

PCA Case N° 2013-31

IN THE MATTER OF
AN ARBITRATION PURSUANT TO
ARTICLE 26 OF THE ENERGY CHARTER TREATY

BEFORE
A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW OF 1976

–between–

YUKOS CAPITAL S.À R.L. (LUXEMBOURG)

(the “Claimant”)

–and–

THE RUSSIAN FEDERATION

(the “Respondent” and, together with the Claimant, the “Parties”)

DISSENTING OPINION OF PROFESSOR BRIGITTE STERN

Arbitral Tribunal

Professor Campbell McLachlan QC (Chairman)
Mr J. William Rowley QC
Professor Brigitte Stern

Jack L. W. Wass, Assistant to the Tribunal

Claimant’s Counsel

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1. This is an important and complex case and although the three members of the Tribunal had lengthy and challenging exchanges of views, they could not at the end of the day arrive at a unanimous analysis both on the interpretation of Article 45 and its consequences and on the question of the existence of an investment protected under the ECT, and therefore on the Tribunal's jurisdiction *ratione voluntatis* and *ratione materiae*.

DISSENT ON ARTICLE 45 OF THE ECT

2. The necessary starting-point for the analysis is that the Tribunal has been seized as an international tribunal by a Notice of Arbitration made by the Claimant against the Respondent under Article 26 of the ECT:

The agreement to arbitrate on which Yukos Capital relies is set forth in Article 26 of the Energy Charter Treaty of 1994 (the ECT).¹

It is common ground that the Russian Federation did sign the ECT at the time it was adopted in 1994, and that it not only abstained from ratifying it, but that the Duma positively refused to ratify it in 1997. It is also on record that the Russian Federation terminated the provisional application of the ECT in 2009.

3. The question to be solved is, therefore, whether Article 26 is binding for the Russian Federation, so that the jurisdiction of the Tribunal can be based on it. The Claimant considers that it is binding as a result of the Russian Federation's signing of the ECT and the application of Article 45 (1) concerning provisional application of the Treaty by the Signatories. The Respondent alleges that the provisional application of Article 26 is excluded by application of the limitation clause in Article 45 (1) of the ECT providing for provisional application only "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

I. THE MEANING OF PROVISIONAL APPLICATION OF THE ECT

4. Before entering into the interpretation of Article 45 (1) of the ECT, it appears necessary to ascertain the distinction between a treaty in force and a treaty provisionally applied in general international law as well as in the Russian legal order.

¹ Notice of Arbitration, 15 February 2013, § 1. See also Interim Award on Jurisdiction (hereinafter "Award"), § 180: "It is common ground that the basis for jurisdiction of the present Tribunal that is invoked by the Claimant depends in the first instance upon the proper construction of the regime for provisional application of the ECT set forth in its Article 45. The Claimant brings its claim solely for alleged breach of rights contained in the ECT. It claims a right to choose to settle its dispute with the Respondent pursuant to the dispute settlement provisions of Article 26(2)(c) of the ECT, which includes submission to an arbitral tribunal under UNCITRAL Rules under Article 26(4)(b). It relies in particular upon the unconditional consent of the Respondent as a contracting party to international arbitration under Article 26(3)(a)."

A. THE DISTINCTION BETWEEN A TREATY IN FORCE AND A TREATY PROVISIONALLY APPLIED

The distinction in international law

5. It is uncontested that a treaty provisionally applied is not a treaty in force. This is consistent with the distinction made in the Vienna Convention on the Law of Treaties (VCLT) between the entry into force of a treaty and its provisional application, in Articles 24 and 25, respectively:

Article 24 Entry into force

1. A treaty **enters into force** in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

...

Article 25 Provisional application

1. A treaty or a part of a **treaty is applied provisionally pending its entry into force** if:
 - (a) the treaty itself so provides; or
 - (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, **the provisional application of a treaty or a part of a treaty** with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. (Emphasis added)

6. It should be noted here that the Claimant has somehow tried to blur this distinction in relying on a concept of “provisional entry into force.” This is what can be read in its Rejoinder:

Similarly, as noted in the ILC Commentary to Article 25 of the Vienna Convention, a provisionally applicable treaty is binding and constitutes a legally enforceable instrument among signatory states: “[...] *there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.*”

Thus,

*“[...] from a drafting point of view, it seemed necessary to specify that it is the treaties in force in accordance with the provisions of the present articles to which the pacta sunt servanda rule applies. **The words ‘in force’ of course cover treaties in force provisionally under Article 22 as well as treaties which enter into force definitively under Article 21.**”²*

7. However, Claimant’s reliance on a notion of “treaties in force provisionally” or “treaty into force on a provisional basis” is based on a draft of the article on provisional application dated 1966, **which is entirely different from the one finally adopted**. The text commented by Claimant, on the basis of the ILC’s comment³ of an article which was not finally adopted, is the following:

² Claimant’s Rejoinder, §§ 20-21. Footnotes omitted. Emphasis in the original.

³ Yearbook of International Law Commission, 1966, Vol II, pp. 210-211, **Exhibit CL-46**.

Article 22. Entry into force provisionally

1. A treaty may enter into force provisionally if:
 - (a) The treaty itself prescribes that it shall enter into force provisionally ending ratification, acceptance, approval or accession by the contracting States; or
 - (b) The negotiating States have in some other manner so agreed.
 2. The same rule applies to the entry into force provisionally of part of a treaty.
8. Article 22 as just quoted referred indeed to the notion of provisional entry into force, while the final adopted text clearly rejected that concept and introduced a dramatic change in the vocabulary speaking of provisional application “pending entry into force.” This means **that the States have expressly rejected the idea of a “provisional entry into force.”**
9. In other words, it is beyond doubt that a provisionally applied treaty cannot be considered as a treaty in force under international law.

The distinction in the Russian legal system

10. It can also be mentioned here that this understanding that there is a difference between a treaty provisionally applied and a treaty in force – as well as the idea that a provisional application can be of the whole treaty or part thereof – has been adopted by the Federal Law On International Treaties of the Russian Federation of 16 June 1995 (FLIT)⁴, which reproduced the distinction found in the VCLT and whose Article 23 reads:

Article 23 Provisional application of international treaties by the Russian Federation

1. An international treaty **or a part of a treaty** may, **prior to its entry into force, be applied by the Russian Federation provisionally** if the treaty itself so provides or if an agreement to that effect has been reached with the parties that have signed the treaty. (Emphasis added)

The distinction in the ECT

11. In fact, no one really contests the fundamental difference between a treaty in force and a treaty provisionally applied. The ECT itself embodies that distinction, as indeed mentioned in the Award:

The Final Provisions of the ECT set forth in Part VIII draw a clear distinction between two types of unilateral acts by states which are to have legal consequences on the plane of international law: (i) signature of the Treaty under Article 38 by those states which have signed the Energy Charter; and (ii) ratification, acceptance or approval by those states under Article 39. That Article does not itself specify the consequences that flow from the act of signature.⁵

The consequences are indeed specified in Article 45.

⁴ Exhibit R-24.

⁵ Award, § 187.

12. Having this important distinction between a treaty in force and a treaty provisionally applied in mind, it is for the Tribunal to make explicit the consequences that flow from the interpretation of Article 45, which it will do in due course.

B. THE INTERPRETATION OF ARTICLE 45 (1) OF THE ECT

13. The point of departure of the analysis must be the text of Article 45, of which the first paragraph is reproduced here:

ARTICLE 45 PROVISIONAL APPLICATION

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, **to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.** (Emphasis added)⁶

14. The rules of interpretation of an international treaty are well known and embodied in Article 31 of the VCLT. On this point, I fully subscribe to the following statement in the Award:

The point of departure is Article 31(1), which requires interpretation “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”⁷

Interpretation in good faith

15. The fact that any interpretation has to be made in good faith does not raise discussion. I, therefore, fully agree here on what is said in the Award under § 206(a) and have nothing to add to these thoughtful considerations:

Each part of clause (1) must be interpreted in good faith. This means that the Tribunal must seek to give an effective meaning to the agreement of “[e]ach signatory ... to apply this Treaty provisionally pending its entry into force for such signatory” as well as to the proviso to that agreement “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.” An interpretation that would be so broad as to empty either the positive agreement of the relevant signatory or the domestic inconsistency proviso of any effect would not be consistent with an interpretation of the terms of Article 45 (1) in good faith.

Interpretation of the text

16. It seems to me that the use of the words “to the extent” indicates that the extent of the provisional application of the ECT will depend on the absence of its inconsistency with the totality of the internal legal order, *i.e.*, the constitution, laws and regulations. In other words, the rules of the Treaty will be provisionally applied to the extent they are **not inconsistent** with any norm of the Russian legal system, or, to say it differently, if they

⁶ The full article is cited in the Award in § 39 and again in § 182.

⁷ Award, § 185.

are **consistent** with that legal order⁸ and will not be provisionally applied if they are inconsistent – or, to say it differently, if they are not consistent – with any norm of the Russian legal system.

Interpretation in the context of the adoption of the text

17. To interpret the meaning of Article 45 (1), an important reference is to the views of representatives of the European Community⁹ and the States during the finalization of the negotiations in 1994 or thereafter, of an authorized legal commentator of the ECT, and, last but not least, of the respective structures of the national legal orders and the international legal system, which shed some light on the object and purpose of the Treaty, and in particular its Article 26. Some guidelines can also be found for the interpretation of the ECT article on provisional application in the interpretation given to a similar article in the GATT, which, as is well known, was provisionally applied from 1948 to 1994, the date of the adoption of the Marrakesh Agreement establishing the WTO.

Common view of the European Community and the Member States at the time of the adoption of the ECT

18. The views expressed in a Joint Statement by the Council, the Commission and the Member States indicate both that the test for provisional application is whether or not a commitment in the Treaty is compatible with the existing legal order of the Signatories and that the European Community could only apply provisionally parts of the Treaty.¹⁰

Article 45 (1) of the European Energy Charter Treaty should be interpreted as defining the conditions and **limits** for the provisional application of the ECT by the Signatories:

(a) it does not create **any commitment beyond what is compatible** with the existing internal legal order of the Signatories;

...

⁸ I confess that I have some difficulty to follow the linguistic considerations on the interpretation of the expression “not inconsistent” as implying what has been called a double negative form in §§ 207-211 of the Award, especially in light of a further statement found in the Award, in § 233 (b), to the effect that “the negotiating states attached importance to inclusion of the Domestic Law Inconsistency Clause so as to ensure that provisional application ‘does not create any commitment beyond what is **compatible** with the existing internal legal order of the Signatories.’” (Emphasis added), which seems to equate “not inconsistent” with “compatible.” I would also like to add that it seems that there is no double negation in the Russian text, which by definition has some relevance here. The full Russian text reads: Каждая подписавшая сторона соглашается временно применять настоящий Договор впредь до его вступления в силу для такой подписавшей стороны в соответствии со Статьей, в той степени, в которой такое временное применение не противоречит ее конституции, законам или нормативным актам. The expression corresponding to what in the English text “is not inconsistent” is “не противоречит”, which means “does not contradict.”

⁹ As it was then called.

¹⁰ Strangely, the *Hulley* tribunal did not consider that these statements contradicted its view of an all-or-nothing application of the ECT and the impossibility of a partial provisional application with the following self-contradictory statement: “This is therefore not so much an example of partial provisional application of the ECT due to inconsistency with the EC’s legal order, as it is an example of the EC’s partial jurisdiction for the provisional application of the whole ECT – meaning, necessarily, that **some parts of the ECT simply cannot be provisionally applied by the EC.**” (Emphasis added), *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, § 327. **Exhibit CL-9.**

(c) this interpretation allows the Community to limit the provisional application to the **matters which fall under its competence**. (Emphasis added)¹¹

19. A Council Decision in respect of the provisional application of the ECT by the European Community confirmed that provisional application could concern only parts of the Treaty:

Whereas the provisional application of the Energy Charter Treaty will help attain the objectives of the European Community;

Whereas the European Community has competence for **parts of the Energy Charter Treaty**;

...

The European Community shall apply on a provisional basis from the time of signature the Energy Charter Treaty to the extent that it has competence for the matters governed by the Treaty. (Emphasis added)¹²

20. The conclusion which flows from these statements is that it is possible to apply only parts of the Treaty and not others – for example Article 26.

Some views of States during the negotiations of the ECT

21. Can be quoted here, for example, what the American delegation stated in a fax dated 24 February 1994, during the discussion of the wording of Article 45 (1):

As I noted during the last plenary, we do not have any legal difficulty with provisional application per se, so long as it is carefully qualified **to ensure that no party is obliged to do, or to refrain from doing, anything for which that party's constitution or law requires an appropriately ratified treaty**. Our law, for example, generally speaking prohibits expenditure of funds to pay the U.S. share of the expenses of an international organization absent the express approval of the Congress. For such reasons language along the lines 'to the extent permitted by its constitution or laws' is essential to any provisional application obligation. (Emphasis added)¹³

22. The same position was reiterated in a fax dated 4 August 1994 from the American Ambassador to the Dutch Ambassador during the finalization of the text of the ECT, on 4 August 1994:

... most national and subnational laws provide for disputes under those laws to go to the local courts, **not through international arbitration** unless there is special provision. Accordingly I imagine that provisional application does not, by and large, bind the signatory to Articles 30 and 31. But both these are really matters for lawyers. If I am wrong, however, the US position could be eased if there were specific provision in Article 50 under

¹¹ Joint Statement on Article 45 of the European Energy Charter Treaty, made by the Council, Commission, and Member States of the European Community, 14 December 1994, **Exhibit R-9**.

¹² Council Decision of 15 December 1994 on the provisional application of the Energy Charter Treaty by the European Community, **Exhibit RL-157**.

¹³ Facsimile from the U.S. Department of State to the Energy Charter Conference Secretariat, 24 February 1994, **Exhibit R-15**.

which a signatory could declare that it is not able to accept provisional application with respect to particular sub-federal bodies or to Articles 30 and 31. (Emphasis added)¹⁴

Some general views of States on the limits of provisional application

23. The German Foreign Office Guidelines on the Treatment of International Treaties also indicate that some commitments can only be made by the Legislative body and not through an administrative act:

On the German side, unrestricted provisional application of a treaty may, in principle, only be agreed to if the treaty does not require either parliamentary consent in accordance with Article 59(2) of the German Constitution (Grundgesetz) or any other domestic implementation. **Otherwise, provisional application would infringe the legislature's exclusive sphere of competence.** [...] This question is closely connected with the question of the need for a law granting parliamentary consent to a treaty (treaty law (Vertragsgesetz)): to the extent that treaty provisions trigger the aforesaid requirement, they can, in principle, not be applied provisionally. **The provisional application of a treaty may in such cases only be agreed to, if made dependent on a unilateral statement that the domestic requirements for provisional application are fulfilled, or if it is agreed upon that provisional application is only foreseen within the limits of domestic law.** (Emphasis added)¹⁵

Views of an authorized legal commentator of the ECT

24. The following comments have quite some weight, as their author was the chair of the legal advisory committee to the Energy Charter Treaty negotiation. It is, therefore, quite striking that both before the entry into force of the ECT for the States that had ratified the Treaty in 1998 and ten years later he expressed some doubts on the applicability on a provisional basis of Article 26.

25. The first expression of doubt can be found in an article published in 1996:

It is presently unclear, however, to what extent additional commitments to the Energy Charter Treaty's substantive rights and obligations flow from the Treaty's "provisional" application commitments.

...

And it should be borne in mind that even after the Treaty has entered into force for at least 30 states, there is no predicting how long it will take before it is in force for all of the signatories, some of whom could continue to apply it "provisionally" for a period of uncertain duration. Thus, it could become important to clarify the duties owed between a Treaty signatory for which the Treaty is in force and one that is applying the Treaty provisionally, the duties owed to their respective investors, and **the extent to which these relationships are subject to the Treaty's dispute settlement mechanisms.** (Emphasis added)¹⁶

¹⁴ Facsimile from the American Ambassador to the Dutch Ambassador, 4 August 1994, **Exhibit R-114**. Article 30 and 31 were to become in the final text Article 26 and 27 relating to Settlement of Disputes respectively between an investor and a Contracting Party and between Contracting Parties.

¹⁵ German Foreign Office Guidelines on the Treatment of International Treaties (RvV) According to § 72 paragraph 6 GGO, p. 27, **Exhibit R-18**.

¹⁶ Craig S. Bamberger, Chapter 27 Epilogue: The Energy Charter Treaty as a Work in Progress, in *The Energy Charter Treaty – An East-West Gateway for Investment and Trade*, (Thomas Wälde, ed. 1996), pp. 601-602, **Exhibit RL-1**.

26. The same views were expressed again in 2006:

At the present time the ECT is in a phase of “provisional application.” The term of course refers to a treaty signatory's commitment to comply with a treaty, **in whole or in part**, before completion of the ratification process. Article 25 of the Vienna Convention allows for provisional application, which can create obligations going beyond those that Article 18 of the Convention imposes to “refrain from acts which would defeat the object and purpose” of a treaty. In states where the Legislative Branch of the Government has not been asked to consent to provisional application, such a commitment often rests on the actual or implied authority of the Executive Branch, the scope of which may not be clear, and which **may be especially problematical as concerns the acceptance of legally binding resolution in an international forum of disputes over domestic matters.** (Emphasis added)¹⁷

27. What these writings convey is at least the fact that it was far from self-evident that Article 26 could be applied provisionally.

Interpretation of the GATT's clause on provisional application

28. Because of great similarities between the clauses relating to provisional application in the ECT and in the GATT, it is worth referring to the manner in which the analysis of the consistency of GATT's provisionally applied rules with the internal legal orders has been performed, as excellently presented in the Award:

Provisional application of the GATT. Article 1 of the Protocol of Provisional Application of the GATT provides that the governments of the signatory states “undertake ... to apply provisionally on and after 1 January 1948:

- (a) Parts I and III of the General Agreement on Tariffs and Trade; and
- (b) Part II of that Agreement *to the fullest extent not inconsistent with existing legislation.*”

This language is not identical to Article 45. It refers to “existing legislation” and not to a signatory state's “constitution, laws and regulations.” It also reinforces the primary obligation, by requiring the signatory states to give provisional application “to the *fullest* extent.” Nevertheless, the clause sets the link between each state's international law obligations arising by virtue of their agreement provisionally to apply the GATT and their domestic law as determined by the former being “not inconsistent with” the latter.

In interpreting this requirement, GATT Panels, following a Working Party Report, adopted a construction that required that “the legislation on which [the reliance on the proviso] is based is **by its terms or expressed intent of a mandatory character** – that is, it imposes on the executive authority requirements which cannot be modified by executive action.” The proviso did not operate to give priority to all existing legislation. Where such legislation did not prohibit the executive from committing to the provisional application of a rule different to the domestic law, the signatory state was obliged to do so in order to

¹⁷ Craig S. Bamberger, *Adjudicatory Aspects of Transit Dispute Conciliation Under the Energy Charter Treaty*, 3 TDM, April 2006, p. 16, **Exhibit RL-45**.

meet the obligations of Part II GATT in accordance with its agreement to provisional application. (Emphasis added)¹⁸

Interpretation in light of the object and purpose of Article 26 of the ECT

29. When interpreting Article 45 (1), the respective structures of the international legal order and the Russian legal order must not be lost sight of, in order to fully understand the object and purpose of Article 26.
30. As far as the international legal order is concerned, it must be emphasized that to give a foreign private investor the right to sue a State in which it has invested through a mechanism of investment arbitration is quite an extraordinary commitment. It is indeed of utmost importance not to forget that no participant in the international community, be it a State, an international organization, a physical or a legal person, has an inherent right of access to a jurisdictional recourse. There is no general rule providing a jurisdictional or arbitral forum to implement the substantive rights that might exist at the international level. An arbitral tribunal – just as the ICJ or any international court – does not have a general jurisdiction, **an international arbitral tribunal only has a “*compétence d’attribution*”, which has to respect the limits provided for by the States.**
31. And in order to appreciate how a State gives such exceptional power to an international arbitral tribunal, reference must be made to the national legal order, which distributes the powers among its different components. In the case of Russia – as probably many other States – giving such a consent to international investment arbitration is a prerogative of Parliament either through the enactment of a federal law or the ratification of a treaty, as will be explained in more detail below.
32. In sum, it results from this approach of the interpretation of Article 45 (1), according to the international principles of interpretation, that this article permits the application of the parts of the Treaty which are consistent with the Russian legal order, and that it must be carefully verified that Article 26 can be a part provisionally applied.
33. The next step is, therefore, to verify to what extent the Russian legal order permits provisional application of the rules of the ECT, and in particular of Article 26.

II. THE CONTENT OF THE RUSSIAN LEGAL ORDER

34. The international rule – Article 45 (1) – provides that the scope of the provisional application of the ECT extends only to the rules which are consistent with the constitution, laws and regulations of the concerned country.
35. The Award’s approach was to first analyze the consequences of provisional application in general¹⁹ and to then verify that this provisional application is not inconsistent with the Russian legal order. It seems to me, however, that the consistency test has to be performed before the consequences of the provisional application are analyzed and not after. The required consistency with the Russian legal order is a condition for the possibility of

¹⁸ Award, §§ 224-226. Footnotes omitted. Emphasis added.

¹⁹ That is without a limitation clause.

provisional application not a consequence or afterthought of a performed provisional application.

36. Therefore, in order to determine whether it is possible to apply provisionally the ECT and, in particular, Article 26, the structure of the Russian legal order has to be examined.
37. It is necessary to specify here the respective roles played by the national legal order and the international legal order. A mere reading of Article 45 – the international rule – shows that it proceeds to a *renvoi* to the national legal orders. This has been aptly summarized in the Award,²⁰ when stating that “(d)omestic law is relevant because the international law obligation so provides and then only to that extent.”²¹
38. It is, therefore, necessary to look at the Russian legal order, as the ECT directs. For reasons of procedural efficiency, the analysis will concentrate on the question of whether the provisional application of Article 26 was consistent or not with the Russian legal order.

The general questions raised

39. The Award formulated the central issue in the following way:

The Tribunal considers that the principal issue that arises for its decision under this head is:

Did Russia’s provisional application of the ECT “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations” under the terms of Article 45 (1) include its consent to international arbitration under Article 26 (3) (a)?

The answer to this issue turns principally on the question whether the application of Article 26 is “not inconsistent with” Russia’s “constitution, laws or regulations”, since Respondent accepts that, if there were no such inconsistency, there would be a treaty obligation assumed by Respondent to apply that provision on a provisional basis.

²⁰ Award, § 206 (c).

²¹ It can be noted here that the *Hulley* tribunal considered that because of the international rule of *pacta sunt servanda*, national law could not be taken into account, which seems to be a complete misunderstanding of what Article 45 provides. This is what the tribunal said, in § 313 of the award: “Under the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal’s opinion, this cardinal principle of international law strongly militates against an interpretation of Article 45 (1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law.” To the contrary, the Dutch court understood correctly the interplay between international and national law: “Even while it is possible that provisions of national law can stand in the way of the performance of one or more provisions of the ECT, the basis for doing so is encased in the ECT itself – *i.e.*, at treaty level. In other words: a state that relies on a conflict between a treaty provision and national law, on sound grounds and referencing the Limitation Clause, does not act contrary to the *pacta sunt servanda* principle, nor to the principle of Article 27 VCLT.” The Hague District Court Judgment dated 20 April 2016, § 5.19.

The Tribunal is conscious of the fact that this issue is one that has generated differing views in the jurisprudence and difficulty in the doctrine. While remaining fully cognizant of the reasoning set forth in the decisions of other tribunals and of those publicists that have been cited to it, this Tribunal approaches the issue, as it is bound to do, in accordance with its power and duty to decide for itself upon its own jurisdiction. It addresses the question independently in the light of the evidence presented by the Parties before it and of the applicable law as it finds it to be.²²

40. As far as the methodology adopted is concerned, I follow the same approach as the majority, referring only marginally to the positions of other bodies on the questions raised.
41. In order to answer the question of whether Article 26 was consistent or not with the Russian legal order, two complementary questions can be raised, as indicated in the Award:

The Tribunal therefore now turns to consider whether, and if so to what extent, such provisional application was “not inconsistent” with the Russian Constitution, laws or regulations

...

(d) This requires a conflict with **a mandatory rule** that precludes the executive from giving provisional application to Article 26

The Treaty’s distinct references to a signatory state’s constitution and to its laws directs attention to two distinct ways in which it may be said that the Domestic Law Inconsistency Clause is engaged:

(i) That the institution of the provisional application of a treaty is itself inconsistent with the state’s constitutional arrangements in relation to the assumption of international law obligations under a treaty, because it is in conflict with a mandatory rule of the Constitution that has the effect of preventing the executive from exercising a power to agree to provisional application; or

(ii) That the subject-matter of the international law obligation in question conflicts with **a mandatory limitation** imposed by domestic legislation upon the provisional application of the particular type of treaty obligation.²³

42. A distinction must indeed be made between the consistency with the national legal order of the **procedure** for introducing an international mechanism of investment arbitration in the national legal order and the consistency of such **mechanism itself** with the national legal order.
43. And, in my understanding, the answer to this dual question is that Article 26 providing for investor-State international arbitration is not inconsistent *as such* with the Russian legal order, but that the introduction of this extraordinary mechanism in the Russian legal order by an act of the executive power is required, as will be explained now.
44. The mechanism of international arbitration is well-known and accepted as a mechanism to resolve disputes between a foreign investor and the Russian State. As mentioned in the Award, “(t)he Tribunal received evidence as to the extensive scope of Russia’s program

²² Award, §§ 174-176. Footnotes omitted.

²³ Award, §§ 243-246. Emphasis in bold added, underlined in the original.

of investment treaties, in which the Russian Federation does submit to binding international arbitration of disputes between it and foreign investors.”²⁴ It appears from the file that the State has ratified 57 BITs providing for a mechanism of investor-State arbitration. The mechanism in itself is thus not contrary to the Russian legal order.

45. The same cannot be said of the introduction of such mechanism in the Russian legal order.

The existence of a mandatory rule prohibiting provisional application of Article 26

46. It is sufficient that a rule be inconsistent with either the constitution, or some laws or regulations, in order for such rule not to be able to be provisionally applied.

47. There has been no submission to the effect that Article 26 would be inconsistent with any Russian regulation. The inquiry is thus limited to the consistency or not of the introduction of Article 26 in the Russian legal order with the Russian constitution or laws.

48. As the reason for such choice will become apparent in due time, when the analysis of the Russian laws on international investment will have been performed, I start the analysis not with the consistency or not of Article 26 with the constitution, but with the consistency or not of the said provision with some Russian laws dealing with investor-State arbitration.

49. Applying the same analysis as was performed for the GATT, it must be verified whether there exists in the Russian legal order a law of a mandatory character prohibiting the provisional application of a mechanism of investor-State arbitration, such as the one provided for in Article 26 of the ECT through an executive act.

50. It can be noted that the Award recognizes that provisional application of a rule would not be consistent with the Russian legal order “where the legislation contains **a mandatory rule** that has the effect of prohibiting the executive from proceeding to give provisional application to the relevant treaty obligation.”²⁵

51. I state that such laws exist, and I refer here to the Law on Foreign Investment in RSFSR (Russian Soviet Federative Socialist Republic) of 4 July 1991 (1991 FI Law)²⁶, and the Law on Foreign Investment in the Russian Federation of 9 July 1999 (1999 FI Law).²⁷

52. First, it must be mentioned that it was the 1991 FI Law which was applicable when the ECT was signed. That Law provided the following:

Article 9. Dispute Resolution

Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, **unless another procedure is established by an international treaty in force in the territory of the RSFSR.**

²⁴ Award, § 278.

²⁵ Award, § 227. Emphasis added.

²⁶ Exhibits AVA-35 and AVA-55.

²⁷ Exhibit AVA-36.

...
International treaties in force in the territory of the **RSFSR** may provide for recourse to international means of resolution of disputes arising in connection with foreign investments in the territory of the RSFSR. (Emphasis added)

53. The first compelling conclusion is that in 1994, **at the time of the signature** by the Russian Federation of the ECT and its agreement to apply it provisionally to the extent that such provisional application is not inconsistent with its constitution, laws or regulations, **the introduction into the Russian legal order of Article 26 by an act of the executive was inconsistent with the Law on Foreign Investment of the RSFSR of 1991,**²⁸ which provided that such disputes were in principle to be decided by the Russian court **but could by exception be decided through arbitration, if so provided by a federal law or a treaty in force**, in other words, a ratified treaty. There was absolutely no room in 1994 for the possibility to introduce in the Russian legal order a mechanism of international investment arbitration such as the one provided for in Article 26, through an executive act, because such an introduction needed the intervention of Parliament. In other words, if “international treaties in force in the territory of the RSFSR may provide for recourse to international means of resolution of disputes arising in connection with foreign investments in the territory of the RSFSR,” it means that **this cannot be provided by a treaty which is not in force and only applied provisionally.**
54. The Law on Foreign Investment of the Russian Federation of 1999,²⁹ which was in force **at the time of the institution of the proceedings**, was adopted in order to acknowledge the replacement of the RSFSR by the Russian Federation, and provides as follows:

A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with **international treaties of the Russian Federation** and federal laws in court, arbitrazh court or through international arbitration (arbitral tribunal). (Emphasis added)

55. I am aware that the law of 1999 does not explicitly refer to treaties in force, but I do not think that this changes the preceding conclusion. Before explaining why, some words should be said here, as a background, on the extremely complex situation created by the end of the RSFSR. A series of agreements have been adopted, and it is not clear exactly when the Russian Federation and the other successor States replaced the RSFSR, but it can be no earlier than 8 December 1991, the date of the Minsk Accords.³⁰ What is certain is that the 1991 FI Law was dated 4 July 1991, and the 1999 FI Law was dated 9 July 1999, and that between those two dates, the RSFSR disappeared, which explains the need to have a new law replacing the old one. The purpose of the new law was to acknowledge the change of sovereign, not a change in the respective powers of the legislative and executive powers.

²⁸ Exhibit AVA-35.

²⁹ Exhibit AVA-36.

³⁰ See on this issue, Brigitte Stern, *La succession d'Etats*, Hague Academy Collected Courses, *RCADI*, volume 262, La Haye, Kluwer, 2000, p. 220 : « *Quelle est la date de la disparition de l'URSS ? Est-ce la date des Accords de Minsk – le 8 décembre 1991 – par lesquels trois républiques seulement sur quinze constatent que l'URSS a cessé d'exister ? La date des Accords d'Alma-Ata – le 21 décembre 1991 – où onze républiques prennent la même position ? Ou encore celle du 24 décembre 1991, par laquelle la Russie a fait savoir qu'elle remplaçait l'URSS en vertu du principe de continuité dans son siège de membre permanent du Conseil de sécurité ? Ou encore le 25 décembre, jour de la démission de Gorbatchev ? Ou encore le 26 décembre 1991, date d'une résolution du Parlement soviétique dans laquelle il prend acte de la disparition de l'URSS ? ... »*

56. The reason why the 1999 FI Law does not differ from the 1991 FI Law is, firstly, that routinely a reference to an international treaty is a reference to a treaty which is ratified or, in other words, in force. A provisional application is something special that needs to be mentioned. **A reference to an international treaty, without specification, is, in my view, a reference to a treaty which is in force** following a consent given by the different methods accepted by international law. The provisional application of a treaty is a modality of existence of the treaty as if it were in force, but such a treaty cannot be equated to a “treaty of” the relevant country.
57. Secondly, the context of the adoption of the new law supports this analysis. There is no trace in the record indicating that, suddenly, in the 1999 FI Law, the Duma would have divested itself of its exclusive existing right to create a mechanism of international arbitration under the 1991 FI Law, without specifying clearly such a dramatic change, for example in stating in Article 10 that such a mechanism could from now on, in the future, be created “by international treaties in force adopted by the Duma or international treaties put in provisional application by the Executive” or “by international treaties of the Russian Federation, including provisionally applied treaties.”
58. The majority adopts another interpretation of Article 10 of the 1999 FI Law in the Award and concludes that because the words “in force” are not there, the concept of international treaty contains a treaty that is provisionally applied. But, in my view, the exception – a treaty provisionally applied – cannot be included by implication in the rule, lest there would be no difference between the rule – a ratified treaty – and its exception – a provisionally applied treaty.
59. If such a Copernican change had occurred between the two laws, no doubt there would have been a lot of political discussion as well as many academic papers commenting on this major change of paradigm. I am aware of no such document in the file.
60. There are, however, indicia going in the reverse direction and supporting the view that the 1999 FI Law did not introduce any change. In the Explanatory Note of 1997 by which the Government submitted the ECT to the Duma in order for it to ratify it,³¹ it explained that once ratified, “(t)he provisions of the ECT are consistent with Russian legislation.” And when referring to Russian legislation, the Note makes no difference between the existing FI Law of 1991 and the upcoming FI Law under discussion in the Duma, which was to become the 1999 FI Law:

The legal regime of foreign investments envisaged under the ECT **is consistent with the provisions of the existing Law** of the RSFSR on Foreign Investments in the RSFSR, **as well as with the amended version of the Law** currently being discussed in the State Duma, and does not require the enactment of any concessions or the adoption of any amendments to the abovementioned Law. (Emphasis added)

No distinction is made here between the 1991 FI Law and the 1999 FI Law.

³¹ Explanatory Note to the Draft Federal Law “On Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects” **Exhibit C-147**, annexed in a different translation as **Exhibit R-111**.

61. Although it is sufficient that the introduction of Article 26, through a mere executive act, be inconsistent with the Russian laws on international investment to prevent the provisional application of Article 26 and render the analysis of the consistency with the constitution superfluous, some comments can be made on the approach of this question in the Award.

The jurisprudence of the Russian Constitutional Court

62. The jurisprudence of the Russian Constitutional Court (CC) also has to be taken into account in order to ascertain the content and interpretation of the Russian legal system, as indeed underscored in the Award.³² The Award relies principally on one decision to analyze the consistency of the introduction of Article 26 in the Russian legal order under Article 23 of the FLIT with the constitution.
63. In this regard, the Award puts great emphasis on a decision of the Constitutional Court dealing with the provisional application of a treaty.³³ The question raised in that case was the constitutionality of Article 23 (1). This article provides:

Article 23. Provisional application of international treaties by the Russian Federation

1. An international treaty or a part of a treaty may, prior to its entry into force, be applied by the Russian Federation provisionally **if the treaty itself so provides** or if an agreement to that effect has been reached with the parties that have signed the treaty. (Emphasis added)

64. The Award states the following in relation to that case:

The Tribunal attaches considerable weight to this Ruling of the apex Constitutional Court in the Russian legal system. It concludes from its Ruling that the institution of the provisional application of a treaty or part thereof is constitutionally valid under Russian law and gives rise to rights and duties within the Russian legal system that take precedence over other Russian laws. The Constitutional Court reached this conclusion, construing a treaty that was to be provisionally applied and **contained no domestic law inconsistency proviso**. When addressing the question whether there is a constitutional prohibition on provisional application, the Tribunal regards this Ruling as applicable *a fortiori* to a case, such as the present, where provisional application is subject to a domestic law inconsistency clause. The Ruling confirms that, irrespective of the inclusion or omission of a domestic law inconsistency clause, there is no objection under the Constitution to the provisional application of a treaty establishing rules other than those provided by law. (Emphasis added)³⁴

65. Several comments need to be made here. The first one is that this decision was accompanied by two dissents, which is a factor that might be taken into account with regard to the weight to be attached to the decision of the majority. The second comment is that the decision of the Constitutional Court is not exactly what the majority has summarized when stating that “the provisional application of a treaty or part thereof is constitutionally valid under Russian law and gives rise to rights and duties within the

³² Award, § 244 (i).

³³ Resolution No. 8-P dated March 27, 2012, Upon review of constitutionality of Article 23 (1) of the federal law “On international treaties of the Russian Federation” following the application of I.D. Ushakov, **Exhibit R-35**.

³⁴ Award, § 258.

Russian legal system that take precedence over other Russian laws” as my colleagues ignored an important *caveat*, which is that the applicability of rules provisionally applied and their precedence over other Russian laws exist only if the provisionally applied rules have been duly published in the same manner as a ratified treaty has to be published, in order to respect the rule of law. This is what the CC said on this question:

In this regard, direct implementation of provisions of a provisionally applied international treaty of the Russian Federation affecting the rights, freedoms and duties of man and citizen and establishing rules other than those provided by law, shall be preceded, **on a mandatory basis**, by its official publication ...

The necessity of the official publication of provisionally applied international treaties of the Russian Federation affecting the rights, freedoms and duties of man and citizen and establishing rules other than those provided by law is also dictated by the requirements for certainty, clarity and unambiguity of a legal rule, as well as its consistency with the existing system of legal regulation arising from constitutional principles of a rule-of-law state, supremacy of law, legal equality and justice ... (Emphasis added)³⁵

66. There is no evidence, to my understanding, that the ECT has been so published. But more importantly, the only thing that the CC really decided is that Article 23 allowing provisional application of a treaty – without a limitation clause – was not contrary to the constitution, as long as the provisionally applied treaty was published, so that such provisional application is not inconsistent with “the constitutional principle of the rule-of-law state, supremacy of law, legal equality and justice.”
67. The CC did not discuss the issue of a treaty with a limitation clause, but the Award considers that the same solution applies. In fact, the third, and probably the most important, comment relates to the application of a decision concerning a treaty without a limitation clause to the very different situation of a treaty with a limitation clause. In my view, the solution of the Constitutional Court is not applicable *a fortiori* to the situation of Article 45 (1), but the reverse solution should apply *a contrario*. Indeed, Article 23 provides for provisional application **if so provided by the treaty**. When there is a limitation clause, the provisional application is not possible if it is inconsistent with the national legal order, and, in my view, the CC should apply Article 45 as a provisionally applicable article and respect the limitations provided there to the provisional application.
68. To illustrate what I consider to be a serious logical error, I think it best to take a more practical example. Firstly, let us take the case of a provisionally applied treaty without any limitation clause saying: “Alcoholic drinks are authorized for everyone.” Applying the CC’s analysis, this rule could apply even if the Russian legal order contained a rule stating that alcoholic drinks are not authorized under the age of 18, and minors have therefore a right stemming from the treaty to drink alcohol. Secondly, let us then take the case of a provisionally applied treaty with a limitation clause saying: “Alcoholic drinks are authorized for everyone, to the extent it is not inconsistent with the national legal order.” Assuming that according to the Russian legal order, alcoholic drinks are not authorized under the age of 18, the reasoning of the Award still implies that even in this

³⁵ Resolution No. 8-P dated March 27, 2012, Upon review of constitutionality of Article 23 (1) of the federal law “On international treaties of the Russian Federation” following the application of I.D. Ushakov, **Exhibit R-35**.

situation, minors can drink alcohol, in violation of the Russian laws. But this conclusion is in plain contradiction with the treaty.

69. My analysis would be the following: the treaty in this second situation makes a *renvoi* to national law; national law makes a *renvoi* to the treaty, which creates some circularity, which has been at the root of many misunderstandings or misrepresentations of the applicable rules all along in these proceedings. In such situation, as an international Tribunal, we have to give precedence to the treaty and if the treaty says that it does not apply if it is inconsistent with the national legal order, so be it. Going back to my example, in the second situation, contrary to the first one, minors are not allowed to drink alcohol.
70. In other words, I do not think that the conclusion drawn by the majority from the mentioned decision of the CC is right, and find to the contrary that it confirms that the provisional application according to Russian law (Article 23 (1)) depends on the extent that the ECT allows such application, and, as is not controversial, the ECT only applies provisionally if not inconsistent with the Russian legal order. The conclusion is that Article 26 cannot be applied provisionally, because it is inconsistent with the mandatory rule found in the FI laws requiring a treaty in force as was demonstrated earlier.
71. In other words, the Russian executive may commit Respondent to the provisional application of treaty provisions that may be inconsistent with domestic law BUT NOT if the Treaty itself says that the provisional application is only possible if it is not inconsistent with the national legal order.
72. To confirm this evident interpretation, it is interesting to look at the Russian practice vis-à-vis the ECT or provisional application in general.

The Russian practice towards the provisional application of the ECT

73. I will review here the main documents relating to the practice of the Russian Federation, which have been analyzed in the Award.³⁶

*Resolution regarding the execution of the Energy Charter Treaty and related documents, 1994*³⁷

74. The first document that should be looked at is the Resolution of the Government of the Russian Federation by which it decided to sign the ECT. All it says is that “[t]he Government of the Russian Federation hereby resolves ... **to execute** the Energy Charter Treaty.” This is in contrast with the Explanatory Notes relating to the introduction of investor-State disputes in bilateral treaties, which says that these BITs are **ratified**.³⁸

³⁶ Award, §§ 234 and ff.

³⁷ **Exhibit R-23.**

³⁸ The fact that the annexes to the Note do not deal with Article 26 is irrelevant in my view, as the non-application of Article 26 was necessarily covered by the Limitation Clause. The Declarations were mainly concerned with reservations related to other international law rules, not with internal rules, as this was unnecessary because of the wording of Article 45 (1).

*Note on the Legal Aspects of Provisional Application of International Treaties in Russia, 1997*³⁹

75. According to the Award, this note was “apparently prepared on behalf of the Russian delegation to the Charter Conference of the ECT held in Brussels on 8 July 1997.”⁴⁰ Some extracts – different from the one cited in the Award at § 236 – are given here:

From Art. 23 it follows that the treaties, entry into force of which requires certain lengthy procedures in the State (e.g. ratification), can be applied provisionally.

Provisional application means putting the treaty into effect, applying its provisions in reality i.e. performing actions foreseen in the treaty **to the extent provided for in the treaty.**

... **provisional application until entry into force and implementation of the treaty is not the same.**

... Art. 31 (3) of the Law is of principal importance. It states that an international treaty is subject to implementation by the Russian Federation from its entry into force for the Russian Federation.

Analysis of **provisional (till entry into force) application** of international treaties by the Russian Federation shows that **in each specific case a detailed study of the legal scope of provisional application** of the treaty is necessary. (Emphasis added)

76. This confirms the understanding by the Russian authorities that provisional application of a treaty was different from implementation of a treaty in force. It also suggests that one has to look at the different provisions of the treaty (“a detailed study of the legal scope of provisional application”) to see which rules are and which rules are not consistent with the Russian legal order.

*Statement by the Delegation of the Russian Federation to the Energy Charter Conference, 2002*⁴¹

The Russian Federation has yet to ratify the Energy Charter Treaty, but as a Signatory Country, it implements the Treaty from the day it entered into force.

We proceed on the premise that the ratification of the Energy Charter Treaty by the Russian Parliament would largely depend on a successful finalization of the Transit Protocol ...

77. This harmless political statement made in an international conference should not be considered to mean more than what it means. It means indeed that the Russian Federation applies provisionally the Treaty since the treaty has entered into force, not since the treaty has entered into force for the Russian Federation. The Energy Charter Treaty was signed in December 1994 but only entered into legal force on 16 April 1998, by application of its Article 44. What this document means, therefore, is that the Russian Federation applies the ECT, with the limitation clause, since 1998. This document also reiterates simply the distinction between a State, which has only signed the treaty and a State, which has

³⁹ Exhibit C-148.

⁴⁰ Award, § 236.

⁴¹ Exhibit C-118.

ratified it, and indicates that it is hoped that a constructive dialogue concerning some protocol to which the Russian Federation was attached would permit the ratification.

*Explanatory Note to the Draft Federal Law “On Ratification of the Energy Charter Treaty, 1997”*⁴²

78. The Claimant has insisted heavily on this Explanatory Note in order to support its argument according to which the Russian Federation never considered that the introduction of Article 26 by an executive act was contrary to the Russian legal order. The Respondent, on the other hand, has given an explanation according to which the different statements have to be put in context and mean essentially that once ratified, the ECT is consistent with the Russian legal order.
79. This is a Note prepared for the Parliament, in order to encourage it to ratify the ECT. In order to understand it correctly, one must be attentive to its structure in two quite distinct parts: the first part is a background presentation of the ECT at the time it was signed; the second part analyzes all the effects and consequences of the ratification.
80. In the first part of the document, the position of the Russian Federation as a signatory was described as follows:
- Prior to the entry into force of the ECT, the majority of the Contracting Parties agreed to apply the treaty on a provisional basis. In this respect, it was decided that such provisional application of **the ECT would be implemented to the extent that it would not be inconsistent** with the constitution, laws and regulations of the country in question.
- At the time of the signing of the ECT, the provision on provisional application was in conformity with the Russian legal acts.** For that reason, the Russian side did not make declarations as to its inability to accept provisional application (such declarations were made by 12 of the 49 ECT signatories). (Emphasis added)
81. This means indeed that the principle of provisional application limited by the necessity to be consistent with the Russian constitution, laws and regulations was accepted in the Russian legal system. This is indeed so, as, at the time of signature, the RSFSR was applying Article 25 of the VCLT, later embodied in Article 23 of the FLIT cited above. Russia clearly indicates that if the principle of provisional application had not been permitted under Russian law, the State would have made the declaration provided for in Article 45(3).
82. From the textual analysis, it results clearly that what is declared here to be in conformity with the Russian legal system is “the provision on provisional application.” It does not say that the different provisions included in the ECT were in conformity with the Russian legal system.
83. In the second part of the Explanatory Note⁴³, all the benefits of the ratification and the conditions of ratification were enumerated. This part should, in my view, be interpreted

⁴² Explanatory Note to the Draft Federal Law “On Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects”. **Exhibit C-147**, annexed in a different translation as **Exhibit R-111**.

⁴³ This second part starts on p. 3 of the document.

so as to mean, first, what will be the benefits of the ECT once ratified and, second, what will be the relation of the ECT once ratified – in other words, once in force – with the Russian legal system.

84. First, all the benefits are enumerated:

Ratification of the ECT will contribute to:

- improvement of the investment climate and the creation of conditions for attracting foreign investments ...⁴⁴
- the creation of favorable conditions for export ...
- the acceleration of Russia's accession to the GATT/WTO ...
- the resolution of the problem of transit of energy resources ...
- the facilitation of access of Russian capital to the energy sector of other countries ...
- ... and so on

Ratification of the ECT will also enable:

- Russia's national sovereignty over its natural resources
- Recognition of the transitional state of the Russian economy ...

Ratification of the ECT will have a major foreign policy impact ...

85. And after this long list of the benefits of ratification, the Explanatory Note confirms that this ratification does not necessitate any change in the existing laws⁴⁵, precisely because these laws authorize the Parliament to provide for international investment arbitration, in the following terms:

The provisions of the ECT are consistent with Russian legislation.

The ECT provisions touch upon legal principles which are envisaged by such legal acts as the Law of the RSFSR on Foreign Investments in the RSFSR ...

The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law of the RSFSR on Foreign Investments in the RSFSR, as well as with the amended version of the Law currently being discussed in the State Duma, and **does not require the enactment of any concessions or the adoption of any amendments to the abovementioned Law.** The ECT is also consistent with the provisions of Russian bilateral international treaties on the promotion and protection of investment. (Emphasis added)

86. As summarized during the hearing by Respondent's counsel, this is a "**post-ratification analysis**"⁴⁶, meaning that, once ratified, the rules of the ECT on arbitration will apply and

⁴⁴ This benefit post-ratification gives credit to the analysis according to which, before ratification, Article 26 did not improve the investment climate and create conditions for attracting foreign investments.

⁴⁵ This has been aptly explained by the Respondent in its Reply, § 193: "Second, Claimant's citation to the statement "[t]he provisions of the ECT are consistent with Russian legislation" is misleading and taken out of context. This statement forms part of the Government's assessment whether the ECT's ratification requires the amendment of existing or the enactment of new Russian laws. ..."

⁴⁶ Hearing, Tr. Day 1, page 39, lines 11-21.

will not be inconsistent with Russian law, as Russian law accepts that international arbitration can be introduced by federal laws or ratified international treaties.⁴⁷

87. As a consequence of the preceding developments, Article 26 cannot be introduced in the Russian legal order through an administrative act and, therefore, cannot be provisionally applied on the international level. As a consequence, Yukos Capital can have no recourse to investment arbitration, since Article 26 cannot serve as a basis for our Tribunal's jurisdiction. In other words, the conclusion is that the Tribunal has no jurisdiction *ratione temporis*.

DISSENT ON JURISDICTION *RATIONE MATERIAE*

88. To make things clear, I am not in disagreement – on the contrary – with the general theoretical analysis of a loan being able to qualify as an investment if it is associated with an economic enterprise. In this sense, I fully agree with the following statement in the Award:

It is not the case that a loan, considered in isolation, is *ipso facto* an investment; rather ... the critical distinction is the extent to which the loan is linked to an economic venture in the host state.⁴⁸

89. An investment must be linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of value, or a loan, which is a process of selling of money for a given price, in other words, a process of provisional transfer of value for a fixed remuneration. As a consequence, a loan *per se* is not an investment⁴⁹, a loan participating in an economic enterprise is an investment.
90. I am neither in disagreement with the fact that it is irrelevant for purposes of the definition of investment to ascertain the origin of the funds, *i.e.*, whether they are dividends or not, whether they come from the investor's own funds or are borrowed or whether they come from abroad or not. A *caveat* here being that, in this specific case, if the loans themselves were to be requalified as dividends they would not be considered as an investment, a point on which the Claimant agrees.⁵⁰ I also agree with the fact that, under the applicable law,

⁴⁷ This understanding has also been endorsed by the The Hague District Court Judgment dated 20 April 2016, setting aside the Awards in *Hulley Enterprises Ltd/Yukos Universal Ltd (Isle of Man)/Veteran Petroleum Ltd (Cyprus) v. Russian Federation*, in its § 5.60: "Whether or not the ratification of the ECT and more specifically of Article 26 would require an adjustment of Russian legislation, is a wholly different question than the question whether the provisional application of this provision is in accordance with Russian law. The latter question is not answered in the explanatory memorandum."

⁴⁸ Award, § 434. I also agree with the references to case law and doctrine to support this view mentioned in §§ 435-437.

⁴⁹ This has been in particular stated in *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, where the bonds of the Greek Government were not considered as an investment, as they were not associated with an economic undertaking: "361. If an "objective" test is applied, in the absence of a contribution to an economic venture, there could be no investment. ... 371. ... under the objective approach of the definition of what constitutes an investment, *i.e.*, a contribution to an economic venture of a certain duration implying an operational risk, the acquisition by Poštová banka of the interests in GGBs would not constitute an investment ..."

⁵⁰ See for example, Claimant's Rejoinder, § 126: "A central plank of Respondent's argument that Claimant has no protected Investment under Article 1(6) ECT is its contention that the Yukos Oil Loans are not loans at all, but

and taking into account the facts, the operations by which money was transferred from Yukos Capital to Yukos Oil have to be qualified as loans, and not as dividends.

91. My dissent is based on the disregard by the majority of the Tribunal of the global legal operation in which the discussed Loans were included, which, in my view, creates an unprecedented twist of the concept of what constitutes an investment protected by international law.
92. The Award characterizes the central issue relating to jurisdiction *ratione materiae* in the following way:

Whether the Claimant “own[s]” an “asset” constituted by a “debt of a company” “associated with an Economic Activity in the Energy Sector” in the “Area” of the Respondent such that it has made an “Investment” to which the present dispute with the Respondent “relat[es].”⁵¹

93. I would slightly amend this in order to be even more precise by putting the emphasis on the act of investing rather than on the result of such activity:

Whether the Claimant “own[s]” an “asset”, **which it has invested**, constituted by a “debt of a company” “associated with an Economic Activity in the Energy Sector” in the “Area” of the Respondent such that it has made an “Investment” to which the present dispute with the Respondent “relat[es].”

94. This precision is taken from Article 1(6) of the ECT, which states in relevant part:

A change in **the form in which assets are invested** does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of **the Investor making the investment** and that for the Contracting Party **in the Area of which the investment is made** (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date. (Emphasis added)⁵²

95. The Decision in fact acknowledges this aspect,⁵³ but, in my view does not draw all the consequences of this utmost important element present in Article 1(6) of the ECT, which is the “making” of an investment. If looked at through this lens, the Loans of Yukos Capital cannot, in my view, be considered as investments.
96. The conclusion reached in § 513 of the Award, according to which “the Tribunal finds that the Claimant ‘own[s]’ an ‘asset’ constituted by a ‘debt of a company’ ‘associated with an Economic Activity in the Energy Sector’ in the ‘Area’ of the Respondent such that it has made an ‘Investment’ to which the present dispute with the Respondent ‘relat[es]’”, could seem *prima facie* convincing, especially as the different steps of the reasoning are excellently presented, but for the fact that the analysis is stopped one step too early. In other words, the majority’s approach would be acceptable if there existed

dividends. Claimant does not dispute that if Respondent is correct, the Yukos Oil Loans cannot be characterized as an Investment of the Claimant.”

⁵¹ Award, § 419.

⁵² The full article 1(6) of the ECT is cited in the Award, § 39.

⁵³ Award, §§ 448-449.

two sets of completely independent loans, each having its own *rationale*; but the analysis is flawed under the circumstances of this case, because it does not really consider exhaustively the legal construction created by the back-to-back loans.

97. Before analyzing these instruments, it deserves mentioning that the Claimant tried, in a first move, to conceal from the Tribunal, and, in a second move, to ignore the existence of, the back stage loans. Indeed, as is the case in the *Notice of Arbitration*, there is no mention of the back-to-back loans agreements in *Claimant's Counter-Memorial on Jurisdiction*, when presenting the loans which are the basis of the claim.⁵⁴ This, in spite of the fact that the Respondent has discovered the scheme and had raised the issue in *Respondent's Memorial on Jurisdiction*. This tends to raise the question whether the existence of the back-to-back loans permits to support the Claimant's argument that it has performed an investment in Yukos Oil.
98. Coming then to the analysis of the back-to-back loans, I will concentrate my comments on the loan flowing from Brittany to Yukos Capital and then to Yukos Oil. I rely here on the citations of the loan contracts which can be found in §§ 502-503 of the Award. A similar analysis on all counts can be performed concerning the loan from Hedgerow.
99. In my view, the two loans are so inextricably linked that they have to be considered as a **unique global unified transaction**: the first loan conditions the second one and *vice versa*. It is indeed a “game of mirrors”, but the source of the image is Brittany: the Brittany loan was only made in order to have the Yukos Capital loan made to Yukos Oil, and the repayment or non-repayment of the Yukos Oil debt is immediately reflected in the equivalent repayment or non-repayment of the Yukos Capital debt to Brittany. Not to mention, of course, their concomitance in time, 12 days for the Brittany loan and 1 day for the Hedgerow loan. But the links are far more important than that.

The two loans from Brittany to Yukos Capital and from Yukos Capital to Yukos Oil were quasi simultaneous

100. The first loan agreement on which Yukos Capital bases a claim is the loan agreement dated 2 December 2003, in which Claimant agreed to loan Yukos Oil an amount not to exceed RUR 80 billion (US\$ 2.7 billion).⁵⁵ This loan was linked to a back-up agreement dated a few days earlier, on 20 November 2003.⁵⁶
101. A very similar analysis can be performed for the Hedgerow loan agreement, which was signed on 19 August 2004, only one day before the second loan agreement to Yukos Oil on which the Claimant bases its claim,⁵⁷ while the back-up agreement between Hedgerow and Yukos Capital was signed on 18 August 2004.⁵⁸ This loan was in an amount not to exceed US\$ 355.000.000.

⁵⁴ There is only a mention of Exhibit C-130 and Exhibit C-131, among many others, in footnote 16 and footnote 307 to illustrate the fact that Yukos Capital entered into more than 40 loans agreements in 2003-2004.

⁵⁵ Loan Agreement between Yukos Oil and Yukos Capital, 2 December 2003, **Exhibit C-9**.

⁵⁶ Loan Facility Agreement between Brittany Assets Limited and Yukos Capital, 20 November 2003, **Exhibit C-130**.

⁵⁷ Loan Agreement between Yukos Oil Company and Yukos Capital, 19 August 2004, **Exhibit C-30**.

⁵⁸ Loan Agreement between Hedgerow Limited and Yukos Capital, 18 August 2004, **Exhibit C-131**.

The two loans from Brittany to Yukos Capital and from Yukos Capital to Yukos Oil had linked purposes

102. In the first leg of the operation, the Brittany loan to Yukos Capital, its purpose is already indicated to be in fact the purpose of the second leg, as is made clear by different references in that document, the Lender being Brittany and the Borrower Yukos Oil:

WHEREAS:

(a) **Borrower intends to provide a loan facility to OAO "NK "YUKOS"** [this is Yukos Oil], a company duly organized and validly existing under the laws of the Russian Federation (hereinafter referred to as "**Sub-Borrower**"), such loan facility to be granted shall not exceed **80'000'000'000-00 (Eighty billion) Russian Rubles**, shall bear interest at the rate of **9% per annum** and shall mature not later than **31st December 2008** (hereinafter referred to as "**Sub-Lending**", and respective loan agreement documenting such Sub-Lending to be hereinafter referred to as Sub-Lending Agreement);

(b) Lender has agreed to make available this Loan Facility on the terms set forth herein.

NOW, THEREFORE, the Parties have agreed as follows:

...

Advance

Shall mean any advance made or to be made by Lender hereunder which **Borrower undertakes to use for Sub-Lending**.

...

2. Commitments

Lender agrees on the terms and conditions herein, to make available to Borrower a loan facility equal to the Facility amount. Lender undertakes to transfer Advances hereunder in US Dollars to the account of Borrower in total Facility amount **in order to make feasible Sub-Lending by Borrower**. (Emphasis added)⁵⁹

103. Thus, the absolute first thing mentioned in the loan from Brittany to Yukos Capital was that it was made so that Yukos Capital could – and, in fact, had to – lend the money received to Yukos Oil. In other words, the purpose of the agreement was not for Brittany (the Lender) to lend money to Yukos Capital (the Borrower), which could use that money to invest how it deemed fit; **the asserted goal was to lend money to Yukos Oil** (the Sub-Borrower) and this was achieved by linking the two loans together. In the first loan, the final recipient was already nominally designed. The sole purpose of the Lending by Brittany was the Sub-Lending Agreement to Yukos Oil.
104. This purpose was then fulfilled almost word for word in the Loan from Yukos Capital (the Lender) to Yukos Oil (the Borrower):

1. SUBJECT

1.1 During the term hereof the Lender undertakes to grant to the Borrower interest bearing loans with total amount (hereinafter referred to as "Loan Amount") not exceeding **80'000'000'000-00 (Eighty billion) Russian Rubles** ... and the Borrower undertakes to

⁵⁹ Loan Facility Agreement between Brittany Assets Limited and Yukos Capital, 20 November 2003, **Exhibit C-130**.

repay such loans and to pay interest for use of funds hereunder at the rate of 9% per annum.
(Emphasis added)⁶⁰

105. In order to fulfill such purpose, some conditions were set forth; some concerning the loan of Brittany to Yukos Capital, some concerning in advance the loan from Yukos Capital to Yukos Oil.
106. As far as the conditions of the loan from Brittany to Yukos Oil are concerned, the interest was set at 8,9375%. The difference with the forecasted 9% of the Loan from Yukos Capital to Yukos Oil was described during the proceeding as the “spread”, whose role will be discussed later.

The two loans from Brittany to Yukos Capital and from Yukos Capital to Yukos Oil had linked conditions

107. As far as the conditions of the second leg of the operation, the Loan from Yukos Capital to Yukos Oil are concerned, these were entirely pre-determined in the first leg of the operation, the Brittany loan to Yukos Capital, in the following terms:

(a) ... such loan facility ... shall bear interest at the rate of **9 % per annum** and shall mature not later than **31st December 2008** (hereinafter referred to as "Sub-Lending", and respective loan agreement documenting such Sub-Lending to be hereinafter referred to as Sub-Lending Agreement

1. Definitions

Drawdown Date

Means **the day when Borrower transfers funds to Sub-Borrower** at the request of the latter under Sub-Lending Agreement.

...

3. Repayments

Borrower shall repay the amount outstanding within one Business Day upon redemption of any part of Sub-Lending.

4. Interest

The loan shall accrue interest at **the interest rate determined above with effect from each Drawdown date** for actual number of days elapsed thereupon on the basis of actual calendar year. The interest shall accrue quarterly and shall be payable on the next Business Days upon receipt of respective quarterly interest from Sub-Borrower, or on final Repayment Date together with repayment of last outstanding balance to Lender. (Emphasis added)⁶¹

108. These conditions set forth in the first leg were mirrored in the second leg:

1. SUBJECT

⁶⁰Loan Agreement between Yukos Oil and Yukos Capital, 2 December 2003, **Exhibit C-9**.

⁶¹ Loan Facility Agreement between Brittany Assets Limited and Yukos Capital, 20 November 2003, **Exhibit C-130**.

1.1 ... the Borrower undertakes to repay such loans and to pay interest for use of funds hereunder at the rate of **9% per annum**.

2. RIGHTS AND OBLIGATIONS OF THE PARTIES

2.4. The Borrower undertakes to repay all loans, borrowed hereunder, to the Lender not later than **31st December 2008**. (Emphasis added)⁶²

109. All the parameters of the second leg were already pre-determined in the first leg: the identical amounts to be loaned, the rate of interest of the second leg, the maturity date of the loan to Yukos Oil (31 December 2008) and the linked maturity date of the loan to Yukos Capital (2nd January 2009).

The drawdown dates and the repayment dates of the loan from Brittany are the drawdown dates and the repayment dates of the Yukos Capital Loan to Yukos Oil

110. Last, but not least, what shows clearly that the two legal instruments are to be construed as **a unique legal operation** is the fact that the drawdown date of the loan from Brittany to Yukos Capital is not the date when the funds are transferred from Brittany to Yukos Capital, as it should be if it were an independent loan, but the date when the funds reach Yukos Oil, through the second Loan; and, therefore, the interests to be paid on the first loan start only to run on the date when the second loan is performed, which is another way of saying that the money from Brittany received only interest when the money reached the final intended recipient, Yukos Oil.

111. It seems clear that, in this scheme, the initial actor as well as the final beneficiary of the whole operation was to be Brittany.

Yukos Capital has no “right” of its own to the interest on and the repayment of the loans to Yukos Oil protected in international law

112. The majority based itself on the mere legal ownership to assert that the Claimant has made an investment. The majority considered that the investment of Yukos Oil was its right to interests and repayment of its loan to Yukos Oil, as stated in § 505 of the Award:

The only person that holds the right to claim repayment of the debt represented by Yukos Capital’s loan to Yukos Oil is Yukos Capital. It is Yukos Capital that advances the loans to Yukos Oil under the Yukos Capital Loan Agreement. Yukos Oil’s undertaking to repay those loans with interest is made to Yukos Capital alone. Yukos Capital does, therefore, have an economic interest in the Loans, since it is Yukos Capital that holds the debt. (Footnotes omitted)

113. It could indeed be argued, as it is by the majority of the Tribunal, that only Yukos Capital had a “right” to claim the interests and reimbursement of the loan, and that it was the only entity capable under the contractual arrangement with Yukos Oil to sue Yukos Oil for the money. This could *prima facie* seem correct, but it is not if the overall picture is not lost of sight. Again, this is an analysis restricted to the second Loan without any consideration of the first loan.

⁶² Loan Agreement between Yukos Oil and Yukos Capital, 2 December 2003, **Exhibit C-9**.

114. There are indeed mutual obligations in the loan from Yukos Capital to Yukos Oil:

1.1 ... the Lender [Yukos Capital] undertakes to grant to the Borrower [Yukos Oil] interest bearing loans ... and the Borrower undertakes to repay such loans and to pay interest for the use of funds ...

1.23.1. In the event of non-fulfillment and/or not due fulfilment of obligations hereunder, the Parties shall be liable ...

115. In other words, if looked in isolation, this agreement seems to grant to Yukos Capital a right to receive interests and the return of the money loaned, and therefore a claim against Yukos Oil. However, if looked at in the framework of the unified operation, the “right” of Yukos to receive the money back is instantly emptied of any substance as it has the concomitant obligation to hand it the next day to Brittany.

116. To say it differently, the right to sue Yukos Capital, if exercised, would be in favor of Brittany, as it was the entity having the right to recuperate the money that initially flowed from it to Yukos Oil, in passing through Yukos Capital. In other words, **the only “right” that Yukos Capital has is to ask for the money from Yukos Oil in order to transfer it to Brittany**, it does not have a right to receive money for itself, which could be expropriated, it only had the right to collect the interests and recuperate the loan for Brittany. This results from § 3 of the loan from Brittany to Yukos Capital stating that “Borrower (Yukos Capital) shall repay the amount outstanding within one Business Day upon redemption of any part of Sub-Lending (Yukos Oil).”

117. Moreover, if Yukos Oil does not pay, Yukos Capital has no obligation towards Brittany and therefore does not sustain any loss resulting from the non-fulfilment of its repayment to Brittany. This is indeed acknowledged by the majority in § 504:

... Undoubtedly, Yukos Capital’s obligation to repay Brittany only arose if and to the extent that Yukos Oil repaid its debt to Yukos Capital. As between Brittany and Yukos Capital, it is Brittany that bears the risk of default associated with Yukos Capital’s loan to Yukos Oil, in terms of Yukos Oil’s failure to pay ...

118. This was indeed clearly stated in the loan from Brittany to Yukos Capital:

Lender shall bear all risks associated with Sub-Lending, including, but not limited to the following:

(a) Failure to pay, which means the failure by Sub-Borrower to make, when and where due, any payments under Sub-Lending Agreement;⁶³

119. The substance of Yukos Capital “right” was to transfer whatever it receives from Yukos Oil to Brittany: if it receives nothing, it has to transmit nothing; if it receives something, it must transfer it. For me, this is not a substantial right that can be expropriated. The real owner of the rights and obligations under the set of contracts was Brittany. If Brittany had not lent money to Yukos Capital, the latter had no obligation to lend money to Yukos Oil.

⁶³ Loan Facility Agreement between Brittany Assets Limited and Yukos Capital, 20 November 2003, **Exhibit C-130**.

If Yukos Oil did not repay its loan from Yukos Capital, the latter had no obligation to repay its loan to Brittany.

120. During the Hearing, answering a question on the difference between a legal owner and a beneficial owner, counsel for Respondent answered in the following way:

One might analogise to beneficial ownership, but I think that the true economic position here is that **Brittany and Hedgerow were the economic actors**, and that, as we've tried to establish in these proceedings, Yukos Capital was just a passive conduit: it received a fee for transmitting funds back to Brittany and Hedgerow if and as it received them.” (Emphasis added)⁶⁴

121. Although the Respondent was not entirely clear on its position, it asserted that the true economic actors were Brittany and Hedgerow, and this is sufficient in my view to consider them as the beneficial owners: they were undoubtedly the ultimate beneficiaries of the circular back-to-back arrangement.

122. It is well known that, in cases where the legal title and the beneficial ownership are split, as far as the position of international law towards beneficial owners is concerned, it is quite uncontroversial that international law grants relief to the owner of the economic interest and not to the one having a mere legal title.

123. This is how Elihu Lauterpacht summarized the position of international law on this distinction in his pleadings for Belgium in the *Barcelona Traction* case:

Precedents recognizes that in cases where there is an apparent division of ownership as between a formal and legal owner, on the one hand, and a beneficial, substantive actual or equitable owner on the other, international law ... has concerned itself with the beneficial, the substantive, the actual, the equitable or the real ownership.⁶⁵

124. It is also important here to quote the *Occidental Petroleum* ad hoc Committee Decision:

262. The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, **held for their own benefit**, not those held (be it as nominees, agents **or otherwise**) on behalf of third parties not protected by the relevant treaty. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument. (Emphasis added)⁶⁶

125. This means, in my understanding, that the concept of beneficial owner extends the meaning of a nominee or agent beyond the strictly legal concept of such persons, to encompass also persons who are considered to be in a comparable position, which is exactly the situation encountered here.

⁶⁴ Hearing, Tr. Day 5, page 87, lines 9-15.

⁶⁵ *Barcelona Traction, Light and Power Co., Ltd. (New application) (Belgium v. Spain)*, Merits, Second Phase, Judgment, 5 February 1970, I.C.J. REPORTS, Pleadings, 1970, p. 444.

⁶⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015.

126. The Claimant did not have the full legal right to use and enjoy either the loan that was granted to it or the debt that Yukos Oil had towards it, as it was constrained by intertwined contractual obligations, which made Brittany the initial actor of the loan to Yukos Oil and the ultimate beneficiary of the debt of Yukos Oil. It cannot, in my view, be denied that Yukos Capital was a mere passive conduit company, having no autonomous right to enforce.
127. It appears that indeed counsel for Claimant has recognized as much during the Hearing, when he insisted on the unique relevance of legal ownership and stated: “Yukos Capital is an investor under this treaty, and the fact that the beneficial owner is somebody else is irrelevant.”⁶⁷
128. I consider that this montage is not far from the situation of the kind successfully raised in *KT Asia*⁶⁸ that would support a finding that the investment company is a shell or conduit used to conceal⁶⁹ the identity of the true beneficial owner.⁷⁰

Yukos Capital has no right to the “spread” provided for in the Loan, which is not an investment protected in international law

129. It could also be argued, as has been done by the majority, that Yukos Capital had a “right” to the spread as an investor having made an investment. One of the arguments relied upon in the Award is indeed that “(i)n addition, the Claimant holds the right to its own return on the Loans, the loss of which it risked in the event of the failure of Yukos Oil, being the spread or difference between the interest that it earned and that was earned by Brittany/Hedgerow.”⁷¹
130. This could seem again *prima facie* correct, but a closer look at the global operation gives another picture.
131. The spread represents one sixteenth of one per cent or 0.0625% of the sums of money loaned under the 2003 Brittany/Yukos Capital/Yukos Oil loan and one thirty-second of one per cent, or 0.03125% of the sums of money loaned under the 2004 Hedgerow/Yukos Capital/Yukos Oil loan.
132. The spread was not the result of the investment. The result of the investment – if there had been an investment – would have been an interest of 9%. If Yukos Capital had made by contract a loan of money A obtained through a loan B in an entirely distinct loan contract, it could indeed be said that it earned an interest of 9% on loan A and could use that money to reinvest or to repay the other loan B. However, this is not the result of the working together of the two linked back-to-back contracts. What mechanism did they create? They created a differential mechanism: the spread has to be considered for what it is: it is the payment of the service rendered by Yukos Capital (for non-illegitimate tax purposes) to the Yukos group, the service of shifting forth and back certain sums of money from Brittany to Yukos Oil and from Yukos Oil to Brittany. Further, the amount

⁶⁷ Hearing, Tr. Day 5, page 205, lines 3-5.

⁶⁸ *KT Asia Investment Group B.V. v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013.

⁶⁹ See what is stated on this issue in § 11 of this Opinion.

⁷⁰ Contrary to the analysis in § 510 of the Award.

⁷¹ Award, § 509.

of the payment of this service was in fact, according to counsel for Respondent, “the tariff that was charged by Luxembourg for the privilege of using it for its tax advantages, not for any economic motivation or purpose in the transaction.”⁷² As the Award acknowledges in § 326:

The Respondent submits that the spreads were calculated to be the minimum necessary to achieve approval of the arrangements from the Luxembourg tax authorities and avoid the risk of the tax authorities imputing to Yukos Capital receipt of a larger spread based on transfer pricing rules. Thus, the spread declined between the 2003 and 2004 loans because the tax authorities agreed in the interim that the lower spread was acceptable.

133. Moreover, it clearly appears that **Yukos Capital was only entitled to this money, if it fulfilled the whole cycle** of conveying the money from Brittany/Hedgerow to Yukos Oil and back to Brittany/Hedgerow. The spread was not a profit on the Loan, it was not a return on an investment; it was a payment which was independent of the loan, a remuneration for being an intermediary. Being a passive intermediary is not “making an investment.”
134. There have been divergent analyses of whether the loss of the spread was a risk taken by Yukos Capital.
135. Looking at the loan from Brittany to Yukos Capital, it appears clear to me that the risk of the loss of the spread was not to be borne by Yukos Capital. As already mentioned,⁷³ it provided that:

Lender shall bear **all risks** associated with Sub-Lending, including, but not limited to the following:

(a) **Failure to pay**, which means the failure by Sub-Borrower to make, when and where due, any payments under Sub-Lending Agreement; (Emphasis added)

136. The loss of the spread was included generally in the reference to “all risks” and was more precisely linked to the “failure to pay” by the Sub-Borrower, *i.e.*, Yukos Oil.
137. It is worth noting here the following exchange between my co-arbitrator and counsel for Respondent concerning the risks assumed by Brittany:

Q. Does that capture any failure to receive the spread?

A. Yes, because it’s any payments under the sub-lending arrangement, and the spread only arises if there are payments under the sub-lending arrangement and then a repayment to Brittany.

Q. So there's no risk of not achieving the profit?

A. As I read those terms, that's correct.

Q. When I say there's no risk associated, it’s a question, and you are answering that that is correct?

⁷² Hearing, Tr. Day 5, page 73, lines 5-9.

⁷³ In § 118 of this Opinion.

A. Correct.⁷⁴

138. This is corroborated, in my view, by the fact that it is indeed the entity Fair Oaks to which the 2003 Brittany Agreement and 2004 Hedgerow Agreement were assigned, which is paying for the expenses linked with the recovery of the so-called “right” of Yukos Capital. This was explained by Respondent, and not denied by Claimant:

Consistent with Yukos Capital’s lack of an economic interest in the “Loans,” the record shows that Yukos Capital’s litigation efforts have been paid for by other Yukos Group subsidiaries. For instance, in November 2010, Yukos Capital and Fair Oaks entered into a so-called “*Loan Agreement*” by which Fair Oaks gave Yukos Capital US\$ 10 million interest free, for Yukos Capital to pay lawyers (“2010 Fair Oaks Agreement”). The stated reason for this arrangement was that “*in accordance with Section 5 of the Loan Agreements, Lender has agreed to bear all risks associated with Sub-Loans and to indemnify Borrower [Yukos Capital] for legal and related expenses involved with the recovery thereof and to compensate Borrower for legal and related expenses incurred by Borrower in the course of seeking remedies for the default of Sub-Borrowers.*”⁷⁵

139. There is a strong presumption that the entity paying to vindicate a right is the person to whom this right belongs. No compelling element has been submitted to reverse this presumption.
140. In conclusion, the Claimant cannot be considered as having made an autonomous investment and the Tribunal, in my view, has no jurisdiction *ratione materiae* to deal with the case. Were it to grant the relief requested by Claimant, the latter is, in the framework of the global operation analyzed so far, under the concomitant contractual obligation to hand it over to Brittany/Hedgerow. It is particularly important in this case to delineate precisely the rights at stake, as the Tribunal has no jurisdiction over the rights of Brittany or Hedgerow, as they are not parties to this arbitration.
141. The importance of the respect of the limited jurisdiction of international arbitral tribunals – whether jurisdiction *ratione personae* or *ratione materiae* – has been aptly emphasized by the *Occidental Petroleum* ad hoc Committee Decision:

263. This subjective limitation of ICSID jurisdiction is a natural consequence of international investment law. Arbitral tribunals are not courts of justice holding unfettered jurisdiction. The role of arbitral tribunals is not to redress torts worldwide. Arbitral tribunals are instruments created by and subject to the consent of States, as formalized in the relevant instrument, and are only empowered to adjudicate disputes between protected investors and consenting States. Other disputes are outside their remit. Investors cannot expand the jurisdiction *ratione personae* of arbitral tribunals by executing private contracts with third parties.

264. Specifically, protected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party, and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To

⁷⁴ Hearing, Tr. Day 1, page 59, lines 11-20.

⁷⁵ Respondent’s Reply, § 228 citing the 2010 Fair Oaks Agreement, Fifth Whereas Clause, **Exhibit R-119**.

hold the contrary would open the floodgates to an uncontrolled expansion of jurisdiction *ratione personae*, beyond the limits agreed by the States when executing the treaty.⁷⁶

142. To be clear, the conclusion that the Tribunal has no jurisdiction *ratione materiae* in this case is not the result of the application of a so-called theory or doctrine of substance over form; it is the result of an objective analysis of the concrete result in real life of the legal structuring of the linked loans.

Geneva, Switzerland

Date: 22 December 2016

Brigitte Stern.

Professor Brigitte Stern

⁷⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015.