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[Translator note: This is an unofficial translation from French by a translator who does not generally work with French. Unconfirmed words/concepts highlighted in Yellow]

<b>Federal Supreme Court</b>	[Stamp]: RECEIVED
<b>Bundesgericht</b>	AUG. 23, 2007
<b>Tribunal Fédéral</b>	REP.:.....
<b>Tribunale Federale</b>	



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1A.18/2007 /col

**August 13, 2007 Decision**  
**1<sup>st</sup> Public Law Division<sup>2</sup>**

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Composition

Presiding Judge [Mr.] Féraud  
Judges Aemisegger, Reeb, Fonjallaz and Eusebio  
Clerk: M. Kurz

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Parties

Leonid **Nezlin**, Ha-Eshel St. 96, Herzliya-Pituach, Israel,  
represented by Olivier Wehrli, Esq. and Andreas Erb, Esq.  
8-10 de Hesse St., P.O. Box 5715, 1211 Geneva 11.

**vs.:**

**Office of the Attorney General,**  
Taubenstrasse 16, 3003 Berne

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In re

International legal assistance in criminal matters to the  
Russian Federation

Administrative court appeal of Office of the Attorney  
General Decrees of March 4 and 25, 2004, and December  
15, 2006.

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<sup>1</sup> Translator note: Logo from Swiss Federal Supreme Court website at: <http://www.bger.ch/>

<sup>2</sup> Translator note: Name in English from [http://en.wikipedia.org/wiki/List\\_of\\_judges\\_of\\_the\\_Federal\\_Supreme\\_Court\\_of\\_Switzerland](http://en.wikipedia.org/wiki/List_of_judges_of_the_Federal_Supreme_Court_of_Switzerland)

### **The Facts:**

A. On August 15, 2003, Russian Federation General Prosecutor's Office requested mutual legal assistance from Switzerland in an investigation against Messrs. Golubovich and Lebedev on suspicion of fraud, abuse of trust and failure to comply with a [court] order. In 1994, bank Menatep managers Lebedev and Golubovich allegedly fraudulently misappropriated, through Volna company, a 20% share [package] of Apatite OJSC [(Open Joint-Stock Company)] (hereinafter «Apatite [OJSC],» a Russian company involved in apatite (calcium phosphate) trade used as fertilizer). These shares were owned by the [Russian] government, and a 1998 Moscow [court] decision to return them [to the government] was not executed until 2002 – [and even then] only in part – when [only] 20% of the share value was paid. From 1994 to 2002, Mr. Golubovich allegedly used his control over Apatite [OJSC] and [other] Russian companies to set up apatite exports to **Swiss** companies Apatit Fertilizers S.A. (hereinafter referred to as "AFSA") and Polyfert AG at \$30 per ton, while the average market price was \$45. The Swiss companies allegedly resold the product at \$40 - \$78.5[0] per ton. Proceeds from these transactions were allegedly deposited in Swiss banks, then laundered "in legal business." The Russian Prosecutor's Office requested documents pertaining to AFSA and Polyfert ([by-laws], accounting [records], sales contracts, report on activities, banking documentation). [The OAG was also asked] to identify [Swiss company] executives, question [them], determine the funds' origin and destination, and, if need be, freeze the [funds]. Group Menatep accounts were specially noted.

On November 14 and 18, 2003, the Requesting Authority specified it was investigating Group Menatep founders and managers, in particular Mikhail Khodorkovsky and Platon Lebedev. Group structure was detailed, and certain bank accounts noted. It was alleged that Yukos Universal Ltd., a wholly-owned subsidiary of Menatep, was involved in [money] laundering.

Supplemental information was provided on January 22, 2004, citing unfounded tax refunds and embezzlement of oil product sale [proceeds]. The organization headed by Khodorkovsky allegedly used political authorities' support and corruption to eliminate his competitors.

**B.**

By [its] Decisions of February 20, 2004 and March 4, 2004, Office of the Attorney General (OAG, tasked by the October 31, 2003 Decision by the Federal Office of Justice), [decided] to engage in the [legal assistance] request and supplements received to date. OAG found accounts at UBS-Zurich held by Group Menatep executive Leonid **Nevzlin**. Significant sums [of money] were temporarily frozen, and the Requesting Authority was asked to make a determination on this issue. On March 12 and 19, 2004, the Requesting Authority produced freezing orders issued by a Moscow judge. [It] also explained that, after taking control of YUKOS, the Khodorkovsky-led group allegedly organized oil product sales at low prices and their resale abroad at market prices. These charges were subsequently detailed in [supplements of] April 2, 13, 23 and May 7, 2004. On March 25, 2004, OAG granted the [Russian] request and issued order[s] to freeze various bank accounts, including Leonid **Nevzlin's**, which had a balance of \$64,632. Appeals of these decisions were found inadmissible for lack of irreparable damage (decisions 1A.84 and 85/2004 of June 1, 2004; see also ATF [ATF = Arrêts du Tribunal Fédéral = Federal Supreme Court Decisions – transl.] 130 II 329 annulling another freezing [order] for lack of connectedness and proportionality).

**C.**

On June 17, 2004, the Requesting Authority restated the allegations, namely: Creation of Group Menatep, offshore companies and sham Russian companies (in particular, Volna); fraudulent misappropriation of [a] 20% Apatite share [package] auctioned by the Russian government by promising a \$283 Mln. investment, producing a guarantee letter from Menatep, [then] failing to so invest; the attempt to make believe that Volna resold the shares to third parties; taking control of Apatite [OJSC and] installing a management team [there]; deceiving shareholders by misrepresenting that apatite bought at \$30 per ton was resold at the same price, and by depriving them of the right to dividends; distribution of embezzled funds among group members through numerous sham companies under the cover of commission payments; embezzlement of oil product proceeds [from] Yukos branches; misappropriation of other companies' shares through exchanges. Another request to freeze funds was made June 22, 2004, and a [corresponding] list of physical persons and legal entities [was provided]. On September 9, 2004, the Requesting Authority advised that

freezing orders issued in Moscow were appealed, [but the appeals were] denied in June and July 2004.

In a September 14, 2004 supplement, apatite sales [proceeds] embezzled were estimated at around \$500 Mln., which [sums] could still be in Swiss bank accounts. Oil operations allegedly brought in \$7.750 Bln., [of which] \$5 Bln. have allegedly already been traced, and documents requested from Switzerland would [help trace] the rest.

In its January 20, 2005 supplement, the Requesting Authority noted the involvement of [Mr.] Malin, President of Russian Federal Property Fund, who, in the AFSA [sic] share exchange allegedly allowed non-performance of the [court] decision to return Apatite [OJSC] shares.

On June 2, 2005, the Requesting Authority indicated that Yukos Group executives could also be charged with murders or attempted murders against persons [they] thought were in the way. Leonid Nevzlin, also on the Yukos board of directors, allegedly prepared for and [perpetrated] attempted murders with [Mr]. Pichugin, convicted by Moscow [City] Court on March 30, 2005 [and sentenced] to 20 years in prison. Total damage to [Russian] government, and to Yukos and Apatite [OJSC] shareholders was [now] allegedly \$8 Bln. It was also noted that Khodorkovsky and Lebedev were convicted by Moscow [City] Court on May 21, 2005 [and sentenced to] 9 years in prison for embezzling funds and misappropriating apatite sales proceeds. The Requesting Authority [stated] the defendants' rights were respected.

**D.**

On June 24, 2005, FOJ [Federal Office of Justice] addressed the Requesting Authority [recapping] concerns over Russian criminal proceedings cited in a November 29, 2004 report on the prosecution and arrest of Yukos executives [presented] to the Parliamentary Assembly of the Council of Europe. Without taking a position on those concerns, [FOJ] asked Russian authorit[ies] for the following guarantees: Court authorities must issue rulings in full independence and with complete impartiality; they must respect rights of the defense; [a] Swiss diplomatic representati[ve] must be able to inquire about the progress of the proceedings, participate in discussions and obtain a copy

of a [court] decision. The Embassy of the Russian Federation [in Switzerland] provided those guarantees on July 5, 2005.

**E.**

By its Partial Final Decree of July 15, 2005, OAG decided to transmit information gathered to the Requesting Authority, [as] suspicions the Requesting Authority raised were allegedly confirmed by [monetary] sums wired by companies tasked with apatite transport, AFSA prof[its] and sizeable commissions these companies wired under the Swiss 50/50 financial practice applicable to these companies ([where] one-half of gross proceeds are automatically considered to be deductible expenses). As for double criminality, it was argued that, under **Swiss** law, misappropriation of Apatite [OJSC] and Yukos proceeds by certain shareholders, as well as fictitious commission payments and share exchanges could constitute abuse of trust and criminal mismanagement, [while] Apatite [OJSC] share purchase by Volna and fraudulent tax refunds could constitute fraud damaging to the State. Underpricing and embezzlement of profits allegedly impacted the Russian companies' [bottom line]; using an especially complicated structure of companies and utilizing the 50/50 practice constitute financial fraud. Money laundering, corruption and homicide offences could also be charged [under Swiss law]. The charged offenses were allegedly neither political nor financial in nature.

With regard to EIMP [(Federal Law on International Mutual [Legal] Assistance in Criminal Matters)] Art. 2(a), arrest and prosecution of Yukos executives (in particular, Khodorkovsky and Lebedev) raised numerous concerns in the November 29, 2004 report by the Parliamentary Assembly of [the Council of] Europe. A decision should be postponed until the European Court of Human Rights, already handling [the case], rules on these issues. Furthermore, in its June 2, 2005 supplement, the Requesting State already stated that the defendants' human rights were respected during the trial that ended last May 21, and provided guarantees requested on these points. Compliance with EIMP Art. 1a was [alleged] to the Federal Department of Justice and Police.

Conviction of two of the defendants (who have, incidentally, filed appeal[s]) does not affect the [requested] documents' usefulness. Systematically examining all the documents would advance the investigation by [shedding light on] the companies' activity

and [enabling] financial flow analysis. [OAG stated that] interrogations were conducted on the basis of a questionnaire supplied by the Requesting Authority.

**F.**

By [its] decisions of January 4, 2006 (1A.215-217/2005) and January 24, 2006 (1A.249 and 257/2006), the [Swiss] Federal Supreme Court granted the [noted Swiss] companies' administrative appeals. The complexity and lack of clarity in the statement of facts, the concerns expressed by the Council of Europe with respect to the proceed[ing] and lack of clarity in taxation [in Russia] caused the Swiss authority to depart from its usual reserve in examining legal assistance request[s]. As for double criminality, misappropriation of apatite sales proceeds did not seem to constitute criminal mismanagement, as it was not shown [that] Apatite [OJSC] and its shareholders were injured. The charges and evidence used [should] be examined, and a critical look taken at the proceedings conducted by the Requesting State, taking into account decisions already issued by trial and appeals courts.

**G.**

On March 12, 2006, OAG, citing the Federal Supreme Court decisions, requested from the Russian Prosecutor a summary of the Yukos case and [list of] persons implicated, and provided a list of questions, which are listed below. Regarding Apatite [OJSC]:

1. Who is being prosecuted and on what charges?
2. Aside from Khodorkovsky and Lebedev, who else has been convicted, and of what crimes?
3. What substantiates the need for documentation from **Switzerland**?
4. What physical persons and legal entities are subject of the requests to freeze [assets], and on what grounds?
5. Are confiscation proceedings conducted in Russia, and what documents are requested from **Switzerland** in connection therewith?
6. How are dividend payment decisions made in Russian companies such as Apatite OJSC?
7. Do shareholders have an unconditional [right] to profit sharing?
8. How did the acts cited [injure] the companies?
9. Did the final ruling retain the 20% Apatite share package purchase charge against Khodorkovsky and Lebedev? Were other persons [named]? Why were the defendants (who apparently already controlled 80% of the company) interested in this acquisition?
10. For what [time] period was the practice of underpricing charged?
11. Are there financial fraud suspicions or convictions, and what

is the *m[odus operandi]* of those crimes? Similar questions were asked with reference to the Yukos case. OAG also asked for information on pertinence of the mutual [legal] assistance requests in view of the fact that the Russian Prosecutor's Office [apparently had sufficient] information [to] convict Khodorkovsky and Lebedev; [the Russian Prosecutor's Office] was also asked to identify other defendants. Finally, the Russian Prosecutor's Office was asked to provide all available information on alleged violations of human rights in the criminal proceeding[s].

On July 4, 2006, Russian Federation Prosecutor's Office essentially replied as follows: Gorbachev and **Brudno** were being prosecuted on [charges of] large-scale misappropriation; **Brudno** was allegedly involved in apatite delivery to end clients, while Gorbachev was involved in concealing crime proceeds. Other countries provided mutual legal assistance despite concerns expressed on Russian proceedings – which concerns the Requesting Authority refuted.

On July 13 and August 24, 2006, OAG again contacted the Requesting Authority, citing May 17-19, 2006 meetings in Moscow, requesting more detail on the amount of damage, [and stating that] all questions asked on March 12, 2006 must be answered.

On September 12, 2006, the Russian prosecutor gave a point-by-point response to OAG's questions. It restated the circumstances of Apatite OJSC share acquisition by Golubovich and Chernysheva and embezzlement committed by **Brudno** to the detriment of the Yukos Group. Gorbachev, currently a fugitive, was also charged in the Apatite case. All individuals and companies named in the request for mutual [legal] assistance, in particular, Group Menatep branches, were used to recycle [sic] the funds. Reference was made to possibly seizing crime proceeds. The decision to pay out Apatite [OJSC] dividends [was] made by shareholder majority, thus allegedly depriving minority shareholders of some of the profits and precluding the company from reinvesting or augmenting its capital. While Khodorkovsky and Lebedev allegedly benefited from the statute of limitations on the 20% Apatite [OJSC] share purchase, investigation of Chernysheva and Golubovich continues, as the statute of limitations [period] was halted while these defendants were fugitive. No financial violation was charged in the Apatite [OJSC] case. By [its] decision of May 16, 2005,

Meschansky District Court (Moscow) convicted Khodorkovsky and Lebedev, [sentencing them] to 9 years in prison, and [convicted and sentenced] Krainov to 5 years in prison. On appeal, Moscow [City] Court reduced the sentences to 8-year terms [for Khodorkovsky and Lebedev], and 4 years and 6 months [for Krainov]. For the Yukos case, the [Requesting] Authority named individuals [prosecuted]; [stated that] sham companies were used to falsify documents on transactions and to take possession of the oil sales proceeds, depriving producing companies of profit. Financial fraud was allegedly committed. The mutual [legal] assistance requests are still relevant with reference to [money] laundering charges, and with reference to Golubovich, Chernysheva, **Brudno** and others. Finally, the Requesting Authority stated that the Russian proceeding [now] estimates the total financial damage at over \$8 Bln.

#### H.

On December 15, 2006, OAG issued a partial final decree on account opening documentation and statements for Leonid **Nezlin's** account at UBS – Zurich. In its July 4 and September 12, 2006 supplements, the Requesting Authority drew a clear distinction between Apatite [OJSC] and Yukos cases. By Meschansky Court decision of May 16, 2005, Khodorkovsky and Lebedev were convicted of fraud, abuse of trust and failure to comply with a [court] order in connection with apatite trade. In the Yukos case, the same defendants were convicted of financial fraud (for unfounded tax benefits and refunds obtained between 1998 and 2000), and of misappropriating oil product resale profits to the detriment of the Yukos Group. That decision was affirmed in part on appeal, with the exception of the charge of Apatite [OJSC] share purchase and failure to comply with a [court] order to return the shares. Facts relative to 1997-1999 apatite sales were [barred by] statute of limitations, and [charges under] Art. 160 of Russian Federation Criminal Code were stricken as excessive. Financial and fraud charges were confirmed in the Yukos case. As for double criminality, under **Swiss** law, facts cited would constitute criminal mismanagement, abuse of trust and fraud, [as] Apatite [OJSC] and its shareholders were deprived of 6 Bln. Rubles in revenue through Khodorkovsky's and Lebedev's actions. Money laundering could also be charged, as financial structure[s were] set up to transfer funds. Financial fraud was committed in that the Swiss companies,



using the 50/50 practice (subsequently found to be a harmful financial practice) neglected to remit the taxable profits to the Russian companies. Finally, it was argued that Arts. 112 and 260 [of Swiss] Criminal Code apply to Pichugin and Nevzlin for the murders and attempted murders.

On appeal, Moscow [City] Court rejected arguments of irregularities in criminal proceedings (evidence evaluation, detention [conditions], defense rights), which the Requesting Authority also noted in its supplements. On November 25, 2004 and May 18, 2006, the ECtHR [(European Court of Human Rights)] ruled on admissibility of Lebedev's Application. Allegations relative to detention [conditions] were held to be manifestly unfounded, except for the period of March 31 – April 6, 2004, when Applicant alleged being held in custody without a court decision. The Application was also found admissible with regard to various hearings (absence of [defense] counsel, no summons [received]; excessive[ly long] time to rule on custody extension) [and] visitation refusal to an attorney. The rest of the Application (regarding the detainee's health, medical care, grounds for the decision to take [him] into custody, appeals court's impartiality [with reference] to the detention) were found inadmissible. Submissions under ECHR [(European Convention on Human Rights)] Art. 6 were found to be premature as the trial was still ongoing. Applications filed by Khodorkovsky were subject to disclosure restrictions per ECtHR rules. In the final analysis, [it was argued that] the ECtHR did not confirm many of the allegations. Allegations concerning searches, seizures and [wiretapping] of attorneys were not raised at cassation, thus contradicting concerns raised by the [Parliamentary] Assembly of the Council of Europe. Irregularities proven were not grave enough to deny mutual legal assistance. Political motivation of the criminal proceeding was also not shown. Other financial violations charged were of criminal nature.

As for proportionality, Swiss companies' active involvement in apatite [trade] was confirmed along with the involvement of Khodorkovsky and Lebedev. In response to OAG's questions, the Requesting Authority restated its request, stating proceedings continue against Gorbachev; documentation obtained in Switzerland could [help] ascertain the amount of damage and [assist] the [money] laundering investigation; the conviction was limited to the year 2002, while

the more sizeable transfers were made in 2003. Investigation of oil product sales also needed the documents seized in Switzerland.

**Nevezlin's** account was opened in 1997, and the interested party did not contest the bank documentation's potential usefulness.

I.

On January 17, 2007, Leonid **Nevezlin** filed an administrative [court] appeal against the [OAG] Final Decree, [first of all] seeking to suspend the proceedings until ECtHR rules on Applications No. 5829/04 and 11082/06. He essentially concludes that the mutual [legal] assistance request is ungrantable, and the [OAG] December 15, 2005 Final Decree is to be annulled along with the March 4 and 25, 2004 Initial Decrees.

OAG argued that the appeal should be denied, [and] the Federal Office of Justice argued the same, noting that the contested decision takes into account available information on the proceedings pending at ECtHR.

**The [Swiss] Federal Supreme Court considered the [following] law:**

1.

Per LTF [(June 17, 2005 Law on the Federal Supreme Court)] Art. 132(1) and EIMP Art. 110b, appeals filed prior to new law taking effect are subject to previous [version of the] law.

1.1 The administrative [court] appeal contests the Partial Final Decree issued by a Federal authority in [a] mutual legal assistance proceeding, and was filed within the [admissible] time [frame] (EIMP Art. 80 (1), RS 351.1).

1.2 Appellant may file an appeal if the contested decision orders transmission of information relative to his bank account (OEIMP ([Ordinance on international mutual assistance in criminal matters of February 24, 1982<sup>3</sup>]) Art. 9(a)(a) [sic], [and] he may seek annulment decisions issued prior to the Final [Decree] if they concern freezing his bank account.

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<sup>3</sup> Translator note: English text at: <http://www.rhf.admin.ch/etc/medialib/data/rhf/recht.Par.0012.File.tmp/sr351-11-e.pdf>

## 2.

Essentially, Appellant alleges that[:] proceedings against him are politically and economically motivated; he is being persecuted for belonging to the opposition and his closeness with [sic] “oligarchs,” whom the current Russian government considers a threat. [He also notes] the [Russian] State’s policy of renationalizing the country’s energy resources, as was the case with **Gusinsky**. The Russian Prosecutor acted on orders from the Russian President himself, after initially closing the case. The murder charges are also a pretext. The discriminatory nature of the proceedings caused British and Liechtenstein authorities to deny Russian mutual [legal] assistance and extradition requests. Lack of judges’ independence was especially evident at the trial of Khodorkovsky and Lebedev, when defense rights were systematically violated.

2.1 In its January 4, 2006 ruling, the [Swiss] Federal Supreme Court already noted the special context of the request for mutual [legal] assistance: Complex facts presented in a confus[ing manner], often-cited uncertainty in taxation, and concerns the Council of Europe raised with reference to prosecutions of Yukos Group executives forced the Swiss authority to depart from its usual reserve in examining [a] statement of facts submitted by [a] requesting authority. In its Resolution 1416 (2005), Parliamentary Assembly of the Council of Europe held that circumstances surrounding the arrest and prosecution of Yukos executives (in particular, Khodorkovsky and Lebedev) strongly suggest they did not conform to the principle of Rule of Law, and that authorities [selectively] targeted those individuals in violation of the principle of equality. The Resolution also cited the ECtHR May 19, 2004 ruling in the **Gusinsky** case, [where] a criminal proceeding was used to intimidate [him]. That Resolution stated guarantees must be obtained on independence of the judiciary and respect for procedural [law], cited numerous violations of defense rights, cumulative [nature] of these [violations], expropriation from Yukos executives through large tax [assessments], Khodorkovsky’s financial support of opposition groups, and an intimidation campaign launched by [Russian] authorities enable [one] to believe that [Russian authorities]’ actions do not merely seek criminal justice, but also [seek to]

“weaken an outspoken political opponent, intimidate other wealthy individuals and regain control over strategic economic assets.” In its first Decision, the [Swiss] Federal Supreme Court also held that connectedness of facts presented in the request for mutual [legal] assistance [with] the Yukos case calls for the statement of facts and the proceeding that led to the defendants’ conviction to be “examined with a critical [eye].”

**2.2** Concerns expressed in that Decision essentially [point to] a politically-motivated foreign proceeding. In effect, if the alleged violations are not directly related to a power struggle (EIMP Art. 3), the mutual [legal] assistance request would pose an obvious problem under EIMP Art. 2(b) and (c), which state that a request is ungrantable if there is reason to believe that the allegedly common-law proceeding in the Requesting State in fact persecutes a person for his political opinions, belonging to a certain social group, race, confession or ethnicity, or if the proceeding risks aggravating the persecuted person’s situation for one of these reasons.

**2.3** EIMP Art. 2 seeks to preclude Switzerland’s participation in mutual legal assistance or extradition proceedings that do not guarantee the defendant a minimal standard of protection corresponding to that provided by law[s] of democratic countries – in particular, the ECHR or UN Pact II<sup>4</sup>, or that violate accepted international public order norms (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). Analysis of EIMP Art. 2 conditions implies making a value judgment of the Requesting State’s internal affairs, in particular, its political regime, institutions, concept of and respect for fundamental rights, and independence and impartiality of the judiciary (ATF 126 II 324 consid. 4 p. 326; 125 II 356 consid. 8a p. 364; 123 II consid. 6b p. 167, 511 consid. 5b p. 517; 111 1b 138 consid. 4 p. 142). Even if it is doubtful that EIMP Art. 2 is directly applicable, the law holds that, for a State that is party to ECMA<sup>5</sup> [(European Convention on Mutual [Legal] Assistance)], procedural guarantees granted by ECHR and UN Pact II are part of international public order, and Switzerland would be violating its international obligations if it collaborated in a criminal proceeding that poses risk to [a person] being treated in violation of those guarantees; in particular, [subjected to] treatment

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<sup>4</sup> Translator note: UN Pact II = International Covenant on Civil and Political Rights [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<sup>5</sup> Translator note: [http://www.europarl.europa.eu/comparl/libe/elsj/zoom\\_in/12\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/12_en.htm)

that is discriminatory (ATF 130 II 217 consid. 8.1 p. 227 and cited decisions; decision [in re] Olachea Cahuas v. Spain of August 10, 2006, paras. 59-61 and reference to ruling [in re] Soering v. United Kingdom of July 7, 1989, Series A No. 161, paras. 89-91). Reasons for refusing cooperation listed in EIMP Art. 2(a), (b) and (c) include national public order, which [may take precedence over granting] cooperation under a treaty (bilateral or multilateral), as long as such [treaty] so provides (ATF 122 II 373 consid. 2d p. 379/380; 120 1b 189 consid. 2a p. 191; 110 1b 173 consid. 2 p. 176, and cited decisions) – and ECMA Art. 2(b) does [so provide]. (ATF 126 II 324 consid. 4c p. 327).

**2.4** A request for mutual [legal] assistance must therefore be denied if there is reason to believe there is a serious and objective risk of prohibited discriminatory treatment (ATF 123 II 161 consid. 6b p. 167, 511 consid. 5b p. 517; 122 II 373 consid. 2a p. 377, and cited decisions). In that context, it is not enough to allege that the foreign criminal proceeding was intended to settle scores [or] eliminate Appellant from the political scene (ATF 115 1b 68 consid. 5a p. 85; 109 1b 317 consid. 16c p. 338/339) – instead, specific elements must be cited that enable [one] to believe he would be persecuted for concealed motives, [related to] his political views (ATF 129 II 268 consid. 6.3 p. 272).

**2.5** Such motives do exist in this particular case, and the Requesting Authority's [numerous] statements made after the January 2006 [Swiss Federal Supreme Court] Decisions [provide] no credible refutation of this point. Current Russian government's desire to combat the preeminence of wealthy oligarchs has been attested to, [and] OAG itself is aware of this, as it mentions in its Decree that the Requesting State is engaged in fighting oligarchic control that resulted from privatizations that took place in obscure circumstances. The decision on appeal also notes that in its report of June 3, 2005, the Committee on the Honouring of Obligations and Commitments of Council of Europe Member States<sup>6</sup> welcomed Russian authorities' efforts to fight these problems, while noting the need to adopt solutions conforming to Council of Europe's binding legal and political norms and principles. In its Resolution 1523 (2006) of October 6, 2006, Parliamentary Assembly of the Council of Europe cited its previous Resolutions and recommendations and expressed regret that subsequent developments substantiate the criticism that

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<sup>6</sup> Translator note: Committee name verified at [www.coe.int](http://www.coe.int)

competent Russian authorities did not heed the [recommendations] (No. 21).

It is certainly not the [responsibility] of the Swiss mutual [legal] assistance authority to comment on legitimacy of reforms in the Requesting State. Nevertheless, cooperation must be refused if it appears that the criminal proceeding for which it is requested is politically motivated.

### **3.**

The political and discriminatory nature of proceedings being conducted in Russia is also substantiated by violations of human rights and defense guarantees, apparently committed throughout the proceedings, as well as by the statement of facts which remains unclear even after final decisions were issued in the Requesting State.

**3.1** According to Amnesty International's 2006 report, the investigation and trial of Khodorkovsky and Lebedev were marred by various violations of fair trial norms. A number of observers believe the trial was primarily political. This case exposed serious problems in the Russian justice [system]: Lack of independence of the judicial power, restricted contact between defendants and their attorneys, poor detention conditions, use of torture or mistreatment to obtain confessions. According to the 2006 Human Rights Watch report, Khodorkovsky and Lebedev were persecuted essentially because the Kremlin considered them a political threat. In its 2006 report, International Helsinki Federation for Human Rights also states that the Yukos proceeding is politically motivated.

**3.2** Lebedev filed his first Application with the ECtHR [with submissions] pertaining solely to his arrest and conditions of his pre[-trial] custody. In its decisions of November 25, 2004 and May 18, 2006, the [European] Court found the following allegations admissible: Absence of a court decision for his custody from March 31 to April 6, 2004; lack of public hearing at July 3 and December 26, 2003 at Basmany Court; barring attorneys from participating in the July 3, 2006 hearing; delayed examination of appeals filed against December 23, 2003 and April 6, 2004 decisions; and failure to give notification of the June 8, 2004 hearing. Submissions relative to fair trial [violations] were generally held to be premature, and [allegations] of financial harassment [of]

Yukos were rejected as unfounded. Nevertheless, the allegations [ECrHR] did find admissible seem sufficiently great in number and relate to [important] aspects of the proceeding. One must therefore disagree with OAG that ECrHR decisions “did not confirm” allegations of the proceedings’ discriminatory nature.

**3.3** Khodorkovsky and Lebedev filed other Applications regarding the trial itself, citing insufficient time to prepare their defense (at trial court as well as on appeal), barriers to communicating with their attorneys, [having to] appear at trial in a cage, being tried by a Court with improper jurisdiction, being denied the opportunity to examine experts and witnesses for the prosecution or present exculpatory [expert] opinions, and being subjected to various prohibited measures by the prosecution that were not remedied by the court. Principles of legality, non-retroactivity of criminal law and non-discrimination were also invoked. Those Applications have not been examined [to date], and will likely not be examined for several years. In reply to OAG, the Requesting Authority stated it deemed addressing this topic premature. Despite this circumstance, the critical examination OAG should have performed could [anyway] not be based solely on Requesting Authority’s refutations.

**3.4** In addition to allegations regarding the proceeding itself, concerns [were] also [raised] over sentence enforcement conditions. Khodorkovsky and Lebedev were sent to prison camps in Siberia, while, by Russian law, [“]detainees should be imprisoned either close to their residence or close to where their trial took place<sup>7</sup>.[”] That choice of detention [facility] location for no objective reason can only be seen as a way of [deliberately] distancing [the defendants from] (cf. European Parliament Resolution P6\_TA (2006) 0270 of June 15, 2006, on the May 25, 2006 Russia-EU summit).

**3.5** Regarding facts cited in support of the request for mutual [legal] assistance, [one] has to admit that even after conviction[s] w[ere] issued and affirmed, and after having had ample opportunity to detail its [proceedings], the Requesting Authority has still not provide[d] the information requested in the Federal Supreme Court Decision of January 6, 2006.

The [Requesting Authority’s] July 4, 2006 [reply] provides only sparse and evasive answers to OAG’s questions, [and]

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<sup>7</sup> Translator note: English from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0270+0+DOC+XML+V0//EN>

the Requesting Authority essentially [merely] restates its previous [requests]. For that reason, OAG sent a list of specific questions to the Requesting Authority, insisting on complete responses. The Requesting Authority's responses are, however, apparently still not satisfactory.

The Requesting Authority has thus provided no response to the question of whether Apatite OJSC or its shareholders were injured by the embezzlement charged to the defendants, [merely] stating, as before, that shareholders were deprived of dividend[s] and the company was deprived of profits it could have reinvested – while citing no e[vidence] as to as to the right to dividend distribution. [The Requesting Authority merely states that] the decision was made by shareholder majority – i.e., by the defendants, [so] one still doesn't know if Apatite OJSC had problems due to the alleged embezzlement. The Requesting Authority [names] Chernysheva and Golubovich as defendants in ongoing criminal proceedings (in connection with the 1994 acquisition of the 20% Apatite [OJSC] share [package]) – yet their extradition was denied by the United Kingdom and Italy. The Requesting Authority also mentions **Brudno** and Gorbachev, then limits itself to [Gorbachev alone], failing, however, to mention that he has [asylum] in the United Kingdom and his extradition has also been denied on grounds that the proceedings were politically motivated. The Requesting Authority alleges that it wishes to use the information [being requested] from Switzerland to ascertain the amount of damage – yet a decision issued in Russia indicates the [damage] amount was [already] considered ascertained on the basis of evidence that was found to be sufficient. Finally, as to assets frozen in Switzerland, the Requesting Authority provides no information or mention of any confiscation proceeding (convictions issued in connection with apatite trade do not provide for such a measure), or a civil proceeding – stating, [in fact], that Russian law has no provisions for a confiscation proceeding.

Information [supplied by the Requesting Authority] answered OAG's detailed questions only in part, and is insufficient to resolve the uncertainties noted in the January 2006 [Swiss Federal Supreme Court] Decisions.

**3.6** Finally, with reference to murder charges cited with reference to Appellant [**Nevzlin**] specifically, it should be noted that one still fails to see any connection between facts described in



connection therewith and the bank account that is the subject of the Decision to transmit [documents].

**4.**

All these elements clearly corroborate the suspicion that this criminal proceeding was orchestrated by the powers that be in order to subordinate the class of rich “oligarchs” and do away with potential or sworn political opponents. [By virtue of this alone], per EIMP Art. 2, **mutual legal assistance cannot be granted** and there is no need to examine [either] the other conditions for granting [legal assistance] (double criminality, proportionality, financial offenses), or the numerous other arguments cited.

**5.**

The administrative [court] **appeal** is therefore **GRANTED**, and the December 21, 2006 [*sic – should be December 15 – transl.*] Final Decree is annulled, together with OAG’s Initial and Execution [(Enforcement)] Decrees of March 4 and 25, 2004 insofar as they refer to Appellant. **Mutual legal assistance with reference to Appellant sought in the August 15, 2003 request and its supplements is DENIED.** [Appellant] is entitled to expense reimbursement by OAG (OJ [(Federal Law on the Organization of the Judicial System<sup>8</sup>)] Art. 159). No court fees are assessed. (OJ Art. 156 al. 2).

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<sup>8</sup> Translator note: Name in English from <http://www.wipo.int/clea/en/fiche.jsp?uid=ch040>

**On these grounds, the Federal Supreme Court RULES:**

**1.**

The **appeal** is **GRANTED**, and the December 15, 2006 Partial Final Decree is annulled together with the Initial and Execution [(Enforcement)] Decrees of March 4 and 25, 2004.

**Mutual legal assistance with reference to Appellant is DENIED.**

**2.**

Appellant is awarded expense reimbursement by OAG [in the amount] of 4,000 CHF [Swiss Francs].

**3.**

No court fees are assessed.

**4.**

Cop[ies] of this Decision [are] being sent to Appellant's attorneys, Office of the Attorney General, and Federal Office of Justice (B 144 708).

Lausanne, August 13, 2007

For the **Swiss Federal Supreme Court**

1<sup>st</sup> Public Law Division

President:

Clerk:

***/SIGNATURE/***

***/SIGNATURE/***

[Round stamp:]

Swiss Federal  
Supreme Court



\*

**The Swiss Confederation**

**Office of the Attorney General OAG**



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Federal Prosecutor: Jacques Rayroud  
Federal Prosecutor: Maria Schnebli  
Clerk: Christine Moosmann  
Proceedings No: MPC/ECI/4/03/0101  
Bern, August 23, 2007

**DECREE**

In the 15.08.2003 Russian Request for Legal Assistance No. MPC/ECI/4/03/0101 in re: Khodorkovsky et al. on the suspicion of Money Laundering Art. 305bis [Swiss] C[riminal] C[ode], Corruption Art. 322ter. et seq. CC and Criminal Mismanagement Art. 159 CC,

per Federal Supreme Court Decisions of August 13, 2007 in the referenced proceeding,

**it is decreed [as follows]:**

1. The freeze of the following account at UBS AG is **lifted in full, effective immediately.**  
- Leonid Nevzlin, Acct. [No.] **0230-00411174**
2. [Copy of this Decree is] sent to:  
- UBS AG, TT83 C363-YJI, Bahnhofstrasse 45, 8001 Zurich, **first by fax [to] 044 234 20 90 and by registered mail.**  
- Olivier Wehrli, Esq., Poncet Turrettini Amaudruz Neyroud & Associates, Attorneys at the Geneva Bar, 8-10 de Hesse St., PO Box 5715, 1211 Geneva 11, **first by fax [to] 022 312 14 31 and by registered mail.**
3. Federal Office of Justice (B 144 708 BF) by internal courier.

Office of the Attorney General OAG

[Round Stamp]

/signature/



Maria Schnebli  
Federal Prosecutor

Swiss Office  
of the Attorney General

Office of the Attorney General OAG  
Christine Moosmann  
Taubenstrasse 16, 3003 Bern  
Tel. +41 31 325 15 06, Fax +41 31 322 10 97  
www.ba.admin.ch

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