the prosecution not sanctioned by the legal terms of the trial. They also invoke the principles of legality, of the non-retroactivity of criminal law and of non-discrimination. These claims were never examined and will not likely be so for several years. Upon questioning by the MPC, the requesting authority has for its part considered it premature to express itself in this regard. This being the case, the critical questioning that the MPC was asked to perform could not base itself solely on the refutations made by the requesting authority.

**3.4** In addition to the claims concerning the proceedings themselves, there are prejudices concerning the conditions of the execution of their sentence. Indeed, Khodorkovsky and Lebedev were sent to prison camps located in Siberia, whereas, according to Russian law, the place of detention should be in a location proximate to the place of residence or the location of the trial. This choice of a detention location, without any objective justification, cannot be understood

otherwise than as a means of isolation (cf. resolution of the European Parliament P6\_TA (2006) 0270 of June 15, 2006, pertaining to the EU-Russian summit of May 25, 2006).

**3.5** Pertaining to the facts that were invoked to strengthen the mutual assistance request, it is obvious that even after the verdict and its confirmation, and after having had many opportunities to clarify its procedure, the requesting authority was not able to produce the specific information demanded by the decision of the Federal Tribunal of January 6, 2006.

The position taken on July 4, 2006 constituted only scattered and evasive responses to the questions asked by the MPC. The prosecuting authority essentially presented anew its prior statements. The MPC then provided the requesting authority with a catalogue of precise questions while insisting on the need to produce exhaustive responses. However, it appears that the answers provided by the requesting authority are still not satisfactory.

For instance, to the question regarding whether the firm OAO Apatit or its shareholders had incurred losses from the misappropriation of funds that the accused were prosecuted for, the requesting authority did not provide an answer. It explains – as previously – that the shareholders were cheated of their dividend, and the firm was denied its profits that could otherwise have been re-invested, yet it does not produce any element that could confirm the existence of the right to these dividends; the decision in that regard was made by the majority of shareholders, those being indicted, and it is still not known whether the firm OAO Apatit suffered from the alleged misappropriation of the funds. The prosecuting authority mentions Chernyshova and Golubovich, persons who are still under indictment (concerning the acquisition in 1994 of 20% of the Apatit shares), while the extradition of these two persons was denied by the United Kingdom and Italy. The requesting authority also mentions Brudno and Gorbachev, and then restricts itself to the latter without adding that he has sought refuge in the United Kingdom and that his extradition was also denied due to the political motivations of the proceedings. The requesting authority claims to wish to see information coming from Switzerland to establish the amount of liability, but the judgment rendered in Russia actually emitted such a figure established on the basis of evidence that was deemed sufficient. Finally, concerning the fate of the assets sequestered in Switzerland, the prosecuting authority provides no information. It mentions neither any confiscation procedure (the sentences already pronounced included no measures regarding

the trade in apatite), nor any civil suit, and it notes that Russian legislation does not provide for a confiscation procedure.

The information provided responds only very incompletely to the questions formulated by the MPC, which in contrast were very detailed. The information provided does not make it possible to dispel the uncertainties that were raised in the decisions of January 2006.

#### **4.**

All of these facts, taken together, clearly corroborate the suspicion that criminal proceedings have indeed been used as an instrument by the power in place, with the goal of bringing to heel the class of rich "oligarchs" and sidelining potential or declared political adversaries. It follows that judicial assistance cannot be granted, in accordance with Article 2 EIMP. There is no need to consider the other conditions for granting assistance (double incrimination, proportionality, tax infractions) and the various other grievances raised.

#### **5.**

The administrative law appeal is therefore granted, and the closure decision of December 21, 2006 is annulled. Mutual assistance under the request of August 15, 2003 and subsequent complementary requests are denied insofar as the appellant is concerned. The latter has the right to an award of costs, which shall be charged to the MPC (Article 159 OJ). There is no court fee (Article 156 sect. 2 OJ).

**For the reasons above, the Federal Tribunal pronounces:**

**1.**

The appeal is granted and the decision for partial closure of December 21, 2006 is annulled. Mutual judicial assistance is denied with regard to the appellant.

**2.**

Compensation for costs incurred in the amount of 4,000 SFR is allocated to the appellant, to be paid by the MPC.

**3.**

No court fee is charged.

**4.**

The present decision is copied and remitted to the parties representing the appellant and to the MPC, as well as the Federal Office of Justice (B 144 708).

Lausanne, August 13, 2007

In the name of the 1st Court of Public Law  
Of the Swiss Federal Tribunal

The President:

[signature]

Court Clerk/Registrar:

[signature]

