

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”)

INTERIM AWARD ON JURISDICTION

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

Mr Cyrus Benson
Ms Ceyda Knoebel
Ms Gail Elman
Ms Penny Madden QC
Mr Piers Plumptre
Ms Sophie Cuss
Gibson, Dunn & Crutcher LLP

Respondent’s Counsel

Mr David G. Sabel
Ms Claudia Annacker
Mr Cameron Murphy
Ms Laurie Achtouk-Spivak
Cleary Gottlieb Steen & Hamilton LLP

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LIST OF DEFINED TERMS

1991 FI Law	<i>Law on Foreign Investments in the RSFSR, 1991</i>
1994 Joint EC Statement	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
1999 FI Law	<i>Law on Foreign Investments in the Russian Federation, 1999</i>
<i>Achmea</i>	<i>Achmea v. Slovak Republic</i> , PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010)
<i>Alpha</i>	<i>Alpha Projektholding GmbH v. Ukraine</i> ICSID Case No. ARB/07/16, Award (8 November 2010)
<i>Alps Finance</i>	<i>Alps Finance and Trade AG v. Slovak Republic</i> (UNCITRAL Award) (5 March 2011)
<i>Amto</i>	<i>Limited Liability Company Amto v. Ukraine</i> , SCC Case No. 080/2005, Final Award (26 March 2008)
August 2004 Loan	The August 2004 loan, made to Yukos Oil by Yukos Capital, in the principal amount of USD 355 million
Brittany	Brittany Assets Ltd.
Brittany Loan Agreement	Agreement establishing a loan between Brittany (lender) and Yukos Capital (borrower) dated 20 November 2003
<i>Caratube</i>	<i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i> , ICSID Case No. ARB/08/12, Award (5 June 2012)
Claimant / Yukos Capital	Yukos Capital S.à r.l., the Claimant
Constitution	<i>Constitution of the Russian Federation, 1993</i>
Constitutional Court	The Constitutional Court of the Russian Federation

Counter-Memorial	Claimant’s Counter-Memorial on Jurisdiction dated 3 November 2014
December 2003 Loan	The December 2003 loan, made to Yukos Oil by Yukos Capital, in the principal amount of RUB 79.3 billion
Domestic Law Inconsistency Clause	Article 45(1) of the Energy Charter Treaty: “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”
ECT / Treaty	Energy Charter Treaty, 1994
<i>Electrabel</i>	<i>Electrabel S.A. v. The Republic of Hungary</i> , ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012)
<i>Emmis</i>	<i>Emmis International Holding BV v. Hungary</i> ICSID Case No. ARB/12/2, Award (16 April 2014)
FLIT	<i>Federal Law on International Treaties of the Russian Federation</i> , 1995
GATT	1994 General Agreement on Tariffs and Trade
Gazprom	O.J.S.C. Gazprom
Gazprom ECP	Gazprom ECP S.A.
Hedgerow	Hedgerow Ltd
Hedgerow Loan Agreement	Agreement establishing a loan between Hedgerow (lender) and Yukos Capital (borrower) dated 18 August 2004
<i>Hulley Enterprises</i>	<i>Hulley Enterprises Limited v. Russian Federation</i> , PCA No. AA226, Interim Award on Jurisdiction and Admissibility (30 November 2009)
<i>Kardassopoulos</i>	<i>Ioannis Kardassopoulos v. The Republic of Georgia</i> , ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007)
<i>KT Asia</i>	<i>KT Asia Investment Group B.V. v. Kazakhstan</i> , ICSID Case No. ARB/09/8, Award (17 October 2013)

Loans	The December 2003 Loan and the August 2004 Loan
Memorial	Respondent's Memorial on Jurisdiction dated 28 July 2014
Notice of Arbitration	Notice of Arbitration dated 15 February 2013
<i>Oil Platforms</i>	<i>Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)</i> [1996] ICJ Rep 803
Parties	The Claimant and the Respondent
PCA	Permanent Court of Arbitration
<i>Phoenix Action</i>	<i>Phoenix Action Ltd v Czech Republic</i> ICSID Case No ARB/06/5, Award (15 April 2009)
<i>Plama</i>	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005)
PO No. 1	Procedural Order No. 1 dated 24 April 2014
PO No. 2	Procedural Order No. 2 dated 20 January 2015
Rejoinder	Claimant's Rejoinder on Jurisdiction dated 15 June 2015
Reply	Respondent's Reply on Jurisdiction dated 2 March 2015
Resolution No. 8-P	Resolution No. 8-P of the Constitutional Court of the Russian Federation dated 27 March 2012
Respondent / Russia / Russian Federation	Government of the Russian Federation, the Respondent
<i>Romak</i>	<i>Romak S.A. (Switzerland) v. Uzbekistan</i> , PCA Case No. AA280, UNCITRAL, Award (26 November 2009)
Rospan	Rospan Overseas Ltd
Russia / Russian Federation / Respondent	Government of the Russian Federation, the Respondent
Sibneft	Sibneft, a joint stock company incorporated in the Russian Federation in 1995

<i>Standard Chartered Bank</i>	<i>Standard Chartered Bank v. Tanzania</i> , ICSID Case No. ARB/10/12, Award (2 November 2012), para. 200
<i>Stati</i>	<i>Stati v. The Republic of Kazakhstan</i> , SCC Case No. 116/2010, Award (19 December 2013)
<i>Stichting</i>	Stichting Administratiekantoor Yukos International, a foundation incorporated in the Netherlands in 2005
Terms of Appointment	Terms of Appointment between the Parties appointing the Tribunal dated 17 February 2014
The Hague District Court Judgment	Judgment dated 20 April 2016 of a District Court sitting at The Hague in action nos C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 re: <i>Hulley Enterprises Ltd/Yukos Universal Ltd (Isle of Man)/Veteran Petroleum Ltd (Cyprus) v. Russian Federation</i>
TMF (or TMF Luxembourg)	TMF Corporate Services S.A. and TMF Management Luxembourg S.A., the Claimant’s corporate and management service providers in Luxembourg
<i>Toto Costruzioni</i>	<i>Toto Costruzioni Generali S.p.A. v. Lebanon</i> , Decision on Jurisdiction (11 September 2009)
Treaty / ECT	Energy Charter Treaty, 1994
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
USSR FLIT	<i>Law of the USSR dated 6 July 1978 “On the Procedure for Conclusion, Performance, and Denunciation of International Treaties of the USSR”</i>
USSR Fundamentals	<i>Fundamentals of Legislation on Foreign Investments in the USSR</i> , 1991
VCLT	Vienna Convention on the Law of Treaties, 1969
Yukos Capital / Claimant	Yukos Capital S.à r.l., the Claimant

Yukos Capital Loan Agreement

Agreement establishing a loan between Yukos Capital (lender) and Yukos Oil (borrower) dated 2 December 2003

Yukos Oil

Yukos Oil Company OJSC, a joint stock company incorporated in the Russian Federation in 1993

Yukos Finance

Yukos Finance B.V., a private limited liability company incorporated in the Netherlands

Yukos International

Yukos International UK B.V., a private limited liability company incorporated in the Netherlands

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is Yukos Capital S.à r.l. (“**Yukos Capital**,” or the “**Claimant**”), a private company organized and existing under the laws of Luxembourg, incorporated in Luxembourg on 31 January 2003, as a “*société à responsabilité limitée*,” with its registered address at 46A, Avenue J. F. Kennedy, L-1855 Luxembourg P.O. Box 415, L-2014 Luxembourg. The Claimant is represented in these proceedings by Mr Cyrus Benson, Ms Ceyda Knoebel, Ms Gail Elman, Ms Penny Madden QC, Mr Piers Plumptre, and Ms Sophie Cuss of Gibson, Dunn & Crutcher LLP, Telephone House, 2-4 Temple Avenue, London EC4Y 0HB, United Kingdom.
2. The Respondent is the Government of the Russian Federation (“**Russia**,” or the “**Russian Federation**,” or the “**Respondent**”). The Respondent is represented by Mr David G. Sabel of Cleary Gottlieb Steen & Hamilton LLP, City Place House, 55 Basinghall Street, London EC2V 5EH, United Kingdom, and Ms Claudia Annacker, Mr Cameron Murphy, and Ms Laurie Achtouk-Spivak of Cleary Gottlieb Steen & Hamilton LLP, 12, rue de Tilsitt, 75008 Paris, France.

B. BACKGROUND TO THE DISPUTE

3. A dispute has arisen between Yukos Capital and the Russian Federation in respect of which the Claimant commenced arbitration pursuant to the Energy Charter Treaty (the “**ECT**,” or the “**Treaty**”).¹
4. The subject matter of this dispute concerns the Claimant’s alleged investments by way of loans to its parent company in Russia, Yukos Oil Company OJSC (“**Yukos Oil**”), the Russian Federation’s alleged expropriation of the Claimant’s purported investment, and the Russian Federation’s allegedly unfair and discriminatory treatment of Yukos Capital.

¹ The Energy Charter Treaty (“**ECT**”) and Related Documents (September 1994) (**Exhibit C-1**).

II. PROCEDURAL HISTORY

5. By letter dated 23 May 2008, the Claimant “notified the Russian Federation, through the Russian Ministry of Justice, of its claims under the ECT, accepted the Russian Federation’s offer to arbitrate and invited the Russian Federation to engage in settlement discussions.”²
6. On 22 August 2008, the Ministry of Justice informed the Claimant that receipt of the notice was not within the Ministry’s competence.
7. On 27 August 2008, the Claimant forwarded the notice to the Government of the Russian Federation and to the Administration of the President of the Russian Federation.³
8. By Notice of Arbitration dated 15 February 2013 (“**Notice of Arbitration**”), the Claimant initiated arbitration proceedings against the Russian Federation pursuant to Article 26(4)(b) of the ECT and the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).⁴
9. By its Notice of Arbitration, the Claimant notified the Respondent of its appointment of Mr J. William Rowley QC as the first arbitrator. Mr Rowley’s address is 20 Essex Street, London WC2R 3AL, United Kingdom.
10. By letter to the Claimant dated 30 May 2013, the Respondent appointed Professor Brigitte Stern as the second arbitrator. Professor Stern’s address is 7 rue Pierre Nicole, 75005 Paris, France.
11. On 8 October 2013, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) act as the appointing authority with regard to the appointment of a presiding arbitrator, pursuant to Articles 6 and 7 of the **UNCITRAL Rules**. In its submission, the Claimant stated that the Parties were “in agreement as to the

² Notice of Arbitration (15 February 2013) (“**Notice of Arbitration**”), para. 31.

³ Notice of Arbitration, para. 31; Letter from Gibson Dunn & Crutcher LLP to the Government of the Russian Federation, including attachments (27 August 2008) (**Exhibit C-103**).

⁴ Arbitration Rules of the United Nations Commission on International Trade Law, 1976, GA Res. 31/98. The Notice of Arbitration purported to invoke the revised 2010 **UNCITRAL Arbitration Rules**, but it was accepted by the Parties and recorded in the Terms of Appointment of the Tribunal that the 1976 rules were applicable: Terms of Appointment (17 February 2014) (“**Terms of Appointment**”), para. 4(a).

employment of the list-procedure referred to in Article 6(3) of the 1976 Rules . . . , but wish for the list to be provided by the Secretary-General to include at least five names.”⁵

12. On 9 October 2013, the PCA proposed to the Parties the use of a modified list procedure, allowing each of the Parties to eliminate a maximum of three names from a list of seven and requiring each Party to rank by preference the remaining names. On 15 October 2013, each of the Parties agreed to the PCA’s proposal.
13. In a letter of 4 November 2013, the PCA implemented the modified list procedure, sending each Party a list of seven candidates who could be appointed as Presiding Arbitrator, and, in separate letters of 19 November 2013, each Party submitted comments to the PCA regarding the list of candidates.
14. On 22 November 2013, Professor Campbell McLachlan QC was appointed as Presiding Arbitrator by the Secretary-General of the PCA. Professor McLachlan’s address is Victoria University of Wellington, School of Law, Old Government Buildings, 55 Lambton Quay, Wellington, New Zealand.
15. By 18 February 2014, both Parties and all Tribunal members had signed the Terms of Appointment, confirming that: (a) the members of the Tribunal had been validly appointed in accordance with the ECT and the UNCITRAL Rules; (b) the proceedings shall be governed by the UNCITRAL Rules; (c) the Tribunal shall determine the legal seat of the arbitration in Procedural Order No. 1 after hearing the Parties on the issue; (d) the language of the arbitration shall be English; (e) the International Bureau of the PCA shall act as registry; (f) the issues in dispute shall be decided in accordance with the ECT and applicable rules and principles of international law; and (g) the arbitral proceedings shall be held in private and all documents in these proceedings created for the purpose of the arbitration as well as all other documents or evidence produced by either Party shall be confidential, unless the Parties expressly agree in writing to the contrary.
16. On 31 March 2014, each Party submitted arguments regarding the Tribunal’s determination of the seat of the arbitration. The Respondent proposed Vienna, Austria or Frankfurt, Germany, but indicated that it would also support the designation of Geneva,

⁵ Claimant’s Application for the Secretary-General to Act as Appointing Authority (8 October 2013), para. 17.

Switzerland or Paris, France. The Claimant proposed The Hague, the Netherlands or London, United Kingdom.

17. On 14 April 2014, the Tribunal convened a preliminary procedural hearing in Vienna, Austria. At the hearing, the Tribunal heard the Parties regarding the determination of the seat of arbitration and the issue of whether or not to bifurcate proceedings, and the Tribunal and Parties discussed a draft Procedural Order No. 1 and the procedural calendar. The following individuals attended the hearing before the Tribunal:

Claimant

Mr Cyrus Benson
Ms Ceyda Knoebel
Gibson, Dunn & Crutcher LLP

Mr Daniel Feldman
Party Representative

Respondent

Mr David Sabel
Ms Claudia Annacker
Mr Cameron Murphy
Cleary Gottlieb Steen & Hamilton LLP

Registry

Mr Hanno Wehland
PCA

Court Reporter

Ms Claire Hill

18. On 24 April 2014, the Tribunal issued Procedural Order No. 1 (“**PO No. 1**”), which determined that the seat of the arbitration shall be Geneva, Switzerland. In PO No. 1, the Tribunal also decided to bifurcate the proceedings, setting forth a procedural calendar for a preliminary phase during which three of the objections raised by the Respondent to the jurisdiction of the Tribunal would be heard and decided. Those objections are:

- (i) “[t]he Russian Federation never ratified the ECT and applied the ECT until October 18, 2009 on a provisional basis pursuant to Article 45(1) ECT only ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’”;⁶

⁶ Procedural Order No. 1 (24 April 2014) (“**PO No. 1**”), para. 2.1(a) (emphasis omitted).

- (ii) “[t]he intra-company loans allegedly made by Claimant to Yukos Oil Company are not ‘investments’ within the meaning of Article 1(6) ECT”,⁷ and
- (iii) “[s]ince Claimant is a shell company with no substantial business activities in Luxembourg and is ultimately controlled by nationals of a third State, Respondent is entitled to deny Claimant the advantages of Part III of the ECT pursuant to Article 17 ECT.”⁸

19. Pursuant to PO No. 1, the Parties submitted the following pleadings and evidence:

- (a) On 28 July 2014, the Respondent filed a Memorial on Jurisdiction, together with an Expert Report of Professor Anton V. Asoskov (“**Asoskov 1**”).
- (b) On 3 November 2014, the Claimant filed a Counter-Memorial on Jurisdiction (“**Counter-Memorial**”), together with a Witness Statement of Bruce K. Misamore (“**Misamore 1**”) and Expert Reports of Professor Paul B. Stephan (“**Stephan 1**”), Stuart B. Gleichenhaus (“**Gleichenhaus 1**”), and Professor Justice J. H. M. Willems (“**Willems 1**”).
- (c) On 2 March 2015, the Respondent filed a Reply on Jurisdiction, together with a Second Expert Report of Professor Asoskov (“**Asoskov 2**”) and Expert Reports of Professor Thomas Z. Lys (“**Lys**”), Lionel Noguera (“**Noguera**”), and Professor Dr. Riemert Pieter Jan Lucris Tjittes (“**Tjittes**”).
- (d) On 15 June 2015, the Claimant filed a Rejoinder on Jurisdiction, together with a Second Witness Statement of Mr Misamore (“**Misamore 2**”), further Expert Reports of Professor Stephan (“**Stephan 2**”), Mr Gleichenhaus (“**Gleichenhaus 2**”), and Professor Willems (“**Willems 2**”), and Expert Reports of Professor Stephen E. Shay (“**Shay**”) and Andrew Grantham (“**Grantham**”).

20. Following the exchange of the first round of pleadings, the Parties made a simultaneous exchange of requests for the production of documents from each other as provided by PO No. 1. Following the exchange of responses and replies, a number of requests remained outstanding, and, on 18 December 2014, each Party submitted a Redfern

⁷ PO No. 1, para. 2.1(b).

⁸ PO No. 1, para. 2.1(c).

Schedule together with introductory comments, requesting that the Tribunal make an order on those requests. On 20 January 2015, the Tribunal set forth its decision on the Parties' requests by issuing Procedural Order No. 2 ("**PO No. 2**").

21. Following the issuance of PO No. 2, the Parties exchanged correspondence on their respective compliance with the Tribunal's decisions in that Order. By letter dated 26 March 2015, the Tribunal determined a number of requests made by the Respondent in relation to the Claimant's compliance with the Tribunal's Order. By letter dated 4 May 2015, the Tribunal determined a number of requests made by the Claimant in relation to the Respondent's compliance with the Tribunal's Order.
22. Following a pre-hearing conference call held by the Chairman with the Parties on 29 July 2015, the Chairman issued a Minute on Arrangements for Hearing on 31 July 2015.
23. The Hearing on Jurisdiction was held over five days from 31 August to 4 September 2015 at the Peace Palace in The Hague. The following persons attended the Hearing before the Tribunal:

Claimant

Mr Cyrus Benson
Ms Penny Madden
Ms Ceyda Knoebel
Mr Piers Plumptre
Ms Sophy Cuss
Mr Sergey Okoev
Gibson, Dunn & Crutcher LLP

Mr David Godfrey
Ms Natalia Kantovich
Ms Sophy Bae
Party Representatives

Mr Bruce K. Misamore
Fact Witness

Professor Paul B. Stephan
Mr Stuart B. Gleichhaus
Professor Stephen E. Shay
Mr Andrew Grantham FCA
Professor Justice J.H.M. (Huub) Willems LLM
Expert Witnesses

Respondent

Dr Claudia Annacker
Mr David G. Sabel
Mr Lawrence B. Friedman
Mr Matthew D. Slater
Mr Larry C. Work-Dembowski
Dr Enikő Horvath
Ms Laurie Achtouk-Spivak
Mr Lorenzo Melchionda
Ms Ksenia Khanseidova
Ms Aija Lejniece
Ms Sarah Schröder
Mr Sean McGrew
Cleary Gottlieb Steen & Hamilton LLP

Mr Andrey Kondakov
Party Representative

Mr Jesse Stevenson
Trial Graphic Consultant

Professor Anton V. Asoskov
Professor Thomas Z. Lys
Professor Dr. Riemert P.J.L. Tjittes
Expert Witnesses

Tribunal Assistant

Mr Jack Wass

Registry

Dr Hanno Wehland
Mr Robert James
PCA

Court Reporter

Mr Trevor McGowan

Interpreters

Ms. Irina van Erkel
Mr Sergei Mikheyev

24. The Hearing proceeded by way of opening arguments, witness and expert testimony, and closing arguments. All of the witnesses who had submitted written evidence were required for cross-examination, save that the Claimant did not request to cross-examine Mr Noguera.
25. By agreement of the Parties, neither Professor Tjittes nor Professor Willems was cross-examined but instead were collectively questioned by the Tribunal, following which the Parties were given the opportunity to ask questions arising.⁹
26. At the conclusion of the Hearing, the Parties confirmed that they had no further procedural matters to draw to the attention of the Tribunal.¹⁰
27. In accordance with the Tribunal's directions, the Parties each exchanged submissions on costs on 5 October 2015 and comments on the other Party's costs submissions on 19 October 2015.
28. On 17 May 2016, the Tribunal wrote to the Parties in the following terms:

The Tribunal has before it, as legal authorities introduced into the arbitration file in these proceedings, the Interim Awards on Jurisdiction and Admissibility in *Hulley Enterprises Ltd/Yukos Universal Ltd (Isle of Man)/Veteran Petroleum Ltd (Cyprus)*

⁹ T4/95/25 – T4/104/14.

¹⁰ T5/232/9-15.

v. Russian Federation (PCA Case Nos AA 226, 227 & 228, 30 November 2009), exhibited in this arbitration as CL-9, CL-26 & CL-27. Both Parties have pleaded as to the relevance of those Decisions for the issues of jurisdiction presently before this Tribunal.

It has come to the Tribunal's attention from the public record that on 20 April 2016 a District Court sitting at The Hague in action nos C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 rendered judgment in proceedings challenging these Awards (together "**The Hague District Court Judgment**").

The Tribunal invites the Parties' observations as to (i) the admission of The Hague District Court Judgment into the record in the present proceedings; (ii) whether, if admitted, the Parties would wish to be heard on its relevance (if any) to the proceedings in the present case and (iii) if so, in what form they would wish to be heard. The Parties are requested to file their preliminary observations on these questions by 5pm (CET) on Monday, 30 May 2016.¹¹

29. In response:

- (a) By email of the same date, the Claimant replied, suggesting that "the fact that neither party has sought to introduce [The Hague District Court Judgment] into the record of this proceeding speaks for its relevance." In the event that the judgment were to be introduced into the record on the application of the Respondent, the Claimant submitted that its relevance could be addressed in submissions not exceeding three pages.
- (b) By letter dated 23 May 2016, the Respondent made certain observations on The Hague District Court Judgment and requested that it be admitted into the record and taken into account by the Tribunal in its award. The Respondent expressed the opinion that it was not necessary for the Parties to be further heard on the relevance of the judgment.

¹¹ Letter from the Tribunal to the Parties dated 17 May 2016.

(c) By letter of 24 May 2016, the Claimant advised that it did not object to the Respondent's request for The Hague District Court Judgment to be placed on the record, but offered certain observations on its relevance.

30. On 26 May 2016, the Tribunal, having received and considered the Parties' submissions in response to this letter, wrote to note that, in view of their agreement, it had decided to admit The Hague District Court Judgment into the record; that the Tribunal had received and would consider the Claimant's submissions of 24 May 2016; and that the Respondent was permitted, if it wished, to submit any response by way of reply by 1 June 2016. In accordance with that leave, by letter of 31 May 2016 the Respondent provided its response to the Claimant's letter.

III. THE FACTUAL BACKGROUND

A. THE ENERGY CHARTER TREATY

31. On 17 December 1994, the ECT became open for signature, with the purpose of establishing "a legal framework in order to promote long-term co-operation in the energy field . . . in accordance with the objectives and principles of the Charter."¹²
32. Having signed the ECT, subject to ratification, on 17 December 1994, the Russian Government presented it for ratification to the State Duma in August 1996.¹³
33. The State Duma did not ratify the Treaty.¹⁴ On 20 August 2009, the Russian Federation notified the depository of the ECT that it did not intend to become a contracting party to the Treaty.¹⁵

¹² ECT, Art. 2.

¹³ Decree of the Government of the Russian Federation No. 1016 (26 August 1996) ("**Decree of Russia**") (**Exhibit R-3**).

¹⁴ Electronic Registration Card for Draft Law No. 96043844-2 on Ratification of the Energy Charter Treaty and the Protocol to the Energy Charter on Energy Efficiency and Related Environmental Aspects (**Exhibit R-4**).

¹⁵ Notification by the Russian Federation to the Portuguese Republic pursuant to Article 45(3)(a) ECT (20 August 2009) ("**Notification of Russia to Portugal**") (**Exhibit R-5**).

B. YUKOS CAPITAL'S LOANS

34. Yukos Capital was incorporated in Luxembourg on 31 January 2003. At its formation, Yukos Capital's direct parent was Yukos Finance B.V. ("**Yukos Finance**"), a Dutch company owned by Yukos Oil.¹⁶ In 2005, Yukos Finance transferred ownership of Yukos Capital to its subsidiary, Yukos International UK B.V. ("**Yukos International**"), another Dutch company. Yukos Finance then delivered its shares in Yukos International (in exchange for depository receipts) to a Dutch foundation, Stichting Administratiekantoor Yukos International (the "**Stichting**"). Accordingly, the *Stichting* wholly owns Yukos International and, through it, Yukos Capital.¹⁷ The structure and operation of the *Stichting* is relevant to the Respondent's third objection to jurisdiction, and is discussed in that context below.
35. The purpose of this restructuring, according to the Claimant, was to protect Yukos Oil's foreign assets from being confiscated by the Russian State. Yukos Oil was dissolved in 2007 at the conclusion of bankruptcy proceedings in Russia.¹⁸
36. At the core of the present dispute are two loans that the Claimant extended to Yukos Oil in December 2003 (the "**December 2003 Loan**") and August 2004 (the "**August 2004 Loan**") and, together with the December 2003 Loan, the "**Loans**"). The Claimant alleges that those loans constitute an investment, and that, by various acts attributable to it, the Respondent expropriated that investment.¹⁹
37. The Respondent relies, *inter alia*, on Yukos Capital's financial statements and affidavits as well as witness statements of former Yukos Oil and Yukos Capital executives to assert that the Claimant "essentially acted as an 'intermediary'" by receiving the funds for the December 2003 Loan from Yukos Oil subsidiaries solely for the purpose of making loans to other Yukos Oil subsidiaries, and that the Loans were part of a "tax-efficient dividend repatriation strategy."²⁰ It is on the basis of this characterisation that the Respondent rests

¹⁶ Notice of Arbitration, para. 10.

¹⁷ See Claimant's Counter-Memorial on Jurisdiction (3 November 2014) ("**Counter-Memorial**"), paras. 178-180.

¹⁸ Notice of Arbitration, para. 10.

¹⁹ Notice of Arbitration, para. 12.

²⁰ Respondent's Memorial on Jurisdiction (28 July 2014) ("**Memorial**"), paras. 101, 111. See also Respondent's Reply on Jurisdiction (2 March 2015) ("**Reply**"), paras. 202-203.

its second objection to jurisdiction: that the Loans do not qualify as Investments in terms of Article 1(6) of the ECT. Further background to the Loans is described below.

IV. LEGAL PROVISIONS RELEVANT TO THE DISPUTE

38. The Tribunal shall apply substantive law in accordance with Article 26(6) of the ECT, including the substantive provisions of the ECT, interpreted under the Vienna Convention on the Law of Treaties (the “VCLT”),²¹ and any rules and principles of international law that are applicable.
39. The relevant provisions of the ECT are as follows:

Article 1—Definitions

- (6) Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
- (a) tangible and intangible, and moveable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - (d) Intellectual Property;
 - (e) Returns;
 - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

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.

²¹ Vienna Convention on the Law of Treaties, 1155 UNTS 332 (signed 23 May 1969, entered into force 27 January 1980) (“VCLT”).

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

- (7) “Investor” means:
- (a) with respect to a Contracting Party:
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
 - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
 - (b) with respect to a “third state,” a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

...

Article 17—Non-Application of Part III in Certain Circumstances

Each Contracting Party reserves the right to deny the advantages of this Part to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;

...

Article 26—Settlement of Disputes Between an Investor and a Contracting Party

- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible be settled amicably.
- (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
 - (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
 - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
 - (c) in accordance with the following paragraphs of this Article.
- (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

- (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

...

- (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

...

- (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”)

...

- (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

...

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.
- (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
- (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
- (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
- (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depository.
- (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty

years following the effective date of termination, except as otherwise provided in subparagraph (c).

- (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.
- (4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.
- (5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.
- (6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.
- (7) A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

V. OUTLINE OF THE PARTIES' SUBMISSIONS

A. THE RESPONDENT'S SUBMISSION

- 40. The Respondent contends that the Tribunal lacks jurisdiction to hear Yukos Capital's claims. The Respondent bases its argument on three grounds:
 - (i) Arbitration of the present dispute is inconsistent with the Russian Federation's "constitution" and "laws" for purposes of Article 45(1) of the ECT, and, accordingly, the obligation to provisionally apply the ECT did not extend to Article 26; the arbitration agreement on which the Claimant seeks to rely is "null and void",²²

²² T1/26/8-16.

- (ii) Yukos Capital has not made an Investment protected under Article 1(6) of the ECT, because the purported Loans were in substance dividends designed to repatriate to Russia the profits of Yukos Oil's Russian trading subsidiaries, in which Yukos Capital played no meaningful role and should be "disregarded";²³ and
- (iii) The Respondent is entitled to deny the Claimant the benefits of Article 17 of the ECT because the Claimant is a shell company with "no substantial business activities" in Luxembourg and is controlled by nationals of a third state, namely the United States nationals who are members of the *Stichting*'s board.²⁴

B. THE CLAIMANT'S SUBMISSION

41. The Claimant submits that the Tribunal should reject each of the Respondent's objections to the Tribunal's jurisdiction, arguing as follows:
- (i) In relation to Article 45(1), the Claimant makes three independent submissions: first, a signatory may avoid provisional application only where the principle of provisional application itself is inconsistent with domestic law – Article 45(1) does not contemplate a "piecemeal" comparison of specific provisions of the Treaty with domestic law;²⁵ second, provisional application is not inconsistent with Russian law because the executive had authority to commit the Respondent to provisional application of Article 26 (and that renders it consistent with Russian law); third, even examined on a piecemeal basis, Article 26 – the arbitration of investment disputes – is not inconsistent with Russian law.²⁶
 - (ii) The Loans qualify as "Investments" under Article 1(6) of the ECT;²⁷ the Claimant rejects the argument that they fail a test derived from "general international law" as to what qualifies as "investment."²⁸

²³ T1/45/8 – T1/46/5.

²⁴ Memorial, paras. 10-11, 163.

²⁵ Counter-Memorial, para. 4.

²⁶ See T1/144/1-15; T5/127/8-11, T5/143/15 – T5/144/3.

²⁷ Counter-Memorial, para. 6.

²⁸ Counter-Memorial, paras. 7-8.

- (iii) The Respondent's attempt to invoke Article 17(1) cannot give rise to a jurisdictional challenge, since the Respondent would only be entitled to deny the benefits of Part III of the ECT (whereas Article 26 is found in Part V);²⁹ the Claimant submits that the Respondent's purported invocation of Article 17 after the arbitration had been commenced could not operate retrospectively to deny the Claimant accrued rights;³⁰ and that the Respondent cannot make out the two substantive requirements of the Article.

VI. RELIEF REQUESTED

42. The Respondent requests that the Tribunal:

- (i) Decline to exercise jurisdiction over the Claimant's claims;
- (ii) Order the Claimant to pay to the Respondent the full costs of this arbitration, including, without limitation, arbitrators' fees and expenses, administrative costs, counsel fees and expenses and any other costs associated with this arbitration;³¹
- (iii) Order the Claimant to pay to the Respondent interest on the amounts awarded under (ii) above until the date of full payment; and
- (iv) Grant any further relief to the Respondent as it may deem appropriate.³²

43. The Claimant requests the Tribunal to dismiss all of the jurisdictional objections raised by the Respondent and to proceed to the merits stage of the proceedings.³³ In its Notice of Arbitration, it also seeks "its arbitration costs, including attorneys' fees."³⁴

²⁹ Counter-Memorial, para. 9.

³⁰ Counter-Memorial, para. 10.

³¹ The Respondent submitted in its submission of 5 October 2015 that if the Tribunal were to find that it had jurisdiction, it should not determine the question of costs until the conclusion of the proceedings. *See* Respondent's Submission on Costs (5 October 2015), para. 14.

³² Memorial, para. 188.

³³ Counter-Memorial, para. 305.

³⁴ Notice of Arbitration, para. 215(b). The Claimant did not address the question of costs in its Counter-Memorial or Rejoinder. It provided a breakdown of its costs in its submission of 5 October 2015, but did not make any submissions on the question of whether costs should be determined at this stage if the Tribunal's jurisdiction were upheld.

VII. THE OBJECTIONS TO JURISDICTION

44. The three objections raised by the Respondent to the jurisdiction of the Tribunal raise distinct points of substance. Each one of them would, if held to be well founded, operate to exclude the jurisdiction of the present Tribunal over the whole of the Claimant's claims.
45. Pursuant to Article 21(1) of the UNCITRAL Rules, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." This provision reflects the concept, fundamental to international arbitration, of *compétence–compétence*, namely that an international tribunal has jurisdiction to rule upon its own jurisdiction.
46. In view of the distinct character of each of the objections, the Tribunal shall proceed by considering each in turn, setting forth the Parties' arguments followed by its own analysis and decision.

A. DOES THE PROVISIONAL APPLICATION OF THE ECT IN THE RUSSIAN FEDERATION, PURSUANT TO ARTICLE 45 OF THE ECT, PROVIDE A BASIS FOR THE TRIBUNAL'S JURISDICTION?

47. The first of the jurisdictional objections for the Tribunal's determination is whether Article 45 provides a jurisdictional predicate for the present claim, and in particular whether the proviso to Article 45(1), which provides for provisional application "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" (the "**Domestic Law Inconsistency Clause**") excludes the provisional application of Article 26.
48. The Parties' first point of disagreement concerns the scope of that clause. The Claimant's case is that a respondent state may only rely on that limitation where the principle of provisional application itself is inconsistent with the state's "constitution, laws or regulations": the limitation is "all-or-nothing." Since the Respondent does not deny that Russian law recognizes the principle of provisional application (albeit subject to limits), the disposition of this issue in the Claimant's favour would dispose of the Respondent's first jurisdictional objection. The Respondent, on the other hand, submits that the clause contemplates a piecemeal analysis, such that a state will not be obliged to provisionally apply any individual provision of the Treaty that is inconsistent with its domestic law.

49. The second sub-issue that arises under this head is whether Article 26 itself, or its provisional application, is inconsistent with Russian law. The Tribunal now summarizes the submissions of each Party on both of these issues before coming to its own decision on provisional application as a whole.

1. The correct interpretation of Article 45(1)

(a) The Respondent's position

50. The Respondent contends that, pursuant to Article 45(1), a signatory applies the ECT provisionally pending its entry into force for that signatory “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.” The Respondent argues that, accordingly, the Domestic Law Inconsistency Clause of Article 45(1) applies (a) to conceptual inconsistencies (*e.g.* the non-recognition of the principle of provisional application in constitutional law) and also (b) to inconsistencies of individual treaty provisions (*e.g.* Article 26 of the ECT on the settlement of disputes between “Investors” and “Contracting Parties”) with the laws or regulations of a signatory.³⁵
51. Addressing the wording of Article 45(1) of the ECT, the Respondent notes that the plain language of the Domestic Law Inconsistency Clause and the ordinary meaning of the term “to the extent” mean that the scope of provisional application of the ECT by a signatory depends on whether or not each provision of the ECT is consistent with the “constitution, laws or regulations” of that signatory. The Respondent contends that the ordinary meaning of the words “to the extent,” “scope” or “width” is to the same effect in the other authentic language versions of the ECT,³⁶ and is consistent with its use elsewhere in the ECT.³⁷ The Respondent objects to the interpretation of the Domestic Law Inconsistency Clause put forth by the Claimant, which suggests that the provision would only take effect if the domestic law of an ECT signatory prohibits provisional application of the Treaty in its entirety.³⁸ The Respondent contends that such an interpretation would siphon any meaning out of the term “to the extent,” effectively substituting it with the term “if” or

³⁵ Memorial, paras. 38-39.

³⁶ Memorial, paras. 38-39; Reply, para. 52; T1/8/2-7.

³⁷ T1/8/8-22.

³⁸ See paras. 77-84 below.

“where”³⁹ and would eliminate the term “such.”⁴⁰ If that meaning was intended, then Article 45(1) would not refer to “such provisional application” but would simply refer to “provisional application” or “provisional application as such.”⁴¹

52. The Respondent points out that, while the Claimant attempts to draw support for its interpretation from an expert Opinion submitted by Professor Reisman on behalf of the claimant in *Hulley Enterprises Limited v. Russian Federation*⁴² (“*Hulley Enterprises*”) Professor Reisman expressly rejected the Claimant’s position in a 2011 article, noting that “[i]f Article 45(1) had been intended to refer to the notion of the permissibility of the provisional application of a treaty as such, it would not have been necessary to introduce the phrase ‘to the extent’.”⁴³ The Respondent refers to several further authorities in accord with this view.⁴⁴
53. The Respondent also sees as significant the inclusion of “laws” and “regulations” in the “to the extent” clause, observing that a prohibition of provisional application typically results from constitutional requirements or acts of legislation implementing constitutional principles; in contrast, such prohibition typically would not result from “several laws” or “hierarchically lower legal acts” such as regulations.⁴⁵ Thus, the Respondent argues that the inclusion of “regulations” in the Domestic Law Inconsistency Clause confirms “that not only conceptual inconsistencies, but also specific inconsistencies of particular treaty

³⁹ Memorial, para. 39; Reply, paras. 55-59.

⁴⁰ T1/12/12.

⁴¹ T1/11/4-8.

⁴² *Hulley Enterprises Limited v. Russian Federation*, PCA No. AA226, Interim Award on Jurisdiction and Admissibility (30 November 2009) (“*Hulley Enterprises*”) (**Exhibit CL-9**). See para. 92 below.

⁴³ Reply, para. 56, referring to W. Michael Reisman & Mahnoush H. Arsanjani, “Provisional Application of Treaties in International Law: The Energy Charter Awards,” in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* (Enzo Cannizzaro, ed., 2011) (“**Reisman & Arsanjani**”), p. 92 (**Exhibit RL-116**).

⁴⁴ Reply, paras. 57-59, referring to Annelise Q. Mertsch, *PROVISIONALLY APPLIED TREATIES: THEIR BINDING FORCE AND LEGAL NATURE* (2012) (“**Mertsch**”), p. 208, n.151 (**Exhibit RL-117**); Gerhard Hafner, “The Provisional Application of the Energy Charter Treaty,” in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* (Binder, et al., eds., 2009), p. 601 (**Exhibit RL-118**); Thomas Roe & Matthew Happold, *SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY* (2011), p. 73 (**Exhibit RL-115**).

⁴⁵ T1/11/9 – T1/12/1.

provisions with domestic laws and regulations are covered.”⁴⁶ The Respondent cites the same article by Professor Reisman as confirmation of this observation.⁴⁷

54. The Respondent submits that its interpretation is supported by the context of the provision. Firstly, with regard to the Claimant’s argument that “‘provisional application’ has the same meaning under both Articles 45(1) and 45(2)(a) (i.e. application of the Treaty as a whole),”⁴⁸ the Respondent disagrees, arguing that “provisional application” does not have the same meaning in Article 45(1) of the ECT as in Article 45(2) of the ECT. In contrast to Article 45(1), with its “to the extent” language, Article 45(2)(a) allows a signatory state to opt out of provisional application entirely. Further, under Article 45(2)(c), a signatory must still provisionally apply the provisions of Part VII (“Structure and Institutions”) “to the extent that such provisional application is not inconsistent with its laws or regulations.”⁴⁹ Thus, “[p]ursuant to Article 45(1) ECT, a signatory applies all parts of the ECT, but subject to inconsistencies with its domestic law. Pursuant to Article 45(2)(c) ECT, a signatory applies only Part VII, but again subject to inconsistencies with its domestic law.”⁵⁰
55. The Respondent contends that, “[s]ince a signatory that applies Part VII on a provisional basis pursuant to Article 45(2)(c) ECT has already opted out of provisional application entirely,” the Domestic Law Inconsistency Clause in Article 45(2)(c) of the ECT can only refer to “inconsistencies between that signatory’s ‘*laws or regulations*’ and specific obligations under Part VII of the ECT.”⁵¹ Moreover, the Respondent points out that a facsimile sent by the U.S. Department of State to the Energy Charter Conference Secretariat in the context of the ECT negotiations supports this view.⁵²

⁴⁶ Memorial, para. 40. *See also* Reply, paras. 60, 126-130; T5/28/14 – T5/29/22, *citing* Transcript of Energy Charter Conference (14 December 1993) (**Exhibit R-80**).

⁴⁷ Reply, para. 60, *citing* Reisman & Arsanjani, p. 93 (**Exhibit RL-116**).

⁴⁸ *See* para. 78 below and Counter-Memorial, para. 48.

⁴⁹ Reply, para. 64.

⁵⁰ Reply, para. 67.

⁵¹ Memorial, para. 42 (emphasis in original). *See also* Reply, paras. 66-67; T1/13/2-21.

⁵² Memorial, para. 43, *citing* Facsimile from the U.S. Department of State to the Energy Charter Conference Secretariat (24 February 1994) (“**U.S. Dept. of State Facsimile**”) (**Exhibit R-15**).

56. Secondly, the Respondent rejects the Claimant's assertion that Article 45(3)(b) of the ECT supports an "all-or-nothing" approach to Article 45(1),⁵³ arguing that "Article 45(3)(b) ECT says nothing about the scope of a signatory's provisional application under Article 45(1) ECT."⁵⁴
57. Thirdly, the Respondent rejects the Claimant's argument that Article 45(6) of the ECT supports the Claimant's "all-or-nothing" approach to Article 45(1),⁵⁵ since the language of Article 45(6) "simply confirms that Article 45 provides for two distinct regimes of provisional application." The Respondent further notes that, if the Claimant were correct in its contention that Article 45(1) is an "all-or-nothing" provision, there would be no reason for Article 45(6) to provide expressly that cost contributions be made "in accordance with and subject to the provisions of paragraph (1)."⁵⁶
58. Fourthly, the Respondent rejects the Claimant's argument that Article 45(2)(b) of the ECT reflects a reciprocity of obligations and provides that investors of a signatory may not claim Treaty benefits unless the signatory consents to apply the Treaty in its entirety.⁵⁷ The Respondent points out that Article 45(2)(b) makes explicit reference to the "benefits of provisional application under paragraph (1)" (thus including the Domestic Law Inconsistency Clause), rather than to "this Treaty." Therefore, according to the Respondent, the reciprocity limitation provided in Article 45(2)(b) only applies to a signatory if it has opted out of provisional application pursuant to Article 45(2)(a).⁵⁸
59. The Respondent also regards the Claimant's argument in relation to Article 27 of the VCLT as misguided, noting that, while "Article 27 VCLT prohibits a State from invoking its domestic law as justification for failure to perform a treaty," "[a] State that invokes its internal law pursuant to a 'to the extent' clause does not seek to justify its failure to perform a treaty obligation," but rather does so "to determine the extent and content of the obligations it has accepted under a treaty."⁵⁹ In this regard, the Respondent points

⁵³ See para. 90 below.

⁵⁴ Reply, para. 68.

⁵⁵ See para. 91 below.

⁵⁶ Reply, para. 69; T1/14/12-24.

⁵⁷ Reply, paras. 63, 70, *citing* Counter-Memorial, para. 49. See para. 86 below.

⁵⁸ Reply, para. 71.

⁵⁹ Reply, para. 40.

out that, contrary to the Claimant's argument,⁶⁰ Professor Lefeber's 1998 article and its 2011 entry in the *Max Planck Encyclopedia* fully support its position, acknowledging the ECT as an example of a treaty providing "that its provisional application is subject to national law, which means that, in case of conflict national law prevails over the treaty."⁶¹ According to the Respondent, other commentators are in accord.⁶²

60. The Respondent takes the view that the authorities cited by Claimant for the proposition that the Respondent's interpretation of the Domestic Law Inconsistency Clause runs against Article 27 of the VCLT "are unavailing."⁶³ The Respondent submits that the Claimant's citation of Resolution No. 8-P ("**Resolution No. 8-P**") rendered in 2012 by the Constitutional Court of the Russian Federation (the "**Constitutional Court**") is irrelevant because the quoted statement dealt with treaties that had entered into force, and the ECT has not yet entered into force for the Respondent.⁶⁴ In like manner, the Respondent rejects the notion that the expert opinion of Professor Reisman in the *Hulley Enterprises* arbitration provides authority for the proposition that the Respondent's interpretation of the Domestic Law Inconsistency Clause runs counter to Article 27 of the VCLT.⁶⁵
61. The Respondent further contends that the Claimant's citation of an expert opinion submitted by Professor James Crawford in *Hulley Enterprises* is unavailing, as "[n]o authority is cited to support the statement that Article 27 VCLT has been relied upon to reduce the scope of a 'to the extent' clause to the principle of provisional application."⁶⁶ The Respondent also dismisses the relevance of the jurisdictional awards in

⁶⁰ See para. 94 below and Counter-Memorial, para. 75.

⁶¹ Reply, paras. 44-45, *citing* René Lefeber, "The Provisional Application of Treaties and Other Unperfected Acts in International Law: Constitutional Functions," in *ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG* (Jan Klabbers & René Lefeber, eds., 1998), p. 89 (**Exhibit RL-30**). The Respondent notes that the Claimant "[s]imply ignores the section [Section C] that addresses domestic law limitations," instead "quot[ing] from Section E, which describes the legal effects of provisional application provisions that do not contain a 'to the extent' clause." Reply, para. 45, *citing* Counter-Memorial, para. 74.

⁶² Reply, para. 46.

⁶³ Reply, para. 86, *citing* Counter-Memorial, para. 56. See para. 92 below.

⁶⁴ Reply, para. 86, *citing* Counter-Memorial, para. 57. See Resolution No. 8-P, Constitutional Court of the Russian Federation (27 March 2012) ("**Resolution No. 8-P**"), para. 6 (**Exhibit R-35**).

⁶⁵ Reply, para. 88, *citing* Counter-Memorial, para. 59. See *Hulley Enterprises*, para. 318 (**Exhibit CL-9**). See para. 92 below.

⁶⁶ Reply, para. 89.

Kardassopoulos v. Georgia (“*Kardassopoulos*”) and *Hulley Enterprises* relied on by the Claimant,⁶⁷ pointing out in particular that both cases were chaired by the same arbitrator and that the *Hulley Enterprises* award is currently subject to set aside proceedings in the Netherlands.⁶⁸

62. The Respondent further contends that the Claimant has inaccurately conflated the Domestic Law Inconsistency Clause under Article 45(1) of the ECT and the grounds for invalidating consent under Article 46(1) of the VCLT.⁶⁹ According to the Respondent, the two provisions have an “essentially different nature and function” and stand in marked contrast with regard to their language and the conditions under which they may be invoked.⁷⁰ In particular, the Respondent points out that it “does not seek to vitiate its consent to apply the ECT on a provisional basis” (as it might under Article 46(1) of the VCLT), but that it is invoking “its domestic law pursuant to the ‘to the extent’ clause in Article 45(1) ECT to determine the extent of its obligations under the ECT.”⁷¹
63. Regarding the issue of reciprocity, the Respondent further points to a memorandum⁷² and an article⁷³ by Mr Craig S. Bamberger, acknowledging (in the words of the Respondent) “that a signatory that applies the ECT provisionally pursuant to Article 45(1) ECT might – or might not – apply a particular provision of the ECT, including, critically, the investor-State arbitration mechanism in Article 26 ECT, depending on whether the Treaty provision in question is consistent with the signatory’s ‘constitution, laws or regulations’.”⁷⁴ The Respondent also submits that Mr Bamberger’s article refutes a policy argument relied on by the tribunal in *Hulley Enterprises* and by the Claimant,⁷⁵

⁶⁷ See para. 77 below. Counter-Memorial, paras. 43-45, citing *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) (“*Kardassopoulos*”), paras. 71, 73-74 (**Exhibit CL-11**); *Hulley Enterprises*, paras. 269, 309, 319 (**Exhibit CL-9**).

⁶⁸ Reply, paras. 93-96.

⁶⁹ Reply, para. 48.

⁷⁰ Reply, para. 49.

⁷¹ Reply, paras. 50-51.

⁷² European Energy Charter Conference Secretariat, Note from the Legal Sub-Group Chairman, “Status of matters pending before the Legal Sub-Group,” LEG-20 (March 1993), para. 12 (**Exhibit R-84**).

⁷³ Craig S. Bamberger, “Epilogue: The Energy Charter Treaty as a Work in Progress,” in *THE ENERGY CHARTER TREATY – AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* (Thomas W. Wälde, ed., 1996) (“**Bamberger, Epilogue**”), p. 602 (**Exhibit RL-1**).

⁷⁴ Reply, para. 74.

⁷⁵ Counter-Memorial, para. 51. See para. 86 below.

that, if a signatory state were allowed to invoke inconsistencies with individual provisions of the ECT, a situation of “unacceptable uncertainty” would emerge.⁷⁶ The Respondent refers to Mr Bamberger to note that treaty drafting requires balancing competing interests through compromise, and that in the case of Article 45(1) of the ECT the drafters balanced “the signatories’ interest to have the treaty applied as soon as possible” with a “respect for domestic law constraints.”⁷⁷ In this manner, “flexibility in the scope of the ECT’s provisional application” was instrumental in “ensur[ing] the widest possible participation in provisional application, including by signatories that were not in a position to commit to provisional application of the entire Treaty because of domestic law constraints.”⁷⁸

64. In response to a question from the Tribunal, the Respondent identified a number of provisions of the ECT that it considered were provisionally applied by the Russian Federation because they reflected existing protections in Russian law.⁷⁹ To that extent an investor has the protection of substantive treaty obligations, although it may only enforce them in the Russian domestic courts.⁸⁰ In the Respondent’s submission, each investor must be aware of the domestic law limitation in Article 45 of the ECT, and is responsible for conducting due diligence with the assistance of local counsel to determine which of the provisions of that treaty it will be entitled to rely on.⁸¹
65. The Respondent goes on to argue that its interpretation is also in line with the “purpose and effect” of Article 45(1) of the ECT, which “is to accommodate the domestic law problems that provisional application raises for most States by limiting provisional application to those treaty provisions that are consistent with each signatory’s domestic laws.”⁸² The Domestic Law Inconsistency Clause was, according to the Respondent, “clearly motivated by this goal,” having been introduced according to a proposal by the United States in the draft Basic Protocol of October 1991.⁸³ As the Respondent

⁷⁶ Reply, para. 75, *citing* Counter-Memorial, para. 51.

⁷⁷ Reply, para. 75.

⁷⁸ Reply, para. 75.

⁷⁹ T5/51/7 – T5/59/8.

⁸⁰ T5/55/4-11.

⁸¹ T5/56/11 – T5/57/8.

⁸² Reply, para. 77.

⁸³ Reply, paras. 78-79, *citing* European Energy Charter Conference Secretariat, Document 21/91, Annex I, BA 4, Draft (31 October 1991), Art. 41 (**Exhibit R-86**); European Energy Charter Conference Secretariat, Document 14/91, BP 3 (11 October 1991) (**Exhibit R-87**).

highlights, the United States admitted in a facsimile that it “d[id] not have any legal difficulty with provisional application *per se*” and found the language of the Domestic Law Inconsistency Clause “essential to any provisional application obligation.”⁸⁴ The European Community likewise recognized the principle of provisional application, relying on the Domestic Law Inconsistency Clause itself to limit its provisional application to provisions within its competence.⁸⁵

66. The Respondent further alleges that the “vast majority” of ECT negotiating states recognized the principle of provisional application, yet “had to accommodate domestic law constraints through the ‘to the extent’ clause.”⁸⁶ In particular, the Respondent pleads that Germany limited provisional application to obligations that “were consistent with its legislation or within executive competence, not requiring parliamentary approval.”⁸⁷ Likewise, the Netherlands only allowed the executive to agree to provisional application “if a treaty did not deviate, or necessitate deviation from, the Constitution, and to the extent its provisions did not deviate from Dutch legislation or necessitate such deviation.”⁸⁸ Similarly, the Respondent contends that France “recognized the principle of provisional application, but only permitted the provisional application of treaties on matters falling within the power of the executive or after parliamentary authorization had been granted.”⁸⁹
67. The Respondent further contends that its interpretation is in line with “the circumstances of the ECT’s conclusion and the signatories’ practice in interpreting and applying Article 45(1) ECT.”⁹⁰ The Respondent highlights that, while a number of signatories of the ECT made declarations pursuant to Article 45(2)(a) when signing the ECT, others chose to expressly rely on the Domestic Law Inconsistency Clause of Article 45(1) to exclude or limit the provisional application of the ECT.⁹¹

⁸⁴ Reply, para. 79, *citing* U.S. Dept. of State Facsimile (**Exhibit R-15**); T1/17/9 – T1/18/2.

⁸⁵ Reply, para. 80.

⁸⁶ Reply, paras. 81, 84.

⁸⁷ Reply, para. 82.

⁸⁸ Reply, para. 82.

⁸⁹ Reply, para. 83.

⁹⁰ Reply, para. 97.

⁹¹ Memorial, paras. 30-31.

68. The Respondent points out that, contrary to the Claimant’s assertion,⁹² the fact that “these ECT signatories invoked the ‘to the extent’ clause to exclude provisional application does not support an inference that they interpreted Article 45(1) ECT as an all-or-nothing provision.”⁹³ In fact, according to the Respondent, two of the relevant signatories “expressly stated that Article 45(1) ECT ‘does not create any commitment beyond what is compatible with the existing legal order of the Signatories’.”⁹⁴
69. In addition, the Respondent contends that even where signatories made no declaration whatsoever, internal documents show that they shared the Respondent’s interpretation of Article 45(1) of the ECT. In particular, the Respondent refers to several documents prepared by the Finnish Government,⁹⁵ as well as a 1994 Statement by the Council, the Commission and the Member States of the European Community on Article 45 of the European Energy Charter Treaty (the “**1994 Joint EC Statement**”).⁹⁶ The Respondent argues that, in the 1994 Joint EC Statement, the European Community and its then twelve Member States, by stating that Article 45(1) of the ECT “does not create any commitment beyond what is compatible with the existing internal legal order of the Signatories,” relied on that provision to determine that a signatory of the ECT would not have to file a declaration of non-application pursuant to Article 45(2), in order to exclude the non-application of parts of the ECT not compatible with its legal order, as this is an automatic consequence from the text of Article 45(1).⁹⁷ The Respondent adds that the Member States that adopted the 1994 Joint EC Statement did not communicate their position to the other ECT negotiating states, as such communication was not required of them.⁹⁸
70. The Respondent also refers to the “‘to the extent’ clause in paragraph 1(b) of the Protocol of Provisional Application” of the General Agreement on Tariffs and Trade (“**GATT**”),

⁹² Counter-Memorial, paras. 81-82. *See* para. 94 below.

⁹³ Reply, para. 108.

⁹⁴ Reply, para. 108.

⁹⁵ Memorial, para. 45; Reply, para. 99, *citing* Finnish Ministry of Foreign Affairs Memorandum (22 November 1994) (**Exhibit R-17**); Finnish Gov. Proposal HE 46/1997, para. 4.1 (**Exhibit R-16**); T1/13/22 – T1/14/11.

⁹⁶ Memorial, para. 46; Reply, para. 100, *referring to* “A” Item Note from the Permanent Representatives Committee to the Council of the European Union, Doc. 12165/94 (14 December 1994), Annex I, p. 3 (**Exhibit R-9**); T1/19/5 – T1/20/19.

⁹⁷ Memorial, para. 34; Reply, paras. 100-106.

⁹⁸ Reply, para. 107.

pointing out that there is a “consistent body of GATT case law” confirming that “GATT Contracting States were entitled to and did invoke specific inconsistencies of their domestic laws with particular GATT obligations.”⁹⁹ The Respondent also argues that there was “never any suggestion that consent by the executive to provisional application may suffice to eliminate inconsistencies” between domestic law and GATT obligations.¹⁰⁰

71. Furthermore, the Respondent disputes the Claimant’s allegation¹⁰¹ that the “Respondent ‘at all relevant times made clear’ that it applied the ECT provisionally as a whole.”¹⁰² The Respondent alleges that the “Claimant has failed to point to a single statement by Respondent in the course of the ECT negotiations or at the time of the Treaty’s signature that ‘made clear’ that it would apply the ECT provisionally as a whole.”¹⁰³ In particular, the Respondent takes issue with the Claimant’s “selective” and “out of context” quotation¹⁰⁴ of background information published on the website of the Ministry of Foreign Affairs, which according to the Respondent “does not state that Respondent applies the ECT as a whole.”¹⁰⁵ Likewise, the Respondent rejects the Claimant’s argument¹⁰⁶ that a statement made by the Russian delegation at the 2002 Energy Charter Conference proves that the Respondent believed it was bound to provisionally apply the ECT as a whole.¹⁰⁷ In contrast, the Respondent argues that the statement does not address the scope of provisional application.¹⁰⁸
72. The Respondent submits that the fact that the European Union and Energy Charter Secretariat and Conference pressured the Respondent to ratify the ECT “evidences that they appreciated that provisional application did not impose on Respondent the same obligations as ratification.”¹⁰⁹ In like manner, the Respondent contends that statements

⁹⁹ Reply, paras. 90-91; T1/20/20 – T1/21/12; T5/30/6-9.

¹⁰⁰ T5/30/15 – T5/31/17.

¹⁰¹ See para. 96 below and Counter-Memorial, para. 90.

¹⁰² Reply, para. 111.

¹⁰³ Reply, para. 111.

¹⁰⁴ See para. 96 below and Counter-Memorial, para. 89.

¹⁰⁵ Reply, paras. 111-112.

¹⁰⁶ See para. 96 below and Counter-Memorial, paras. 15, 88.

¹⁰⁷ Reply, para. 113.

¹⁰⁸ Reply, para. 113.

¹⁰⁹ Reply, paras. 114-116.

by the United Kingdom Secretary of State provide support for the Respondent's interpretation of the Domestic Law Inconsistency Clause.¹¹⁰ The Respondent recounts that the UK Secretary of State told the House of Commons in 2006 that Article 45 "places some obligations on the Russia[n] Federation, but only to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."¹¹¹

73. The Respondent also quotes the former chairman of the legal advisory committee to the European Energy Conference, Mr Bamberger. In an article on the subject of the provisional application of the ECT's dispute resolution provisions in energy transit disputes, Mr Bamberger acknowledged that:

[e]ven in the case of a state not making such a declaration [pursuant to Article 45(2)(a) of the ECT], it could prove extremely difficult to ascertain the extent to which the provisions of the ECT are inconsistent with the particular signatory's constitution, laws or regulations.¹¹²

74. The Respondent submits that Mr Bamberger's article supports the proposition that "the operation and effectiveness of the transit dispute settlement mechanism . . . depends on the consistency of that mechanism with each signatory's domestic law."¹¹³

(b) The Claimant's position

75. Against the Respondent's position, the Claimant contends that Article 45(1) of the ECT permits a signatory to avoid provisional application of the ECT as a whole "only to the extent the principle of provisional application is inconsistent with their domestic law."¹¹⁴ The Claimant contends, that this was "not the case with Russia, nor does Respondent suggest that it is."¹¹⁵ The Claimant additionally points out that, whilst a signatory to the ECT may elect not to apply the Treaty provisionally by making a declaration under

¹¹⁰ Reply, paras. 116-117.

¹¹¹ Reply, paras. 116-117, *citing* House of Commons Hansard Written Answers, Part 3, Column 1045 W (7 February 2006) (**Exhibit R-20**).

¹¹² Memorial, para. 51, *citing* Craig S. Bamberger, *Adjudicatory Aspects Of Transit Dispute Conciliation Under The Energy Charter Treaty*, 3 TDM (April 2006) ("**Bamberger, Adjudicatory Aspects**"), pp. 16-17 (**Exhibit RL-45**). *See also* Reply, para. 118.

¹¹³ Memorial, para. 51; Reply, para. 118; T1/21/13 – T1/22/11.

¹¹⁴ Counter-Memorial, para. 4.

¹¹⁵ Counter-Memorial, para. 4.

Article 45(2) ECT, “Respondent did not do so.”¹¹⁶ The Claimant argues that the Respondent’s interpretation of the Domestic Law Inconsistency Clause represents a “piecemeal argument” that would make “the specific scope of provisional application entirely dependent on the degree and nature of each signatory’s invocation of its internal laws.” Such an interpretation would “run[] counter to cardinal principles of international law.”¹¹⁷

76. The Claimant argues for an interpretation of Article 45(1) grounded in the “ordinary meaning” of the provision, emphasizing the need for reading the provision in the context of the ECT’s object and purpose, in line with Article 31(1) of the VCLT.¹¹⁸ Accordingly, the Claimant contends that the limiting language of Article 45(1) “applies only to ‘such provisional application’,” the meaning of which must be the foundation of a proper interpretation of Article 45(1).¹¹⁹
77. Interpreting Article 45(1) in this manner, the Claimant focuses on the word “such,” which it alleges was “ignored by Respondent.”¹²⁰ The plain meaning of “such” in this context is, according to the Claimant, “of the kind specified.”¹²¹ The Claimant further argues that “the kind of provisional application specified is that ‘[e]ach signatory agrees to apply [the ECT] provisionally pending its entry into force for such signatory’.”¹²² Therefore, as the Claimant contends, “the limiting ‘to the extent’ language . . . operates only where applying ‘*this Treaty*’ (i.e., the principle of provisional application itself) is inconsistent with the signatory’s constitution, laws or regulations.”¹²³ The Claimant notes that such an interpretation is consistent with the findings of the tribunals in *Hulley Enterprises*¹²⁴ and *Kardassopoulos*.¹²⁵

¹¹⁶ Counter-Memorial, para. 4, n. 4.

¹¹⁷ Counter-Memorial, paras. 58, 66.

¹¹⁸ Counter-Memorial, paras. 39-42; Claimant’s Rejoinder on Jurisdiction (15 June 2015) (“**Rejoinder**”), para. 28.

¹¹⁹ Counter-Memorial, para. 41.

¹²⁰ Counter-Memorial, paras. 41-42.

¹²¹ Counter-Memorial, para. 42.

¹²² Counter-Memorial, para. 42.

¹²³ Counter-Memorial, para. 42 (emphasis in original); T1/145/4-5.

¹²⁴ Counter-Memorial, paras. 43, 50-51, citing *Hulley Enterprises*, paras. 308, 314-315 (**Exhibit CL-9**); Rejoinder, paras. 29-30.

¹²⁵ Counter-Memorial, paras. 44-45, citing *Kardassopoulos*, para. 210 (**Exhibit CL-11**); Rejoinder, paras. 30, 33.

78. The Claimant further contends that “‘provisional application’ has the same meaning under both Articles 45(1) and 45(2)(a) (i.e. application of the Treaty as a whole).”¹²⁶ According to the Claimant, the Respondent concedes that the Claimant “is correct that the phrase ‘such provisional application’ refers to the provisional application previously mentioned in Article 45(1) ECT, namely the provisional application of ‘this Treaty’.”¹²⁷ After making such a concession, however, the Claimant asserts that the Respondent offers a rebuttal¹²⁸ that is no more than a tautology and a “confused commentary devoid of any apparent logic.”¹²⁹ The Claimant adds that the Respondent’s authorities in this regard do not support the Respondent’s position.¹³⁰
79. The Claimant rejects the Respondent’s assertion that the Claimant’s interpretation of Article 45(1) “deprives the term ‘to the extent’ of any meaning and would effectively substitute for it ‘if’, ‘unless’ or ‘where’,”¹³¹ noting that the Respondent’s interpretation “cannot be gleaned from the language on any logical basis.”¹³² Although it accepts that deleting “such” or replacing it with “if” would also convey the meaning for which the Claimant contends, it maintains that this does not change the proper interpretation of the clause.¹³³
80. The Claimant also rejects the Respondent’s reliance on the word “regulations” as being within the Domestic Law Inconsistency Clause,¹³⁴ noting that the word was added at the request of the Japanese delegation late in the drafting process and “attracted no attention.”¹³⁵ The Claimant criticizes the Respondent’s “very selective use of the *travaux*”¹³⁶ and sees no reason to conclude that “the addition of ‘regulations’ . . . somehow

¹²⁶ Counter-Memorial, para. 48.

¹²⁷ Rejoinder, para. 32, *referring to* Counter-Memorial, para. 42; Reply, paras. 53-54.

¹²⁸ *See* Reply, para. 54.

¹²⁹ Rejoinder, paras. 34-35.

¹³⁰ Rejoinder, paras. 36-37.

¹³¹ *See* Reply, para. 55.

¹³² Rejoinder, para. 40.

¹³³ T1/145/16-23.

¹³⁴ *See* Reply, para. 60.

¹³⁵ Rejoinder, paras. 41-42.

¹³⁶ Rejoinder, paras. 43-44.

signalled a consensus understanding that Article 45(1) would be subject to a piecemeal interpretation.”¹³⁷

81. The Claimant also disputes the Respondent’s contention that the Claimant’s interpretation renders Article 45(1) “superfluous.”¹³⁸ The Claimant notes that, for signatories that do not make an opt-out declaration, Article 45(1) “provides a safety net that . . . permits [signatories] to . . . avoid provisional application if, and only if, it is inconsistent with their laws to so apply the Treaty,” as opposed to opt out declarations made pursuant to Article 45(2)(a), which “may be made for any reason.”¹³⁹ So if any state had a concern with provisional application, they were free to opt out pursuant to that clause.¹⁴⁰ They could also opt out of the 20 year tail.¹⁴¹
82. The Claimant rejects the Respondent’s interpretation of other provisions in Article 45 as well, finding the Respondent’s contentions¹⁴² regarding Article 45(3)(b) “impossible to comprehend.”¹⁴³ The Claimant criticizes the Respondent’s interpretation as ignoring the fact that Article 45(3)(b) holds that, under Article 45(1), there exists an “obligation . . . to apply Parts III and V,” the effect of which is to “strip[] Article 45(3)(b) of all meaning for any signatory claiming that Parts III and V are inconsistent with its domestic law.”¹⁴⁴ What this conveys, according to the Claimant, is that “under any interpretation of Article 45(1), signatory states are applying provisionally Parts III and V.”¹⁴⁵
83. Further, the Claimant finds the Respondent’s arguments¹⁴⁶ regarding Article 45(2)(b) to be “unclear” and “circular and of no apparent significance,” contending instead that “Article 45(2)(b) simply provides for reciprocity.”¹⁴⁷ According to the Claimant, the

¹³⁷ Rejoinder, para. 42.

¹³⁸ See Reply, para. 65.

¹³⁹ Rejoinder, para. 45.

¹⁴⁰ T5/123/22 – T5/124/5.

¹⁴¹ T5/124/6-9.

¹⁴² See Reply, para. 68.

¹⁴³ Rejoinder, para. 46.

¹⁴⁴ Rejoinder, para. 47.

¹⁴⁵ T1/148/5-8.

¹⁴⁶ See Reply, para. 70.

¹⁴⁷ Rejoinder, paras. 48-49.

Respondent's position¹⁴⁸ on Articles 45(1) and 45(2)(b) is a "piecemeal approach" in which "signatory states could invoke their own domestic law to determine which Treaty obligations they would apply provisionally."¹⁴⁹ Under the Respondent's interpretation, for states applying the ECT provisionally, "there would then be no legal obligation of reciprocity whatsoever, either to or from them: signatory states would be free to adopt (or not) their own subjective, non-transparent policies of reciprocity . . . based upon their domestic-law infused provisional application," thereby creating a system in which investors would face the impossible job of deciphering a "non-reciprocal patchwork of 'reciprocity'."¹⁵⁰ The Claimant refers to commentary characterizing such a system as lacking "harmonisation, standardisation or unification of conduct" since "the reach of international law would be limited by approximately [40] internal legal orders."¹⁵¹

84. As the Claimant notes, Article 17(1) of the VCLT provides that "the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree."¹⁵² The Claimant contends that Article 45(2)(c) of the ECT is an example of a provision that expressly provides for provisional application of only part of the ECT, as it requires a signatory that has made a declaration under Article 45(2)(a) to "apply Part VII provisionally . . . to the extent that such provisional application is not inconsistent with [their] laws or regulations."¹⁵³ Thus, "Article 45(2)(c) creates a specific exception where parties are to apply only Part VII."¹⁵⁴ In contrast, the Claimant notes that Article 45(1) does not contain such express authorisation for a signatory to apply provisionally only a part of the Treaty, "mak[ing] clear that the use of 'provisional application' in Articles 45(1) and 45(2)(c) refers to application of the Treaty as a whole."¹⁵⁵
85. The Claimant cites Article 45(2)(a) of the ECT as support for this argument, since the provision entitles the signatory to deliver a declaration after signing the ECT that the

¹⁴⁸ See para. 63 above and Reply, paras. 72, 75.

¹⁴⁹ Rejoinder, para. 52.

¹⁵⁰ Rejoinder, para. 52; T1/146/14 – T1/147/10.

¹⁵¹ Rejoinder, para. 53, *citing* Mertsch, p. 94 (**Exhibit RL-117**).

¹⁵² Counter-Memorial, para. 46.

¹⁵³ Counter-Memorial, para. 52.

¹⁵⁴ Counter-Memorial, para. 52.

¹⁵⁵ Counter-Memorial, paras. 47, 52.

signatory “is not able to accept provisional application.” According to the Claimant, Article 45(2)(a) therefore “provides that a declaration removes ‘[t]he obligation contained in paragraph (1),’ making clear that ‘provisional application’ has the same meaning under both Articles 45(1) and 45(2)(a) (*i.e.*, application of the Treaty as a whole).”¹⁵⁶

86. The Claimant also cites Article 45(2)(b) of the ECT and its “reciprocity of obligations,” providing that “investors of a signatory may not claim [ECT] benefits unless the signatory consents to apply [the ECT] provisionally (*i.e.*, in its entirety).”¹⁵⁷ On such obligations, the Claimant references *Hulley Enterprises* for the proposition that “[a]llowing a State to modulate . . . the obligation of provisional application . . . would undermine the principle that provisional application of a treaty creates binding obligations,”¹⁵⁸ thus “creat[ing] unacceptable uncertainty in international affairs.”¹⁵⁹ It would also mean that one state could be “provisionally applying virtually nothing and receive all of the benefits from states that are applying the whole thing.”¹⁶⁰

87. Commenting on the Respondent’s submissions as to what provisions were provisionally applied by the Russian Federation, the Claimant suggests that “the Russian Federation provisionally applied nothing” but just invited investors to avail themselves of the protections available under existing Russian law.¹⁶¹

88. The Claimant rejects the Respondent’s critique¹⁶² that the *Hulley Enterprises* tribunal’s decision regarding Article 45(1) issues was based merely on policy considerations.¹⁶³ The Claimant notes that Articles 27 and 46 of the VCLT “reflect the strong presumption in international law of the separation of international law and domestic law,” and that, in spite of the Respondent’s arguments to the contrary,¹⁶⁴ these articles are relevant to the interpretation of the Domestic Law Inconsistency Clause.¹⁶⁵ Further, the Claimant notes

¹⁵⁶ Counter-Memorial, para. 48.

¹⁵⁷ Counter-Memorial, para. 49.

¹⁵⁸ Counter-Memorial, para. 50, *citing Hulley Enterprises*, para. 314 (**Exhibit CL-9**).

¹⁵⁹ Counter-Memorial, para. 51, *citing Hulley Enterprises*, para. 315 (**Exhibit CL-9**).

¹⁶⁰ T1/146/25 – T1/147/3.

¹⁶¹ T5/125/7-11.

¹⁶² *See* para. 63 above and Reply, paras. 75-76.

¹⁶³ Rejoinder, paras. 54-55.

¹⁶⁴ *See* para. 51 above and Reply, paras. 40-41.

¹⁶⁵ Rejoinder, para. 56.

that “legal certainty” is more than a policy issue, considering it instead “a fundamental principle of international and national law” that “informs” Articles 27 and 46 of the VCLT.¹⁶⁶ Thus, the Claimant argues that, “if Article 45(1) was to depart from [these principles of international law] it would need to expressly state that that is what it is doing,” noting that Article 45(1) does not do so.¹⁶⁷

89. The Claimant also rejects the Respondent’s citation of Professor Reisman’s critique of the same position that the Claimant has adopted in this arbitration,¹⁶⁸ noting that the Respondent omits a portion of Professor Reisman’s analysis that shows that Professor Reisman, *Hulley Enterprises*, and *Kardassopoulos* are all in accord with the proposition that a signatory state wishing to avoid provisional application “must duly notify in advance that its constitution, laws or regulations disable it from provisional application” and that, for investors having already invested in a State, “Part III and Part V of the ECT remain in force for 20 years with regard to any investments made in that state during the provisional application unless a declaration rejecting the ‘tail’ is made at the time of signature.”¹⁶⁹
90. The Claimant also refers to Article 45(3) of the ECT as a provision allowing a signatory to stop provisionally applying the ECT, but nonetheless simultaneously requiring a signatory to apply Part III and Part V of the ECT with respect to investments that already had been made, unless that signatory is listed in Annex PA.¹⁷⁰ Accordingly, the Claimant sees Article 45(3) as evidence that “application of Parts III and V of the ECT is part of the obligation of provisional application found in Article 45(1),” as “it would otherwise be nonsensical.”¹⁷¹
91. As additional support for its argument that the ECT envisions two categories of provisional application, the Claimant also cites Article 45(6) of the ECT, which states that “signatories shall, in accordance with and subject to the provisions of paragraph (1)

¹⁶⁶ Rejoinder, para. 57.

¹⁶⁷ Rejoinder, para. 58.

¹⁶⁸ See Reply, para. 56.

¹⁶⁹ Rejoinder, paras. 60-61.

¹⁷⁰ Counter-Memorial, para. 53.

¹⁷¹ Counter-Memorial, para. 53.

or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties.” The Claimant contends that Article 45(6) supports its argument that “there are two distinct categories of provisional application . . . application of the Treaty as a whole under Article 45(1) or application only of Part VII under Article 45(2)(c).”¹⁷²

92. The Claimant also cites Article 27 of the VCLT to show that the Respondent is wrong to “invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁷³ As authority for this proposition, the Claimant cites the legal opinions of Professor Crawford and Professor Reisman in *Hulley Enterprises*,¹⁷⁴ as well as the Constitutional Court.¹⁷⁵ The Claimant concedes that, under Article 46(1) of the VCLT, a “narrow exception” applies “[i]f a fundamental provision of internal law ‘regarding competence to conclude treaties’ . . . manifestly precludes the giving of consent to so conclude . . . the treaty.”¹⁷⁶ Nevertheless, the Claimant rejects the notion that the Respondent has suggested or could suggest that this exception applies to the Respondent here.¹⁷⁷ According to the Claimant, the interpretation advanced by the Respondent would give Article 45 of the ECT “the function of a reservation,” and Article 46 of the ECT “precludes any reservations to individual Treaty provisions.”¹⁷⁸
93. The Claimant further rejects the Respondent’s interpretation arguments, noting that “[m]ost of the Respondent’s arguments in support of its . . . approach may be described as supplementary means of interpretation arguments.”¹⁷⁹ The Claimant contends that Article 45(1) of the ECT is not “ambiguous or obscure” and that interpreting the ECT using a plain language approach does not lead to a “manifestly absurd or unreasonable”

¹⁷² Counter-Memorial, para. 54.

¹⁷³ Counter-Memorial, para. 56.

¹⁷⁴ Counter-Memorial, paras. 59-60, *citing Hulley Enterprises*, paras. 316-318 (**Exhibit CL-9**).

¹⁷⁵ Counter-Memorial, para. 57, *citing* Resolution No. 8-P, para. 6 (**Exhibit R-35**).

¹⁷⁶ Counter-Memorial, paras. 61-62, *citing* VCLT, Art. 46(1).

¹⁷⁷ Counter-Memorial, paras. 63-65.

¹⁷⁸ Rejoinder, para. 62.

¹⁷⁹ Counter-Memorial, para. 67.

result. Thus, according to the Claimant, the Respondent's arguments are "unnecessary and should not be considered pursuant to Article 32 of the [VCLT]."¹⁸⁰

94. In any event, the Claimant considers the Respondent's interpretation arguments misguided for several reasons. Firstly, the Claimant notes that a UN General Assembly discussion to which the Respondent refers "concerns the *principle* of provisional application of treaties" but does not support the "piecemeal" provisional application for which the Respondent argues.¹⁸¹ Secondly, the Claimant avers that a work by René Lefeber – cited by the Respondent as authority for the proposition that "in the event of a conflict, domestic laws prevail over inconsistent treaty provisions" – does not, in reality, back up such a proposition.¹⁸² On the contrary, the Claimant notes, quoting Lefeber, that "if a competent organ agrees to the provisional application of a treaty in disregard of such domestic limitations, such disregard will normally not have legal effect at the international level."¹⁸³ Thirdly, on the Respondent's argument regarding state practice, the Claimant notes that the states referred to by the Respondent invoked the "to the extent" language of Article 45(1) of the ECT "solely to exclude," not to limit, provisional application of the ECT.¹⁸⁴
95. Moreover, the Claimant argues that the Respondent "at all relevant times made clear that it was provisionally applying 'the Treaty', not merely some unidentified part of it."¹⁸⁵ As evidence for this proposition, the Claimant highlights the fact that the Respondent failed to notify the ECT Secretariat of any desire to be excepted from provisional application on the basis of either Article 45(1) or Article 45(2)(a) of the ECT, even though the Secretariat had "asked all delegations wishing to make a request to be excepted from provisional application to notify it."¹⁸⁶

¹⁸⁰ Counter-Memorial, para. 67.

¹⁸¹ Counter-Memorial, paras. 72-73 (emphasis in original).

¹⁸² Counter-Memorial, para. 75.

¹⁸³ Counter-Memorial, para. 74, *citing* René Lefeber, "Treaties, Provisional Application," in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (2011), para. 17 (**Exhibit CL-37**).

¹⁸⁴ Counter-Memorial, para. 82.

¹⁸⁵ Counter-Memorial, paras. 84, 90, 95.

¹⁸⁶ Counter-Memorial, paras. 85-87.

96. Furthermore, the Claimant notes that, at the Sixteenth Plenary Session of the Energy Charter Conference, the Respondent joined a declaration stating that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁸⁷ Even further, the Claimant draws evidence from the Energy Charter Conference of December 2002, quoting the Russian delegation as saying that it had “yet to ratify the Energy Charter Treaty, but, as a Signatory Country, it implements the Treaty from the day it entered into force.”¹⁸⁸ The Claimant submits that the “Respondent’s conduct during the treaty negotiations displayed nothing but complete enthusiasm for provisional application.”¹⁸⁹ The Claimant also cites an information bulletin from the website of the Russian Ministry of Foreign Affairs as evidence that the Respondent acknowledged that it was provisionally applying the ECT as a whole.¹⁹⁰
97. The Claimant further contends that, regarding state practice, the Respondent only analyzes the practice of one State – Finland – and that, moreover, the documents it relies on fail to “provide evidence of ‘any agreement’ between the parties or an instrument accepted by the other parties on signature or any ‘subsequent agreement’ or ‘practice’ establishing the agreement of the parties for purposes of Article 31 of the [VCLT].”¹⁹¹ Additionally, the Claimant finds the other documents cited by the Respondent to be irrelevant and, “in any event, consistent with the Claimant’s interpretation.”¹⁹²
98. The Claimant argues that state practice in fact provides support for its interpretation, noting that, during the negotiating process, an “emphasis on legal certainty prevailed over opposition from various delegations”¹⁹³ and referring to the Energy Charter Conference Secretariat’s request to the delegations that they notify the Secretariat of their intention

¹⁸⁷ Counter-Memorial, para. 87, *citing* ECT, pp. 157-158 (**Exhibit C-1**); Note from the European Energy Charter Conference Secretariat, Document 42/94-CONF 115 (6 January 1995) (“**Note from the European Energy Charter Conference Secretariat**”), p. 4 (**Exhibit C-145**).

¹⁸⁸ Counter-Memorial, para. 88, *citing* Statement by the Delegation of the Russian Federation to the Energy Charter Conference (17-18 December 2002) (“**Statement by Delegation of Russia**”) (**Exhibit C-118**); Rejoinder, para. 11.

¹⁸⁹ T5/172/6-8.

¹⁹⁰ Counter-Memorial, para. 89; Rejoinder, para. 12; T1/136/16 – T1/137/8

¹⁹¹ Counter-Memorial, para. 91.

¹⁹² Counter-Memorial, para. 92.

¹⁹³ Rejoinder, para. 63.

not to provisionally apply the ECT.¹⁹⁴ The Claimant notes that nine states – Iceland, Malta, Bulgaria, Cyprus, Switzerland, Turkmenistan, Norway, Japan, and Poland – made declarations pursuant to Article 45(2)(a), and that Hungary made a declaration citing Article 45 without specifying a particular paragraph.¹⁹⁵ The Claimant cites the *Hulley Enterprises* decision, which highlighted that no state relied on Article 45(1) for “selective or partial application of the ECT based on the non-application of only those individual provisions that are claimed to be inconsistent with a signatory’s domestic law.”¹⁹⁶ According to the Claimant, the Respondent has not provided evidence that any signatory that did not give notice or make a declaration adopted the Respondent’s “piecemeal approach” to Article 45(1).¹⁹⁷

99. The Claimant also refers to the Decision of the Energy Charter Conference of 7 December 2000 recording the termination of certain transitional arrangements contained in Annex T by Armenia and Russia, noting that the decision does not suggest an understanding that, after the transitional arrangements were terminated, Russia would only apply in part the substantive obligations referred to in Article 32(1), since such a point would have been recorded.¹⁹⁸ The Claimant sees further support for its interpretation of Article 45(1) in “the practice of the ECT Secretariat concerning transitional provisions in Article 32 in relation to, *inter alia*, Article 10(7) on non-discrimination.”¹⁹⁹
100. The Claimant submits that GATT practice is not informative on this point because the provisional application regime is different.²⁰⁰
101. The Claimant also rejects the Respondent’s notion that the 1994 Joint EC Statement is relevant.²⁰¹ Again turning to *Hulley Enterprises*, the Claimant argues that “[t]he [1994

¹⁹⁴ Rejoinder, para. 64.

¹⁹⁵ Rejoinder, para. 71.

¹⁹⁶ Rejoinder, para. 72, *citing* *Hulley Enterprises*, para. 321 (**Exhibit CL-9**). *See also* T1/151/19 – T1/153/6.

¹⁹⁷ Rejoinder, para. 84.

¹⁹⁸ Rejoinder, para. 74, *citing* Decision of the Energy Charter Conference, CCDEC 2000, 14 NOT Brussels (7 December 2000) (**Exhibit R-104**).

¹⁹⁹ Rejoinder, para. 74, *citing* European Commission, Communication from the Commission to the Council and the European Parliament on the signing and provisional application by the European Communities of the European Charter Treaty, COM(94) 405 final (21 September 1994) (**Exhibit R-19**).

²⁰⁰ T5/149/7-15.

²⁰¹ Counter-Memorial, para. 94.

Joint EC Statement] does not say, and cannot be read as meaning, that certain elements of the ECT will not be provisionally applied by the European Community because they are inconsistent with the Community's internal legal order."²⁰² Rather, the Tribunal in *Hulley Enterprises* found that "the [1994 Joint EC Statement] concludes that the European Community can safely sign the ECT, and accept the obligation of provisional application, without taking on any obligation to do anything that is beyond its competence."²⁰³ Accordingly, the 1994 Joint EC Statement is "not so much an example of partial provisional application of the ECT due to inconsistency with the EC's legal order, as . . . an example of the EC's partial jurisdiction for the provisional application of the whole ECT."²⁰⁴

102. The Claimant notes that there is no suggestion in the statement that the European Community thought that individual provisions of the ECT could be applied provisionally on a piecemeal basis.²⁰⁵ Rather, when the European Court of Justice issued Opinion 1/94, holding that there were certain categories of treaties that the European Commission did not have competence to commit to, the European Community took the view that each of the European Commission and Member States could commit to the provisions that they were competent to commit to, and the result was provisional application of the entire treaty.²⁰⁶
103. The Claimant additionally rejects that the Bamberger and Loibl articles referred to by the Respondent are relevant, since "[t]he opinions of publicists as to the interpretation of a treaty are not supplementary means of treaty interpretation."²⁰⁷
104. Regarding the Respondent's argument that it never received the benefits of provisional application, the Claimant disagrees, contending that Russia was "anxious to bind as many signatories as possible to immediate provisional application of the Treaty," since signing the ECT was one part of a larger plan to attract foreign capital following the collapse of

²⁰² Counter-Memorial, para. 94, citing *Hulley Enterprises*, para. 327 (**Exhibit CL-9**).

²⁰³ Counter-Memorial, para. 94, citing *Hulley Enterprises*, para. 327 (**Exhibit CL-9**).

²⁰⁴ Counter-Memorial, para. 94, citing *Hulley Enterprises*, para. 327 (**Exhibit CL-9**).

²⁰⁵ T1/154/3-9.

²⁰⁶ T1/155/2-25.

²⁰⁷ Counter-Memorial, paras. 95-96.

the USSR.²⁰⁸ The Claimant adds that the Respondent provisionally applied the ECT until it notified the ECT depository in 2009, a period in which it received “substantial foreign investment” in the energy sector.²⁰⁹

105. Further, the Claimant rejects the Respondent’s citation of a 2006 statement by the Secretary of State for Foreign and Commonwealth Affairs to the UK House of Commons,²¹⁰ noting that the statement is “irrelevant” and contending that, in any event, the statement is consistent with the Claimant’s interpretation.²¹¹

2. Is Article 26 or its provisional application inconsistent with Russia’s constitution, laws or regulations?

(a) The Respondent’s position

106. The Respondent contends that Article 26 of the ECT is, for purposes of Article 45(1) of the ECT, inconsistent with the Russian Federation’s “constitution, laws or regulations.” It argues that any ECT provision that imposes an obligation that cannot be fulfilled in conformity with domestic law, or that grants a right that cannot be exercised in conformity with domestic law, is inconsistent with the signatory’s domestic law for the purposes of Article 45(1).²¹²

107. The Respondent argues that since “Article 26 ECT is a treaty provision that is inconsistent with Russian law,” as long as the Russian Federation has not ratified the ECT,²¹³ the provisional application of Article 26 of the ECT “at least beyond six months” is inconsistent with the Russian Federation’s “constitutions” and “laws” for the purposes of Article 45(1) of the ECT.²¹⁴ The Respondent further contends that the provisional application of Article 26 of the ECT “has at all relevant times been inconsistent with Russian laws prohibiting the arbitration of disputes arising out of public law relations,”

²⁰⁸ Rejoinder, paras. 76-78.

²⁰⁹ Rejoinder, para. 79.

²¹⁰ See para. 72 above and Reply, para. 116.

²¹¹ Rejoinder, para. 86.

²¹² T1/22/17-23.

²¹³ Memorial, para. 62.

²¹⁴ Memorial, para. 64.

and that, for this reason, the provisional application of Article 26 is inconsistent with the Respondent's laws for the purposes of Article 45(1) of the ECT.²¹⁵

108. As support for this argument, the Respondent appeals to the principle of the separation of powers, citing the 1993 *Constitution of the Russian Federation* (the “**Constitution**”) and the Russian *Federal Law on International Treaties of the Russian Federation* (the “**FLIT**”).
109. Addressing the argumentation of the Claimant, the Respondent takes the view that the Claimant “conflates fundamentally different concepts of the law of treaties,” thereby “repeatedly mischaracteriz[ing] Respondent’s signature of the ECT as an expression of ‘consent to be bound’ by the ECT.”²¹⁶ The Respondent notes that the ECT includes an express ratification requirement, pointing out that, as a consequence, the Respondent “never consented to be bound by the ECT, and the ECT never entered into force for Respondent.”²¹⁷ According to the Respondent, “by signing the ECT, subject to ratification . . . , Respondent did not consent to be bound by the Treaty,” but merely agreed to “apply the ECT provisionally ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’.”²¹⁸
110. In particular, the Respondent refers to Article 106(d) of the Constitution, which provides that the State Duma (the lower chamber of the Federal Assembly) must adopt federal laws on the “ratification and denunciation of international treaties of the Russian Federation,” pointing out that these laws are then subject to mandatory consideration by the Council of the Federation (the upper chamber of the Federal Assembly). When these constitutional requirements are not complied with, the fundamental principle of the separation of powers under the Constitution is violated.²¹⁹ Specifically, the Respondent states that the Russian Federation splits treaty-making powers between the executive and Parliament, with the President (or Government) having the power to negotiate and sign treaties, the Federal Assembly having authority to ratify treaties by adopting a federal

²¹⁵ Memorial, para. 65.

²¹⁶ Reply, para. 28.

²¹⁷ Reply, para. 31; T1/7/6-9.

²¹⁸ Reply, para. 32.

²¹⁹ Memorial, para. 56, *citing* the Constitution of the Russian Federation (12 December 1993) (“**Constitution**”) (**Exhibit R-21** and **Exhibit AVA-1**).

law, and the president having the power to sign that federal law as well as the ratification instrument prepared on the basis of that federal law.²²⁰ Quoting from Professor Asoskov's second opinion, the Respondent concludes that the Russian Government "does not have the power to express consent to be bound by the treaty on behalf of the Russian Federation."²²¹

111. The Respondent also refers to Articles 6(2), 14, 15(1)(a), and 15(2) of the FLIT, which implement the principle of separation of powers in the context of the treaty making process. These articles provide a requirement that certain categories of treaties, including those "whose implementation requires amendment of existing legislation or enactment of new federal laws, or that set out rules different from those provided for by a law" must be ratified through the enactment of a federal law.²²² The Respondent says that Professor Stephan accepts that the Government may not express the Russian Federation's consent to be bound by a treaty which sets out rules different from those provided for by federal law – except where there is provision for provisional application.²²³ He thus accepts that the Government lacks competence to enact, amend or supplement federal laws – except to the extent that the Government is authorised to implement orders by the president under Article 90 of the Constitution that do not contradict Russian law.²²⁴
112. Additionally, Article 23(1) of the FLIT states that "[a]n 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."²²⁵ The Respondent notes that Article 23(2) of the FLIT provides a requirement that the provisional application of a legislative treaty must be submitted to the State Duma within six months of the beginning of the treaty's provisional application;²²⁶ Professor Asoskov's evidence was that this was to enable

²²⁰ Reply, para. 158.

²²¹ Reply, para. 160.

²²² Memorial, para. 58, *citing* Law "On International Treaties of the Russian Federation" (15 July 1995) ("**FLIT**"), Art. 15(1)(a) (**Exhibit R-24** and **Exhibit AVA-52**). *See also* Reply, para. 163.

²²³ T2/166/14-22; T2/167/16 – T2/169/19.

²²⁴ T2/167/6-15.

²²⁵ Memorial, para. 59.

²²⁶ Memorial, para. 59.

parliament to have the “final say,” even though the treaty could not derogate from federal law by provisional application.²²⁷

113. The Respondent also notes that the FLIT’s predecessor, the Law of the USSR dated 6 July 1978 “On the Procedure for Conclusion, Performance, and Denunciation of International Treaties of the USSR” (the “**USSR FLIT**”), which remained in force when the ECT was signed, contained ratification requirements that were similar to those of the future FLIT. These ratification requirements were “applicable, inter alia, to ‘treaties providing for rules different from those contained in the USSR legislative acts,’ as well as to ‘international treaties of the USSR . . . where the contracting parties have agreed on subsequent ratification when concluding the treaty’.”²²⁸ The Respondent asserts that Professor Stephan agrees that the same wording is present in the 1978 and 1995 Laws (with the exception of the last sentence), but stresses that the constitutional order had changed significantly, including the creation of the institution of the president as part of the executive (whereas the Presidium had previously been part of the legislature).²²⁹
114. The Respondent rejects the Claimant’s argument that, pursuant to Article 15(4) of the Constitution, “treaties are incorporated into the Russian legal system ‘at the time of expression of valid consent’ and automatically prevail over Russian law.”²³⁰ The Respondent notes that Article 15(4) of the Constitution is a conflict of law rule that “grant[s] priority in application to treaty provisions that establish ‘other rules than those envisaged by law’” and “is not implicated where the terms of the treaty set a limit on its application by reference to inconsistent domestic law.”²³¹
115. Additionally, the Respondent contends that, whilst a treaty may be incorporated into Russian law pursuant to Article 15(4) of the Constitution, this “does not mean that its provisions prevail over Russian domestic law.”²³² According to the Respondent, quoting from Professor Asoskov’s Second Opinion, the “prevailing interpretation of Article 15(4)

²²⁷ T2/117/7-13.

²²⁸ Reply, para. 164, *citing* Law of the USSR “On the Procedure for Conclusion, Performance, and Denunciation of International Treaties of the USSR” (6 July 1978), Art. 12 (**Exhibit AVA-54**).

²²⁹ T2/190/21 – T2/192/1.

²³⁰ Reply, para. 131.

²³¹ Reply, paras. 133-137.

²³² Reply, para. 138.

of the Constitution, as applied by the Supreme Court and supported by the Constitutional Court, is that non-ratified treaties (including those applied on a provisional basis pending their entry into force for the Russian Federation) have no priority over federal laws and other legal acts having a higher rank in the hierarchy of sources of Russian law.”²³³

116. Thus, the Respondent submits that it is “firmly established in Russian law that the executive is not authorized to express the Russian Federation’s consent to be bound by a treaty that requires ratification through the enactment of a federal law by the Federal Assembly.”²³⁴ Decisions to consent to be bound by a treaty shall be adopted by state authorities “in accordance with their competence” (Article 6(1) of the FLIT) so where ratification is within the exclusive competence of the Federal Assembly (pursuant to Article 160 of the Constitution and Article 14 of the FLIT), the executive may sign the treaty but may not express the Respondent’s consent to be bound.²³⁵ The executive may also agree to provisional application, but in the absence of ratification such a treaty has the status of a treaty concluded without parliamentary approval and is accordingly hierarchically subordinate to federal laws.²³⁶
117. The Respondent further contends that “[i]n implementing an unratified treaty, including a provisionally applied treaty, the Government may . . . not amend, derogate from or supplement federal laws.”²³⁷ Referring to a Supreme Court decision (the *Chinese trespassers case*),²³⁸ the Respondent asserts that “if the Government expresses consent to be bound by a treaty containing rules different from those stipulated in federal laws . . . the provisions of the treaty may not be applied.”²³⁹ That treaty provided for entry into force on the international level by an exchange of notes and not ratification, and had not been ratified domestically, and in those circumstances the treaty would not apply in the

²³³ Reply, para. 141, *citing* Second Expert Report of Professor Anton V. Asoskov (2 March 2015) (“**Asoskov 2**”), para. 66. Professor Stephan accepts that Article 15(4) does not distinguish between a treaty in force and a treaty that is being applied provisionally “[a]s to the immediate impact in the Russian legal system”; T2/171/8-13.

²³⁴ T1/40/9-13.

²³⁵ T1/40/17 – T1/41/6.

²³⁶ T1/41/7 – T1/42/3.

²³⁷ Reply, para. 170.

²³⁸ Cassation Ruling of the Supreme Court of the Russian Federation No. 59-O09-35 (29 December 2009) (“**Supreme Court Cassation Ruling**”) (Exhibit AVA-61).

²³⁹ Reply, para. 171.

domestic system to the extent that it provided rules different to those of federal law; the Respondent submits that Professor Stephan accepted that characterisation.²⁴⁰

118. According to the Respondent, these constitutional constraints “apply with equal force in the context of treaties that are applied on a provisional basis,” meaning that the implementation of “treaty provisions that require amendment of existing or enactment of new legislation or that set out rules different from those provided for by law” is “inconsistent with the Russian Constitution.”²⁴¹ So the Respondent cites a recent decision of the Constitutional Court for the proposition that a derogation from the requirement that a dispute must be heard in the arbitrazh courts cannot be adopted by the executive but must be provided by federal law.²⁴² According to the Respondent, these restrictions derive from the Constitution’s limitation on executive powers and the principles of separation of powers, the rule of law and the requirement that the executive must act on the basis of federal laws.²⁴³
119. Referring to the *Chinese trespassers case*, the Respondent relies on Professor Asoskov’s testimony to the effect that limitations on the implementation of a provisionally applied treaty translate into limitations on the executive’s power to consent to provisional application, such that the executive is not authorised to consent to apply a treaty provisionally to the extent that it would lack the power to implement it.²⁴⁴ So, pursuant to Article 15(4) of the Constitution, only a treaty consent to be bound which was given in the form of a federal law prevails over federal laws; in this respect, Professor Asoskov relies on Resolutions of the Plenum of the Supreme Court which are not concerned specifically with provisional application but are said to be generally applicable.²⁴⁵ According to the Respondent, Professors Asoskov and Stephan agree that Article 15(4)

²⁴⁰ T2/164/18 – T2/165/23.

²⁴¹ Reply, para. 173.

²⁴² T5/31/18 – T5/32/6.

²⁴³ T5/37/9-21.

²⁴⁴ T5/38/5-18.

²⁴⁵ T5/39/6-10, *citing* Resolution of the Plenum of the Supreme Court No. 8 “On Certain Issues of Application by Courts of the Constitution of the Russian Federation in Administering Justice” (31 October 1995) (**Exhibit AVA-79**); Resolution of the Plenum of the Supreme Court No. 5 “On Application by Courts of General Jurisdiction of Generally Recognized Principles and Rules of International Law and International Treaties of the Russian Federation” (10 October 2003) (“**Ruling 2531-O**”) (**Exhibit AVA-80**); Constitutional Court Ruling 2531-O (6 November 2014) (**Exhibit AVA-86**). *See* Professor Asoskov’s testimony at T2/40/15-25.

applies to both treaties that have entered into force and provisionally applied treaties.²⁴⁶

The Respondent submits that Professor Osminin's opinion that the government may derogate from federal law by consenting to provisional application is a minority view based on disapproval of the relevant jurisprudence.²⁴⁷

120. The Respondent contends that “[n]either of the two court decisions cited by Claimant and its expert for the proposition that the terms of a provisionally applied treaty necessarily apply *in lieu* of Russian federal law supports such a proposition.”²⁴⁸ Resolution 8-P holds that agreement to provisional application of a treaty means that the treaty becomes part of Russian law and must be applied on the same basis as treaties that have entered into force, but the Russian Federation may condition provisional application of a treaty prior to its entry into force by compliance with the Constitution, laws and other regulatory acts of the Russian Federation.²⁴⁹ The Respondent argues that Professor Stephan accepts that this expression refers to the same three types of legal acts as Article 45(1) of the ECT: the constitution, laws and regulations.²⁵⁰

121. The Respondent submits that this confirms the general application of Article 15(4) of the Constitution, but the treaty in question takes its place in the hierarchy of Russian law according to the body that expressed consent to be bound by it. So where consent to be bound (or consent to provisional application) was expressed by the government, the treaty is incorporated at the level of a government resolution and does not prevail over federal law.²⁵¹

122. The Respondent also disputes the Claimant's assertion²⁵² that signatories of the ECT expressly recognized, in the sixteenth understanding of the Final Act of the Energy Charter Conference²⁵³, the possibility that Article 26 of the ECT would be incorporated

²⁴⁶ T5/39/24 – T5/440/4.

²⁴⁷ T5/40/10-20.

²⁴⁸ Reply, para. 142.

²⁴⁹ Resolution No. 8-P (**Exhibit R-35**).

²⁵⁰ T2/176/4-8.

²⁵¹ T5/43/10 – T5/45/20, *citing* Ruling 2135-O (**Exhibit AVA-86**). *See also* T2/113/10 – T2/114/5.

²⁵² *See* para. 96 above and Counter-Memorial, paras. 127-128.

²⁵³ Understanding16: “With respect to Article 26(2)(a) Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.” (**Exhibit C-1**).

into domestic legal systems and would prevail over conflicting domestic law.²⁵⁴ The Respondent contends that, “[o]n its face, Understanding No. 16 does nothing more than clarify that an ECT Contracting Party is not required to enact the substantive investment protections in Part III into its domestic law in order to allow an investor to submit a dispute to its courts or administrative tribunals, recognizing that self-executing treaty provisions are directly applicable in the legal systems of many ECT Contracting Parties,” and that “Understanding 16 thus does not go to the question whether or not arbitration of the present dispute is consistent with Respondent’s ‘constitution, laws or regulations’.”²⁵⁵

123. The Respondent further rejects the argument of the Claimant that Article 26 of the ECT and Russian law cannot possibly be inconsistent because President Yeltsin signed the ECT and thereby expressed the consent of the Respondent State to be bound by the ECT.²⁵⁶ The Respondent notes that the ECT was not signed by President Yeltsin but rather by the Deputy Chairman of the Government of the Russian Federation, Mr Davydov.²⁵⁷ It challenges Professor Stephan’s opinion that the powers of the President to negotiate and to sign treaties are exclusive, and that Mr Davydov as a member of the Government was acting under a form of delegation.²⁵⁸ In addition, the Respondent points out that, since Article 39 of the ECT expressly required ratification of the Treaty, its signature was “only ‘a stage in the conclusion of’ the ECT.”²⁵⁹

124. The Respondent rejects the Claimant’s view²⁶⁰ that Russian domestic law and Article 26 of the ECT cannot be inconsistent since the Claimant seeks to enforce rights that arise under the ECT and that are interpreted pursuant to public international law.²⁶¹ The Respondent submits that the Claimant ignores the fact that Article 26 of the ECT is qualified by the Domestic Law Inconsistency Clause of Article 45(1), and argues that the

²⁵⁴ Reply, para. 150.

²⁵⁵ Reply, para. 150.

²⁵⁶ Reply, para. 152.

²⁵⁷ Reply, paras. 152-153.

²⁵⁸ T2/138/10 – T2/154/18.

²⁵⁹ Reply, para. 157.

²⁶⁰ See para. 144 below and Counter-Memorial, para. 116.

²⁶¹ Reply, para. 197.

two textbooks cited by the Claimant in this regard²⁶² are not relevant to addressing this issue.

125. The Respondent also rejects the Claimant's expert's contention that Yukos Capital's claims are arbitrable because the Claimant does not request the annulment of public acts such as tax assessments, enforcement measures, and decisions of the receiver in bankruptcy proceedings.²⁶³ Professor Stephan's evidence is that matters such as tax assessments must be challenged before the Russian courts "[a]bsent some derogation."²⁶⁴ The Respondent cites Professor Asoskov as authority for the proposition that a review of the legality of such acts would be "inevitably" necessary to determining compensation claims derived from those acts of governmental authority.²⁶⁵ The Respondent also quotes Professor Skvortsov in concluding that "a dispute for compensation of damages caused by the unlawful actions of State bodies and their officials exercising their public law functions may not be referred for resolution to an arbitral tribunal."²⁶⁶
126. The Respondent argues that disputes between a foreign investor and the host state are generally within the jurisdiction of the host state's courts, regardless of whether the investor invokes protections under treaty or domestic law.²⁶⁷ Under Russian law, claims for the wrongful exercise of state power are heard by the courts of general jurisdiction and the arbitrazh courts.²⁶⁸
127. The Respondent further argues, citing the First Opinion of Professor Asoskov, that certain public law disputes "have always been non-arbitrable under Russian law," including disputes regarding tax assessment, sanctions levied by tax authorities, the enforcement of

²⁶² Counter-Memorial, para. 116, *citing* Campbell McLachlan, Laurence Shore, & Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007), para. 3.51 (**Exhibit CL-39**); Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009) ("**Douglas**"), para. 141 (**Exhibit CL-35** and **Exhibit RL-64**).

²⁶³ Reply, para. 199.

²⁶⁴ T2/176/9 – T2/177/21.

²⁶⁵ Reply, para. 199, *citing* Expert Report of Professor Anton V. Asoskov (28 July 2014) ("**Asoskov 1**"), paras. 69-70; Asoskov 2, paras. 95-96.

²⁶⁶ Reply, para. 199, *citing* O. Yu. Skvortsov, "About Certain Matters Concerning Recovery of Damages in Arbitration Proceedings," in *DAMAGES AND PRACTICE OF THEIR RECOVERY: COLLECTION OF PUBLICATIONS* (M.A. Rozhkova, ed., 2006) ("**Skvortsov**"), pp. 525-526 (**Exhibit AVA-32**).

²⁶⁷ T1/26/17-21.

²⁶⁸ T1/27/4-7.

decisions by tax authorities, actions or omissions of state authorities in enforcement proceedings, and bankruptcy issues.²⁶⁹ Specifically, the Respondent claims that “arbitration of the present dispute is inconsistent with Russian federal laws, including the Tax Code, the Civil Procedure Code, the Arbitrazh Procedure Code, the Law ‘On Enforcement Proceedings’ and the Law ‘On Insolvency (Bankruptcy) of Business Entities’.”²⁷⁰

128. Addressing the Claimant’s view that limitations on arbitrability are not applicable to state authorities acting in a public law capacity,²⁷¹ the Respondent contends that this “turns the principle of non-arbitrability on its head.”²⁷² According to the Respondent, “[p]ublic law disputes are not arbitrable precisely because the principles of freedom of contract and procedural discretion, which allow parties to refer disputes to arbitration in the sphere of private law, are not present in the sphere of public law.”²⁷³ As a consequence, the Respondent quotes Professor Asoskov to the effect that a legal regulation that involves an exercise of sovereign power is a public law regulation (alleging that the Claimant chose not to cross-examine Professor Asoskov on this point²⁷⁴) and “[p]ublic law disputes are not arbitrable unless a federal law expressly provides an exemption.”²⁷⁵
129. Specifically, the Respondent argues that this dispute is to be settled in the Moscow Arbitrazh Court pursuant to Article 35 of the 2002 Arbitrazh Procedure Code.²⁷⁶ Article 4(6) of that Code authorises parties to displace the jurisdiction of the arbitrazh courts by virtue of an arbitration agreement only if the dispute arises out of civil law relations, which, according to Professor Asoskov, are relations based on the principle of coordination, as opposed to public law relations, which are based on the principle of

²⁶⁹ Memorial, para. 69, *citing* Asoskov 1, para. 12. *See also* Reply, para. 200.

²⁷⁰ Reply, para. 175.

²⁷¹ *See* paras. 161-162 below.

²⁷² Reply, para. 178.

²⁷³ Reply, para. 178.

²⁷⁴ T5/3/19-24, *citing* Asoskov 1, paras. 30, 32.

²⁷⁵ Reply, para. 179. *See also* T5/8/7-19, *citing* decisions annexed as Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11535/13 (28 January 2014) (**Exhibits AVA-18**); Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11059/13 (11 February 2014) (**AVA-19**); Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 3515/00 (10 April 2001) (**Exhibit AVA-20**).

²⁷⁶ T1/27/11-22, *citing* Asoskov 2, para. 75.

subordination or involve a state party, public interest and the expenditure of public funds,²⁷⁷ or otherwise “involves appreciation of [the] legality of the legal acts of state or municipality.”²⁷⁸ The Respondent says that on either standard the present dispute that concerns taxation measures, tax enforcement measures and bankruptcy issues, arises out of public law relations and thus cannot be referred to arbitration.²⁷⁹ The consequence is that, according to the Constitutional Court, “the current legal system does not permit the arbitration of disputes arising out of administrative and other public law relations” unless there is a derogation provided by federal law.²⁸⁰ Professor Stephan’s response is that “‘do not allow’ is not the same as ‘forbid’.”²⁸¹ The Respondent cites a decision of the Supreme Arbitrazh Court and commentary in support, but accepts that there is no case holding that a claim based on the breach of an investment treaty is not arbitrable in Russia.²⁸² Professor Stephan accepts that neither the Civil Procedure Code nor the Arbitrazh Code contain any authorisation to refer disputes arising out of public law relations to arbitration, but says that nor do they contain any “language of prohibition.”²⁸³

130. The Respondent emphasizes that several laws on foreign investment, namely the *1991 Fundamentals of Legislation on Foreign Investments in the USSR* (the “**USSR Fundamentals**”), the *1991 Law on Foreign Investments in the RSFSR* (the “**1991 FI Law**”) and the *1999 Law on Foreign Investments in the Russian Federation* (the “**1999 FI Law**”), do not provide any exception to this general rule of non-arbitrability of public law disputes.
131. In the first place, the Respondent contends that these laws do not apply to the present dispute,²⁸⁴ arguing that, in order for a transaction to qualify as a “foreign investment”

²⁷⁷ T1/27/23 – T1/28/23.

²⁷⁸ T2/102/24 – T2/103/4.

²⁷⁹ T1/28/24 – T1/31/25.

²⁸⁰ T5/2/24 – T5/3/1, *citing* Resolution of the Constitutional Court of the Russian Federation No. 10-P (26 May 2011) (**Exhibit AVA-2**). *See also* T2/181/1 – T2/184/2.

²⁸¹ T2/180/24-25. *See also* T2/181/1 – T2/182/18, *discussing* Ruling of the Constitutional Court of the Russian Federation No. 5-O (5 January 2015) (**Exhibit AVA-94**).

²⁸² T5/3/25 – T1/86, *citing* Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 17043/11 (3 April 2012) (**Exhibit AVA-21**); Skvortsov (**Exhibit AVA-32**); S. Krupko, *INVESTMENT DISPUTES BETWEEN A STATE AND A FOREIGN INVESTOR: A TRAINING AND PRACTICAL GUIDE* (2002) (**Exhibit AVA-33**).

²⁸³ T2/177/22 – T2/180/10.

²⁸⁴ Memorial, paras. 70-71.

under Russian law, foreign capital must be injected into “objects of entrepreneurial activity” in the territory of the Russian Federation and result in a capital increase in the Russian economy from foreign resources.²⁸⁵ The Loans do not meet these requirements for a “foreign investment” as they “were in fact profits made by Yukos Oil Company’s trading subsidiaries and other entities controlled by Yukos Oil Company” and failed to involve any “injection of foreign capital into the Russian Federation.”²⁸⁶

132. In any event, the Respondent submits that the abovementioned laws “do not authorize the submission of investment disputes arising out of public law relations to arbitration.”²⁸⁷ Thus, both Article 43 of the USSR Fundamentals and Article 9 of the 1991 FI Law would only allow investment disputes “arising out of civil law relations” to be submitted to arbitration, whilst state courts would have jurisdiction over disputes regarding sovereign acts or omissions unless (in the words of the 1991 FI Law) “another procedure is established by an international treaty in force in the territory of the RSFSR.”²⁸⁸

133. In like manner, according to Article 10 of the 1999 FI Law, investment disputes would be arbitrable only “in accordance with international treaties of the Russian Federation and its federal laws.”²⁸⁹

134. The Respondent argues that Article 10 of the 1999 FI Law itself “does not address the issue of arbitrability,” as it merely “conditions an investor’s right to submit investment disputes to arbitration on an international treaty or a federal law providing for such a right.”²⁹⁰ The Respondent submits that “[n]o federal law has been enacted that authorises the arbitration of disputes arising out of public law relations, including claims for compensation based on allegedly unlawful taxation measures, enforcement measures related to tax assessments or actions or omissions of State organs in bankruptcy

²⁸⁵ Memorial, paras. 72-73; T1/36/9-18.

²⁸⁶ Memorial, para. 73.

²⁸⁷ Memorial, para. 74. *See also* Reply, paras. 176-181.

²⁸⁸ Memorial, paras. 74-75, *citing* Fundamentals of Legislation on Foreign Investments in the USSR adopted by the Supreme Council of the USSR under No. 2302-1 (5 July 1991), Art. 43 (**Exhibit AVA-34**); Law of the RSFSR No. 1545-1 “On Foreign Investments in the RSFSR” (4 July 1991) (“**1991 FI Law**”), Art. 10 (**Exhibit AVA-35**). Federal Law No. 160-FZ “On Foreign Investments in the Russian Federation” (9 July 1999) (“**1999 FI Law**”), Art. 9 (**Exhibit AVA-36**).

²⁸⁹ Memorial, para. 78, *citing* 1999 FI Law, Art. 10 (**Exhibit AVA-36**).

²⁹⁰ Memorial, para. 78, *citing* Asoskov 1, paras. 98-110.

matters.”²⁹¹ The Respondent relies on Professor Asoskov’s evidence that Article 10 is a “declaratory norm” or “blanket provision” which does not itself provide an independent basis for resort to arbitration.²⁹² The consequence is that, although the provision does not prohibit arbitration, a claimant must be able to point to another federal law or treaty which provides for the right to arbitrate.²⁹³ Where a treaty provides for arbitration, it must either be ratified or (where provisionally applied) the treaty terms must be permitted by Russian law.²⁹⁴ The consequence is that, under current law, it is never possible to provide for provisional application of an international treaty’s provision for investor-state dispute settlement through arbitration.²⁹⁵

135. The Respondent submits that the reference to treaties in force in the 1991 FI Law means ratified treaties, consistent with the distinction in the VCLT between the entry into force of a treaty and its provisional application,²⁹⁶ while the references to an “international treaty of the Russian Federation” in the 1999 Law means an international agreement concluded by Russia,²⁹⁷ to which Russia had given consent to be bound.²⁹⁸ The ECT is not, according to the Respondent, a treaty to which the Respondent has consented to be bound.²⁹⁹
136. The Respondent submits that it does not matter at which time piecemeal provisional application is assessed, since disputes such as the present dispute have always been non-arbitrable. While states may have been free to change their law during the period of provisional application, it was expected that “more of it [would become] provisionally applicable over time.”³⁰⁰ Nevertheless, the Respondent submits that the question of

²⁹¹ Memorial, para. 78.

²⁹² T5/9/13-21, *citing* Asoskov 1, paras. 91-111; T2/109/17-24.

²⁹³ T5/46/7 – T5/47/11. *See also* T2/110/11-22.

²⁹⁴ T5/49/4-25.

²⁹⁵ T5/50/1-9.

²⁹⁶ T5/12/14 – T5/13/16; T5/41/8 – T5/42/18.

²⁹⁷ FLIT, Art. 2(a) (**Exhibit R-24**).

²⁹⁸ FLIT, Art. 2(d) (**Exhibit R-24**).

²⁹⁹ T5/42/19 – T5/43/9.

³⁰⁰ T5/10/1 – T5/12/13; T5/60/1-13.

whether the Russian Federation consented to arbitration must be assessed by reference to the 1991 FI Law in force when the ECT was signed.³⁰¹

137. The Respondent further argues that there are no federal laws that authorise arbitration of the present dispute. Because the ECT, “through the renvoi to Russian federal law” in Article 45(1), provides for arbitration only to the extent not inconsistent with Russian federal laws, the ECT does not “establish another procedure for the resolution of investment disputes”; such disputes are exclusively within the jurisdiction of domestic courts.³⁰²
138. According to the Respondent, the provisions that the Claimant relies on “do not delegate legislative power to the executive to derogate from the principle of non-arbitrability of public law disputes,” but merely “refer to treaties that have been ratified by Parliament through the enactment of a federal law, as Respondent’s consistent practice in the conclusion of bilateral investment treaties confirms.”³⁰³ In other words, the laws on foreign investment do not authorise the executive to submit the present dispute to arbitration.³⁰⁴
139. The Respondent notes that it is a party to 57 bilateral investment treaties that were subject to ratification.³⁰⁵ The Russian ratification instruments regarding these BITs were accompanied by explanatory notes, which the Respondent argues demonstrate that “investor-State arbitration provisions ‘set out rules different from those provided for by law’ within the meaning of Article 15(1)(a) FLIT, i.e., they derogate from federal laws.”³⁰⁶ The same position prevailed under the 1978 Law.³⁰⁷ According to the Respondent, the relevant arbitration provisions “require ratification because, absent

³⁰¹ T5/14/8 – T5/15/2.

³⁰² T1/37/3 – T1/37/19.

³⁰³ Reply, para. 186. *See also* Memorial, paras. 62-64.

³⁰⁴ T1/37/20-21.

³⁰⁵ A number of the explanatory notes accompanying these treaties were put in evidence. The Respondent also referred to the texts of two of the treaties themselves, those between the USSR and the Netherlands (**Exhibit RL-174**) and between the Russian Federation and Denmark (**Exhibit CL-78**), both of which refer to the treaties entering into force on the completion of internal procedures: T2/194/2 – T2/195/17.

³⁰⁶ Reply, para. 187, *citing* Memorial, paras. 62-63. *See also* T1/32/1 – T1/34/16; T2/187/14 – T2/190/16; T5/18/10 – T5/19/20.

³⁰⁷ T1/35/19-23.

ratification, they are inconsistent with Russian law.”³⁰⁸ The Respondent notes that none of those BITs contained a provisional application clause (and all were ratified) and suggests that there is accordingly “no ... practice” of the Russian Federation provisionally applying investment treaties.³⁰⁹ The Respondent notes that Professor Stephan testified that he was not aware of any investment treaty that was not subject to ratification at the international level: that is, that contemplated an ultimate method of consent and going into force other than through ratification.³¹⁰

140. In the context of the ECT, the Respondent points out that the explanatory note prepared by the Government as part of its attempt to persuade the State Duma to ratify the ECT and relied on by the Claimant³¹¹ “does not express a view on whether arbitration under Article 26 ECT, or the implementation of any other ECT provision, is inconsistent with Russian law for purposes of Article 45(1) ECT.”³¹² The Respondent submits that the Claimant relies on a mistaken English translation of the explanatory note, which, when properly translated, only states that Article 45(1) of the ECT (rather than the application of the ECT in general) conformed with Russian law.³¹³ The Respondent points out that Professor Stephan also accepted that, properly translated, the reference to “provisions on provisional application” should refer to “provision” in the singular, and understood that as a reference to Article 45.³¹⁴ Professor Stephan also accepted that the term “legal regime of foreign investments” was the same term as used in Article 6 of the [1991 FI Law] then linguistically it does not refer to “investor-state arbitration.”³¹⁵

³⁰⁸ Memorial, para. 62.

³⁰⁹ T1/33/20 – T1/34/16.

³¹⁰ T2/186/10 – T2/187/6

³¹¹ See para. 148 below and Counter-Memorial, paras. 111, 129.

³¹² Reply, para. 189. See also T5/24/2 – T5/28/7; T2/204/9 – T2/212/3.

³¹³ Reply, paras. 190-193. The Claimant’s allegedly “mistaken” translation may be found at 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” (“**Explanatory Note to the Draft Law**”) (**Exhibit C-147**, annexed in a different translation as **Exhibit R-111**). The Respondent’s allegedly “corrected” translation may be found at Reply, para. 191.

³¹⁴ T2/206/1 – T2/207/14.

³¹⁵ T2/211/1-10.

141. With regard to the Claimant's quotation of the explanatory note that "[t]he provisions of the ECT are consistent with Russian legislation,"³¹⁶ the Respondent claims that this has been taken out of context.³¹⁷ The Respondent explains that there are three categories of legislative treaties whose ratification is contemplated by Article 15(1)(a) of the FLIT, namely, (i) treaties that require enacting federal laws to amend federal laws already in existence, (ii) treaties that require adopting new federal laws for implementing non-self-executing treaty provisions, and (iii) "treaties that provide for derogations from federal laws applicable solely in specific relations with other Contracting States and their citizens and nationals," which do not require adopting new federal laws or amending existing ones, instead being "appl[ie]d directly in the Russian legal system and prevail[ing] over inconsistent federal laws pursuant to Article 15(4) of the Constitution."³¹⁸
142. According to the Respondent, the explanatory note placed the ECT within the third category of treaties, with the consequence that it did "not require the enactment of any concessions or the adoption of any amendments" since if it "set out rules different from those provided for by a law, the rules of the international treaty shall apply."³¹⁹ The fact that the ECT contained a number of provisions yet to be reflected in Russian legislation was not an obstacle to ratification because legislation aligning Russian law with GATT and WTO standards was in the process of being enacted.³²⁰ So the list of provisions relied on by the Claimant does not list all those provisions inconsistent with federal law, but rather contains a non-exhaustive list of provisions whose implementation will require the enactment of new federal laws.³²¹
143. Article 26 falls into the category of ECT provisions that are inconsistent with federal law but will, following ratification, prevail over that federal law.³²² So where the explanatory note records that inconsistent provisions of the ECT would prevail over domestic law in relations with other contracting parties pursuant to Article 15(4) of the Constitution, the

³¹⁶ See para. 148 below and Counter-Memorial, paras. 111, 129, *citing* Explanatory Note to the Draft Federal Law, pp. 1-4 (**Exhibit C-147**, corr. trans. **Exhibit R-111**).

³¹⁷ Reply, para. 193.

³¹⁸ Reply, para. 193.

³¹⁹ Reply, para. 194.

³²⁰ T1/39/3-10.

³²¹ T5/26/13-20.

³²² T5/27/11-15.

Respondent contends that this is a “post-ratification analysis” that does not address whether the ECT is subject to ratification or contains provisions inconsistent with Russian law in the absence of ratification;³²³ in other words, the explanatory note does not discuss whether ratification is required, but is based on the premise that it is.³²⁴

(b) The Claimant’s position

144. As a starting point, the Claimant submits that the question is not – as the Respondent is said to formulate it – whether individual treaty provisions are inconsistent with Russian law in the abstract. Rather, the question is whether provisional application of such individual provisions is inconsistent with Russian law.³²⁵ The Claimant’s case is that provisional application of Article 26 is not inconsistent with Russian law, either because the executive had authority to commit the Russian Federation to provisional application of the clause, or because the clause itself is not inconsistent with Russian law since the relevant foreign investment statutes contemplate the submission of international investment treaty disputes to arbitration.
145. The Claimant also stresses that “provisional application is an extraordinary thing” and an exception to the separation of powers: that explains the requirement under Russian law to submit provisionally-applied treaties to the State Duma within six months.³²⁶ Thus, provisional application in accordance with Article 25 of the VCLT means that a state agrees to apply provisions of the treaty even though they require ratification and implementing legislation to become part of domestic law.³²⁷
146. As a preliminary matter, the Claimant argues that the burden of proof to show that the provisional application of Article 26 of the ECT is inconsistent with Russian law is on the Respondent, and that the Claimant is not under any obligation to show that the arbitration of this dispute is consistent with Russian law.³²⁸ The Claimant asserts that, under the ordinary meaning of “inconsistent with” “only a direct conflict with Russian

³²³ T1/39/11-21.

³²⁴ T5/25/2-4.

³²⁵ T5/126/23 – T5/127/15.

³²⁶ T5/129/2-12.

³²⁷ T5/132/12-18.

³²⁸ Rejoinder, para. 90.

law existing at the time of the ECT’s signature . . . would satisfy the limitation in Article 45,” and that the Domestic Law Inconsistency Clause could do no more than “absolve[] Respondent from an obligation to pass new legislation or modify existing legislation in case of a direct conflict with ECT provisions.”³²⁹ The Claimant notes that this “requirement of a positive conflict” is consistent with state practice.³³⁰

147. Likewise, the Claimant contends that tribunals in investment treaty arbitrations also have required “express prohibition under domestic law” in their determination of whether an inconsistency exists between treaty provisions and domestic law.³³¹ The Claimant refers to the decisions in *Kardassopoulos*,³³² *Achmea v. Slovak Republic*³³³ (“*Achmea*”), *Electrabel v. Hungary*³³⁴ (“*Electrabel*”), and *Khan Resources v. Mongolia*³³⁵ as authority for this proposition. In other words, only where domestic law “forbids compliance” will the necessary inconsistency exist – a vacuum is not sufficient.³³⁶ With these decisions in mind, the Claimant argues that the “Respondent fails to put forward any case to establish that Russian law existing at the time of ECT signature forbade arbitration of investment disputes or required Respondent to modify existing legislation – i.e., that a conflict existed.”³³⁷ The Claimant cites authority from the GATT context in support, arguing that it was not the case that the Russian Federation had “no choice but to violate the treaty.”³³⁸ So, where domestic law offers only one form of recourse, but the treaty provides an alternative, then provisional application will enable the claimant to take advantage of the treaty procedure.³³⁹

³²⁹ Rejoinder, para. 91.

³³⁰ Rejoinder, para. 96.

³³¹ Rejoinder, para. 97.

³³² Rejoinder para. 97, citing *Kardassopoulos*, paras. 237, 245 (**Exhibit CL-11**).

³³³ Rejoinder, para. 98, citing *Achmea B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) (“*Achmea*”), para. 274 (**Exhibit CL-56**).

³³⁴ Rejoinder, para. 99, citing *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (“*Electrabel*”), para. 4.175 (**Exhibit RL-76**).

³³⁵ Rejoinder, paras. 100-101, citing *Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. The Government of Mongolia, MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012), para. 71 (**Exhibit CL-61**).

³³⁶ T1/124/15-21, citing *Eureko B.V. v. Poland*, Partial Award (19 August 2005) (**Exhibit RL-74**); T5/159/8-12.

³³⁷ Rejoinder, para. 102.

³³⁸ T1/125/7-20, citing GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (“**GATT GUIDE**”) (**Exhibit RL-139**); T5/148/5 – T5/149/15.

³³⁹ T5/133/2-19.

148. To the contrary, the Claimant points out that the Respondent sought to ratify the ECT in the State Duma of the Russian Federal Assembly, and that during that ratification process, the government of Russia made a “determination” (albeit not on the international plane³⁴⁰) confirming that “[t]he provisions of the ECT are consistent with Russian legislation.”³⁴¹ The Claimant submits that the drafter of that note listed the provisions of the ECT that were in conflict with Russian law, and did not include Article 26.³⁴²
149. The Claimant submits that “Article 26 ECT is not inconsistent with Russian law,”³⁴³ since “[t]reaties become incorporated into Russian law at the time of expression of valid consent,” even without an incorporating act.³⁴⁴ The Claimant maintains that this also holds true for treaties applied provisionally, as is the case with the ECT.³⁴⁵ The Claimant argues that an inconsistency between international treaties and Russian domestic law “cannot exist as a matter of Russian law,” since the terms of international treaties would “apply in lieu of the rules provided by domestic law.”³⁴⁶
150. Contrary to allegations made by the Respondent,³⁴⁷ the Claimant contends that it is not “conflating provisional application with final entry into force,” but “simply set[ting] out the implications of a treaty mechanism that Russia cannot deny it has consented to by its signature.”³⁴⁸ The Claimant quotes from a Resolution of the Constitutional Court to support the proposition that “[a]greement to provisional application of an international treaty means that it . . . must be applied on the same basis as international treaties that have entered into force . . . since otherwise, provisional application would be meaningless.”³⁴⁹ Further, the Claimant quotes the Russian delegate in the context of the ECT negotiations as understanding that there would be a “period of provisional

³⁴⁰ T5/154/11-14.

³⁴¹ Counter-Memorial, paras. 110-111, *citing* Explanatory Note to the Draft Federal Law, pp. 1, 4 (**Exhibit C-147**, corr. trans. **Exhibit R-111**); Rejoinder, paras. 10, 104; T1/128/22 – T1/132/14.

³⁴² T1/132/1-6; T5/153/2-16.

³⁴³ Counter-Memorial, para. 97; Rejoinder, para. 87.

³⁴⁴ Counter-Memorial, paras. 105, 107, *citing* Expert Report of Professor Paul B. Stephan (28 October 2014) (“**Stephan 1**”), para. 29.

³⁴⁵ Counter-Memorial, paras. 103, 106, 123.

³⁴⁶ Counter-Memorial, paras. 107-108, *citing* Stephan 1, para. 29.

³⁴⁷ *See* Reply, paras. 36-38.

³⁴⁸ Rejoinder, para. 17.

³⁴⁹ Rejoinder, para. 18, *citing* Resolution No. 8-P, para. 6 (**Exhibit R-35**).

application of the Treaty [that] would be a sort of running in period of the implementation of this most important instrument for international cooperation.”³⁵⁰

151. Against the Respondent’s arguments as to why Russia was not bound, the Claimant notes that “a provisionally applicable treaty is binding and constitutes a legally enforceable instrument among signatory states,” citing the ILC Commentary to Article 25 of the VCLT.³⁵¹ The Claimant considers “irrelevant” the fact that President Yeltsin did not sign the ECT himself,³⁵² noting that the Constitution grants the President the authority to express consent to be bound to treaties, and that the signature of a duly authorized representative of the president “is equivalent to the President’s personal signature.”³⁵³ The Claimant notes that no part of its case rests on an assumption that President Yeltsin himself signed the ECT.³⁵⁴
152. The Claimant also contends that the Respondent “conflates international ratification with domestic consent to ratification.”³⁵⁵ The Claimant cites Professor Stephan as authority for the proposition that “ratification of a treaty is an international process and occurs only when a treaty party renders the relevant documentation as specified by the treaty,” noting that in the case of Russia the executive renders such documentation, not the legislature.³⁵⁶ The Claimant adds that Russian law does not require legislative domestic ratification of all treaties and that “Russian law indisputably provides for provisional application of treaties with signature in advance of, and thus independent of, subsequent domestic ratification.”³⁵⁷
153. Furthermore, the Claimant takes issue with the Respondent’s argument that the ECT Secretariat’s desire to see Russia’s ratification of the ECT is evidence that the Secretariat recognized that “provisional application did not impose on Respondent the same

³⁵⁰ Rejoinder, para. 19, *citing* Transcript of Energy Charter Conference (14 December 1993) (**Exhibit R-80**).

³⁵¹ Rejoinder, paras. 20-21, *citing* International Law Commission, DRAFT ARTICLES ON THE LAW OF TREATIES WITH COMMENTARIES (1966) Vol. II, Pt. II, ILC Yearbook (“DRAFT ARTICLES”), pp. 187, 210 (**Exhibit CL-46**).

³⁵² *See* Reply, paras. 152-153.

³⁵³ Rejoinder, para. 22, *citing* Supplemental Expert Report of Professor Paul B. Stephan (15 June 2015) (“**Stephan 2**”), paras. 2-8.

³⁵⁴ Rejoinder, para. 23.

³⁵⁵ Rejoinder, para. 24.

³⁵⁶ Rejoinder, para. 25.

³⁵⁷ Rejoinder, para. 25.

obligations as ratification,”³⁵⁸ proposing instead that the Secretariat wanted Russia to ratify the ECT in order to affirm Russia’s political commitment and to increase the treaty regime’s legal certainty and stability.³⁵⁹

154. According to the Claimant, a signatory commits to provisional application of all treaty provisions to which that signing authority can commit the state.³⁶⁰ The executive branch has authority under Article 86 of the Constitution to negotiate and sign treaties.³⁶¹ When a treaty provides for signature to have the effect of accepting a binding obligation, the Russian Federation is bound by that.³⁶² The executive is empowered to determine whether to agree to provisional application and therefore commit Russia to so apply a treaty.³⁶³ None of those propositions are said to be disputed. The only limitation, according to the Claimant, is that the executive may not agree to the provisional application of provisions that violate the Constitution itself.³⁶⁴
155. This is because, the Claimant submits, Article 23 of the FLIT empowers the executive to commit to the provisional application of treaty provisions that conflict with domestic law provided that the treaty so provides.³⁶⁵ The Claimant cites a number of commentaries which opine that the purpose of provisional application is to apply a treaty immediately pending the fulfillment of specific procedures required for its entry into force (usually ratification),³⁶⁶ and rejects Professor Asoskov’s contention that these are a minority view in the absence of any dissenting commentary on the record.³⁶⁷

³⁵⁸ See para. 72 above and Reply, para. 115.

³⁵⁹ Rejoinder, para. 85.

³⁶⁰ T1/113/21-24.

³⁶¹ T1/114/18-21.

³⁶² T1/114/22-25.

³⁶³ T1/115/1-5.

³⁶⁴ T1/115/6-11.

³⁶⁵ T1/115/16-23.

³⁶⁶ T1/118/6 – T1/124/7, *citing* FEDERAL LAW ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION (Vadim P. Zverkov & Boris I. Osminin, eds., 1996) (“**Zverkov & Osminin**”) (**Exhibit CL-48**); Boris I. Osminin, ADOPTION AND IMPLEMENTATION OF TREATY OBLIGATIONS BY STATES (2006) (“**Osminin**”) (**Exhibit RL-140**). See T2/29/11 – T2/56/7 where the Claimant put these commentaries to Professor Asoskov. See also Sergui M. Pounjin, “The New Federal Law on International Treaties of the Russian Federation,” in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (Rein Müllerson, Malgosia Fitzmaurice, and Mads Andenas, eds., 1998) (**Exhibit RL-51**).

³⁶⁷ T5/140/9 – T5/141/2. See also T2/78/13 – T2/79/25.

156. The Claimant also submits that in the only Russian decision on the record which addresses this point – the *Lufthansa* case – the court simply applies the treaty without regard to whether its provisions are consistent with domestic law,³⁶⁸ while the decisions on which Professor Asoskov relies for the proposition that only ratified treaties can prevail over federal law do not concern provisional application.³⁶⁹ Professor Stephan testified that the *Chinese trespassers case* involved a treaty that had been brought into legal effect by an exchange of notes, and did not provide for provisional application. In that context, the court’s decision was that the exchange of notes did not substitute for ratification.³⁷⁰ The Claimant also put to Professor Asoskov a Council of Europe document which records the Russian Federation’s statement that provisional application of a treaty is possible if the treaty so provides; Professor Asoskov’s opinion was that the response was incomplete.³⁷¹
157. Although Article 23 was enacted after Russia signed the ECT, with the exception of the six-month requirement it reflected Article 25 of the VCLT,³⁷² which Professor Asoskov testified had been ratified by the Soviet Union and thus formed part of Russian law.³⁷³ Professor Asoskov accepted there was no other restriction on the executive’s power to commit to provisional application on the face of Article 23, but maintained that general principles on the limitations of the executive’s power to conclude international treaties applied.³⁷⁴

³⁶⁸ T5/139/7 – T5/140/8, *citing* Judgment of the High Arbitrazh Court of Russian Federation No. VAS-13594/09 re: Case No. A40-46399/08-29-480 and Joint Declaration (14 July 2003) (**Exhibit C-146**); put to Professor Asoskov at T2/80/9 – T2/86/10.

³⁶⁹ T2/40/15 – T2/40/25 and T2/73/22 – T2/77/11, *citing* Constitution and Resolutions of Plenum of the Supreme Court Nos 8 (31 October 1995), Art. 15(4) (**Exhibit AVA-79**); Resolution of the Plenum of the Supreme Court No. 5 “On Application by Courts of General Jurisdiction of Generally Recognized Principles and Rules of International Law and International Treaties of the Russian Federation” (10 October 2003) (**Exhibit AVA-80**); Ruling 2531-O (**Exhibit AVA-86**). *See also* Stephan 2, paras. 36-39.

³⁷⁰ T2/162/15-25, *citing* Supreme Court Cassation Ruling (**Exhibit AVA-61**).

³⁷¹ T2/56/8 – T2/63/25, *citing* “Russian Federation Country Report,” in TREATY-MAKING- EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY (Council of Europe, ed., 2001) (**Exhibit CL-42**).

³⁷² T2/24/14 – T2/25/15.

³⁷³ T2/18/22 – T2/19/20.

³⁷⁴ T2/29/4-10.

158. The consequence is that when the executive agrees to provisional application then the terms of the treaty become part of Russian law and are enforced as if the treaty were in force pursuant to Article 15(4) of the Constitution.³⁷⁵
159. The Claimant submits that if (as is not disputed) the executive can commit the Russian Federation to provisionally apply a treaty that determines territorial boundaries (including one that is required to be ratified by Article 15(3) of the FLIT), it is “inconceivable” that it would not have the power to commit the state to arbitrate with an investor.³⁷⁶
160. The Claimant accordingly rejects Professor Asoskov’s “hierarchy argument,” according to which a treaty in force in the Russian Federation that has not been ratified is subordinate to federal laws. The Claimant submits that none of the authorities on which Professor Asoskov bases this theory concerns provisional application. The “whole point” is that a provisionally applied treaty is applied as if it is in force,³⁷⁷ and it assumes the same hierarchy as if it were in force.³⁷⁸ Professor Asoskov’s distinction between the authority of the Government and that of the President is beside the point, since although executive acts are subordinate to legislative acts the effect of provisional application is to apply the treaty as if it had been ratified.³⁷⁹
161. On the subject of whether Article 26 is in fact inconsistent with any provisions of Russian law, the Claimant rejects the Respondent’s contention that “disputes about taxes, their enforcement and bankruptcy . . . cannot be arbitrated.” It says this is relevant only for “arbitration in Russia within its domestic legal system,” but not with regard to rights arising under a treaty and interpreted according to public international law.³⁸⁰
162. So, the Claimant disputes the Respondent’s reliance on Professor Asoskov’s theory of “the principle of non-arbitrability of public law disputes as a fundamental aspect of the Russian law.”³⁸¹ The Claimant quotes Professor Stephan, arguing that Professor

³⁷⁵ T1/126/23 – T1/127/4.

³⁷⁶ T5/137/15-20, T5/138/11-14. It appears that this was intended to be a reference to Art. 15(1).

³⁷⁷ T1/137/9 – T1/138/10.

³⁷⁸ T5/141/3 – T5/142/16.

³⁷⁹ T5/142/17 – T5/143/14.

³⁸⁰ Counter-Memorial, paras. 115-116, 118-120.

³⁸¹ Rejoinder, para. 115, *citing* Asoskov 2, paras. 67-96.

Asoskov’s “authorities involve only the interpretation of particular legislation, and do not indicate the existence of any broader principle barring the Russian Federation from submitting to binding arbitration.”³⁸² The Claimant insists that Professor Asoskov makes a “misleading point” when he asserts³⁸³ that certain disputes – concerning the assessment and collection of taxes and tax sanctions, the enforcement of tax authorities’ decisions and the bankruptcy of Russian legal entities – must be resolved in Russian courts.³⁸⁴ The Claimant maintains that the present dispute does not concern such matters: the Claimant is not “asking the Tribunal to try a bankruptcy case” or any of the other kinds of case dealt with in the laws on which Professor Asoskov relies.³⁸⁵ The present dispute does not arise in the context of a relationship of subordination, but under a multilateral investment treaty,³⁸⁶ and the Claimant alleges that Professor Asoskov has no authority for the extension of that principle to public international law disputes.³⁸⁷ Under cross-examination, Professor Asoskov accepted that none of the first four examples of disputes falling within the principle of non-arbitrability involved a dispute under public international law arising from a treaty entered into between states.³⁸⁸

163. Thus “[t]he fact that Russian public authorities used sovereign powers when effecting their expropriatory objectives does not disqualify this dispute as an investment dispute arbitrable under international law or somehow entrust its resolution to the Russian domestic legal order/system.”³⁸⁹ Rather, the Claimant quotes Professor Stephan to make the point that the fact that Russia took measures “in [the] exercise of its public authority” makes this dispute arbitrable rather than precluding it.³⁹⁰

164. On the contrary, and citing Professor Stephan’s interpretation of the USSR Fundamentals, the 1991 FI Law and the 1999 FI Law, the Claimant argues that “Russian law positively recognizes that disputes under public international law instruments may be resolved by

³⁸² Rejoinder, para. 116, *citing* Stephan 2, paras. 54-56.

³⁸³ *See* paras. 142 and 134 above and Asoskov 2, paras. 68, 72.

³⁸⁴ Rejoinder, para. 117.

³⁸⁵ T1/138/23 – T1/139/22. *See* Professor Asoskov’s testimony at T2/94/11 – T2/97/13.

³⁸⁶ T1/143/2-5.

³⁸⁷ T5/167/11 – T5/168/23. *See* Professor Asoskov’s testimony at T2/90/7 – T2/93/1.

³⁸⁸ T2/101/8-13, *discussing* Asoskov 1, para. 39.

³⁸⁹ Rejoinder, para. 118.

³⁹⁰ Rejoinder, para. 119, *citing* Stephan 2, para. 57.

arbitration.”³⁹¹ The Claimant submits that the applicable foreign investment law is the one in force at the time Article 26 is invoked by the Claimant,³⁹² so that a state may change its domestic law as long as it increases the scope of provisional application.³⁹³

165. So, the 1999 FI Law provides that such disputes may be arbitrated, “if the treaty says so.”³⁹⁴ So far as the 1991 FI Law refers to treaties “in force,” the Claimant’s answer is that provisionally applied treaties are applied as if they are in force.³⁹⁵ It is on this basis that the Claimant argues that, even if the executive was not empowered to commit the Russian Federation to treaty provisions that conflicted with federal law, the foreign investment laws do in fact contemplate the submission of disputes such as the present one to arbitration and, therefore, there is no inconsistency. In other words, the reference to “treaty” in those laws includes provisionally applied treaties³⁹⁶ and in those circumstances there is “by definition, a consistency.”³⁹⁷

166. The Claimant also relies on Professor Asoskov’s opinion that the law on production sharing agreements authorizes arbitration, and submits that the language of the foreign investment laws is identical.³⁹⁸

167. The Claimant also disputes the Respondent’s arguments regarding Article 23(2) of the FLIT, which requires that treaties that are provisionally applied be sent to the State Duma for ratification within six months of being signed.³⁹⁹ The Claimant argues that “Article 26 ECT did not require the amendment or supplementation of existing Russian law,” as it “became part of Russian law by operation of the Russian Constitution.”⁴⁰⁰ Additionally, the Claimant maintains that Article 23(2) of the FLIT did not exist at the time that the ECT was signed by the Respondent and cannot be applied retroactively, since such

³⁹¹ Counter-Memorial, para. 122, *citing* Stephan 1, paras. 55-57. *See also* Rejoinder, para. 103.

³⁹² T5/152/8-9.

³⁹³ T5/165/5-21; T5/176/7 – T5/177/15.

³⁹⁴ T1/140/1-13.

³⁹⁵ T1/140/25 – T1/141/9.

³⁹⁶ T5/161/9-24.

³⁹⁷ T5/164/3-7.

³⁹⁸ T5/159/1 – T5/160/19, *citing* Asoskov 2, para. 105; Professor Asoskov’s testimony was that they were distinguishable because the production sharing law expressly authorized the conclusion of arbitration agreements: T2/105/21 – T2/110/2.

³⁹⁹ Counter-Memorial, paras. 124-125.

⁴⁰⁰ Counter-Memorial, para. 127.

retroactive reliance would be in violation of the Respondent's obligations pursuant to Article 27 of the VCLT.⁴⁰¹

168. In any event, the Claimant explains that, contrary to the Respondent's position, Article 23(2) recognizes that the termination of the provisional application of treaties operates by notification to other Contracting States, a fact that was also appreciated by the Respondent when it "communicat[ed] its termination of provisional application by a notification to the ECT depository on 20 August 2009."⁴⁰² The Claimant provides authority for this proposition via references to Professor Stephan's first report,⁴⁰³ a note the Respondent submitted to the Secretariat of the ECT,⁴⁰⁴ and the Respondent's compliance with the ECT after the passage of the six-month period.⁴⁰⁵
169. With regard to the Respondent's arguments based on Article 12 of the USSR FLIT,⁴⁰⁶ the Claimant submits that this law is not applicable, as it is in conflict with the Constitution.⁴⁰⁷ Even so, the Claimant maintains that the USSR FLIT did not preclude the provisional application of treaties.⁴⁰⁸
170. With respect to other treaty practice, the Claimant rejects the Respondent's contention that eight explanatory notes drawn from 57 BITs in force confirm that investor-state arbitration provisions set out rules different from those provided by law and therefore are subject to ratification.⁴⁰⁹ The Claimant argues that these explanatory notes are irrelevant, as the only relevant time is December 1994 and the only relevant "'inconsistency' analysis" involves the ECT.⁴¹⁰ The Claimant also adds that none of the 57 BITs included

⁴⁰¹ Counter-Memorial, paras. 130-131.

⁴⁰² Counter-Memorial, paras. 132-136, *citing* William E. Butler, "National Treaty Law and Practice: Russia," in NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis, Merritt R. Blakeese, and L. Benjamin Ederington, eds., 2005), pp. 537, 545 (**Exhibit CL-30**).

⁴⁰³ Counter-Memorial, paras. 139-141, *citing* Stephan 1, paras. 74-75, 77.

⁴⁰⁴ Counter-Memorial, para. 137, *citing* Note on the Legal Aspects of Provisional Application of International Treaties in the Territory of the Russian Federation (8 July 1997); Energy Charter Secretariat, List of Participants in the Charter Conference (8 July 1997) (**Exhibit C-148**).

⁴⁰⁵ Counter-Memorial, paras. 143-144, *citing* *Hulley Enterprises*, para. 390 (**Exhibit CL-9**).

⁴⁰⁶ *See* para. 113 above and Reply, para. 164.

⁴⁰⁷ Rejoinder, para. 124, *citing* Stephan 2, paras. 18-22.

⁴⁰⁸ Rejoinder, para. 125.

⁴⁰⁹ *See* para. 138 above and Reply, para. 187.

⁴¹⁰ Rejoinder, para. 105.

a provision for provisional application, meaning that, in those cases, Russia would have to ratify the treaties in order to be bound.⁴¹¹ Moreover, according to the Claimant, “most of the BITs concerned legislation that did not exist at the time of the ECT’s signature.”⁴¹² The Claimant rejects the relevance of the authorities cited by Professor Asoskov to support the proposition that Article 26 of the ECT is inconsistent with Russian law,⁴¹³ contending that these authorities deal with “unratified treaties having no provisional application clause that include rules conflicting with existing legislation,” compared with the current arbitration, which involves the ECT, “a treaty with a provisional application clause that has no rules conflicting with Russian investment legislation.”⁴¹⁴ For the Claimant, Russian domestic law states that international treaties may be applied provisionally “if the treaty itself so provides” and that decisions on provisional application by the Russian Federation “shall be made by the body that has taken the decision to sign the international treaty according to the procedure set out in Article 11 of this Federal Law.”⁴¹⁵

171. The Claimant also takes issue with the Respondent’s argument⁴¹⁶ that there was not a “pre-existing legal basis” in Russian law for the application of Article 26 because there were no investment treaties in force between Russia and 21 ECT contracting states.⁴¹⁷ The Claimant contends that the Respondent has not offered any support for the notion that there is a requirement that there must be a pre-existing legal basis for international obligations that states voluntarily assume, and notes that, even if valid, the principle does not establish any “inconsistency.”⁴¹⁸
172. The Claimant also disputes the Respondent’s contention⁴¹⁹ that “several of Russia’s BITs limited investor-State arbitration to civil law issues excluding arbitral review of sovereign

⁴¹¹ Rejoinder, para. 105.

⁴¹² Rejoinder, para. 105.

⁴¹³ See Asoskov 2, paras. 12-27.

⁴¹⁴ Rejoinder, paras. 107-109, citing Stephan 2, paras. 25-27, 36-39.

⁴¹⁵ Counter-Memorial, para. 102, citing FLIT, Art. 23(1)-(2) (**Exhibit R-24**); Rejoinder, para. 110.

⁴¹⁶ See Reply, para. 195.

⁴¹⁷ Rejoinder, para. 111.

⁴¹⁸ Rejoinder, para. 112.

⁴¹⁹ See Reply, paras. 178, 195, 199.

acts or omissions.”⁴²⁰ The Claimant submits that the Respondent did have BITs with other ECT contracting states that provided for settlement of investment disputes via arbitration, including the France-USSR BIT.⁴²¹ The Claimant also notes that a Model BIT approved by Resolution of the Government of the Russian Federation in 1992 provides for the settlement of investment disputes by arbitration without limitations regarding civil law issues.⁴²²

173. Finally, the Claimant argues that, if a state decides to invoke the Domestic Law Inconsistency Clause, it must do so in good faith.⁴²³ According to the Claimant, the Respondent has not done so, as its “‘inconsistency’ arguments are contrived with the aim to escape accountability for its actions.”⁴²⁴

3. The Tribunal’s analysis

(a) Introduction

174. The Tribunal considers that the 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)?

175. The answer to this issue turns on the question whether the application of Article 26 is “not inconsistent with” Russia’s “constitution, laws or regulations”, since the Respondent accepts that, if there were no such inconsistency, there would be a treaty obligation assumed by the Respondent to apply that provision on a provisional basis.⁴²⁵

⁴²⁰ Rejoinder, para. 111.

⁴²¹ Rejoinder, para. 113.

⁴²² Rejoinder, para. 113.

⁴²³ Rejoinder, para. 121.

⁴²⁴ Rejoinder, para. 122.

⁴²⁵ T5/23/8-20.

176. The Tribunal is conscious of the fact that this issue is one that has generated differing views in the jurisprudence⁴²⁶ and difficulty in the doctrine.⁴²⁷ 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.
177. The Tribunal will assess the question whether its jurisdiction has been established by reference to the law applicable at the time of the institution of proceedings, namely 15 February 2013, being the date on which the Claimant claimed to accept Russia's consent to arbitration of the present dispute. Such approach is in conformity with the constant practice of international courts and tribunals.⁴²⁸
178. This rule is also important in the present case in view of the nature of provisional application. Both Parties accept that states that have entered into a treaty that they have agreed will be provisionally applied "to the extent that such provisional application is not inconsistent" with domestic law may progressively remove any such inconsistencies during the period of provisional application.⁴²⁹ As a result, the material time at which to determine whether the rule in Article 26 of the ECT is "not inconsistent with" Russian law is the time at which the Tribunal's jurisdiction is invoked.
179. The Tribunal analyses the issue in the following sections:
- (a) Section (b) analyses the proper interpretation of the regime of provisional application under Article 45 of the ECT in accordance with the general rule of interpretation set forth in Article 31(1) of the VCLT.

⁴²⁶ *Kardassopoulos*, paras. 71, 73-74 (**Exhibit CL-11**); *Hulley Enterprises* (**Exhibit CL-9**); cf. Action nos C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 re: *Hulley Enterprises Ltd/Yukos Universal Ltd (Isle of Man)/Veteran Petroleum Ltd (Cyprus) v. Russian Federation* (20 April 2016) ("**The Hague District Court Judgment**").

⁴²⁷ Bamberger, Epilogue p. 602 (**Exhibit RL-1**); Bamberger, *Adjudicatory Aspects*, pp. 16-17 (**Exhibit RL-45**).

⁴²⁸ *Nottebohm (Liechtenstein v. Guatemala)* [1953] ICJ Rep 123; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 1.

⁴²⁹ Respondent: T5/11/16 – T5/12/13; Claimant: T5/165/5-21.

- (b) Section (c) considers that regime against the background of the institution of provisional application in general international law (pursuant to Article 31(3)(c) of the VCLT).
- (c) Section (d) examines relevant practice of the ECT States at the conclusion of the Treaty (Article 31(2)) and the preparatory materials for the Treaty (Article 32) as to the construction of Article 45.
- (d) Section (e) considers the evidence as to Russian practice under the ECT.
- (e) Section (f) addresses the extent to which Article 26 is “not inconsistent” with Russian law.

(b) The regime of provisional application under the ECT

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).
181. In view of the fact that Russia signed the ECT, but did not in the event decide to ratify it, the question whether it has consented to arbitration under Article 26 must be determined on the basis of the meaning and effect to be given to the provisions of Article 45 of the ECT, which prescribe a detailed regime for its provisional application.
182. Although this Article has been set out earlier in this Decision, it is necessary to repeat the terms of its paragraphs (1)–(3) for clarity of the analysis that is to follow:⁴³⁰

⁴³⁰ Pursuant to ECT, Art. 50, the Treaty was signed in English and six other official languages “of which every text is equally authentic”. The Parties agreed that the language of this arbitration is English: Terms of Appointment, para. 6(a). Neither Party submits or advances evidence that there is any material difference between the English text and the texts in the other official languages in which the ECT was concluded. The Respondent submits: “The

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.
- (2)
 - (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
 - (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
 - (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
- (3)
 - (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.
 - (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).
 - (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

183. The Respondent's objection and the submissions of the Parties have focused on the proper construction of the final clause of Article 45(1), the Domestic Law Inconsistency Clause. By this clause, each signatory agrees to apply the Treaty provisionally prior to its entry into force for it "*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.*"

ordinary meaning of the 'to the extent' clause in the other authentic language versions of the ECT is to the same effect": Memorial, para. 38.

184. The Tribunal approaches the task of interpreting Article 45(1) in the light of the general rule of treaty interpretation prescribed in Article 31 of the VCLT. This rule, which is accepted to be a statement of the customary international law rule of interpretation, was also expressly accepted by way of the declaration of a number of delegations (including Russia) at the Adoption Session of the ECT as supplying the relevant rules of interpretation for the ECT.⁴³¹ It will be necessary to refer to a number of the elements identified in Article 31 as relevant to interpretation.
185. 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.*” Article 31(2) provides that the first element in the “context” is “the text, including its preamble and annexes.”
186. Analysis of the text enables the following initial points to be made.
187. 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.
188. The Treaty’s entry into force – generally and in respect of any particular state – is determined by reference to ratification, acceptance or approval under Article 44 “Entry into Force.”
189. Article 45 “Provisional Application” immediately follows the provision on entry into force. It introduces a separate form of legal obligation. This obligation is assumed by “[e]ach signatory”; that is to say, a state that has signed the Treaty in accordance with Article 38. Such 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.”

⁴³¹ Chairman’s Statement at Adoption Session, Annex 1 to Note from the European Energy Charter Conference Secretariat (6 January 1995) (**Exhibit C-145**).

Paragraph (1) could thus be described as determining the scope of provisional application *ratione materiae*.

190. The ensuing paragraphs (2) and (3) of Article 45 establish a specific regime governing the scope of provisional application *ratione personae* and *ratione temporis*.

191. *Ratione personae*. Article 45(2) permits a signatory to deposit a declaration upon signature “that it is not able to accept provisional application.” Such a declaration produces a legal effect on both the burdens and the benefits of provisional application *ratione personae*:

(a) It is effective to disapply the regime of provisional application generally in respect of that signatory: Article 45(2)(a).

(b) It also precludes both that signatory *and its Investors* from claiming the benefits of provisional application: Article 45(2)(b).

192. *Ratione temporis*. Article 45(3) enables a signatory to terminate provisional application upon notification of its intention not to become a contracting party to the Treaty. It adds two provisions as to the effect of such a notification *ratione temporis*:

(a) Termination of provisional application does not take effect until 60 days after receipt of notification by the Depository: Article 45(3)(a).

(b) In the event of such a termination, the obligation of the signatory under paragraph (1) to apply Parts III (“Investment Promotion and Protection”) and V (“Dispute Settlement”) “with respect to any Investments made in its Area during such provisional application by Investors of other signatories” remains in effect for those Investments for 20 years following the effective date of termination: Article 45(3)(b).

193. Each signatory had the option upon conclusion of the Treaty not to accept the obligation in Article 45(3)(b) by entering its name on the list in Annex PA: Article 45(3)(c).

194. *Provisional application generally under Article 45*. This initial review of Article 45(1)–(3) permits the following five preliminary observations about the scheme of the Treaty

vis-à-vis its provisional application (subject always to the effect of the Domestic Law Inconsistency Clause, to the construction of which the Tribunal will turn shortly).

195. First, the signatories expressly contemplated that, by signing the ECT, they were engaging in a set of mutual legal rights and obligations to apply the Treaty provisionally in accordance with its terms prior to its entry into force. The regime of provisional application contemplated by Article 45 is therefore separate and distinct from the legal relations between the Contracting Parties that will apply upon entry into force following ratification. The Domestic Law Inconsistency Clause in Article 45(1), which refers to “*such* provisional application” as being “not inconsistent with its constitution, laws or regulations” is a reference to the inconsistency with domestic law of the regime of provisional application created by virtue of Article 45. It does not relate to the requirements of domestic law applicable to the entry into force of a treaty.
196. Second, the concept of provisional application contemplated by Article 45 cannot be regarded as purely moral or a matter of diplomatic courtesy or option. It denotes a state of affairs intended to operate and produce legal effects. This is confirmed both by the ordinary meaning of the words used in paragraph (1) and the context of the other paragraphs of Article 45.
197. The *Oxford English Dictionary* defines “application” as “the action of putting something into operation” and “provisional” as “arranged or existing for the present, possibly to be changed later.”⁴³² When these two concepts are put together, they refer to a state of affairs that, while it may be subject to later change, nevertheless exists and is in operation for the present.
198. This construction of provisional application under Article 45(1) as producing legal obligations prior to entry into force is further supported by reference to Article 45(3)(b). This sub-paragraph speaks of “the obligation of the signatory” under Parts III and V following a termination of provisional application remaining in effect for 20 years.

⁴³² Oxford English Dictionary, available at: <http://www.oed.com/view/Entry/93864?redirectedFrom=application#eid> (accessed on 11 June 2015) (**Exhibit C-209**).

199. Parts III and V create legal obligations under international law dealing *ratione materiae* with (a) substantive rights of investors and (b) dispute settlement:

(a) Part III creates legal obligations under international law to afford investment promotion, protection and treatment of investments. Its obligations are expressed in terms that are mandatory and contemplate legal process. So, for example, Article 13 “Expropriation” provides that investments “*shall not* be nationalized [or] expropriated” save under the conditions there specified. These include that the expropriation be “carried out under due process of law” (Article 13(1)(c)) and that the investor has “a right to prompt review, under the law of the Contracting Party making the Expropriation by a judicial or other competent and independent authority” (Article 13(2)).

(b) Part V confirms “unconditional consent to the submission of a dispute to international arbitration” (Article 26(3)(a)). It provides that the tribunal so established “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law” (Article 26(6)); that the resulting awards “shall be final and binding” (Article 26(8)).

200. Third, the signatories contemplate that the obligations arising for them upon signature by way of provisional application include obligations vis-à-vis Investors. Article 45(3)(b) expressly refers to the continued application of Parts III and V. Since Article 45(3)(b) speaks of the obligation of the signatory under these Parts “remain[ing] in effect” for 20 years after a signatory’s termination, it follows that the signatory’s obligations to Investors under Parts III and V are already in effect, having arisen upon signature as a matter of provisional application, provided always that such application was *ab initio* not inconsistent with the domestic laws of the signatory state. This notwithstanding that both Parts III and V constantly refer to “Contracting Parties” – an expression defined as “a state ... which has consented to be bound by this Treaty and for which the Treaty is in force”: Article 1(2).

201. The conclusion that provisional application is capable of applying to the obligations of States to Investors is further reinforced by the express reference to Investors in Article 45(2). This reference would be unnecessary if provisional application could not apply to create legal duties of states to Investors. It is only because provisional application

otherwise is capable of so applying that it is necessary to confirm expressly that when a State opts out of the regime under Article 45(2), it is relieved from the obligation of provisional application *and* neither it nor its Investors may take the benefit of it vis-à-vis other signatories.

202. Fourth, the provisional application regime is designed to apply, if necessary, over a long period of time. Absent prior termination, the provisional application of the Treaty applies until its entry into force for that signatory. The cumulative entry-into-force provisions of Article 44 entail two 90-day periods: after collective ratification of at least 30 states and following individual ratification.
203. Further, and crucially, the ability that the negotiating states created for a signatory to decide to opt out of the provisional application regime altogether *after* signature upon its decision not to become a party to the Treaty does not enable such a state to avoid the obligations of Parts III and V in respect of investments made during the period of provisional application for 20 years after termination: Article 45(3)(b). The import of this provision is clear. Investments made during the period in which the ECT is provisionally applied in respect of a particular State and prior to any decision on the part of that State not to become a party are (again subject to the domestic inconsistency clause) entitled to extended treaty protection. A signatory State may not encourage such investment by provisional application and then, by terminating provisional application, divest such investments already made during the period of provisional application of the treaty protections.
204. Fifth, in recognition of the potentially onerous nature of the obligations upon signatories arising by virtue of the Treaty's provisional application (not least those of Article 45(3)(b)), Article 45 makes liberal provision for any State to opt out of the regime altogether upon signature. This it may do by the simple expedient of a declaration under Article 45(2).⁴³³ Such a declaration places the declaring State in the same position that it would be in upon signature under any other treaty that requires ratification. It excludes any possibility of provisional application. At the same time, it excludes the declaring

⁴³³ Some States also declared that they would not apply the Treaty provisionally under Art. 45(1): Austria, Hungary, Italy, Luxembourg, Portugal, Romania and Turkey. *See* Updated List of Signatories to the ECT (1 March 1995) (“**Updated Signatories List**”) (**Exhibit C-144**).

State and its Investors from any of the benefits of provisional application that would otherwise be opposable to other signatory States. Neither the declaring State nor its Investors can share in any of the benefits of the Treaty until its entry into force for that state under Article 44.

205. Further, a signatory also had the option upon signature (but not thereafter) to exclude the long tail provision in Article 45(3)(b), by entering its name on the list in Annex PA.

206. *The Domestic Law Inconsistency Clause.* Against this background, it is now possible to return to consideration of the Domestic Law Inconsistency Clause in Article 45(1) within the framework of the general rule of interpretation in Article 31(1) of the VCLT. The following preliminary observations may be made:

(a) 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 Law Inconsistency Clause of any effect would not be consistent with an interpretation of the terms of Article 45(1) in good faith.

(b) Such a signatory also has the option, without restriction, upon signature of delivering a declaration excluding the operation of provisional application of the ECT altogether under Article 45(2). The proviso to Article 45(1) must be given a meaning that preserves a distinct sphere of operation for it in contrast to the making of a declaration under Article 45(2). This is particularly so since both legal acts are to be undertaken by the same person on behalf of the same State at the same time.

(c) The Clause contains an express *renvoi* to domestic law. Its terms require any person seeking to understand the nature and scope of the obligations assumed by a particular signatory State by way of provisional application to consider that State’s “constitution, laws or regulations” in order to satisfy themselves as to

whether, and if so to what extent, the proviso applies to qualify the obligation. Nevertheless, this does not change the character of the obligation assumed by each signatory State under Article 45(1) as an obligation that is governed by international law. Domestic law is relevant because the international law obligation so provides and then only to that extent. Article 45(1) does not operate to convert a signatory's international law obligation into one of its own domestic law.

- (d) The agreement to provisional application in Article 45(1) is one that is made by a signatory. The question whether provisional application as a consequence of such an agreement is “not inconsistent with [a State’s] constitution, laws or regulations” must be determined by reference to whether, under the constitution, laws or regulations of the relevant State, an obligation of provisional application assumed by a signatory infringes the proviso. This is a question that is separate from the provisions of a State’s constitution or laws relating to the ratification of a treaty for the purpose of its entry into force.
- (e) The signatory’s agreement is framed as giving rise to a positive obligation of the State. By contrast, the proviso is limited in two ways. First, it requires consideration of “the extent” to which provisional application is subject to domestic inconsistency. Second, the proviso is formulated as a double negative: “not inconsistent.” The signatory agrees to give the Treaty provisional application, provided that such application does not give rise to an inconsistency with domestic law. The burden is on the signatory State invoking such an inconsistency to establish it.⁴³⁴

207. “*Not inconsistent with.*” The ordinary meaning of the words “not inconsistent with” requires careful consideration. The expression connects two sets of legal rules: (i) those assumed by each signatory under international law by way of provisional application of the Treaty and (ii) those under the signatory’s “constitution, laws or regulations.” It is necessary to analyse the relation between these two sets of legal obligations required by the connecting phrase. This is defined by reference to two cumulative elements: the to

⁴³⁴ It is common ground between the Parties that the burden of establishing inconsistency rests upon the Respondent: T1/138/20-22; T5/91/18-22.

be determined by reference to lack of *consistency* and the use of the double negative form: “*not inconsistent with.*”

208. The *Oxford English Dictionary*⁴³⁵ offers the following relevant definition of “consistent” as “[a]greeing or according in substance or form; congruous, compatible.” It defines “inconsistent” as “[n]ot consisting; not agreeing in substance, spirit, or form: not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.” *Collins English Dictionary*⁴³⁶ defines inconsistent relevantly as “lacking in consistency, agreement, or compatibility; at variance.” It also adds a meaning applicable to a set of propositions in logic: “enabling an explicit contradiction to be validly derived.”
209. The relation of compatibility required is affected by the use of the double negative form “not inconsistent with.” A number of the examples given in the *Oxford English Dictionary* of the historical usage of “inconsistent” use it in its double negative form: “[r]esentment is not inconsistent with Good-will”; “[t]he benevolence of God ... is not inconsistent with his determination to punish.” In these examples, the double negative is used to contrast two things that are not the same. They may have quite different content. Yet they may also be regarded as not inconsistent, since they may each exist side-by-side without coming into conflict between each other.
210. The use of the double negative form denotes in the first place a point about burden of proof: that the burden is on the party that wishes to establish *inconsistency*, rather than imposing a burden on the party that wishes to rely on the positive obligation to establish that it is *consistent* with the proviso. It also conveys a substantive element of the relation between the positive obligation and the proviso. A requirement that the positive obligation be *consistent* with the proviso might be said to denote complete identity or conformity between the two sets of legal obligations in question. By contrast, the purpose of the requirement that the positive obligation be *not inconsistent with* the domestic law

⁴³⁵ Oxford English Dictionary, available at: <<http://www.oed.com/view/Entry/93864?redirectedFrom=inconsistent#eid>> (accessed on 11 June 2015) (**Exhibit C-209**).

⁴³⁶ Collins English Dictionary, available at <<http://www.collinsdictionary.com/dictionary/english/inconsistent>> (accessed on 11 June 2015) (**Exhibit C-208**).

proviso is to prevent a clash between the two systems, even if they differ in material respects.⁴³⁷

211. This consideration of the ordinary meaning of the phrase “not inconsistent with” enables the following conclusions to be drawn as to its ordinary meaning in the context of Article 45(1):

(a) The relation that is contemplated is not one of equivalence between the two sets of legal obligations referred to Article 45(1). It does not require the obligations existing in one such set to exist also in the other. Nor does it require the obligations existing in one set to be expressly authorized or permitted by the rules of the other set. Rather the use of the term “not inconsistent” asks a different question. It is whether (and if so to what extent) the two bodies of law can live together: are they “compatible” or are they “discordant”? The enquiry that the interpreter is directed to undertake is one that requires identification of conflict, if any, between the two systems, rather than identity or equivalence.

(b) The double negative form “not inconsistent with” in both ordinary and legal usage denotes both: (i) that the burden is on the party alleging the inconsistency to establish it; and (ii) that the extent of consistency required in the relation between the two sets of legal obligations is one that “prevents clashes” rather than one that “ensures conformity.”

212. As will be seen, these conclusions are also supported by the manner in which the law has approached the use of the same or similar tests in other cognate areas of international law.

(c) Provisional application in international law

213. The regime for the provisional application of the ECT under its Article 45 has a number of distinctive features. Yet provisional application is itself a well recognised institution in general international law, to which the Tribunal is directed by Article 31(3)(c) of the VCLT to refer in its interpretation of Article 45 of the ECT.

⁴³⁷ For illustrative examples, *see* Bryan A. Garner, *A DICTIONARY OF MODERN LEGAL USAGE* (1995), p. 585.

214. *Provisional application generally under Article 25 of the VCLT.* The provisional application of treaties finds express recognition in Article 25 of the VCLT which provides:

Article 25—Provisional application

- (1) A treaty or part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty 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 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.

215. Article 25 is found in Part II of the VCLT “Conclusion and Entry into Force of Treaties,” Section 3 of which deals in particular with “Entry into Force and Provisional Application of Treaties.” This Section precedes Part III, which, under the heading “Observance, Application and Interpretation of Treaties,” deals in its Section 1 with the obligation upon parties to observe a treaty that is in force.

216. Part II Section 3 distinguishes between “Entry into force,” which is provided for in Article 24 and “Provisional application” in Article 25. A treaty enters into force “in such manner and upon such date as it may provide or as the negotiating States may agree,” failing which it is determined by reference to the consent of the states to be bound. Where the treaty so provides, entry into force requires the deposit of instruments of ratification, approval or accession.⁴³⁸ By contrast, provisional application takes effect pending the entry into force of the treaty. It suffices for this purpose that the treaty itself so provides or that the negotiating states have so agreed.

217. Article 25 of the VCLT reflects the extensive practice of states. The final clauses of the two treaties comprising the Peace of Westphalia 1648 provided that, notwithstanding the requirement for ratification, the substantive provisions were to be carried out as soon as

⁴³⁸ VCLT, Arts. 14(a), 16(a).

possible after signature and to the extent practicable before ratification.⁴³⁹ There is much subsequent practice over the ensuing three centuries.

218. Of particular note is the GATT, which was subject to provisional application under a Protocol of Provisional Application for nearly 50 years from 1947 until the adoption of the Marrakesh Agreement establishing the WTO in 1994.⁴⁴⁰ The provisional application of the GATT between the Parties included Articles XXII and XXIII, which formed the source of the signatory states' consent to the international settlement of disputes by GATT panels.

219. The legal effect of this practice was recognised and codified by the International Law Commission in its preparatory work for the VCLT. In its Commentary to draft Article 22 (which preceded Article 25 of the VCLT), the Commission noted:

This article recognizes a practice which occurs with some frequency to-day and requires notice in the draft articles ... [T]here can be no doubt that such clauses have legal effect.⁴⁴¹

220. When the Commission returned to the same topic in 2013, it emphasised to the Sixth Committee of the General Assembly that both the Special Rapporteurs on the Draft Articles on the Law of Treaties and members of the Commission took the view that “unless the parties agreed otherwise, agreement to provisionally apply a treaty implied that the parties concerned were bound by the same rights and obligations under the treaty in the same way *as if it were in force*.”⁴⁴²

221. At the Vienna Diplomatic Conference to negotiate the VCLT, the ILC's draft Article 22 on provisional application was amended into the form now found in Article 25 of the VCLT. It was moved into Part II of the Convention, dealing with “Conclusion and Entry into Force of Treaties.” One aspect of the amendments then made was to separate the

⁴³⁹ Treaty of Peace between France and the Holy Roman Empire (signed Münster 24 October 1648) 1 Con TS 319, 349-350, Arts. CIV–CVI; Treaty of Peace between Sweden and the Holy Roman Empire (signed Osnabrück, 24 October 1648) 1 Con TS 119, 198, Art. XVI, *cited* in Robert E. Dalton, “Provisional Application of Treaties,” in THE OXFORD GUIDE OF TREATIES (D. Hollis, ed., 2012) (“Dalton”), pp. 220, 222 (**Exhibit CL-34**).

⁴⁴⁰ Protocol of Provisional Application of the GATT (30 October 1947) in GATT GUIDE (**Exhibit RL-139**); Dalton, pp. 236-237 (**Exhibit CL-34**).

⁴⁴¹ DRAFT ARTICLES, pp. 187, 210 (**Exhibit CL-46**).

⁴⁴² United Nations, General Assembly, Sixty-Eighth Session, Statement by Austria during the twenty-third session of the Sixth Committee (A/C.6/68/SR.23) (4 November 2013) (emphasis added) (**Exhibit RL-41**).

institution of the provisional application of a treaty, which by definition arises prior to the entry into force of the treaty and by virtue of a provision in the treaty or the agreement of the negotiating states, from the legal consequences of a treaty that is in force as between the states parties to it following their consent to such entry into force. As the Tribunal will later explain, this distinction is reflected in Russian law.

222. The final form of the draft article was adopted by a majority of 87 votes to 1.⁴⁴³ Sir Humphrey Waldock (Special Consultant to the Conference) commented: “The practice of provisional application was now well established among a large number of States.”⁴⁴⁴
223. Reference to other aspects of the law of treaties also sheds further light on the meaning of “not inconsistent with.” There are two lines of case-law interpreting treaties that, though not identical to the Domestic Law Inconsistency Clause in Article 45(1) of the ECT, are particularly germane to its construction: (i) the interpretation of Article 1(b) Protocol of Provisional Application of the GATT; and (ii) the consideration by ECT tribunals of the compatibility of successive treaties under Article 30 of the VCLT.
224. *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.*”⁴⁴⁵

225. 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

⁴⁴³ Eleventh Plenary Meeting, United Nations Conference on the Law of Treaties Official Records A/CONF.39/11/Add.1, 43 (30 April 1969) (“**Eleventh Plenary Meeting**”) (**Exhibit RL-39**).

⁴⁴⁴ Eleventh Plenary Meeting (**Exhibit RL-39**).

⁴⁴⁵ GATT GUIDE (emphasis added) (**Exhibit RL-139**).

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.

226. 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.”⁴⁴⁶ 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 meet the obligations of Part II GATT in accordance with its agreement to provisional application.
227. This approach is in accord with the interpretation of “not inconsistent with” that the Tribunal has already reached as a matter of ordinary interpretation. That is to say, it requires a conflict between the domestic legislation on the one hand and the provisional application of the treaty, given effect by decision of the executive, on the other. Such a conflict will only arise 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.
228. *Application of successive treaties.* Tribunals also have to consider the relation between two sets of legal rules, each of which is binding and applicable, when determining the relation between successive treaties relating to the same subject matter under Article 30(3) of the VCLT. This paragraph provides that “[w]hen all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies *only to the extent that its provisions are compatible with* those of the later treaty.”
229. This provision differs from Article 45(1) of the ECT. It uses “compatible” as the connecting factor rather than “not inconsistent.” It is framed as a positive test, requiring

⁴⁴⁶ GATT/CP.3/60/Rev.1, 10 August 1949, II/49, 62, para. 99, applied, *inter alia*, in GATT Panel Report, *Belgian Family Allowances* G/32 (7 November 1952), BISD 1S/59, para. 6-7 (**Exhibit RL-132**); GATT Working Party, *German Import Restrictions* (2 May 1958) L/821, para. 16 (**Exhibit CL-81**), and further references cited in GATT GUIDE, pp. 1074-1080 (**Exhibit RL-139**).

compatibility of the earlier treaty, rather than a negative assurance of “*not inconsistent*.” Article 30 is concerned with successive sets of international law obligations between parties *inter se*, not a qualification upon such obligations derived from a particular state’s domestic law. These material differences noted, reference to the jurisprudence under this provision is also of some assistance. The ordinary meaning of “inconsistent” found above includes “incompatible.” In both cases, the test contemplates a relation of continuing parallel sets of obligations, one to be applied “to the extent” of compatibility with the other.

230. In *Achmea*⁴⁴⁷ and *Electrabel*⁴⁴⁸ tribunals had to determine whether the obligations assumed by the respondent states under investment treaties were compatible with obligations that they had subsequently assumed under EU Treaties. In *Achmea*, the issue concerned compatibility of a submission to arbitration under a prior bilateral treaty with EU law. The Tribunal held that this question was to be determined by reference to whether such a submission violated EU law. It found that it did not, there being no rule of EU law that prohibits investor-state arbitration.⁴⁴⁹ In *Electrabel*, the Tribunal considered whether the submission to arbitration under the ECT was compatible with the EU legal order. It found no “inconsistency,” there being “no legal rule or principle of EU law that would *prevent* this Tribunal from exercising its functions in this arbitration under Article 26 of the ECT.”⁴⁵⁰

231. In this context, the question of compatibility is answered by reference to whether the rule in the later treaty prevents the application of the rule in the earlier treaty, such that the application of the prior rule would violate the later treaty.

(d) Other guides to interpretation of Article 45

232. The Parties also referred the Tribunal to materials prepared by the negotiating States either in the course of the drafting of the ECT or following its adoption that they considered may assist the Tribunal in the interpretation of Article 45 of the ECT. The Tribunal is entitled to consider such material to the extent that it properly forms part of:

⁴⁴⁷ *Achmea* (Exhibit CL-56).

⁴⁴⁸ *Electrabel* (Exhibit RL-76).

⁴⁴⁹ *Achmea*, paras. 271-277 (Exhibit CL-56).

⁴⁵⁰ *Electrabel*, paras. 4.166, 4.190 (Exhibit RL-76).

(a) any other element of the context in which the treaty was concluded (Article 31(2) of the VCLT); or (b) subsequent practice of the parties as to the interpretation of the treaty (Article 31(3) of the VCLT). It may also have recourse to the preparatory work of the treaty and the circumstances of its conclusion either in order to confirm a meaning arrived at or to determine such a meaning in cases of ambiguity or where the result would otherwise be absurd: Article 32 of the VCLT.

233. Two points deserve emphasis:

(a) The negotiating States agreed that “there should be a strong commitment to Provisional Application of the Energy Charter Treaty” and specifically requested those States that did not wish to apply the Treaty provisionally to make a declaration to that effect at the time of signature.⁴⁵¹ A number of negotiating States availed themselves of this option,⁴⁵² which, the Secretariat reminded them, was an action available to be taken upon signature.⁴⁵³ Upon signature, states made three different kinds of declarations under Article 45:

- (i) Some signatories declared that they could not accept provisional application of the Treaty in accordance with Article 45(2)(a).
- (ii) A number of other signatories declared that they would not apply the Treaty provisionally in accordance with Article 45(1).⁴⁵⁴

⁴⁵¹ Message No. 239 from the Energy Charter Conference Secretariat (28 April 1994) (**Exhibit C-142**).

⁴⁵² See Letter from Canada to the Secretary-General of the ECT (**Exhibit C-188**); Letter from Austria to the European Energy Charter Conference Secretariat (**Exhibit C-189**); Letter from Romania to the Conference on European Energy Charter Secretariat (**Exhibit C-190**); Fax from Denmark to Clive Jones, Secretariat of the European Energy Charter (**Exhibit C-191**); Letter from Norway to Energy Charter Secretariat (**Exhibit C-192**); Letter from Portugal to Clive Jones, Secretariat of the European Energy Charter Conference (**Exhibit C-194**); Letter from Italy to the European Energy Charter (**Exhibit C-141**); Fax from Switzerland to the Charter Conference Secretariat (**Exhibit C-197**); Letter from Poland under Article 45(1) (**Exhibit C-200**); Declaration by Hungary under Article 45 (**Exhibit C-201**).

⁴⁵³ ECT Note from the Conference Chairman, Document 27/94 CONF 104 (14 September 1994) (**Exhibit C-206**).

⁴⁵⁴ Updated Signatories List (**Exhibit C-144**).

(iii) A third list of signatories declared that they did not accept the provisional application obligation of Article 45(3)(b) in accordance with Article 45(3)(c).⁴⁵⁵

(b) By the same token 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.”⁴⁵⁶

(e) Russian practice as a signatory to the ECT

234. Having considered the nature of provisional application as expressly provided in the ECT and under general international law, it is now necessary to consider the actions taken by the Respondent in connection with its signature and provisional application of the ECT.

235. Under the signature of Mr Chernomyrdin, Chairman, the Government of the Russian Federation resolved on 16 December 1994 to execute the ECT subject to certain specified declarations and to instruct Mr Davydov, its Deputy Chairman, to execute the Treaty.⁴⁵⁷ The Government resolved to make a number of declarations with respect to separate articles of the ECT, as listed in an Appendix to the Resolution. This list did not include any declaration of the kind provided for in Article 45. By a certificate of the same date, the Russian Federation (under the signature of its Deputy Minister of Foreign Affairs) issued full powers to Mr Davydov to sign the ECT,⁴⁵⁸ which he did on 17 December 1994.⁴⁵⁹

⁴⁵⁵ The Czech Republic, Germany, Hungary, Lithuania, Poland and Slovakia: ECT, Annex PA, p. 115 (**Exhibit C-1**).

⁴⁵⁶ “A” Item Note from the Permanent Representatives Committee to the Council of the European Union, Do. 12165/94, Annex 1 (14 December 1994) (**Exhibit R-9**). *See also* U.S. Dept. of State Facsimile (**Exhibit R-15**).

⁴⁵⁷ Resolution of the Government of the Russian Federation No 1390 (16 December 1994) (**Exhibit R-23**).

⁴⁵⁸ Russia’s Full Powers for Signature of the Energy Charter Treaty, the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, and the Final Act of the European Energy Charter Conference (16 December 1994) (**Exhibit R-110**).

⁴⁵⁹ There was some dispute in the evidence about whether Mr Davydov signed the Treaty as a delegate of President Yeltsin, rather than on behalf of the Government. *See e.g.* T2/141/22 – T2/145/11.

236. A Note on the Legal Aspects of Provisional Application of International Treaties in Russia, apparently prepared on behalf of the Russian delegation to the Charter Conference of the ECT held in Brussels on 8 July 1997, states that:

Provisional application of international treaties is quite common in Russian legal practice ... When provisional application is foreseen in the text of the treaty, no separate decision to this effect is taken. The decision to sign a treaty includes the decision to apply it provisionally since the draft treaty is approved by the Decree of the President or by the Ruling of the Government. In this particular case the decision to sign the ECT in 1994 was approved by the Ruling of the Government of the RUF.⁴⁶⁰

237. The FLIT requires that a treaty presented for ratification be accompanied by an “analysis of the consistency of the treaty with the legislation of the Russian Federation.”⁴⁶¹ The Treaty was presented to the Russian Parliament for ratification in 1996 under cover of the Government’s Explanatory Note, which stated *inter alia*:

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 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).

...

The legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing Law of the RSFSR.⁴⁶²

⁴⁶⁰ Note on the Legal Aspects of Provisional Application of International Treaties in the Territory of the Russian Federation (8 July 1997) (emphasis in original) (**Exhibit C-148**). The Respondent disputes the provenance and authorship of the Note: Rejoinder, para. 168.

⁴⁶¹ FLIT, Art. 16(4) (**Exhibit AVA-52**).

⁴⁶² Explanatory Note to the Draft Law (**Exhibit C-147**, corr. trans. **Exhibit R-111**).

238. On 18 December 2002, the Delegation of the Russian Federation further stated to the Energy Charter Conference that “[t]he 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.”⁴⁶³ At that stage, it proceeded on the premise that the ratification of the Treaty by the Russian Parliament would largely depend upon a successful finalization of the Transit Protocol.
239. On 25 November 2005, the Ministry of Foreign Affairs of the Russian Federation issued background information on the ECT in which it stated: “[t]he Russian Federation applies [the ECT] on a provisional basis in accordance with Part II of the [VCLT] and Section II of the [FLIT].”⁴⁶⁴
240. On 20 August 2009, the Russian Federation notified the depository of the ECT that it did not intend to become a Contracting Party to the Treaty.⁴⁶⁵ Pursuant to Article 45(3)(a) of the ECT, this notification had the effect of terminating Russia’s provisional application of the Treaty on 19 October 2009, 60 days after notification.
241. Pausing at this point in the analysis, the following observations may be made as to the factual position adopted by Russia vis-à-vis the Treaty’s provisional application:
- (a) The Russian Government, in investing Mr Davydov with full powers to sign the ECT, did not avail itself to make any declaration of the kinds permitted by Article 45 that would have restricted the provisional application of the Treaty pending its entry into force for Russia following ratification. The Energy Charter Secretariat had reminded all negotiating States of this option, which a number of other States exercised upon signature.
 - (b) Russia took the view that, since provisional application was specifically provided for in the Treaty, and since the institution of provisional application

⁴⁶³ Statement by Delegation of Russia (**Exhibit C-118**).

⁴⁶⁴ Information Bulletin on the Energy Charter Treaty (25 November 2005) (“**ECT Information Bulletin**”) (**Exhibit C-119**).

⁴⁶⁵ Notification of Russia to Portugal (**Exhibit R-5**).

was well known under Russian law, it was not necessary to make a specific decision as to provisional application.

- (c) The Russian Government considered that no declaration was required since the ECT “was in conformity with the Russian legal acts” and “consistent with the provisions of the existing Law.”⁴⁶⁶ Contrary to the Respondent’s submission that this is a “post-ratification analysis,”⁴⁶⁷ the Tribunal considers this to be a statement of the relationship between the ECT and Russian law as at the date of the Note – that is, prior to the ECT’s ratification.
- (d) Russia continued to inform the Energy Charter Conference, even after the Russian Parliament had deferred its ratification of the Treaty, that it “implements”⁴⁶⁸ and “applies”⁴⁶⁹ the Treaty on a provisional basis. It did not suggest in so stating that its provisional application was qualified or partial.
- (e) This continued to be Russia’s position from conclusion and signature of the Treaty in December 1994 until its notification that it did not intend to become a contracting party nearly 15 years later in August 2009.

242. Nevertheless, Russia’s obligation of provisional application that it voluntarily assumed upon signature in December 1994 under Article 45(1) of the ECT was always subject to the proviso: “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

(f) “Not inconsistent with” Russian constitution, laws or regulations

243. The Tribunal now turns to consider whether, and if so to what extent, such provisional application was “not inconsistent” with the Russian Constitution, laws or regulations (together “**Russian Law**”). It does so informed by the construction of the Domestic Law Inconsistency Clause that it has reached above, applying Articles 31-2 of the VCLT, which is in summary:

⁴⁶⁶ Explanatory Note to the Draft Law (**Exhibit C-147**, corr. trans. **Exhibit R-111**).

⁴⁶⁷ T1/39/11-21.

⁴⁶⁸ Statement by Delegation of Russia (**Exhibit C-118**).

⁴⁶⁹ ECT Information Bulletin (**Exhibit C-119**).

- (a) The question is whether the provisional application of Article 26 of the ECT is not inconsistent with Russian law;
- (b) The signatory States (including Russia) expressly contemplated that the dispute settlement provisions of Part V of the ECT (which contains Article 26) are capable of provisional application (para. 200 above), if not inconsistent with their respective national laws;
- (c) Consistency does not require identity or equivalence. The question is whether the two legal orders are compatible or discordant. The test of “not inconsistent with” is designed to prevent clashes between the two legal orders. It does not ensure conformity or require express permission in domestic law (para. 210 above);
- (d) This requires a conflict with a mandatory rule that precludes the executive from giving provisional application to Article 26 (para. 227 above).

244. In addressing the question whether the provisional application of Article 26 is not inconsistent with Russian law, the Tribunal has been assisted by experts called on behalf of the Parties: Professor Stephan for Claimant and Professor Asoskov for Respondent, each of whom was called for cross-examination and asked to answer questions from the Tribunal. It also has the benefit of an extensive file of primary materials of Russian law presented by the Parties, which contains relevant legislation, judicial decisions and commentary. Two preliminary points should be made about the Tribunal’s approach to Russian law:

- (i) The Tribunal is directed to address the application of Russian law by virtue of the *renvoi* found in the proviso to Article 45(1). In determining the content of Russian law, the Tribunal proceeds in light of the following consideration:

Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it

as to the content of the law and the manner in which the law would be understood and applied by the municipal courts.⁴⁷⁰

- (ii) Having ascertained the content of Russian Law, it is then obliged to consider its application within the framework of the test posited in Article 45(1), the construction of which is determined under international law (para. 206(c) above).

245. “*Constitution*” and “*laws*.” The Domestic Law Inconsistency Clause in Article 45(1) requires the Tribunal to determine whether Russia’s provisional application of the Treaty is not inconsistent with three elements of its national legal system: (i) its Constitution, (ii) its laws, and (iii) its regulations. Neither Party has relied upon specific Russian regulations as being relevant to this enquiry. The Tribunal may therefore confine itself to the Russian Constitution and laws.

246. 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.

247. The Tribunal will consider each of these possible forms of inconsistency, whilst noting that they are nevertheless closely interrelated:

⁴⁷⁰ *Emmis International Holding BV v. Hungary* ICSID Case No. ARB/12/2, Award (16 April 2014) (“*Emmis*”), para. 175 (internal citations omitted) (**Exhibit CL-59**).

- (a) As a matter of international law, they are both different aspects of the single question provoked by Article 45 of whether the provisional application of Article 26 of the ECT is or is not inconsistent with Russian Law as a whole.
- (b) As a matter of Russian Law, there is an important distinction between Russia's Constitution⁴⁷¹ and laws adopted thereunder by the Russian Parliament. Nevertheless, in answering the question posed in paragraph 246(i) above, the Tribunal will find it necessary to refer in addition to certain federal legislation, notably the FLIT⁴⁷² and to judicial decisions of the competent Russian final courts of appeal on its interpretation. This legislation bears directly on the core constitutional law question of the distribution of powers between Parliament and the executive in relation to international treaties.

248. *Constitutional effect of provisional application under Russian law.* As noted above, the first step in the enquiry is to examine the general effect given to the institution of provisional application under the Russian Constitution and law.

249. The following general propositions as to the impact of the Constitution itself on the provisional application of treaties are not contentious and were accepted by Professor Asoskov, Russia's legal expert:

- (a) Article 15(4) of the Constitution provides:

The universally-recognised rules of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation provides for other rules than those envisaged by law, the rules of the international treaty shall be applied.⁴⁷³

- (b) The rule of incorporation and supremacy within the Russian legal system for international law includes the rules of the VCLT.⁴⁷⁴

⁴⁷¹ Constitution (**Exhibit R-21**).

⁴⁷² FLIT (**Exhibit AVA-52**).

⁴⁷³ Constitution, Art. 15(4) (**Exhibit AVA-1**).

⁴⁷⁴ See Professor Asoskov's testimony at T2/19/4-14.

(c) Article 15(4) of the Constitution applies equally to provisionally applicable treaties.⁴⁷⁵

250. The FLIT draws a distinction between the ratification of international treaties, which must be done by federal law in cases where ratification is required (Articles 14-15) and the provisional application of treaties by the Russian Federation (Article 23).

251. The effect given to the provisional application of treaties under Russian law is confirmed by Article 23 of the FLIT, which makes express provision for provisional application as follows:

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.
2. Decisions on the provisional application of a treaty or a part thereof by the Russian Federation shall be made by the body that has taken the decision to sign the international treaty according to the procedure set out in Article 11 of this Federal Law.

If an international treaty – the decision on the consent to the binding character of which for the Russian Federation is, under this Federal Law, to be taken in the form of a Federal Law – provides for the provisional application of the treaty or a part thereof, or if an agreement to that effect was reached among the parties in some other manner, then this treaty shall be submitted to the State Duma within six months from the start of its provisional application. The term of provisional application may be prolonged by way of a decision taken in the form of a federal law according to the procedure set out in Article 17 of this Federal Law for the ratification of international treaties.

3. Unless the international treaty provides otherwise, or the respective States otherwise agree, the provisional application by the Russian Federation of a treaty or a part thereof shall be terminated upon notification to the other States that apply the treaty provisionally of the intention of the Russian Federation not to become a party to the treaty.

252. Both experts agree that Article 23(1) and the first sentence of Article 23(2) reflect the position that obtains pursuant to the VCLT and under prior Russian law.⁴⁷⁶ The

⁴⁷⁵ See Professor Asoskov's testimony at T2/73/3-6; T2/76/5-16.

⁴⁷⁶ See Professor Asoskov's testimony at T2/24/17 – T2/25/9. See Professor Stephan's testimony at T2/201/17-21.

consequence is that, in Russian practice, treaties requiring ratification are also capable of being applied provisionally.⁴⁷⁷ As it was put in a scholarly *Commentary* on the FLIT:

The provisional application of treaties has been widely used in Russian treaty practice. Before the Law entered into force, such practice was based on Article 25 of the [VCLT]. Article 23 of the Law was called upon to harmonize this practice; it introduces requirements in addition to those contained in the [VCLT].

...

In Russian practice, treaties requiring ratification are likewise applied provisionally.⁴⁷⁸

253. The second sentence of Article 23(2) adds an additional procedural requirement of submission to the State Duma within six months from the start of a treaty's provisional application. It is common ground between the experts that this requirement was newly introduced by way of the FLIT in 1995; it was not found in the prior Russian law; its introduction did not have retrospective effect so as to apply to the provisional application of treaties undertaken on behalf of Russia prior to the enactment of the FLIT.⁴⁷⁹ In any event, a failure to comply with this new requirement does not mean that the provisional application of a treaty in Russia is automatically terminated.⁴⁸⁰ "Such a result would contradict Article 23 of the Law and Article 18 of the [VCLT] ... [S]uch a failure will not automatically entail any international legal consequences."⁴⁸¹
254. The status of the provisional application of a treaty within the Russian legal system was the subject of authoritative determination by the Constitutional Court in Resolution 8-P upon a specific challenge to the constitutionality of Article 23 of the FLIT.⁴⁸² In that case, the applicant sought review of a decision on the part of the Government to impose customs duties upon him for the import of goods through Kazakhstan in accordance with

⁴⁷⁷ See Professor Asoskov's testimony at T2/33/9-15-16.

⁴⁷⁸ Zverkov & Osminin, pp. 73-74 (**Exhibit CL-48**).

⁴⁷⁹ See Professor Asoskov's testimony at T2/33/22-25; See Professor Stephan's testimony at T2/201/6-20.

⁴⁸⁰ See Professor Asoskov's testimony at T2/34/8-15.

⁴⁸¹ Zverkov & Osminin, p. 74 (**Exhibit CL-48**).

⁴⁸² Resolution No. 8-P, p. 6 (**Exhibit R-35**). Upon review of the constitutionality of FLIT, Art. 23(1) following the application of I.D. Ushakov (**Exhibit R-24**).

the higher rates prescribed in a customs union treaty between Russia and Kazakhstan. That treaty had not entered into force and was subject to provisional application. The Court had to review Article 23(1) of the FLIT in order to decide “the extent upon which the issue of possibility of review of provisional application of an international treaty of the Russian Federation (or any part thereof) prior to its entry into force, which affects the rights, freedoms and duties of man and citizen and establishes other rules than those provided by law and in case such treaty was not officially published, is resolved.”⁴⁸³

255. The Constitutional Court held that provisional application has the following effect:

The Russian Federation may agree to provisional application of an international treaty (whether in full or in part), may determine the maximum period of its provisional application and may condition provisional application of an international treaty (or any part thereof) prior to its entry into force by compliance with the Constitution of the Russian Federation, laws and other regulatory acts of the Russian Federation. Agreement to provisional application of an international treaty means that it becomes part of the legal system of the Russian Federation and must be applied on the same basis as international treaties that have entered into force (unless otherwise expressly stated by the Russian Federation), since otherwise, provisional application would be meaningless. That is why neither the [VCLT] nor the [FLIT] contains any exemptions from *pacta sunt servanda* with respect to provisional application of treaties: as follows from Article 25(2) of the Convention and Article 23(3) of the Federal Law, if a treaty does not provide otherwise or if the respective states have not agreed otherwise, provisional application of such international treaty or any part thereof with respect to the Russian Federation will cease if it notifies other states between which such treaty is provisionally applied of its intention not to become a party thereto.⁴⁸⁴

256. In consequence, the Court held that “provisions of a provisionally applied international treaty become part of the legal system of the Russian Federation and, like international treaties of the Russian Federation that have entered into force, have priority over Russian laws.”⁴⁸⁵

⁴⁸³ Resolution No. 8-P, p. 3 (**Exhibit R-35**).

⁴⁸⁴ Resolution No. 8-P, pp. 8-9, para. 4 (**Exhibit R-35**).

⁴⁸⁵ Resolution No. 8-P, p. 9, para. 4.1. (**Exhibit R-35**).

257. As a result, the Court upheld the constitutional validity of Article 23(1) of the FLIT “insofar as it permits provisional application prior to its entry into force of an international treaty of the Russian Federation (or any part thereof).” Such provisional application is valid even where the provisionally applied treaty is “establishing rules other than those provided by law,”⁴⁸⁶ with the consequence that the treaty forms part of Russian law pending its ratification or the termination of provisional application.
258. 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.⁴⁸⁷
259. It also follows from this Ruling that the institution of provisional application, as recognised and given effect in Russian law, provides grounds for an exception to federal law. This possibility is also confirmed in Russian doctrine. As Professor Osminin concludes in his treatise:

The [FLIT] (Art 23) contains no restrictions limiting the scope of provisional application of treaties according to their subject-matter, permitting provisional application to be used for all categories of treaties subject to ratification, including treaties that establish rules different from those prescribed by law.⁴⁸⁸

⁴⁸⁶ Resolution No. 8-P, p. 13, *dispositif* para. 1 (**Exhibit R-35**).

⁴⁸⁷ Supreme Court Cassation Ruling (**Exhibit AVA-61**) cited by Respondent as authority for the contrary position is not in point. *See* paras. 117-119 above. The treaty in question in that case had not been ratified and contained no provisional application clause: Stephan: T2/162/15-25.

⁴⁸⁸ Osminin, pp. 326-327 (**Exhibit RL-140**); *see also* Zvekkov & Osminin, p. 75 (**Exhibit CL-48**).

260. It is in this context that Article 15(1) of the FLIT falls to be interpreted.⁴⁸⁹ That provision requires ratification, *inter alia*, of international treaties “that set out rules different from those provided by law.” That is a separate question to provisional application of a treaty pending its ratification and entry into force. The FLIT does not prohibit the provisional application of such treaties pending ratification. Rather, it expressly contemplates it. The purpose of provisional application is to grant binding effect to treaties that must otherwise be ratified in order to take effect within Russia’s legal system.

261. Article 23(2) also provides guidance as to which internal organ within the Russian Federation is empowered to take decisions on the provisional application of a treaty or part thereof. It requires such a decision to be made “by the body that has taken the decision to sign the international treaty according to the procedure set out in Article 11.”

262. Article 11 provides:

1. Decisions to negotiate and to sign international treaties of the Russian Federation shall be made:

a) with respect to treaties to be concluded on behalf of the Russian Federation, by the President of the Russian Federation, but with respect to treaties to be concluded on behalf of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation, by the Government of the Russian Federation;

b) with respect to treaties to be concluded on behalf of the Government of the Russian Federation, by the Government of the Russian Federation.

2. Decisions to negotiate and to sign international treaties of the Russian Federation on matters under the jurisdiction of the Government of the Russian Federation shall be made by the President of the Russian Federation if circumstances so require.

263. Article 11 of the FLIT as a whole confirms that the decision to sign an international treaty on behalf of Russia is one within the competence of the executive, not for Parliament. In the present case, the decision to sign the ECT was taken by the Government of the Russian

⁴⁸⁹ FLIT (Exhibit AVA-52).

Federation by Resolution, pursuant to which Mr Davydov was issued with full powers to sign on behalf of Russia.⁴⁹⁰

264. Against this background, it is possible to return to the place within the Russian constitution of treaties that may, if the treaty so provides, be provisionally applied. Article 23 permits such provisional application by the Russian Federation and empowers the body that has taken the decision to sign the treaty pursuant to Article 11 to make the decision to provisionally apply the treaty or a part thereof. Where such a treaty is provisionally applied, it becomes, to the extent of such provisional application “an international agreement concluded by the Russian Federation.”⁴⁹¹ For that purpose, “‘conclusion’ means the expression of the consent of the Russian Federation to be bound by an international treaty.”⁴⁹² In turn, the reference in Article 15(4) of the Constitution to “international treaties and agreements of the Russian Federation” includes treaties that are provisionally applied, as both Parties and their experts agree.
265. The Tribunal next tests whether this conclusion, arrived at by construction of the pertinent provisions of the Constitution and the FLIT, is also consistent with the principle of the separation of powers that may be said to underlie the requirement enshrined in Article 15 of the FLIT to subject “international treaties ... that set out rules different from those provided for by law” to ratification “through the enactment of federal law” by Parliament.
266. The FLIT draws a careful distinction between the entry into force of a treaty and the regime of provisional application prior to entry into force.⁴⁹³ The ECT does the same. It requires ratification by a State for the purpose of entry into force;⁴⁹⁴ while provisional application operates “pending [the ECT’s] entry into force for such signatory.”⁴⁹⁵

⁴⁹⁰ See para. 235 above.

⁴⁹¹ FLIT, Art. 2(a) (**Exhibit R-24**).

⁴⁹² FLIT, Art. 2(d) (**Exhibit R-24**).

⁴⁹³ FLIT, Arts. 23-24 (**Exhibit R-24**).

⁴⁹⁴ ECT, Art. 44 (**Exhibit C-1**).

⁴⁹⁵ ECT, Art. 45(1) (**Exhibit C-1**).

267. Consistent with this structure, the question whether to ratify the ECT such that it may enter into force for Russia was one for the Russian Parliament. The executive accepted this, introducing a Bill into Parliament seeking ratification.⁴⁹⁶
268. The question here is different: it is whether the provisional application of the ECT pending ratification and entry into force itself offends the constitutional principle of the separation of powers.
269. The provisional application of a treaty prior to its ratification and entry into force is an institution that is expressly contemplated by the FLIT. It was Parliament that enacted the FLIT as a federal law. It is by virtue of that law that Parliament empowers the executive to commit Russia to such provisional application of treaties.
270. Professor Asoskov opines that, since Article 15(4) of the Constitution accords priority to international treaty obligations over federal law, only such obligations that have been ratified by Parliament and implemented by federal law can be given such effect.⁴⁹⁷ Otherwise there would be the prospect of conflict between treaty obligations and federal law, each having the force of law within the Russian legal system.
271. In the present case, the Domestic Law Inconsistency Clause ensures that there is no such conflict, since the treaty obligations only apply “to the extent that such provisional application is not inconsistent” with Russian law.
272. In the Tribunal’s view, provisional application of the ECT under Article 45(1) is not inconsistent with the Constitution, since (a) Russian law expressly contemplates that the executive may commit Russia to the provisional application of a treaty prior to its ratification and (b) there can be no conflict between the ECT and Russian law in a manner that might offend the priority necessarily accorded to Parliament as a matter of the separation of powers to enact federal law, since, to the extent of such a conflict with federal law, the Treaty would not provisionally apply.

⁴⁹⁶ Decree of Russia (**Exhibit R-3**).

⁴⁹⁷ Asoskov 1, paras. 48-66.

273. From the above analysis, the Tribunal concludes that the decision of the executive in Russia to give provisional application to the ECT was not inconsistent with its Constitution.
274. *“Not inconsistent with” Russian laws on the settlement of investment disputes?* That is not the end of the analysis. The Tribunal must also consider whether the provisional application of the dispute settlement provisions of Article 26 is itself “not inconsistent with” Russian law. Following the construction of Article 45 that the Tribunal has found above, this would have to be because such provisional application would conflict with mandatory provisions of Russian legislation that, expressly or impliedly, may not be derogated from by the executive by way of provisional application.
275. In light of its finding at paragraph 177 above, the Tribunal addresses Russian law pertinent to this question as at the date on which its jurisdiction was invoked, namely 15 February 2013. This is the date on which its jurisdiction falls to be determined, both Parties also accepting that a State applying the Treaty provisionally may progressively remove inconsistencies over time.
276. It is important to be clear about the scope of this enquiry: it is limited to the question whether there is a mandatory rule of Russian legislation that prohibits the executive from agreeing to the provisional application of Article 26 of the ECT.
277. Much of the evidence adduced on behalf of Respondent and relied upon by Professor Asoskov was directed towards establishing the non-arbitrability of public law disputes between private persons and the state within the Russian municipal legal order, including disputes concerning matters such as bankruptcy and taxation. This proposition is not germane to the issue before the Tribunal, which relates to whether there is any prohibition on an agreement made on the plane of international law to submit a category of disputes with foreign nationals to international arbitration. The fact that the subject matter of the Claimant’s underlying allegations may relate, for example, to the application of bankruptcy legislation, does not change the character of the claim in respect of which this Tribunal’s jurisdiction is invoked.
278. The Parties agree that Russian law permits the State to submit to binding resolution of such investment disputes by arbitration pursuant to an international treaty. The Tribunal

received evidence as to the extensive scope of Russia's programme of investment treaties, in which the Russian Federation does submit to binding international arbitration of disputes between it and foreign investors.⁴⁹⁸

279. The issue in dispute between the Parties that is submitted for the Tribunal's decision is whether Russian law prohibits the executive from agreeing to such a form of dispute resolution as provided by Article 26 *by way of provisional application* such that the provisional application of Article 26 is inconsistent with Russian law. This question is not addressed by reference to the record of Russian bilateral investment treaties. On the evidence before the Tribunal, none of these contained a clause providing for their provisional application. The fact that these treaties were each submitted for ratification to the Russian Parliament does not therefore address the question of whether Russian legislation prohibits the executive from provisionally applying a treaty clause providing for international arbitration prior to ratification. At the same time, the fact that Russia has consented to the submission of investment disputes to international arbitration by way of ratified treaties in other circumstances is not itself sufficient to establish that the provisional application of Article 26 is not inconsistent with Russian law.

280. The relevant provision of Russian legislation that was in force at the date on which the jurisdiction of this Tribunal is to be determined is Article 10 of the 1999 FI Law.⁴⁹⁹ This states:

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 courts, arbitrazh courts or through international arbitration (arbitral tribunal).

281. The Preamble to the 1999 FI Law states, *inter alia*, that it is aimed at "making sure that the legal treatment of foreign investment is consistent with the rules of international law and international practice of investment cooperation."

⁴⁹⁸ See paras. 139 & 170 above.

⁴⁹⁹ 1999 FI Law (**Exhibit AVA-36**).

282. Article 10 is a permissive rule as to *applicable law* and as to *available fora* for the resolution of investment disputes:

(a) It permits reference to international treaties of the Russian Federation as providing one source for rules concerning the resolution of a dispute of a foreign investor in connection with its investments in the Russian Federation.

(b) It offers international arbitration as one forum for the resolution of such disputes by way of an alternative to courts or arbitrazh courts.

283. “[I]nternational treaties of the Russian Federation” is to be construed as a reference to such treaties as are capable of creating legal obligations within the Russian legal system. In light of the evidence of Russian law cited above, a provisionally applied treaty also has the force of law within the Russian legal order. Unlike its predecessor the 1991 FI Law,⁵⁰⁰ the 1999 FI Law does not qualify the reference to international treaties with the words “in force.” As the Constitutional Court has confirmed, a treaty that is provisionally applied is applied on the same basis as treaties that have entered into force. The reference to “international arbitration” includes a treaty provision for the resolution of disputes through international arbitration, such as Article 26 of the ECT, in a treaty that is provisionally applied.

284. Russian legislation on the resolution of investment disputes does not prohibit the executive from provisionally applying a treaty that contains a reference of such disputes to international arbitration. The Tribunal accordingly concludes that the decision of the executive to give provisional application to the ECT was not inconsistent with Russia’s “laws”.

285. The Tribunal has reached the above conclusions following its own independent analysis of the law in the light of the evidence and the legal authorities adduced before it.

286. As mentioned earlier,⁵⁰¹ with the Parties’ agreement, the Tribunal received into the record in these proceedings The Hague District Court Judgment dated 20 April 2016, setting

⁵⁰⁰ 1991 FI Law, Art 9. (**Exhibit AVA-35**).

⁵⁰¹ See paras. 28-30 above.

aside the Awards in *Hulley Enterprises Ltd/Yukos Universal Ltd (Isle of Man)/Veteran Petroleum Ltd (Cyprus) v. Russian Federation*.⁵⁰² As that judgment also dealt with the provisional application of the ECT to the Russian Federation vis-à-vis an invocation of jurisdiction under Article 26, the Tribunal invited the Parties to make submissions on the relevance (if any) of the judgment in the present case. Both the Arbitral Tribunal and the District Court in that case necessarily had to decide the issue on the basis of the evidentiary record and submissions advanced before them, which may well differ materially from the record in the present proceedings. Nevertheless, in view of the fact that the present Tribunal has come to a different view on the application of Article 45(1) to that reached by the District Court, the Tribunal now indicates in outline where it respectfully differs from the District Court in its analysis of the law.

287. In the first place, the District Court holds that “not inconsistent with” is equivalent to “compatibility.” It reasons that:

Given in part the fact that the provisional application finds its legitimacy in the signing (and the sovereignty of the Signatories is at stake in a number of treaty provisions), the provisional application of the arbitral provision contained in Article 26 is also contrary to Russian law if there is no legal basis for such a method of dispute settlement or is irreconcilable with the starting points and principles that have been laid down in or can be derived from legislation.⁵⁰³

288. As a result of characterising the question as a search for compatibility with Russian law, the District Court considers that “incompatibility with Russian law can also exist if that law does not provide for the option of arbitration as laid down in Article 26 ECT.”⁵⁰⁴ It finds that the 1999 FI Law “does not provide a separate legal basis for the arbitration of disputes between an investor and a state in international arbitral proceedings, as provided for in Article 26 ECT.”⁵⁰⁵ The Court concludes that it “does not follow the Tribunal’s

⁵⁰² *Hulley Enterprises (Exhibit CL-9); Veteran Petroleum Limited (Cyprus v. The Russian Federation)*, PCA Case No. AA228, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (**Exhibit CL-26**); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 October 2009 (**Exhibit CL-27**).

⁵⁰³ The Hague District Court Judgment, para. 5.33.

⁵⁰⁴ The Hague District Court Judgment, para. 5.41.

⁵⁰⁵ The Hague District Court Judgment, para. 5.58.

opinion that such disputes, and therefore also the current dispute, can be arbitrated based on Russian law.⁵⁰⁶

289. The Respondent in the present case urged a similar interpretation upon the Tribunal. In answer to a question from the Tribunal as to which provisions of the ECT had been applied by the Respondent upon signature, it referred solely to a number of substantive provisions of Russian domestic law that were already in force at the time of signature and that contain obligations similar to those in the ECT, but were only enforceable in the Russian courts.⁵⁰⁷
290. For the reasons developed above,⁵⁰⁸ the Tribunal considers that this approach is not in accordance with Article 45 of the ECT when interpreted in accordance with the general approach to interpretation of treaties in international law, codified in Articles 31-2 of the VCLT. The District Court's enquiry construes the test in Article 45 in a manner that does not give effect to the purpose of the provision, namely the agreement of the signatory States to apply the Treaty provisionally subject to the Domestic Law Inconsistency Clause. The approach of the District Court reverses the enquiry mandated by Article 45. Its approach requires the signatory State to have already made provision in its domestic law in terms that are in substance the same as the treaty obligation. Such an interpretation would mean that the provisional application of the ECT, as provided in Article 45, would add nothing to the pre-existing domestic law of the signatory States.
291. This would deprive Article 45 of its substantive effect, despite the clearly expressed intent of the signatories that the ECT was to be subject to provisional application, with the consequences spelled out in detail in the ensuing paragraphs of Article 45. As the Tribunal has shown, the institution of provisional application is well accepted in both international law and in Russian law as giving effect, on a provisional basis prior to ratification, to the obligations of *international* law assumed by the signatory states under the Treaty.

⁵⁰⁶ The Hague District Court Judgment, para. 5.58.

⁵⁰⁷ T5/51/7 – T5/56/7.

⁵⁰⁸ See paras. 180-233 above.

292. For these reasons and in the light of the rest of its analysis above, the Tribunal differs in its interpretation of Article 45 of the ECT in its application to the present case.
293. The Tribunal concludes that, upon signature, the Respondent did agree to provisionally apply Article 26 of the ECT in accordance with – and with the consequences provided for in – Article 45.
294. In light of this conclusion, the Tribunal finds it unnecessary to decide whether provisional application must apply to the ECT as a whole or may apply piecemeal, since, for all of the reasons elaborated above, it is in any event satisfied that the Respondent’s agreement to the provisional application of the ECT includes the obligation to submit a dispute to arbitration under Article 26.

B. DID THE CLAIMANT MAKE A PROTECTED INVESTMENT UNDER THE ECT?

1. Introduction and factual background

(a) The Respondent’s objection

295. In its second principal objection to jurisdiction, the Respondent alleges that the Loans do not qualify as Investments in terms of Article 1(6) of the ECT.
296. The Respondent accepts that the Claimant is an “Investor” for the purpose of Article 1(7) of the ECT, being “a company or other organization organized in accordance with the law applicable in that Contracting Party.”⁵⁰⁹
297. However, it submits that the Loans do not constitute an “Investment” on the grounds that the Loans:
- (a) Do not qualify as “other debt of a company” in terms of Article 1(6)(b), “claims to money” in terms of Article 1(6)(c) or “Returns” in terms of Article 1(6)(d);
 - (b) Do not meet the characteristics of an Investment under Article 1(6); and
 - (c) Are not “associated with an Economic Activity in the Energy Sector” in terms of Article 1(6).

⁵⁰⁹ T5/118/24 – T5/119/1.

(b) The relevant provisions of the ECT

298. The ECT provides the following relevant definition of “Investment”:

Article 1—Definitions

(6) “Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and moveable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) ...
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

...

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

299. “Economic activity in the Energy Sector” is defined in Article 1(5) to mean: “an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products.”

300. “Area” means with respect to a state that is a contracting party both “the territory under its sovereignty” and the sea and sea-bed over which it exercises sovereign rights in accordance with the international law of the sea: Article 1(10).

301. “Returns,” which are included within the definition of “Investment” by virtue of Article 1(6)(e), are defined in Article 1(9) to mean “the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits,

dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.”

302. An investment may be made by “establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity”: Article 1(8).
303. The requirement that there be “an Investment” forms an integral part of the agreement to submit disputes concerning an alleged breach of the Investment Promotion and Protection provisions of Part III of the ECT to international arbitration. Article 26(1) defines the scope *ratione materiae* of the disputes capable of submission to arbitration under Article 26(3)(a) as “[d]isputes between a Contracting Party and an Investor of another Contracting Party *relating to an Investment* of the latter in the Area of the former.”⁵¹⁰

(c) Summary of the Parties’ characterisation of the Loans

304. A brief summary of the factual background to this arbitration was provided in Part III of this Award. A closer understanding of the background, character and operation of the Loans is now necessary in order to understand the nature of the Respondent’s objection and the Claimant’s response.
305. The Tribunal briefly summarises the Parties’ different positions on the characterisation of the primary facts before summarising the facts as it finds them to be. It then outlines the Parties’ detailed submissions on the question of whether the Claimant made a qualifying Investment.
306. The Respondent submits that the history, intent and terms of the Loans demonstrate that they were a repatriation to Yukos Oil in Russia of the profits of its own oil trading activities in Russia and the sale of its interest in a Russian gas company.⁵¹¹ The form of a loan was adopted to achieve tax benefits. But, on the Respondent’s case, the substance was not changed; the Loans did not contribute anything to the Russian economy. Yukos Capital played no meaningful role in the transaction and should be disregarded.⁵¹²

⁵¹⁰ ECT, Art. 26(3)(a) (emphasis added).

⁵¹¹ T1/64/11-14.

⁵¹² T1/45/8-19.

307. In order to illustrate the structure of the relevant transactions the Respondent produced an annotated demonstrative exhibit.⁵¹³
308. The Respondent submits that, in those circumstances, the Loans do not qualify as an Investment in terms of Article 1(6). During the Hearing, the Respondent confirmed that for the purpose of this phase of the proceedings, it:
- (a) Does not object to the Tribunal’s jurisdiction on the ground that Yukos Capital does not qualify as an Investor in terms of Article 1(7);⁵¹⁴ and
 - (b) Does not argue that the payments from other companies in Yukos Group out of Russia were contrary to Russian law. It accepted (again for this purpose only) that the transfers from Russia to Cyprus (including the tax paid on them) were in accordance with the then treaty arrangements between Russia and Cyprus.⁵¹⁵
309. The Claimant produced its own version of the Respondent’s demonstrative exhibit.⁵¹⁶ The Claimant does not take issue with the basic structure of the transactions alleged by the Respondent. The primary difference is that the Claimant submits that funds upon which Yukos Capital drew in order to fund the Loans comprised – in addition to the dividends derived from trading subsidiaries’ profits – funds from international investment, which together formed a pool of investments.⁵¹⁷
310. The Claimant submits that there “was never anything remotely circular” about the path of the funds, which were never owned by Yukos Oil. This was not a strategy to “pop funds out of Russia just to stick them back in for tax purposes,” and the original strategy was to use the funds for international expansion.⁵¹⁸

⁵¹³ Demonstrative Exhibit Showing the Flow of Funds Transferred under the December 2003 and August 2004 Loan (**Exhibit R-115**). At the Tribunal’s request, the Respondent annotated the exhibit with references to the evidential record, and produced the annotated version as **Exhibit R-115A**.

⁵¹⁴ T5/118/24 – T5/119/22.

⁵¹⁵ T5/65/25 – T5/66/25.

⁵¹⁶ Claimant’s Demonstrative Exhibit Correcting Exhibit R-115 (7 September 2015) (“**Exhibit R-115 Correction**”) (**Exhibit C-220**). The Claimant’s exhibit only addresses the December 2003 Brittany Loan; Loan Facility Agreement between Brittany Assets Limited and Yukos Capital (“**Brittany Loan Agreement**”), para. 3 (**Exhibit C-130**).

⁵¹⁷ T5/213/22 – T5/214/6.

⁵¹⁸ T5/212/1-23.

(d) The Tribunal's approach to the evidence

311. In addition to the documentary evidence submitted on the record in these proceedings relating to the Loans by both Parties, the Tribunal also had the benefit of witness evidence. The Claimant called Mr Misamore, who had been the Chief Financial Officer of Yukos Oil from April 2001 to December 2005. He submitted two witness statements and was tendered for cross-examination at the hearing. He also answered questions from the Tribunal. In addition, each Party produced experts on inter-company loan transactions: Mr Gleichenhau and Mr Grantham for the Claimant, and Professor Lys for the Respondent. They each submitted reports and appeared before the Tribunal.
312. The Tribunal is mindful of the nature of its function at the jurisdictional stage in relation to contested matters of fact. It draws a distinction that is well established in the jurisprudence of international courts and tribunals, both generally and in the specific context of investment disputes. That is the distinction between: (a) allegations of fact that go to the merits of the claim, which the Tribunal must take care not to prejudge at the jurisdictional stage and must instead approach on a *prima facie* basis; and (b) questions of fact that go directly to the scope of its jurisdiction, on which it is bound to make a final determination.
313. As the Annulment Committee in *Duke v. Peru* observed:

[A]n arbitral tribunal must, for the purpose of its jurisdictional determination, presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In that sense, its determination may be said to be *prima facie*. But, in the application of those presumed facts to the legal question of jurisdiction before it, the tribunal must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the parties' consent. In making this determination, the tribunal may not simply adopt the claimant's characterisation without examination. In this way, a tribunal whose jurisdiction is contested strikes the balance between avoiding pre-judging the merits, on the one hand, and objectively determining the question of jurisdiction on the other.⁵¹⁹

⁵¹⁹ *Duke Energy International Peru Investments No. 1 Ltd v. Peru* (Decision on Annulment) ICSID Case No. ARB/03/28 (1 March 2011), para. 118.

314. That an objective and final determination of its jurisdiction must be made was a central element in the reasoning of the International Court of Justice in *Oil Platforms* when it observed:

[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.⁵²⁰

315. The distinction here drawn was well elucidated by Judge Higgins in her Separate Opinion, when she said:⁵²¹

Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are “arguable questions” or that are “bona fide questions of interpretation”....

The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them.

316. The same distinction was made in the investment arbitration context by the tribunal in *UPS v. Canada* when, distinguishing the two types of factual allegations for jurisdictional purposes, it observed, as to the second type, that “any ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.”⁵²²

⁵²⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996] ICJ Rep 803 (“**Oil Platforms**”), para. 16.

⁵²¹ *Oil Platforms*, Higgins Separate Opinion, para. 31.

⁵²² *United Parcel Service of America Inc v. Canada* (Award on Jurisdiction) (2002) 7 ICSID Rep, paras. 285, 296-7 (**Exhibit RL-92**). See also, to like effect: *Phoenix Action Ltd v. Czech Republic* ICSID Case No ARB/06/5, Award (15 April 2009) (“**Phoenix Action**”), paras. 60-61 (**Exhibit RL-65**); Douglas, paras. 502–527 (**Exhibit CL-35**).

(e) The factual background

317. In this section, the Tribunal analyses the facts pleaded as relevant to this second jurisdictional objection in more detail. It makes findings on matters that are clearly established on the record and identifies remaining matters in dispute between the Parties as to the appropriate characterisation of the transactions or the implications to be drawn from them. It will return to those factual matters where the Parties are not in agreement at a later point in its analysis, once it has determined what issues of fact are essential to its reasoning for the purpose of deciding the specific jurisdictional objection before it. In light of the limited nature of a tribunal's fact-finding task at the jurisdictional stage outlined above, the Tribunal is not to be taken as pre-judging other issues of fact that may be germane to the merits.
318. Yukos Capital was incorporated in 2003 as a group finance company to serve the needs of the wider Yukos Group.⁵²³ In 2005, its ownership structure was reorganised so that it was owned by Yukos International, which in turn was wholly owned by the *Stichting*. The purpose of this restructuring, according to the Claimant, was to protect Yukos Oil's foreign assets from being confiscated by the Russian State. Yukos Oil was dissolved in 2007 at the conclusion of bankruptcy proceedings in Russia.⁵²⁴
319. This proceeding concerns two Loans – the December 2003 Loan and the August 2004 Loan – under which Yukos Capital was the lender and Yukos Oil the borrower. In each case, the Loans were funded by non-recourse back-to-back loans from other entities in the Yukos Group. The structure of these loans and the source of the funds advanced under them are relevant to the Respondent's contention that they do not give rise to qualifying Investments in terms of the ECT.
320. *The December 2003 Loan.* The December 2003 Loan was made pursuant to a loan agreement dated 2 December 2003, whereby the Claimant agreed to loan Yukos Oil an amount not to exceed RUB 80 billion.⁵²⁵ The December 2003 Loan carried a quarterly interest rate of 9 percent, and its repayment was due on 31 December 2008. Failure to

⁵²³ Counter-Memorial, para. 24.

⁵²⁴ Notice of Arbitration, para. 10.

⁵²⁵ Loan Agreement between Yukos Oil Company and Yukos Capital S.a.r.l. (2 December 2003) ("**2003 Loan Agreement**"), Art. 1.1 (**Exhibit C-9**).

meet the repayment due date entitled the Claimant to a penalty of 0.1 percent of the amount overdue.⁵²⁶ An amount of RUB 79.3 billion under the December 2003 Loan was disbursed to Yukos Oil during the period of December 2003 to June 2004.⁵²⁷

321. *The August 2004 Loan.* The August 2004 Loan was made pursuant to a loan agreement dated 19 August 2004, whereby the Claimant agreed to loan Yukos Oil an amount not to exceed USD 355 million.⁵²⁸ The August 2004 Loan carried a semi-annual interest rate of six-month LIBOR plus 1.75 percent, and its repayment was due on 30 December 2009. Failure to meet the repayment due date entitled the Claimant to a penalty of 0.1 percent “of the amount overdue for each day of delay.”⁵²⁹ The August 2004 Loan was disbursed to Yukos Oil in full upon the execution of the loan agreement.

322. *Back-to-back loans.* Each of the Loans was backed by another loan agreement:

- (a) The December 2003 Loan was linked to a back-to-back agreement between Yukos Capital and Brittany Assets Ltd. (“**Brittany**”);
- (b) The August 2004 Loan was linked to a back-to-back agreement between Yukos Capital and Hedgerow Ltd (“**Hedgerow**”) which “extended to Yukos Capital a ‘facility’ up to a certain amount.”⁵³⁰

323. Each of Brittany and Hedgerow was an indirectly-held wholly-owned subsidiary of Yukos Oil:

- (a) Brittany was incorporated in the British Virgin Islands. It was wholly owned by Yukos Oil through intermediate subsidiaries: Yukos Hydrocarbons Investments Ltd (BVI) and Yukos CIS Investment Co Ltd (Armenia).⁵³¹

⁵²⁶ Notice of Arbitration, para. 18; 2003 Loan Agreement, Art. 3.2 (**Exhibit C-9**); Counter-Memorial, para. 25.

⁵²⁷ Notice of Arbitration, para. 18; Counter-Memorial, para. 26.

⁵²⁸ Loan Agreement between Yukos Oil Company and Yukos Capital S.a.r.l. (19 August 2004) (“**2004 Loan Agreement**”), Art. 1.1 (**Exhibit C-30**).

⁵²⁹ Notice of Arbitration, para. 19; *see* 2004 Loan Agreement, Art. 3.2 (**Exhibit C-30**).

⁵³⁰ Reply, paras. 209-210, 286-288.

⁵³¹ **Exhibits R-115A and R-78-284.**

(b) Hedgerow was incorporated in Cyprus. It was wholly owned by Yukos Oil through an intermediate subsidiary, Yukos UK Ltd, a British company.⁵³²

324. The agreements with Brittany and Hedgerow defined Yukos Capital as the “Sub-Lender” and determined the maximum amount to be sub-lent, the nominal interest rate, and the maturity.⁵³³ In practice, the funds that Brittany and Hedgerow lent to Yukos Capital were equal to the amounts that Yukos Capital sub-lent to Yukos Oil, and, in most cases, these funds were transferred in and out of Yukos Capital’s bank accounts in matching deposits and withdrawals made within one business day of each other.⁵³⁴

325. In both cases, there was a specified margin (described as the “spread”) between the interest rate payable under the primary loan and the sub-loan:

(a) The December 2003 Loan carried an interest rate on the sub-lending to Yukos Oil of 9 per cent. The interest rate payable on the corresponding loan from Brittany was 8.9375 per cent. That is a margin of one sixteenth of one per cent or 6.25 basis points (0.0625%).⁵³⁵

(b) The August 2004 Loan carried an interest rate on the sub-lending of six-month LIBOR plus 175 basis points. The interest rate on the corresponding loan from Hedgerow was LIBOR plus 171.875 per cent. That is a margin of one thirty-second of one per cent, or 3.125 basis points, or half the margin applicable to the December 2003 Loan.

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

⁵³² Exhibits R-115A and R-78-281.

⁵³³ Reply, para. 211, *citing* Expert Report of Professor Thomas Z. Lys, PH.D. (“Lys”), paras. 27, 29, 43, 45. Among the terms prescribed in the agreements with Brittany and Hedgerow were the identity of the sub-borrower (Yukos Oil), the maximum amount that could be sub-lent, the nominal interest rate, and the maturity of the loan: T3/46/7-21.

⁵³⁴ Reply, paras. 210, 212.

⁵³⁵ T1/57/2-13.

because the tax authorities agreed in the interim that the lower spread was acceptable. The Respondent claims that the spread was no more or less than an administrative fee.⁵³⁶

327. The terms of the agreements with Brittany and Hedgerow were non-recourse. Yukos Capital did not have to repay the funds until Yukos Oil paid it pursuant to the sub-lending agreements of the Loans.⁵³⁷ The Respondent alleges that Yukos Capital acknowledged this in 2004 in correspondence with Brittany and Hedgerow,⁵³⁸ and it was reflected in a subsequent agreement with Fair Oaks (the assignee of Brittany's and Hedgerow's interests under the loans) in 2010.⁵³⁹ These terms also prescribed that Brittany and Hedgerow "shall bear all risks associated with Sub-Lending."⁵⁴⁰ The Respondent submits that this includes the risk of failing to receive the spread.⁵⁴¹ The Loans were unsecured.⁵⁴²
328. Mr Gleichenhaus' evidence is that the Loans were accounted for as such in Yukos Capital's financial statements from 2003 to 2007.⁵⁴³
329. The Respondent accepts that the Loans met the formal requirements to qualify as such. Nevertheless it submits that they should be treated as dividends for the purpose of determining whether they constitute an Investment in terms of the Treaty.⁵⁴⁴
330. *Origin of the loan funds.* It was common ground that funds from profits of oil trading activities within the Yukos Group, including those of its Russian subsidiaries, Ratibor and Fargoil, were remitted to Brittany and provided a source of the funds used for its

⁵³⁶ T1/57/6-13; T1/60/23 – T1/61/25; T1/86/6-11.

⁵³⁷ Reply, para. 213, *citing* Brittany Loan Agreement, para. 3 (**Exhibit C-130**); Loan Agreement HgYCS-1808/04 between Hedgerow Limited and Yukos Capital (18 August 2004) ("**Hedgerow Loan Agreement**"), para. 3 (**Exhibit C-131**); Lys, paras. 31, 47; T3/45/24 – T3/47/10.

⁵³⁸ T1/54/13-25, *citing* Letter from Yukos Capital to Brittany (15 November 2004) (**Exhibit R-118**); Letter from Yukos Capital to Hedgerow Limited (30 December 2004) (**Exhibit C-138**).

⁵³⁹ T1/62/17 – T1/64/10; T1/82/21 – T1/83/23.

⁵⁴⁰ Reply, paras. 214-215, *citing* 2003 Brittany Agreement, para. 5 (**Exhibit C-130**); Hedgerow Loan Agreement, para. 5 (**Exhibit C-131**); Lys, paras. 31-32, 47-48.

⁵⁴¹ T1/59/8-20, T5/108/14 – T5/109/14.

⁵⁴² T3/46/4-6; T3/47/18 – T3/48/9.

⁵⁴³ Expert Report of Stuart B. Gleichenhaus (3 November 2014) ("**Gleichenhaus 1**"), para. 58.

⁵⁴⁴ T5/79/21 – T5/80/2.

December 2003 loan to Yukos Capital, which Yukos Capital in turn applied to the December 2003 Loan to Yukos Oil:⁵⁴⁵

- (a) Yukos Oil's wholly owned Russian production subsidiaries produced oil, and sold it to various Yukos trading companies which traded the oil amongst themselves.⁵⁴⁶ In this case, profits were accumulated in two companies, Fargoil and Ratibor, both Russian companies.
- (b) Yukos Oil was the ultimate owner of Fargoil and Ratibor through intermediate holding companies: Yukos CIS, which, in turn, owned Yukos Hydrocarbons, which, in turn, owned Brittany, which owned (through further British Virgin Island entities) two Cyprus entities, Nassaubridge and Dunsley. Those two companies owned Ratibor and Fargoil respectively.⁵⁴⁷
- (c) Trading profits accumulated by Ratibor and Fargoil were passed in the form of dividends to their Cyprus parents, which, in turn, passed the profits through their holding structures in the British Virgin Islands to Brittany.⁵⁴⁸
- (d) Brittany's funds were then lent to Yukos Capital, which then lent them to Yukos Oil.

331. An area of dispute between the Parties on the evidence concerns the extent to which, as Respondent alleges, these funds were sent in a loop that started and finished in Russia. The evidence that the Tribunal has received in this jurisdictional phase as to this is as follows:

- (a) The payment by Fargoil and Ratibor of dividends to their foreign parents constituted an expatriation of the profits of Russian oil trading subsidiaries of Yukos Oil.⁵⁴⁹

⁵⁴⁵ Demonstrative Exhibit Showing the Flow of Funds Transferred under the December 2003 and August 2004 Loan (**Exhibit R-115A**); Exhibit R-115 Correction (**Exhibit C-220**)

⁵⁴⁶ T1/49/2-9.

⁵⁴⁷ T1/50/4-16.

⁵⁴⁸ T1/50/17-25; T5/64/1-4, *citing* Mr Misamore's testimony.

⁵⁴⁹ *See* Mr Misamore's testimony at T2/227/1-13; T2/231/20 – T2/232/23.

- (b) Mr Misamore also accepts that, as he testified in Russian proceedings in 2009, the dividends derived from Fargoil and Ratibor formed at least a source of the funds loaned to Yukos Oil under the December 2003 Loan.⁵⁵⁰ For example, Mr Misamore testified in 2009 that it was decided that the funds derived from Fargoil's 2003 dividend would be loaned by Brittany to Yukos Capital, and then to Yukos Oil.⁵⁵¹ To the same effect, Mr Gleichenhaus (an expert for the Claimant) noted that the funds lent to Yukos represented dividend profits from trading or treasury operations of Yukos subsidiaries.⁵⁵²
- (c) At the same time, it is common ground that Yukos Capital loaned some of the funds generated by these dividends to production subsidiaries within the Yukos Group.⁵⁵³ They were not simply routed directly to Yukos Oil *in toto*.
- (d) The Fargoil and Ratibor dividends were paid over a period to June 2003,⁵⁵⁴ while Brittany did not loan the funds to Yukos Capital until December 2003.
- (e) Mr Misamore testifies that the funds Brittany lent to Yukos Capital came out of a pool that also included funds generated by the international entities from the investment of their own funds and profits passed from their international subsidiaries.⁵⁵⁵ The Respondent rejects this evidence as unsubstantiated.⁵⁵⁶ This evidence was not advanced in Mr Misamore's written witness statements, and largely emerged during his cross-examination. It receives support from a statement of Mr Wilson given for the purpose of the Russian criminal proceedings and exhibited in this arbitration. Mr Wilson states that he was until April 2002 an International Tax Director at PwC (Moscow) and tax advisor to Yukos Oil, before being appointed International Tax Director of Yukos Oil. He

⁵⁵⁰ T2/233/14 – T2/234/12.

⁵⁵¹ Record of Interview of Bruce Misamore by Attorney Yelena Levina (9 March 2009) (“**Misamore Record of Interview**”), p. 37 (**Exhibit R-39**).

⁵⁵² T1/47/6-14, *citing* Gleichenhaus 1, para. 33. *See also* Statement of Stephen J. Wilson (16 April 2010) (“**Wilson Record of Interview**”), p. 8 (**Exhibit C-125**).

⁵⁵³ Compass Lexecon Report (9 January 2009), para. 29 (**Exhibit R-38**), *cited by* Respondent: T5/67/2-23.

⁵⁵⁴ T2/221/6-8; Mr Misamore referred to “early 2003” at T3/68/15-22; T5/67/24 – T5/68/8: Respondent, *citing* Compass Lexecon Report (9 January 2009) (**Exhibit R-38**).

⁵⁵⁵ Exhibit R-115 Correction (**Exhibit C-220**); T3/70/2-22; T3/80/1-6.

⁵⁵⁶ T5/214/12-25.

states that the dividends “together with the foreign trading profits and the profits from foreign treasury operations” would be available to Yukos Capital.⁵⁵⁷

332. At the present jurisdictional stage, there is insufficient documentary evidence on the record to enable the Tribunal to make a precise determination of the source of all of the funds received by Brittany that were in turn applied to the Loan. The Tribunal finds on the evidence that at least some of the funds advanced under the Loan were derived from profits originally generated by Russian subsidiaries of Yukos Oil. However, given that money is fungible and there was a delay of some six months between the dividends being paid and the Loan being advanced, it cannot simply equate the funds advanced under the December 2003 Loan with the dividends paid by Fargoil and Ratibor.
333. The funds advanced under the August 2004 Loan were derived from the sale of Hedgerow’s 56 per cent shareholding in Rospan Overseas Ltd (“**Rospan**”), a Russian company. Yukos Oil was the ultimate owner of this equity interest through intermediate companies within the Yukos Group: Yukos UK Ltd, which, in turn, owned Hedgerow.⁵⁵⁸ The funds were not passed to Yukos Oil by way of dividend through Hedgerow’s immediate parent company Yukos UK Ltd. Instead, they were loaned to Yukos Capital and then to Yukos Oil. Yukos Oil used the funds to make a tax payment in Russia.⁵⁵⁹
334. *Control of the funds and the parties’ intentions in making the Loans.* The Respondent submits that Yukos Oil remained in control of Yukos Capital, Brittany, and Hedgerow, and thus the funds that were moved via the Loans, at all times.⁵⁶⁰ The Claimant does not dispute that all of the relevant Russian and international entities were subsidiaries of Yukos Oil.⁵⁶¹
335. Yukos Capital was administered by TMF Corporate Services S.A. and TMF Management Luxembourg S.A. (“**TMF**”) the Claimant’s corporate and management service providers in Luxembourg. Mr Misamore accepted that TMF took instruction from the Yukos treasury group about what transactions to conduct and the terms on which to conduct

⁵⁵⁷ Wilson Record of Interview, p. 8 (**Exhibit C-125**).

⁵⁵⁸ Reply, para. 206; T1/53/6-19.

⁵⁵⁹ T1/53/20 – T1/54/7.

⁵⁶⁰ Reply, para. 207.

⁵⁶¹ **Exhibit R-115** Correction (**Exhibit C-220**).

them, including in relation to the Loans. He maintained that they exercised an independent function as professional managers including with respect to documentation.⁵⁶² Nevertheless, Mr Misamore accepted that TMF did not conduct credit checks or underwriting procedures before loaning funds, where Yukos Capital operated as an inter-company financing vehicle.⁵⁶³ Claimant's expert, Mr Gleichenhaus, accepted that TMF played no role in cash management, except to the extent that it administered transactions involving funds going in or out of Hedgerow or Brittany.⁵⁶⁴

336. Mr Misamore testified that the funds were extended by way of loans because the repatriation was intended to be temporary, and that was a tax efficient means of achieving a temporary repatriation and management flexibility.⁵⁶⁵ Interest payments were initially made under the December 2003 Loan.⁵⁶⁶ No payments were made under the August 2004 Loan.⁵⁶⁷ Mr Misamore stated at the time that this was because Yukos Oil's bank accounts had been frozen in the Russian tax proceedings.⁵⁶⁸ Yukos Capital made formal demands for payment of the outstanding Loans,⁵⁶⁹ but did not pursue further enforcement action.⁵⁷⁰
337. The Claimant emphasises that the legal ownership of the funds stayed with the party lending them – Brittany and then Yukos Capital – and those companies were located outside Russia.⁵⁷¹ Yukos Oil itself never owned the funds prior to the Loans being

⁵⁶² T3/34/6 – T3/40/22; T3/47/11-14.

⁵⁶³ T3/37/17-20.

⁵⁶⁴ T3/227/10-17.

⁵⁶⁵ T3/24/16 – T3/25/13; T3/65/5-6.

⁵⁶⁶ Gleichenhaus 1, para. 32; Yukos Oil response to Yukos Capital late payment notice (12 November 2004) (**Exhibit B-18**); Yukos Capital Transfers for Interest Payments, pp. 2, 5, 6 (**Exhibit B-19**); Yukos Capital – Financial Statements for Period Ended December 31, 2004, p. 7 (**Exhibit B-35**); Yukos Oil Audit Report, pp. 7, 12 (**Exhibit C-210**); Explanatory Note to the Financial Report of Yukos Oil (2004) (“**2004 Explanatory Note**”), pp. 17, 22 (**Exhibit C-137**).

⁵⁶⁷ Gleichenhaus 1, para. 32.

⁵⁶⁸ Yukos Oil response to Yukos Capital late payment notice (12 November 2004) (**Exhibit B-18**).

⁵⁶⁹ Letter from Yukos Capital to Yukos Oil (19 October 2014) (**Exhibit C-155**); Letter from Yukos Capital to Yukos (20 January 2005) (**Exhibit C-156**); Notice of Default from Yukos Oil to Yukos Capital (11 November 2005) (**Exhibit C-139**).

⁵⁷⁰ T5/83/15-22.

⁵⁷¹ T5/197/1-3.

made.⁵⁷² Likewise, the fact that Yukos Capital borrowed the funds in order to lend them does not change their legal ownership.⁵⁷³

338. The Respondent invites the Tribunal to conclude that Yukos Capital had no role of economic substance in the transactions, describing it as a “transfer agent” or “delivery agent,” ultimately of Yukos Oil, but within the structure of the transaction, as an agent of Brittany or Hedgerow.⁵⁷⁴ The Tribunal will return to consider this submission when it analyses the economic materialization of the Loans.⁵⁷⁵
339. The Respondent does not dispute in the present jurisdictional phase that the transactions by which the funds were transferred out of Russia were made in accordance with the relevant tax conventions, including the Russia-Cyprus Double Tax Agreement.⁵⁷⁶ Withholding tax at the rate agreed between Russia and Cyprus under that Treaty was paid on those dividends.⁵⁷⁷
340. There is no evidence adduced before this Tribunal, for the purpose of determining the present jurisdictional issue of whether an “Investment” was made, that the Loans would have been treated as dividends under the Double Tax Agreement between Russia and Luxembourg.⁵⁷⁸ Article 10(3) of this Treaty expressly excludes loans from its definition of dividends providing that: “[le] terme “dividendes” employé dans le présent article désigne les revenus provenant d’actions, actions ou bons de jouissance, parts de mine, parts de fondateur ou autres parts bénéficiaires à l’exception des créances.”⁵⁷⁹
341. This leaves for consideration the overall purpose of the transactions. The Tribunal returns to this issue after summarising the Parties’ submissions.

⁵⁷² T5/212/1-6.

⁵⁷³ Gleichenhaus 1, paras. 35, 55.

⁵⁷⁴ T1/65/18 – T1/66/9.

⁵⁷⁵ See paras. 456 – 513 below.

⁵⁷⁶ T5/65/25 – T5/66/25.

⁵⁷⁷ See Mr Misamore’s testimony at T2/227/5 – T2/228/12.

⁵⁷⁸ Double Tax Treaty between Luxembourg and the Russian Federation (28 June 1993) (“**Double Tax Treaty**”) (**Exhibit N-14**); T5/88/18-25.

⁵⁷⁹ Double Tax Treaty, Art. 10(3) (emphasis added) (**Exhibit N-14**).

2. The Parties' submissions

342. The Tribunal now summarises the Parties' submissions on the question of whether the Claimant made a qualifying Investment.

(a) The Respondent's submissions

(i) Do the Loans constitute "other debt of a company," "claims to money" or "Returns"?

343. The Respondent rejects the Claimant's assertion to the effect that the "Loans" are "debts of Yukos Oil's" and, as such, constitute "debt of a company or business enterprise" within the meaning of Article 1(6)(b) of the ECT.⁵⁸⁰ According to the Respondent, the Loans were the "economic equivalent of a dividend," since the funds in question were profits generated by Yukos Oil's subsidiaries, which were at all relevant times controlled by Yukos Oil and accounted for in its consolidated financial statements.⁵⁸¹

344. The Respondent asserts that Article 1(6)(b) of the ECT only covers "equity and debt interests in a company, but not claims to money under a loan agreement."⁵⁸² This results from a contextual interpretation, given that, whilst "other types of assets listed in Article 1(6)(b) ECT are separated by commas," the formulation "'other debt of a company or business enterprise' is not set off by commas and is thus to be treated as within the same asset class as 'bonds'."⁵⁸³ In accordance with the *ejusdem generis* principle, the general term "debt" must belong to the same genus as the specific word "bond" that precedes it, implying that "other debt of a company" only refers to "debt instruments issued by a company."⁵⁸⁴

345. The Respondent also refers to the principle of *effet utile*, contending that the Claimant's suggested interpretation would both render Article 1(6)(c) and the reference to "claims to money" contained therein "largely redundant" and "deprive the express limitation" to claims "associated with an Investment" in that Article of any meaning, since all claims to

⁵⁸⁰ Memorial, para. 137.

⁵⁸¹ Memorial, para. 137.

⁵⁸² Memorial, para. 142.

⁵⁸³ Memorial, para. 140.

⁵⁸⁴ Memorial, paras. 141-142.

money against a company—whether associated with an investment or not—would be covered by Article 1(6)(b) of the ECT.⁵⁸⁵ Claims to money are covered, therefore, only by Article 1(6)(c), with Article 1(6)(b) being limited to equity and debt interests in a company.⁵⁸⁶

346. Arguing that *Electrabel* does not support the Claimant’s position in its Counter-Memorial, the Respondent rejects the Claimant’s contention that the Loans may be seen as debt interests in Yukos Oil, meaning the Loans do not come under the scope of Article 1(6)(b) of the ECT.⁵⁸⁷ The Respondent also notes that none of the cases cited by the Claimant for the proposition that loans are protected investments concern “stand-alone loans ... that did not form part of the investor’s economic venture in the host state.”⁵⁸⁸

347. To the extent that the Claimant alleges that the Loans qualify as Returns in terms of Article 1(6)(e) and Article 1(9), they must be amounts derived from or associated with an Investment.⁵⁸⁹ If anything, the Respondent submits, the funds were returns of a Russian company (Yukos Oil) and granting “treaty protection to funds associated with shareholdings of a Russian company in its Russian subsidiaries would be at odds with the investment treaty system” since investment treaties are not deemed to create protection for rights involved in purely domestic claims.⁵⁹⁰

348. The Respondent contends that Article 1(6)(c) of the ECT only covers claims to money that form part of an “overall investment” in the host state.⁵⁹¹ The Respondent cites the decision in *Electrabel* to support the idea that there needs to be an “overall investment,” which must be an “investment other than the one addressed” in the particular subparagraph.⁵⁹² The Respondent claims that, since the Claimant’s alleged “Investment” only consists of the two Loans, there is no “overall investment” that claims to money

⁵⁸⁵ Memorial, para. 143, citing, *inter alia*, OPPENHEIM’S INTERNATIONAL LAW, Vol 1. (Robert Jennings & Arthur Watts, eds., 1996), p. 1280 (**Exhibit RL-71**).

⁵⁸⁶ Memorial, para. 144.

⁵⁸⁷ Reply, paras. 302-313.

⁵⁸⁸ T5/115/2-20.

⁵⁸⁹ T1/88/3-16.

⁵⁹⁰ T1/88/17 – T1/89/5, citing *Phoenix Action*, para. 97 (**Exhibit RL-65**).

⁵⁹¹ Memorial, para. 146.

⁵⁹² Memorial, para. 147, citing *Electrabel*, para. 5.53 (**Exhibit RL-76**).

could be associated with and that, accordingly, the Loans cannot be covered by Article 1(6)(c) of the ECT.⁵⁹³

(ii) Do the Loans bear the characteristics of an Investment in terms of Article 1(6)?

349. The Respondent contends that the Loans are not protected under the ECT because they do not qualify as “Investments” under Article 1(6) of the ECT.⁵⁹⁴
350. The Respondent maintains that, pursuant to Article 31(1) of the VCLT, Article 1(6) of the ECT must be interpreted in good faith, in accordance with its ordinary meaning, in its context, and in light of the ECT’s object and purpose,⁵⁹⁵ which involves consideration of “the concept of investment under general international law.”⁵⁹⁶
351. The Respondent cites the tribunal in *Alps Finance v. Slovak Republic* (“*Alps Finance*”) for the proposition that “[t]he term investment has an inherent meaning,” which entails “a commitment of resources, a certain duration, and an element of risk.”⁵⁹⁷ In *Alps Finance*, the tribunal found that it is insufficient merely to establish that an asset falls within the category of “claims and rights to any performance having an economic value.” The Respondent quotes from the decision of the tribunal in *Nova Scotia v. Venezuela* to similar effect.⁵⁹⁸
352. The Respondent also points out that a contextual interpretation of “Investment” backs up the contention that there is a need to give the notion of “Investment” an “objective meaning.”⁵⁹⁹ The Respondent argues that this interpretation is corroborated by the use of the term “Investment” elsewhere, particularly in Article 10(1) of the ECT and in the ECT Contracting States’ Understanding with respect to Article 1(6) of the ECT.⁶⁰⁰

⁵⁹³ Memorial, para. 148.

⁵⁹⁴ Memorial, para. 83.

⁵⁹⁵ Memorial, para. 88.

⁵⁹⁶ Memorial, para. 88.

⁵⁹⁷ Memorial, para. 89; Reply, para. 246, citing *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL Award) (5 March 2011) (“*Alps Finance*”) (**Exhibit RL-55**).

⁵⁹⁸ Reply, para. 247, citing *Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/1, Award (30 April 2014), para. 80 (**Exhibit RL-179**).

⁵⁹⁹ Memorial, paras. 92-93.

⁶⁰⁰ Memorial, para. 94.

353. The Respondent submits that, from Article 1(6) of the ECT, it is clear that “the term ‘Investment’ cannot be dissociated from its ordinary meaning.”⁶⁰¹ In spite of the broad list which precedes Article 1(6) and which describes the various forms that an investment may take, Article 1(6) “does not dispense with the requirement that an investment have certain inherent characteristics, which derive from the term’s ordinary meaning.”⁶⁰² The Respondent highlights, in particular, the fact that Articles 1(6), 1(8), and 10(1) of the ECT refer to the “making” of investments.⁶⁰³ Accordingly, “for an investor to have made an investment, the assets listed in Article 1(6) ECT must have been invested.”⁶⁰⁴
354. The Respondent argues that this interpretation conforms with the object and purpose of the ECT, which is expressed at Article 2 as “long-term cooperation in the energy field, based on complementarities and mutual benefits.”⁶⁰⁵ Such an object and purpose would remain unrealized “if any asset held by any company incorporated in one ECT Contracting State benefited from ECT investment protection” without regard as to “whether it engaged in any investment activity in another ECT Contracting State, had control or direction over the asset, or transferred any value to another ECT Contracting State.”⁶⁰⁶ Referring to the communication from the European Commission cited by the Claimant for the proposition that the ECT was intended to protect repatriation of profits, the Respondent submits that the concern was the protection of profits of foreign investors investing in Eastern Europe, and that the ECT “was never intended to and does not protect the repatriation of profits of a host state company ... arising from its activities in the host state, back to the host state.”⁶⁰⁷
355. It submits that the cases cited by the Claimant, including *Stati v. Kazakhstan* (“*Stati*”) and *Alpha Projektholding v. Ukraine*, were concerned with reinvested profits, not repatriated profits, that the Claimant contradicts itself by claiming that the funds were both a repatriation of profits and the injection of capital into Russia, and submits that the

⁶⁰¹ Reply, paras. 250-251.

⁶⁰² Reply, paras. 250-251.

⁶⁰³ Reply, paras. 251-252.

⁶⁰⁴ Reply, paras. 251-252.

⁶⁰⁵ Memorial, para. 95.

⁶⁰⁶ Memorial, para. 96.

⁶⁰⁷ T5/95/9 – T5/96/21.

Claimant has failed “to demonstrate that the source of funds is irrelevant as a matter of law.”⁶⁰⁸ Other cases cited by the Claimant do not concern “round-tripping” of funds.⁶⁰⁹ The Respondent was asked whether, if the transfer of the funds by Fargoil and Ratibor out of Russia resulted in the money being lost to the Russian economy in a lawful manner, the return of that money was a benefit to the Russian economy. The Respondent’s response was that this did not qualify for protection because there is no association with an original protected investment.⁶¹⁰

356. Citing *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* (“**Romak**”), the Respondent contends that a “mechanical application” of the categories of assets listed in an investment definition without regard for the “objective requirements of an investment” would lead to a “result which is manifestly absurd or unreasonable.”⁶¹¹ In response to the Claimant’s argument that tribunals endorsing the objective requirements of an investment have done so only to decline jurisdiction over “one-off sale of goods contract[s] akin to ordinary commercial transaction[s],” the Respondent says that it is precisely the “principled” approach of these tribunals that allowed them to distinguish between an investment and an ordinary commercial transaction.⁶¹²
357. The Respondent describes an investor’s contribution to the economy as a “*quid pro quo*” of the right to bring a claim to international arbitration⁶¹³ and refers to several tribunals in investment treaty arbitrations that found that they did not have jurisdiction in the absence of such a contribution.⁶¹⁴ In particular, the Respondent quotes from the decision rendered in *Phoenix Action v. Czech Republic* (“**Phoenix Action**”), where the tribunal

⁶⁰⁸ T5/97/3 – T5/98/2, citing *Stati v. The Republic of Kazakhstan*, SCC Case No. 116/2010, Award (19 December 2013) (“**Stati**”), para. 806 (**Exhibit CL-3**) and *Alpha Projekt Holding GmbH v. Ukraine* ICSID Case No. ARB/07/16, Award (8 November 2010) (“**Alpha**”) (**Exhibit CL-57**).

⁶⁰⁹ T5/98/8 – T5/100/22, citing, *inter alia*, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) (“**Caratube**”), paras. 350, 435 (**Exhibit RL-59**).

⁶¹⁰ T5/100/23 – T5/101/18.

⁶¹¹ Memorial, para. 97, citing *Romak S.A. (Switzerland) v. Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 November 2009) (“**Romak**”), para. 184 (**Exhibit RL-54**); Reply, paras. 254-256.

⁶¹² T1/74/11-21.

⁶¹³ Memorial, para. 118, citing Douglas, paras. 335-336 (**Exhibit CL-35**).

⁶¹⁴ Memorial, paras. 119-122, citing *Phoenix Action*, para. 97 (**Exhibit RL-65**); *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), paras. 232-233 (**Exhibit RL-57**); *Caratube*, paras. 350, 435 (**Exhibit RL-59**); *KT Asia Investment Group B.V. v. Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) (“**KT Asia**”), paras. 203-206 (**Exhibit RL-56**).

held that there could be no protection for rights “not involving any significant flow of capital, resources or activity into the host State’s economy.”⁶¹⁵ It also submits that *KT Asia Investment Group B.V. v. Kazakhstan* (“*KT Asia*”) is analogous, arguing that Yukos Capital was only an “instrument in this game of revolving door” where Yukos Oil shifted assets between its “various pockets.”⁶¹⁶

358. Similarly, with regard to the notion of risk, the Respondent refers to several arbitral decisions⁶¹⁷ as well as publicist commentary⁶¹⁸ that support the idea that risk is a necessary element of an “investment.”⁶¹⁹

359. With regard to such citations of authority, the Respondent rejects the Claimant’s assertion⁶²⁰ that awards in non-ECT arbitrations are “irrelevant” to this Tribunal’s determination.⁶²¹ The Respondent notes that the Claimant “has not been able to point to any difference in language in the investment definitions applied by the tribunals cited by Respondent that would render their decisions or awards ‘irrelevant’ to the interpretation of Article 1(6) ECT.”⁶²² None of the ECT cases on which the Claimant relies except one, *Stati*, dealt with an objection that the assets did not meet the inherent characteristics of an investment, and that case is inapposite.⁶²³

360. The Respondent also rejects the Claimant’s argument⁶²⁴ that contribution, duration, and risk are not relevant to determining whether an asset is an investment, noting that “out of the seven ECT decisions and awards cited by Claimant for the proposition that the term ‘investment’ lacks an objective meaning under Article 1(6) of the ECT, only one ECT tribunal so stated, but in a factual context that is clearly distinguishable from that in the

⁶¹⁵ Memorial, para. 119, citing *Phoenix Action*, para. 97 (**Exhibit RL-65**).

⁶¹⁶ T1/84/22 – T1/86/5; T5/104/21 – T5/108/13, citing *KT Asia* (**Exhibit RL-56**).

⁶¹⁷ See e.g. *Toto Costruzioni Generali S.p.A. v. Lebanon*, Decision on Jurisdiction (11 September 2009) (“*Toto Costruzioni*”), para. 84 (**Exhibit RL-66**); *KT Asia*, paras. 220-221 (**Exhibit RL-56**).

⁶¹⁸ See e.g. Douglas, para. 403 (**Exhibit CL-35**).

⁶¹⁹ Memorial, paras. 130-133.

⁶²⁰ See para. 398 and Counter-Memorial, para. 194.

⁶²¹ Reply, para. 257.

⁶²² Reply, paras. 257-260.

⁶²³ T1/75/23 – T1/76/23.

⁶²⁴ See paras. 395ff below and Counter-Memorial, paras. 179-193.

present case.”⁶²⁵ The Respondent contends that the Claimant “did not attempt to rebut any of the authorities cited by Respondent that confirm that risk is a necessary element of an investment,” except for one, the rebuttal of which was “misleading,” according to the Respondent.⁶²⁶

361. According to the Respondent, the Loans do not meet the objective requirements of an investment under the ECT. The Respondent submitted in closing that it was the intention from the start that the dividends paid by Fargoil and Ratibor representing Russian oil trading profits would be repatriated in the form of loans.⁶²⁷ Since the loaned funds essentially consisted of profits made by Yukos Oil’s trading subsidiaries and other entities controlled by Yukos Oil and the Claimant “merely acted as a conduit in back-to-back transactions to funnel [these profits] to Yukos Oil Company,” the Claimant made no contribution to the Russian Federation and did not incur any risk.⁶²⁸
362. As the Respondent argues, the agreements with Brittany and Hedgerow “reveal that Yukos Capital never made any decision with respect to the ‘Loans’, had no control over the funds that transited through its bank accounts, and never had any economic interest in those funds.”⁶²⁹ The Respondent submits that no value was transferred through the Loans from Luxembourg to the Russian Federation.⁶³⁰ The Respondent recalls that the *Phoenix Action* tribunal rejected a claim in which a restructuring of domestic investments was merely “a rearrangement of assets within a family” rather than being a part of a “significant flow of capital, resources or activity into the host State’s economy.”⁶³¹
363. The Respondent alleges that the funds of both the December 2003 Loan and the August 2004 Loan were “in substance” dividends to Yukos Oil, dressed up as loans to avoid Russian taxes.⁶³² In the case of the December 2003 Loan, the funds were “profits arising from the production and sale of oil produced by Yukos Oil Company’s subsidiaries,”

⁶²⁵ Reply, paras. 266, 274.

⁶²⁶ Reply, paras. 296-297.

⁶²⁷ T5/102/21-25.

⁶²⁸ Memorial, paras. 83, 99.

⁶²⁹ Reply, para. 287.

⁶³⁰ Reply, para. 290.

⁶³¹ Reply, paras. 291-293, citing *Phoenix Action*, paras. 97, 140 (**Exhibit RL-65**).

⁶³² Memorial, paras. 110, 114.

whilst in the case of the August 2004 Loan they were the “proceeds of the sale of Yukos Oil Company’s indirect interest in another Russian oil and gas company,” Rospan.⁶³³ To the extent that interest payments were made (which would be inconsistent with the transactions’ characterisation as dividends), the Respondent submits that this had no impact on the economic position of the Yukos Group.⁶³⁴

364. The Respondent denies the Claimant’s assertion that the Respondent “recognized that the Loans were valid intercompany loans, not dividends,” asserting that Yukos’ filing of a financial statement did not involve recognition or approval by the Respondent and that Yukos never disclosed to the Russian Federation details about the “loan” in its tax filings.⁶³⁵

365. Against this backdrop, the Respondent argues that the Claimant failed to show “that it made a personal contribution to the ‘Loans’ and that the ‘Loans’ involve a ‘contribution to, or relevant economic activity within’ the Russian Federation.”⁶³⁶ In particular, the Respondent points out that the decision of the tribunal in *Romak*, upon which the Claimant relies,⁶³⁷ did not imply “that any commitment of funds, or transfer of title to funds, fulfills the contribution requirement.”⁶³⁸ According to the Respondent, the Claimant must show, but has not shown, that “it committed funds ‘in furtherance of a venture’, *i.e.*, that it had an economic interest in the ‘Loans’ and committed its funds in order to ‘obtain an economic benefit’.”⁶³⁹

366. As the Respondent argues, the Claimant never had any control over the funds it received from other Yukos Oil subsidiaries, which were rather “at all relevant times controlled by Yukos Oil Company.”⁶⁴⁰ The purpose of the Loans was not to engage in economic activity, but to avoid Russian taxes that would have been due if dividends had instead

⁶³³ Memorial, paras. 110, 114, 116.

⁶³⁴ T5/82/3-9.

⁶³⁵ Reply, paras. 234-238.

⁶³⁶ Memorial, para. 123; Reply, para. 276.

⁶³⁷ Counter-Memorial, para. 204, *citing Romak*, paras. 177, 214 (**Exhibit RL-54**).

⁶³⁸ Reply, para. 278, *citing Romak*, para. 222 (**Exhibit RL-54**).

⁶³⁹ Reply, para. 279, *citing Romak*, para. 206 (**Exhibit RL-54**).

⁶⁴⁰ Memorial, para. 125; Reply, paras. 207, 287-288.

been paid by the subsidiaries.⁶⁴¹ The Loans also did not transfer any value from any ECT contracting state to the Russian Federation, but, if anything, “withheld value from the Respondent since they were designed to and did avoid Russian taxes on profits.”⁶⁴²

367. The Respondent asserts that, in spite of the Claimant’s arguments to the contrary, the fact that Yukos Capital was a “passive conduit” is “not irrelevant,” citing *Standard Chartered Bank v. Tanzania*, in which “[t]he tribunal required that there be an ‘active relationship between the investor and the investment’ in the sense that ‘the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner’.”⁶⁴³ The Respondent also rejects as inapposite the authorities the Claimant cites on this point.⁶⁴⁴

368. Addressing the Claimant’s argument that a dividend payment was necessary to facilitate the merger between Yukos Oil and Sibneft, a joint stock company incorporated in the Russian Federation in 1995 (“**Sibneft**”),⁶⁴⁵ the Respondent points out that this cannot be the case, since Yukos and Sibneft called off the merger before the December 2003 Loan was made.⁶⁴⁶ The Respondent relies on Mr Misamore’s statement in 2009 Russian court proceedings that the money was loaned to Yukos Oil or other Group companies for their “cash needs.”⁶⁴⁷

369. The Respondent points out that the Claimant has been unable to provide any documentary evidence that supports the Claimant’s assertion that some of the funds from the December 2003 Loan “were used to fund Yukos Oil’s continuing operations.”⁶⁴⁸

⁶⁴¹ Memorial, para. 127.

⁶⁴² Memorial, para. 128. *See also* Reply, para. 290.

⁶⁴³ Reply, para. 282, citing *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award (2 November 2012), para. 200 (“**Standard Chartered Bank**”) (**Exhibit RL-193**).

⁶⁴⁴ Reply, paras. 283-285. *See ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), paras. 332-362 (**Exhibit CL-1**); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility (18 April 2008), para. 97 (**Exhibit CL-23**).

⁶⁴⁵ *See* para. 405 below.

⁶⁴⁶ Reply, para. 241.

⁶⁴⁷ T5/65/3-12, *citing* Misamore Record of Interview, p. 37 (**Exhibit R-39**).

⁶⁴⁸ Reply, para. 242.

370. The Respondent likewise claims that the Claimant did not incur any risk, as it was merely “effectuating back-to-back payments on a non-recourse basis.”⁶⁴⁹ The Respondent cites *Toto Costruzioni v. Lebanon* for the proposition that investment “implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk,” something that, according to the Respondent, Yukos Capital did not do.⁶⁵⁰ The Respondent also argues that the interest rate spreads between the Loans and the back-to-back agreements were “trivial,” implying that the Claimant “did not expect a commercial return.”⁶⁵¹ Thus, the Respondent contends, the only purpose for interposing Yukos Capital was to minimise tax, not for any “economic motivation or purpose,”⁶⁵² since Yukos Capital played no role in cash management, produced no efficiencies, was not used to collect group funds and (as explained below) did not perform a foreign exchange function because it bore no risk.⁶⁵³
371. So, in spite of the Claimant’s arguments to the contrary,⁶⁵⁴ the Respondent contends that one cannot view the back-to-back agreements as “hedges” nor can one view interest rate spreads as evidence of risk-taking by Yukos Capital, as “Yukos Capital paid nothing . . . in exchange for the non-recourse or indemnification terms” and the “minuscule spreads are the cost that Yukos Oil Company chose to pay to be able to gain tax benefits in Luxembourg.”⁶⁵⁵ The Respondent submits that “[t]he non-recourse provisions in the Brittany and Hedgerow agreements were an inherent feature of the scheme, and Yukos Capital was never meant to have any role other than that of a passive conduit,” as Brittany and Hedgerow bore all risk associated with the Loans.⁶⁵⁶
372. Further, despite the Claimant’s insistence otherwise, the Respondent notes that the Claimant has “fail[ed] to produce a single document showing any negotiation about the [back to back payment agreements],” demonstrating that “the interest rate spreads on the

⁶⁴⁹ Memorial, para. 134; Reply, paras. 209-211, 213-215.

⁶⁵⁰ Reply, para. 295, citing *Toto Costruzioni*, para. 84 (**Exhibit RL-66**).

⁶⁵¹ Reply, paras. 297-298, citing *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 75 (**Exhibit CL-24**); *Romak*, para. 206 (**Exhibit RL-54**).

⁶⁵² T5/72/9 – T5/75/7, citing Mr Misamore’s testimony at T3/24/2-17 and Mr Gleichenhaus’ testimony at T3/238/13-22.

⁶⁵³ T5/75/2 – T5/77/10.

⁶⁵⁴ See Counter-Memorial, para. 213.

⁶⁵⁵ Reply, paras. 216-221, 299.

⁶⁵⁶ Reply, paras. 299-300.

‘Loans’ were not on ‘arm’s length terms’ or determined with a ‘view to generate profits’.”⁶⁵⁷ Yukos Capital’s lack of economic interest in the loans is further shown by the fact that “Yukos Capital’s litigation efforts have been paid for by other Yukos Group subsidiaries.”⁶⁵⁸

373. In those circumstances, the Respondent says that because the Claimant played no active role in the making of the investment, made no contribution and incurred no risk, it cannot say that it made the “so-called ‘loans’” – and this is “true irrespective of whether the funds originated from the sale of oil and gas in Russia and the sale of a Russian company, which in any event the Claimant does not dispute; and this is also true irrespective of whether these back-to-back transactions amounted in substance to a repatriation of dividends rather than a lending of funds.”⁶⁵⁹ The Respondent submits that the transactions were always conceived as the repatriation of profits, there was no economic purpose to the transaction and Yukos Capital’s role was not “in accordance with its economic interests.”⁶⁶⁰ In particular, “there was no genuine intent to collect because there was no genuine intent to repay,”⁶⁶¹ which the Respondent submits is demonstrated by Yukos Capital’s conduct when stress on the Loan arose.⁶⁶² It also submits that the “economic imperatives that existed for repatriation at the inception of the loan will remain the same in the future, leading to rollover or forgiveness”; thus, all the Respondent is “asking the Tribunal to do is ... take account of the true economic position.”⁶⁶³

374. For all these reasons, the Respondent contends, the Loans do not qualify for protection under Article 1(6) of the ECT.

(iii) Are the Loans associated with an Economic Activity in the Energy Sector?

375. The Respondent further argues that, for an investment to be “associated with an Economic Activity in the Energy Sector” (set out in Article 1(5) of the ECT), as required under

⁶⁵⁷ Reply, para. 224.

⁶⁵⁸ Reply, para. 228.

⁶⁵⁹ T1/81/18 – T1/82/3.

⁶⁶⁰ T5/78/18-25.

⁶⁶¹ T5/82/13-17.

⁶⁶² T5/82/18 – T5/84/12.

⁶⁶³ T5/79/4-16.

Article 1(6) of the ECT, there must be a “functional relationship” between the investment and that activity, rather than merely a “contractual relationship with a company engaged in economic activities in the Energy Sector.”⁶⁶⁴ The Respondent disputes the Claimant’s proposition that “any financing provided to an energy company is necessarily ‘[a]ssociated with an economic activity in the energy sector’,” pointing out that the Claimant has cited no authority in this regard.⁶⁶⁵

376. The Respondent refers to the decision rendered in *Amto v. Ukraine* (“*Amto*”), where the tribunal had to decide whether shares in a Ukrainian company that had concluded contracts with a nuclear power generating company for the provision of technical services constituted an investment protected under Article 1(6) of the ECT.⁶⁶⁶ The tribunal took the view that “[a] mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector.”⁶⁶⁷ Since energy producers have “dozens, if not hundreds, of contracts and contractual counter-parties,” it could “not be in line with the object and purpose of the ECT to extend its investment protection provisions to all these contractual counter-parties and their contractual rights without a functional qualification.”⁶⁶⁸

377. The Respondent suggests that the Loans were not used to engage in any of the economic activities set out as illustrative of an “Economic Activity in the Energy Sector” in the ECT Contracting Parties’ Understanding on Article 1(5) ECT.⁶⁶⁹ They were, according to the Respondent, rather made to avoid taxes, whilst paying “a massive dividend to Yukos Oil Company’s majority shareholders” (in the case of the December 2003 Loan) or “allegedly . . . to pay a small portion of Yukos Oil Company’s back taxes.”⁶⁷⁰ To the extent that the Claimant asserts that money from the Loans was used to fund the

⁶⁶⁴ Memorial, para. 152.

⁶⁶⁵ Reply, para. 315.

⁶⁶⁶ Memorial, para. 153, citing *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008) (“*Amto*”), para. 42 (**Exhibit RL-77**).

⁶⁶⁷ Memorial, para. 153, citing *Amto*, para. 42 (**Exhibit RL-77**).

⁶⁶⁸ Memorial, para. 155.

⁶⁶⁹ Memorial, para. 157; Reply, para. 318.

⁶⁷⁰ Memorial, paras. 159-160; Reply, para. 319.

operations of Yukos Oil and to pay overdue taxes,⁶⁷¹ the Respondent points out that the Claimant has not produced evidence in this regard.⁶⁷² As such, the Respondent concludes, the Loans constituted a “disinvestment” without any “functional relationship” with an “Economic Activity in the Energy Sector.”⁶⁷³

(b) The Claimant’s submissions

(i) Do the Loans constitute “other debt of a company,” “claims to money” or “Returns”?

378. The Claimant dismisses the Respondent’s reliance on the *ejusdem generis* principle in its interpretation of Article 1(6)(b) of the ECT as “literally nonsensical.”⁶⁷⁴ Loans include, so the Claimant submits, “‘other debt of a company’, ‘debt instruments issued by a company’ and ‘debt interests in a company’.” Furthermore, the Claimant adds that “[it] is aware of no investment treaty anywhere (whether ECT or otherwise) where ‘investment’ definitions relating to debt obligations have been interpreted to exclude loans.”⁶⁷⁵

379. In response to the Respondent’s characterization of the Loans as dividends, the Claimant notes that there are two separate issues: first, whether these are loans or dividends, and second, whether Yukos Capital should be considered to be the lender as a matter of tax or accounting treatment. The Claimant accepts that the first issue is relevant to the present analysis, and that if the Respondent can satisfy the Tribunal that the Loans are really dividends, then the Claimant will fail. But the second question relates to the allocation of risk between Yukos Capital and its lenders, and is irrelevant to the Tribunal’s task.⁶⁷⁶

380. On the second issue, the Claimant contends that it need only establish legal ownership – that Yukos Capital made the Loans – and that matters that go to the degree of control exercised by Yukos Capital are irrelevant.⁶⁷⁷ For this reason, the Claimant submits that

⁶⁷¹ See para. 414 below and Counter-Memorial, paras. 228, 243.

⁶⁷² Reply, paras. 319-320.

⁶⁷³ Memorial, paras. 159-160.

⁶⁷⁴ Counter-Memorial, paras. 157-158.

⁶⁷⁵ Counter-Memorial, para. 158.

⁶⁷⁶ T1/160/12 – T1/161/21.

⁶⁷⁷ T1/161/22 – T1/162/11.

Yukos Capital could have been (but was not) a conduit, since beneficial ownership and the source of the funds is irrelevant.⁶⁷⁸ Whether Yukos Capital was or was not a conduit (including the question of when interest began to accrue under the two legs) is “legally irrelevant.”⁶⁷⁹

381. The Loans meet, so the Claimant argues, “virtually uniform” legal tests that distinguish them from dividends.⁶⁸⁰ Relying on Mr Gleichenhaus’ evidence, the Claimant asserts that, notwithstanding their inter-company characteristic, the Loans “are consistent with the substance, form and requirements of debt instruments,” which include “defined interest payments and a defined maturity date”; “defined rights to enforce the payment of principal and interest”; “a defined obligation to repay the loans”; “the existence of formal and duly executed loan agreements”; and “the intention of Yukos Capital and Yukos Oil to establish a debtor-creditor relationship.”⁶⁸¹ The Claimant submits that Mr Gleichenhaus’ evidence that the Loans were made on “arm’s length market terms” is not disputed.⁶⁸² The Claimant asserts that Rosneft, a joint stock company incorporated in the Russian Federation,⁶⁸³ as well as the Respondent’s tax authorities recognized the Loans as loans and not dividends.⁶⁸⁴
382. The Claimant further posits that the reliance “on intercompany loans for tax effective financing” is “ubiquitous” and “commonplace in the world of commerce,”⁶⁸⁵ and that the fact that the Loans were accounted for in Yukos Oil’s consolidated financial statements “has nothing to do with, and cannot alter, the legal nature” of the transactions between Yukos Capital and Yukos Oil.⁶⁸⁶ Indeed, the Claimant relies on the fact that the Loans were recorded as a debt of Yukos Oil on the latter’s financial statements – on Yukos Oil’s

⁶⁷⁸ T1/162/12 – T1/163/19.

⁶⁷⁹ T5/202/25 – T5/205/15, *citing, inter alia, Hulley Enterprises; Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (“*Saluka*”) (**Exhibit CL-20**).

⁶⁸⁰ Counter-Memorial, para. 163.

⁶⁸¹ Counter-Memorial, paras. 164-167, *citing* Gleichenhaus 1, paras. 12-14, 24.

⁶⁸² T1/164/6-18.

⁶⁸³ Counter-Memorial, para. 168; Rosneft Consolidated Financial Statements, Years-Ended 2003, 2004, 2005, pp. 39, 41 (**Exhibit C-149**).

⁶⁸⁴ Counter-Memorial, para. 169.

⁶⁸⁵ Counter-Memorial, paras. 166-167, *citing* Gleichenhaus 1, paras. 20-23; *Saluka*, para. 228 (**Exhibit CL-20**).

⁶⁸⁶ Counter-Memorial, para. 170.

balance sheet as a liability and on Yukos Capital's balance sheet as an asset – in support of the contention that they are loans.⁶⁸⁷

383. The Claimant rejects the Respondent's *effet utile* argument,⁶⁸⁸ contending that it “distorts the principles of effectiveness, by denying the treatment of money as an asset within the ECT capable of investment and failing to distinguish between the (in common law terms) intangible property right or chose in action, and the action to enforce it.”⁶⁸⁹

384. The Claimant submits that the Respondent's characterization of the Loans as dividends is “dishonest,” as the Respondent has known about the Loans since they were made but at no time tried to re-characterize them as dividends prior to these arbitral proceedings.⁶⁹⁰ Specifically, the Claimant notes that the Russian tax authorities were given copies of Yukos Oil's 2003 and 2004 financial statements in which the Loans were clearly disclosed.⁶⁹¹ Even further, the Claimant notes that, in their December 2003 reassessment for additional tax, the Russian tax authorities never suggested that the Loans were really dividends.⁶⁹² The Claimant points to similar instances where the character of the Loans was not brought into question, including in a submission by the Russian Federal Tax Service and a ruling by the Moscow City Arbitration Court.⁶⁹³ The Claimant dismisses the contention that the tax authorities did not have sufficient access to information on the Loans as “laughable given Yukos Oil's premises were repeatedly raided [and] all documents were seized” and asserts that the Tribunal should disregard that contention since the Respondent has not submitted relevant fact witness testimony.⁶⁹⁴

385. The Claimant further submits that the Respondent also engages in “similar intercompany lending practices” yet does not characterize those loans as anything but loans.⁶⁹⁵ The Claimant cites the example of O.J.S.C. Gazprom (“**Gazprom**”), which submitted to

⁶⁸⁷ T1/165/19 –T1/166/8, *citing* 2004 Explanatory Note (**Exhibit C-137**).

⁶⁸⁸ *See* para. 345 above.

⁶⁸⁹ Rejoinder, para. 174.

⁶⁹⁰ Rejoinder, paras. 126-127.

⁶⁹¹ Rejoinder, para. 127.

⁶⁹² Rejoinder, paras. 128-129.

⁶⁹³ Rejoinder, para. 130, *citing* Ruling of the Moscow City Arbitration Court (17 July 2006) (**Exhibit C-71**).

⁶⁹⁴ Rejoinder, para. 131.

⁶⁹⁵ Rejoinder, para. 132.

Luxembourg authorities a request for approval of tax treatment. That request describes an arrangement whereby Gazprom incorporated Gazprom ECP S.A. (“**Gazprom ECP**”) as an orphan entity in Luxembourg.⁶⁹⁶ The arrangements with Gazprom ECP involved back-to-back loans and interest rate spreads, with Gazprom ECP earning a margin on its loans to Gazprom.⁶⁹⁷ Further, Gazprom ECP board meetings and shareholder meetings were held in Luxembourg, and corporate records were kept there. The Claimant notes that, in the submission to authorities, PricewaterhouseCoopers submitted that “Gazprom ECP is effectively managed from Luxembourg and qualifies as a Luxembourg tax resident company.”⁶⁹⁸ The Claimant further notes that the Gazprom ECP loans were taxed by Russia as loans and not as dividends.⁶⁹⁹

386. On the question of whether the Loans were really loans, the Claimant further disputes the testimony of Professor Lys, the conclusion of which “is based upon a manipulation of the facts and grossly flawed applications of tax and accounting rules.”⁷⁰⁰ The Claimant calls into question the accuracy of the facts as told by Professor Lys, arguing that the sources to which Professor Lys cites – principally, prior statements by officers of Yukos Oil – do not support his position.⁷⁰¹ Instead, the Loans “were undoubtedly loans,” and there is nothing in the statements cited by Professor Lys that suggests that the investment of funds into Russia would have been made by dividend if Yukos Capital had not existed.⁷⁰² The Claimant takes issue with Professor Lys’ methodology of analysis, disagreeing with his “substance over form” analysis and his focus on the question of whether Yukos Capital assumed the role of a “typical commercial lender,” an issue that is, according to the Claimant, “completely irrelevant.”⁷⁰³ The Claimant criticizes Professor Lys’ report for acknowledging that Mr Gleichenhaus’ report focuses on how the Loans have “several trademark characteristics of loans,” but nevertheless failing to address this observation,

⁶⁹⁶ Rejoinder, para. 133.

⁶⁹⁷ Rejoinder, paras. 134-136.

⁶⁹⁸ Rejoinder, para. 136.

⁶⁹⁹ Rejoinder, para. 137.

⁷⁰⁰ Rejoinder, paras. 139-141, *citing* Lys.

⁷⁰¹ Rejoinder, paras. 142-143.

⁷⁰² Rejoinder, para. 144.

⁷⁰³ Rejoinder, paras. 145-148.

even failing to identify “the defining characteristics that distinguish loans from dividends.”⁷⁰⁴

387. Further, the Claimant takes issue with Professor Lys’ “substance over form” analysis that concluded that Yukos Capital did not bear risk associated with the Loans.⁷⁰⁵ The Claimant maintains that, first, it is an irrelevant test.⁷⁰⁶ Citing Professor Shay, the Claimant contends that the “substance over form” doctrine is relevant only to determining the tax treatment applicable to a particular transaction, such that “even if some tax authority were to conclude that the Yukos Oil Loans should be taxed as dividends, and none ever did, they would still be loans as a legal matter.”⁷⁰⁷ The Claimant and Professor Shay submit that, if the “substance over form” doctrine were relevant, such analysis properly concluded would show that “the Yukos Loans would be respected as indebtedness and such doctrines would not operate to recast the Yukos Loans as dividends or as anything other than loans.”⁷⁰⁸

388. The Claimant further rejects Professor Lys’ determination that “Yukos Capital should simply be ignored” and the Loans treated as one single loan from Brittany and/or Hedgerow to Yukos Oil, accepting Professor Shay’s view that, properly analyzed, “Yukos Capital should be respected as a separate entity and the Yukos Loans should be respected as separate transactions.”⁷⁰⁹ The Claimant thus submits that there is “no evidence on which you could make any kind of a finding that Yukos Capital should be disregarded.”⁷¹⁰

389. The Claimant also criticizes Professor Lys’ “loose” referral to the rules of accounting and principles applied by tax authorities, noting that the Claimant’s own expert, Mr Andrew Grantham, concludes that Russia and Luxembourg applied “form over substance” rules, making it such that “there is no proper accounting basis on which to suggest the Yukos

⁷⁰⁴ Rejoinder, para. 149; T1/177/18 – T1/178/3.

⁷⁰⁵ Rejoinder, paras. 150-151.

⁷⁰⁶ Rejoinder, para. 152.

⁷⁰⁷ Rejoinder, paras. 153-155, *citing* Expert Report of Stephen E. Shay (31 October 2014) (“**Shay**”), paras. 14, 50.

⁷⁰⁸ Rejoinder, paras. 157-161, *citing* Shay, para. 85.

⁷⁰⁹ Rejoinder, paras. 162-163, *citing* Shay, paras. 77-78.

⁷¹⁰ T5/201/24 – T5/202/2.

Oil Loans are anything other than loans.”⁷¹¹ The Claimant notes that, with respect to substance over form, Mr Grantham concludes that “in substance, the Loans provided by Yukos Capital to Yukos Oil were loans, and not dividends.”⁷¹² The Claimant notes that Professor Lys’ “interpretation” of the substance over form doctrine “would likely cripple the corporate finance structures” of United States based international companies.⁷¹³ The Claimant also notes that none of its experts were cross-examined on the substance of their opinion that these were loans.⁷¹⁴

390. On the basis of the authorities discussed by these witnesses, the Claimant submits that the “only relevant enquiry” is whether the borrower intended to repay the funds advanced, that the Respondent has not alleged a lack of intent to repay,⁷¹⁵ and the “evidence in the record ... is unequivocal that there was an intent to repay at all relevant times.”⁷¹⁶ To the extent that the Respondent addressed in closing submissions the “intent to recover,” the Claimant submits that some of this material was not in the record and was, in any case, irrelevant.⁷¹⁷
391. The Claimant also submits that, as defined in Article 1(9) of the ECT, the Loans “are an ‘asset’ owned by Yukos Capital and the obligation of Yukos Oil to repay the Loans, together with interest thereon, constitute ‘Returns’ as that term is defined in Article 1(9) ECT.”⁷¹⁸ The Loans constitute, so the Claimant asserts, “valid, legal indebtedness of Yukos Oil.”⁷¹⁹
392. The Claimant submits that “claims to money” covers purchase and sale transactions rather than loans “as *Electrabel v. Hungary* makes clear.”⁷²⁰ According to the Claimant, “[l]oans are covered by the specific category of ‘other debt’ in Article 1(6)(b) ECT and

⁷¹¹ The Claimant notes that “the answer would be the same” under US GAAP “form over substance” principles: Rejoinder, paras. 164-265, *citing* Expert Report of Andrew Grantham (15 June 2015) (“**Grantham**”).

⁷¹² Rejoinder, para. 166, *citing* Grantham, paras. 2.3.3-2.3.4.

⁷¹³ Rejoinder, para. 168, *citing* Supplemental Expert Report of Stuart B. Gleichenhaus (15 June 2015), para. 19.

⁷¹⁴ T5/186/17-19.

⁷¹⁵ T5/185/11-12.

⁷¹⁶ T1/179/1-16, *citing, inter alia*, Letter from Yukos Oil to Yukos Capital (12 November 2004) (**Exhibit C-135**).

⁷¹⁷ T5/185/19-25.

⁷¹⁸ Counter-Memorial, para. 153.

⁷¹⁹ Counter-Memorial, para. 155.

⁷²⁰ Counter-Memorial, para. 159.

... the ‘overall investment’ test of *Electrabel* has no application.”⁷²¹ Citing Professor Douglas’s opinion, the Claimant argues that there is a “fundamental distinction between ‘claims to money’ and ‘loans’” and submits that “[a] loan is the form of credit that features most prominently as an investment in the corpus of investment treaty precedents.”⁷²² In this light, the Claimant contends that the Loans are in effect “substantial loans” that fall under the ECT’s protection.⁷²³

393. The Claimant maintains that Article 1(6) makes it clear that the list in that provision “is supposed to be a broad, illustrative, non-exclusive list of the examples of assets considered by the parties to be investments, and that “other debt” and “claims to money” are broad, catch-all terms which may refer to a variety of transactions, in line with the treaty’s purpose and the broad definition in Article 1(6).”⁷²⁴ Further, “[t]here is no reason why a particular ‘loan agreement’ cannot comprise or give rise to more than one of the assets listed in Article 1(6).”⁷²⁵ In other words, the Loans constitute both debt of a company and a claim to money.⁷²⁶ The Claimant submits that sources cited by the Respondent, such as the German Model BIT, confirm that loans are considered claims to money “only ‘when investment definitions do not expressly mention loans,” a situation that does not arise with the ECT, since Article 1(6)(b) has a special category for “debt of a company.”⁷²⁷
394. To the extent that the Respondent suggests that the Loans can only be a “claim to money,” and thus have to meet the additional requirement of being “pursuant to contract having an economic value and associated with an Investment,” the Claimant submits that the Respondent’s authority supports the contention that loans can constitute “debt of a company.”⁷²⁸

⁷²¹ Counter-Memorial, para. 159.

⁷²² Counter-Memorial, paras. 161-162, *citing* Douglas, paras. 381, 383.

⁷²³ Counter-Memorial, para. 162.

⁷²⁴ Rejoinder, para. 174.

⁷²⁵ Rejoinder, para. 175.

⁷²⁶ T1/166/5-11.

⁷²⁷ Rejoinder, para. 176.

⁷²⁸ T1/168/20 – T1/171/4, *citing* Kenneth J. Vandervelde, *BILATERAL INVESTMENT TREATIES : HISTORY, POLICY AND INTERPRETATION* (2010) (**Exhibit RL-75**).

(ii) Do the Loans bear the characteristics of an Investment in terms of Article 1(6)?

395. The Claimant begins by noting that the Respondent does not dispute that it meets the definition of “Investor” in Article 1(7) of the ECT.⁷²⁹
396. The Claimant contends that, in light of Article 31(1) of the VCLT, the “‘ordinary meaning’ of the terms employed in Article 1(6) is that the definition of ‘Investment’ is wide and open-ended: an investment is ‘every kind of asset’.”⁷³⁰ The Claimant further argues that, in spite of the Respondent’s submissions to the contrary, “[n]o tribunal has emphasized ‘the need to interpret the term “Investment” [i.e. Article 1(6) of the ECT] in accordance with the concept of investment under general international law” and, therefore, dismisses the Respondent’s reliance on the *Salini* test.⁷³¹
397. The Claimant disputes the Respondent’s focus on the “inherent meaning” of “Investment,”⁷³² arguing that the concerns that motivated the tribunals cited by the Respondent do not exist in the current arbitration.⁷³³ Accordingly, the Claimant asserts that it is not necessary for the Tribunal to express its view on whether it is proper for an investment tribunal to “legislate treaty meaning” by way of “inherent” principles.⁷³⁴
398. The Claimant notably highlights *Electrabel*, an arbitration under both the ECT and the ICSID Convention, in which the tribunal “recognized that Article 25 of the ICSID Convention and Article 1(6) ECT each has its own test for an investment” and stated that “[t]he tribunal did not conflate the two tests, or suggest that the *Salini* or any similar test had independent significance under the ECT, but correctly proceeded to analyse them separately.”⁷³⁵ The Claimant also quotes *Stati v. Kazakhstan*, an arbitration in which the tribunal concluded that “the so-called *Salini* test . . . cannot be used for the definition of

⁷²⁹ T1/158/1-18.

⁷³⁰ Counter-Memorial, para. 151.

⁷³¹ Counter-Memorial, paras. 178, 180 (emphasis in original). On this point, the Claimant cites various decisions. See e.g. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), paras. 125, 128 (“*Plama*”) (Exhibit RL-88). See also Rejoinder, paras. 186-192.

⁷³² See para. 351 above.

⁷³³ Rejoinder, paras. 193-197.

⁷³⁴ Rejoinder, para. 197.

⁷³⁵ Counter-Memorial, paras. 188-189, citing *Electrabel*, paras. 5.43-5.45, 5.47-5.48 (Exhibit RL-76).

investment under the ECT or, likewise, in the present case.”⁷³⁶ In addition, the Claimant dismisses the Respondent’s authorities⁷³⁷ – including *Romak* – for “supplementing the ECT’s terms” as being essentially “irrelevant.”⁷³⁸ The Claimant also contends that (contrary to the Respondent’s assertions) extending treaty protection to “any asset” under Article 1(6) of the ECT does not run counter to the ECT’s object and purpose.⁷³⁹

399. The Claimant notes that none of the ECT cases in the record applied an inherent characteristics test to Article 1(6) (the two which did so applying it to Article 25 of the ICSID Convention).⁷⁴⁰ Overall, all but two of the awards where the inherent characteristics test was applied were ICSID cases, where Article 25 gives rise to special considerations because it uses “investment” in lower case, whereas in the ECT “Investment” is specifically defined.⁷⁴¹ So the Claimant submits that there is “no general international principle for the application of inherent characteristics, and in fact there is a positive avoidance of it outside the ICSID context.”⁷⁴² Thus, the Claimant rejects the Respondent’s argument that the Claimant must establish that it made an “active contribution of money or other assets to Respondent’s economy,”⁷⁴³ contending that neither the ECT nor the authorities cited by the Respondent mention such a requirement.⁷⁴⁴

400. The Claimant also suggests that the two non-ECT, non-ICSID cases that applied an inherent characteristics test involved distinguishable facts.⁷⁴⁵ The Claimant submits that the *KT Asia* case and the other authorities cited by the Respondent are “sham transaction

⁷³⁶ Counter-Memorial, paras. 190-191, citing *Stati*, para. 806 (**Exhibit CL-3**). See also Rejoinder, para. 189.

⁷³⁷ See paras. 351-354 above.

⁷³⁸ Counter-Memorial, paras. 194-195, referring to the Respondent’s citation of *Romak* (**Exhibit RL-54**) and *Alps Finance* (**Exhibit RL-55**).

⁷³⁹ Counter-Memorial, paras. 199-201.

⁷⁴⁰ T1/185/2-9.

⁷⁴¹ T1/186/3-13.

⁷⁴² T1/186/14 – T1/187/3, citing *inter alia Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award (31 January 2014) (“*Guaracachi*”) (**Exhibit CL-80**); *Stati* (**Exhibit CL-3**).

⁷⁴³ See para. 365 above and Reply, para. 276.

⁷⁴⁴ Rejoinder, paras. 237-238.

⁷⁴⁵ T5/207/22 – T5/208/21.

cases”: for example, in *KT Asia* the purchase price was not “even remotely arm’s length” and was met by the manufacture of sham loans.⁷⁴⁶

401. Asked by the Tribunal whether, in order to constitute an Investment under Article 1(6), one has to establish not merely that there is something which takes the legal form of an asset, but also that there is an economic materialisation of that, in the form of an asset passing into the territory of the contracting state, the Claimant submitted that it needed to establish ownership or control of an asset which creates rights and obligations which are deemed to have their location in the host state.⁷⁴⁷ There is, the Claimant’s submits, no need to establish a contribution or flow of funds, noting that if an investor purchases shares in a public listed company on the exchange, it may have contributed nothing to the company itself, but would nevertheless still hold an investment in that company.⁷⁴⁸
402. In any event, the Claimant asserts that the Loans satisfy the “*Salini* test.”⁷⁴⁹ The Claimant argues that “[it] committed funds, indeed, approximately US\$ 3.2 billion, to Yukos Oil with the purpose to receive repayment plus interest and profit from the interest rate spread between the Loans and Yukos Capital’s own cost of funds,”⁷⁵⁰ which ultimately flowed into the Respondent’s economy⁷⁵¹ at “a real risk” that effectively materialized.⁷⁵²
403. On the subject of contribution, the Claimant asserts that the principal amounts of the Loans “were in fact disbursed into the Respondent’s economy and used for Yukos Oil’s business in Russia’s energy sector.”⁷⁵³ The Loans transferred from outside Russia into Russia US\$3.5 billion of capital, so that would satisfy any requirement to establish a flow of funds or some contribution of value.⁷⁵⁴

⁷⁴⁶ T5/209/20 – T5/210/13.

⁷⁴⁷ T5/187/13 – T5/190/10.

⁷⁴⁸ T5/190/13 – T5/192/9.

⁷⁴⁹ Counter-Memorial, paras. 202-203; Rejoinder, para. 218.

⁷⁵⁰ Counter-Memorial, para. 205.

⁷⁵¹ Counter-Memorial, para. 209.

⁷⁵² Counter-Memorial, paras. 210-216.

⁷⁵³ Rejoinder, para. 239.

⁷⁵⁴ T5/195/24 – T5/196/8.

404. That those funds represented the repatriation of profits, or may have originated at one point in time in the host state, is legally irrelevant.⁷⁵⁵ These were Yukos Capital's funds, they were never the property of Yukos Oil, and the origin of the funds and whether Yukos Capital controlled them is immaterial.⁷⁵⁶ Citing the report of Professor Lys, the Claimant says that the funds originated in the "earnings" of international companies.⁷⁵⁷ Those funds belong as a matter of law and property to those companies, a decision was made to invest those funds in Russia in a tax-efficient way, and the result was an international injection of funds.⁷⁵⁸ In the Claimant's submission, the Respondent has not identified "a single authority that suggests the origin and source of funds is relevant" to the Tribunal's decision.⁷⁵⁹ In any case, there was nothing about the funds loaned under the August 2004 Loan that were Russian, since they represented the proceeds of the sale by an international company of an asset that happened to be located in Russia.⁷⁶⁰
405. The Claimant admits that "[i]f one takes only a short term/snap view of Yukos Oil's treasury operations at the time," an amount of RUR 26 billion disbursed on 8 December 2003 pursuant to the December 2003 Loan "could be said to have been applied toward a dividend payment to Yukos Oil's shareholders."⁷⁶¹ However, that dividend payment would have been "required to implement a merger between Yukos Oil and Sibneft"⁷⁶² by adjusting Yukos' debt leverage ratio.⁷⁶³
406. The remaining proceeds of the December 2003 Loan were used, according to the Claimant, "for working capital to fund the continuing operations of Yukos Oil" against the backdrop of "the increasingly hostile and illegal acts of the Russian authorities."⁷⁶⁴ The proceeds of the August 2004 Loan "were to be used by Yukos Oil to make a partial

⁷⁵⁵ T1/188/9 – T1/189/22, citing *Stati* (**Exhibit CL-3**); *Alpha* (**Exhibit CL-57**); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) (**Exhibit RL-95**).

⁷⁵⁶ T1/189/21 – T1/193/16, citing *Caratube* (**Exhibit RL-59**); *Standard Chartered Bank* (**Exhibit RL-193**).

⁷⁵⁷ T5/197/4-15, citing Lys, para. 131.

⁷⁵⁸ T5/197/13 – T5/198/6.

⁷⁵⁹ T5/210/17 – T5/211/1.

⁷⁶⁰ T5/213/7-20.

⁷⁶¹ Counter-Memorial, para. 27.

⁷⁶² Counter-Memorial, para. 27.

⁷⁶³ T5/212/24 – T5/213/6.

⁷⁶⁴ Counter-Memorial, para. 27, citing *Misamore 1*, para. 36.

payment toward the immense . . . tax assessments that formed part of the Respondent's strategy for the expropriation of Yukos assets and destruction of . . . Yukos Oil."⁷⁶⁵

407. As for the Respondent's argument that the contribution must be made "in furtherance of a venture,"⁷⁶⁶ the Claimant argues that the decision from which the Respondent took the criterion (*Romak*) may be distinguished from the present arbitration and that, in any event, Yukos Oil qualified as a "venture."⁷⁶⁷
408. On the subject of risk, the Claimant submits that the only issue is how the risk was allocated between Yukos Capital and Brittany and Hedgerow, but that this has "nothing to do with whether the loans had risk."⁷⁶⁸ Moreover, Yukos Capital had its own risk because it had its own expected profits.⁷⁶⁹ The Claimant describes as "ridiculous" the suggestion that Yukos Capital was protected against the risk of not receiving the spread, arguing that there is nothing in the record to suggest that the non-recourse nature of the back-to-back Loans was intended to function as an indemnification of Yukos Capital.⁷⁷⁰
409. Moreover, the Claimant posits that "the source of funds for an investment is not relevant even in non-ECT cases"⁷⁷¹ nor is it "relevant to an assessment of the legal relationship created between Yukos Capital and Yukos Oil or the nature of that indebtedness."⁷⁷² The Claimant contends that "Respondent's conception of whether the funds advanced pursuant to the Yukos Oil Loans were Claimant's funds makes little sense in the context of commercial lending" as it "would effectively require tribunals to make detailed forensic examinations into the source of funds to determine on some unarticulated test whose funds were loaned."⁷⁷³ The Claimant distinguishes the investment treaty awards that the Respondent cites in this regard from the circumstances of the present case.⁷⁷⁴

⁷⁶⁵ Counter-Memorial, para. 30.

⁷⁶⁶ See para. 365 above and Reply, para. 278.

⁷⁶⁷ Rejoinder, para. 240.

⁷⁶⁸ T1/193/24 – T1/194/5.

⁷⁶⁹ T1/194/6-7.

⁷⁷⁰ T1/195/11 – T1/197/3.

⁷⁷¹ Counter-Memorial, para. 206.

⁷⁷² Counter-Memorial, para. 207, citing *Gleichenhaus 1*, para. 35.

⁷⁷³ Rejoinder, para. 223.

⁷⁷⁴ See Rejoinder, paras. 224-225.

410. Additionally, the Claimant rejects the Respondent's apparent complaint that the Loans represent an "ordinary commercial transaction," as they bear no resemblance to a sale of goods contract, such that the authorities relied upon by the Respondent in this regard "are clearly distinguishable and therefore irrelevant."⁷⁷⁵ The Claimant quotes Professor Douglas for the proposition that "[a] loan is the form of credit that features most prominently as an investment in the corpus of investment treaty precedents."⁷⁷⁶
411. As for the Respondent's argument that the funds loaned by Yukos Capital to Yukos Oil were "profits generated . . . in Russia," the Claimant first argues that there was no alleged circular flow of funds, as "Yukos Oil never owned the funds at issue until it received them in its capacity as a borrower from Yukos Capital."⁷⁷⁷ The Claimant adds that, in any event, the source of the funds is irrelevant, a proposition it seeks to support by several past investment treaty awards.⁷⁷⁸ Additionally, the Claimant points out that the object and purpose of the ECT "strongly counsel against any restrictive reading that might deprive [intercompany lending] of protection" under the ECT.⁷⁷⁹

(iii) Are the Loans associated with an Economic Activity in the Energy Sector?

412. The Claimant submits that "the purpose of the Loans was to advance billions of dollars to a major oil company whose only activities were in the energy sector."⁷⁸⁰
413. The Claimant emphasizes the importance of the factual context in the interpretation of Article 1(6) in light of the ECT's object and purpose.⁷⁸¹ The Claimant dismisses the Respondent's reliance on the decision in *Amto* on the basis that the "Claimant invested directly in an energy company" in contrast to the claimant in *Amto*.⁷⁸² Moreover, the Claimant asserts that "[it] is aware of no authority, and Respondent cites none, where a tribunal has examined the use of proceeds of equity or debt financing provided directly

⁷⁷⁵ Rejoinder, paras. 196, 213.

⁷⁷⁶ Rejoinder, para. 214, *citing* Douglas, para. 381 (**Exhibit RL-64**).

⁷⁷⁷ Rejoinder, paras. 227-228.

⁷⁷⁸ Rejoinder, paras. 229-230.

⁷⁷⁹ Rejoinder, paras. 231-234.

⁷⁸⁰ Counter-Memorial, para. 219. *See also* Rejoinder, para. 179.

⁷⁸¹ Counter-Memorial, paras. 221-222, *citing Amto*, para. 42 (**Exhibit RL-77**).

⁷⁸² Counter-Memorial, para. 223.

to an energy company to determine whether that financing was ‘associated with’ activity in the energy sector.”⁷⁸³

414. The ECT Contracting Parties’ Understanding on Article 1(5) of the ECT is, so the Claimant argues, merely “illustrative” and cannot be construed so as to “only attract protection under the ECT if the funds are used by [a] company specifically for the physical or actual exploration, production, transportation, marketing or sale of oil and not the related necessary ancillary tasks of running a company dedicated to those activities.”⁷⁸⁴ The Claimant argues that such an interpretation would be “unworkable and . . . produces absurd results.”⁷⁸⁵ While reiterating that the December 2003 Loan “was necessary” for the financing of the Yukos Oil and Sibneft merger, and the August 2004 Loan for the payment of taxes,⁷⁸⁶ the Claimant concludes that “[t]here is no question that direct equity and debt investments in energy companies are associated with their activities and attract the protection of the Treaty.”⁷⁸⁷
415. The Claimant cites *British Caribbean Bank v. Belize* as authority for the proposition that “the benefit of a loan agreement is to be found in the location to which the funds were disbursed.”⁷⁸⁸
416. The Claimant rejects the suggestion that a different test applies to equity and debt, noting that if an investor purchases equity in a public listed oil company on the exchange, then the company usually never sees the money at all. Accordingly, there is no place for a “use of proceeds” test.⁷⁸⁹
417. The Claimant disputes the Respondent’s allegation that the Claimant has not provided evidence supporting its statement as to the use of the Loans, noting that the witness statements of Mr Misamore shed light on such use and that it is the Respondent’s burden

⁷⁸³ Counter-Memorial, para. 223.

⁷⁸⁴ Counter-Memorial, para. 224.

⁷⁸⁵ Counter-Memorial, para. 225.

⁷⁸⁶ Counter-Memorial, para. 228.

⁷⁸⁷ Counter-Memorial, para. 226.

⁷⁸⁸ Rejoinder, para. 180, citing *British Caribbean Bank Limited v. The Government of Belize*, PCA Case No. 2010-18, Award (19 December 2014), para. 207 (**Exhibit CL-58**).

⁷⁸⁹ T1/172/14 – T1/173/22.

to establish that he is being untruthful.⁷⁹⁰ Moreover, even if the Claimant had the burden of establishing the use of the Loans (which Claimant maintains it does not), the burden would have shifted to the Respondent because the Respondent has control of the relevant documents (following the seizure of Yukos Oil's records).⁷⁹¹

418. Further, the Claimant maintains that, in spite of the Respondent's arguments to the contrary,⁷⁹² the merger with Sibneft had not been called off before the execution of the December 2003 Loan.⁷⁹³ The rest of the funds were used for Yukos Oil's ongoing business, which can be interpreted as nothing other than "activity in the energy sector."⁷⁹⁴ The Claimant adds that the payment of dividends "is part of the normal and necessary activities of an energy company" and does not constitute "disinvestment."⁷⁹⁵

3. The Tribunal's analysis

(a) The material issues

419. The question before the Tribunal under this challenge to its jurisdiction *ratione materiae* may conveniently be stated, in the pertinent terms of Articles 1(6) and 26(1) of the ECT, as:

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]."

420. The definition of "Investment" in Article 1(6) of the ECT "means every kind of asset, owned directly or indirectly by an Investor." The definition then sets out a non-exhaustive list of categories of asset. The Tribunal has framed the issue in terms that are derived from Article 1(6)(b), which refers, *inter alia*, to the "debt of a company."

⁷⁹⁰ T1/174/8-21.

⁷⁹¹ Rejoinder, para. 183.

⁷⁹² See para. 368 above.

⁷⁹³ Rejoinder, para. 184.

⁷⁹⁴ T1/173/23 – T1/174/14.

⁷⁹⁵ Rejoinder, para. 185.

421. The Claimant also submits that its “asset” is comprised by either “claims to money” under Article 1(6)(c) or “[r]eturns” under Article 1(6)(e). The Tribunal approaches the issue by reference to whether the Claimant owns the “debt of a company” under Article 1(6)(b), since, for reasons that are developed below, this characterisation appears to the Tribunal to be the most apt description of the Claimant’s Loans. It would only be if the Loans did not meet that characterisation that it would be necessary to go on to consider whether in the alternative they might be characterised as “claims to money” or “[r]eturns.”
422. In light of the specific arguments that have been developed before the Tribunal in relation to the facts and circumstances of this case, this major question gives rise on the Tribunal’s analysis to two distinct sub-issues:
- (i) Whether the sums that the Claimant paid to Yukos Oil under the Loans were not advanced as a loan, and therefore did not constitute a “debt of a company” but rather amounted to dividends.
 - (ii) Alternatively, if the sums advanced were by way of loan, whether it is not the Claimant but rather Brittany and Hedgerow that own that asset.
423. If the answer to either of these sub-issues were “yes,” the consequence would be that the Tribunal would have no jurisdiction because the Claimant would not “own” an “asset” constituting an “Investment” upon which it could in law found a claim:
- (a) In the first case that would be because, upon disbursement of the funds, the Claimant would have irrevocably relinquished any claim to repayment. It would no longer own an asset constituted by the chose in action under the Loan. Rather the funds would, from the moment of their transfer, be an asset of Yukos Oil. The Claimant accepts that, if this were the case, it would not have an “Investment.”⁷⁹⁶
 - (b) In the second case, if the sums were to be treated as having been extended by way of loan, there would be an asset remaining in the hands of the lender, but the lender would not be the Claimant.

⁷⁹⁶ Rejoinder, para. 126.

424. In both cases, but in different ways, the Respondent invites the Tribunal to look beyond the form of the particular Loans to consider the alleged economic substance of the transactions at issue. It invites the Tribunal to treat the transaction as including wider elements from the context beyond the specific transfers from the Claimant to Yukos Oil. It relies on both:

- (a) Steps in the transfer of assets *prior* to Yukos Capital's receipt of the funds. The Respondent alleges that the funds may be traced from Russian subsidiaries of Yukos Oil. In particular, it alleges that the true transferors are Brittany and Hedgerow, not the Claimant; and,
- (b) Steps *subsequent* to the receipt of the funds by Yukos Oil. In particular, it relies upon a contemporaneous payment by Yukos Oil of a dividend to its shareholders. Claimant alleges that this payment was made in connection with the planned merger between Yukos Oil and Sibneft.⁷⁹⁷

425. It is important to be clear about precisely what it is that the Respondent invites the Tribunal to find in this respect and what it does not.

426. The Respondent's case in this regard is not that the Loans should be treated as shams. It submits that it is not necessary for the Tribunal to obliterate the legal rights and duties of the Parties under the legal regime applicable to the Loans. Rather those Loans should be *re*-characterised for the specific and different purpose of considering whether they constitute an "Investment" under the ECT.

427. The essence of this submission is well explained in the following passage from the transcript. There are two steps in the Respondent's submission:

- (a) The Respondent first invites the Tribunal to find that the two possible ways of re-characterising the transaction identified in paragraph 422 above result "when analysed in economic substance" in a single transaction: a dividend payment from Brittany or Hedgerow as the case may be to Yukos Oil:

⁷⁹⁷ Respondent: para. 368 above; Claimant: paras. 405 – 406 above.

[W]hat appear to be two loan transactions are at most one: from Brittany to Yukos and from Hedgerow to Yukos. And then when analysed in economic substance, we suggest that that is equivalent to and always was intended to have the effect of a dividend to Yukos Oil.

[Tribunal Member]: So when you said “to Yukos”, you meant to Yukos Oil?

[Counsel for Respondent]: Correct.⁷⁹⁸

- (b) The Respondent then submits that such re-characterisation does not affect the legal obligations of the Parties “in other spheres.” It is limited to a finding of “the true transaction” for the purpose of the question whether there is an “Investment” under the ECT:

[I]t is quite possible for one legal regime to disregard the legal form of an arrangement to test its true economic substance for purposes of determining the significance of those arrangements for a different legal regime. ...

[R]echaracterisation of these transactions for purposes of analysis under the ECT does not mean that you’re piercing the corporate veil, does not mean that you’re obliterating what legal obligations or rights those parties might have in other spheres. It means that you’re analysing the true transaction for the purposes of determining whether there is a protected investment under the Energy Charter Treaty.

...

[A]ny decision that you make about whether this is a protected investment has no consequence for the parties to the transaction as to their legal obligations. That’s something for them to deal with in a different setting. Just as a recharacterisation for tax purposes would not affect the legal obligations of the parties in a different setting.⁷⁹⁹

⁷⁹⁸ T5/79/22 – T5/80/5.

⁷⁹⁹ T5/80/14 – T5/81/22.

428. In order to address these submissions, the Tribunal must therefore decide, on the evidence before it, as to the particular character of the transaction at issue and for the purpose of jurisdiction (and not otherwise):

- (a) Whether the extent of the jurisdiction *ratione materiae* granted under the ECT requires it to re-characterise a transaction (the legality of which is not disputed) in terms of “economic substance”; and,
- (b) If so, whether that would have the consequence that the Claimant does not have an “Investment” that can found a claim under the ECT before this Tribunal.

(b) A loan associated with an Economic Activity in the Energy Sector

429. In approaching this question, it is necessary for the Tribunal to make preliminary findings of law on two other aspects of the issue that were traversed in argument. These findings will only be relevant if and to the extent that the transaction is properly to be characterised as a loan. Nevertheless they will assist in focusing on the specific nature of the central issues for decision. These issues are:

- (a) Whether a loan that is associated with an Economic Activity in the Energy Sector is capable of constituting an “Investment” for the purpose of the ECT; and,
- (b) What is the content of the connecting factor denoted by “associated with an Economic Activity in the Energy Sector.”

430. *A loan as a form of “Investment.”* In the first place, the Tribunal finds that, where a company makes a loan that is “associated with an Economic Activity in the Energy Sector,” such a loan is capable of constituting “debt” that is an “Investment” for the purpose of the ECT.

431. This conclusion results from the ordinary meaning of Article 1(6)(b) of the ECT. The Tribunal does not accept the Respondent’s submission that, as a matter of construction, Article 1(6)(b) is incapable of including such a loan. It does not accept that “other debt of a company” is to be read down to include only instruments equivalent to a “bond.” The Respondent’s argument that “other debt of a company” must be limited to “debt instruments issued by a company” would involve reading into Article 1(6) words that are

not there. The use in the Treaty of the word “other debt of a company” refers, in its ordinary meaning, to the existence of an obligation of indebtedness on the part of a company. In the hands of the “Investor” such a debt is capable of constituting an “asset” for the purpose of the definition of “Investment.”

432. Such a debt is not purely, as Respondent submitted, a “claim[] to money ... pursuant to contract” under Article 1(6)(c). The debt will give rise to a contractual relationship of debtor and creditor, the incidents of which are determined by reference to the terms of such a contract. The debt also gives rise to a chose in action that is an “asset” – a property interest of the “Investor.”
433. This conclusion, arrived at as a matter of the construction of the ordinary meaning of Article 1(6)(b) pursuant to Article 31(1) of the VCLT, is further supported by consideration of the approach that has been taken to the question whether loans that are linked to an economic venture may be considered as an investment in general international law, to which the Tribunal makes reference pursuant to Article 31(3)(c) of the VCLT.
434. It is not the case that a loan, considered in isolation, is *ipso facto* an investment; rather reference to these authorities supports the Tribunal’s view that the critical distinction is the extent to which the loan is linked to an economic venture in the host state.
435. This point has been emphasised in both the jurisprudence and the doctrine. In *CSOB v. Slovak Republic*, the tribunal held:

Loans as such are therefore not excluded from the notion of an investment under Article 1(1) of the BIT. It does not follow therefrom, however, that any loan and, in particular, the loan granted by CSOB to the Slovak Collection Company meets the requirements of an investment ... under Article 1(1) of the BIT, which speaks of an “asset invested or obtained by an investor of one Party in the territory of the other Party.”

...

The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the Slovak Collection Company is closely related to and

cannot be disassociated from all other transactions involving the restructuring of CSOB.

...

The basic feature of the Consolidation Agreement was not the financial consolidation of CSOB as such, but the development of the role and activities of CSOB in both Republics.⁸⁰⁰

436. By contrast, in *Joy Mining Machinery Ltd v. Egypt*⁸⁰¹ and in *Alps Finance*⁸⁰² the loan was linked respectively with a contract of sale and a contract of assignment. It was not linked with an underlying economic venture capable of constituting an investment. It followed that the loan itself could not constitute an investment.

437. Doctrine also supports the proposition that a loan may constitute an investment, provided that it is linked to an underlying economic venture in the host state. Douglas explains the point in the following way:

The provision of credit by the investor to an entrepreneur or enterprise engaged in commercial activities in the host state qualifies as an investment. The investor acquires rights to a debt, which can be assigned and thus has the feature of a right *in rem*. Credit can take the form of a loan....

A loan is the payment of money by the investor to the debtor (an entrepreneur or enterprise engaged in commercial activities in the host state) upon terms that the sum advanced, with any stipulated interest, must be repaid by the debtor in due course.

...

A loan is the form of credit that features most prominently as an investment in the corpus of investment treaty precedents.⁸⁰³

⁸⁰⁰ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999), paras. 77, 80, 83 (**Exhibit CL-4**).

⁸⁰¹ *Joy Mining Machinery Ltd v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**Exhibit RL-67**).

⁸⁰² *Alps Finance* (**Exhibit RL-55**).

⁸⁰³ Douglas, paras. 381-383 (**Exhibit CL-35**).

438. “*Associated with an Economic Activity in the Energy Sector.*” Within the framework of the ECT, the nature of the requisite link is prescribed by the final paragraph of Article 1(6), which specifies: “‘Investment’ refers to any investment associated with an Economic Activity in the Energy Sector.” Such Activity is further defined in Article 1(5) as “an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy Materials and Products.”
439. The connecting factor “associated with” is relevantly defined in the *Oxford English Dictionary* as “connected with an organization or business.”⁸⁰⁴ The consequence of the use of this phrase by the treaty drafters is that it suffices that the contribution made by way of loan in turn contributes to an enterprise that is itself engaged in an Economic Activity in the Energy Sector.
440. The business of Yukos Oil is described in its audited 2004 Accounts as “exploring of oil and gas deposits, extracting of oil and gas, selling of oil and other products, and providing of services.”⁸⁰⁵ This activity falls squarely within the ECT definition of an Economic Activity in the Energy Sector. This is further confirmed by the Understanding of Article 1(5) that the representatives agreed to by signing the Final Act, which refers specifically to (i) “prospecting and exploration for, and extraction of, e.g., oil [and] gas” as well as (iii) its “land transportation, distribution, storage and supply” and (vi) “marketing and sale of, and trade in Energy Materials and Products, e.g. retail sales of gasoline,” together with (vii) “research, consulting, planning, management and design activities related to the activities mentioned above.”⁸⁰⁶
441. The Tribunal does not accept the Respondent’s submission that the loan itself must be devoted to the activity. The term used in the Treaty is “associated with,” which, as the Tribunal has found, is met where the investment by way of loan goes to support an

⁸⁰⁴ Oxford English Dictionary, available at <<http://www.oed.com/view/Entry/93864?redirectedFrom=association#eid>> (accessed on 11 June 2015) (**Exhibit C-209**).

⁸⁰⁵ 2004 Explanatory Note (**Exhibit C-137**).

⁸⁰⁶ Understandings, Final Act of the European Energy Charter Conference (17 December 1994), p. 28 (**Exhibit C-1**).

enterprise that itself carries out the defined economic activities in the area of the relevant state.

442. The construction placed on this phrase by the Tribunal in *Amto*, an authority relied upon by the Respondent, is consistent with this interpretation when read in its proper context. In that case, the tribunal was addressing a submission that a mere contractual relationship with an energy company (such as “contracts of a power station for publishing, advertising or security services”) would not be “associated with” an Economic Activity in the Energy Sector.⁸⁰⁷ The tribunal held:

[T]he interpretation of the words ‘associated with’ involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase ‘associated with’ must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, *without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector.*⁸⁰⁸

443. In *Amto* itself, the contribution made by the claimant was in the form of the provision of technical services directly related to the production of electrical energy, which services the tribunal held amounted to an “Investment.”

444. The present case concerns a direct financial contribution to an enterprise that is engaged in an Economic Activity in the Energy Sector. An interpretation in accordance with the purpose of the ECT, is, as Article 2 states, to be “in accordance with the objectives and principles of the Charter.” The Objectives of the European Energy Charter itself include “to create a climate favourable to the operation of enterprises and to the flow of investments” and “promoting best possible access to capital.”⁸⁰⁹ A loan to an enterprise that is engaged in an Economic Activity in the Energy Sector meets this objective.

⁸⁰⁷ *Amto*, para. 42 (**Exhibit RL-77**).

⁸⁰⁸ *Amto*, para. 42 (emphasis added) (**Exhibit RL-77**).

⁸⁰⁹ Concluding Document of the Hague Conference on the European Energy Charter (17 December 1991), p. 216 (**Exhibit C-1**).

445. These preliminary findings are subject to the issues of law and fact as to the economic substance of the transaction that have already been identified, to which the Tribunal must now turn.

(c) The materialization of an “Investment”

446. The Tribunal takes as its point of departure for analysis of the “economic substance” argument the premise that inherent in the concept of “Investment” is both a legal and an economic materialization.

447. This requirement is reflected in Article 1(6) of the ECT:

(a) The list at the outset of Article 1(6) is concerned with identifying “assets.” Its focus is on proprietary rights “owned or controlled” by the Investor. Such rights form the legal basis of a right the invasion of which by a respondent state may be the subject of a claim under the Treaty.

(b) The final paragraph of Article 1(6) then adds an economic element in stating that “‘Investment’ refers to any investment associated with an Economic Activity in the Energy Sector.”

448. The use in this last sentence of “investment” in lower case emphasises that the drafters of the Treaty desired to distinguish the legal materialization of the asset from the factual enquiry into its association with economic activity – both elements being required.⁸¹⁰

449. This dual aspect of “Investment” in investment treaties has been expressed in the cases as being between:

(a) The legal aspect: “the asset belonging to the claimant” or “fruits and assets resulting from the investment”; and

(b) The economic aspect: “a commitment of resources” or “contributions that have created such fruits and assets.”⁸¹¹

⁸¹⁰ The Parties consider the general significance of this reference to “investment”: Memorial, para. 93; Counter-Memorial, para. 198; Reply, para. 251. The Tribunal here makes a more specific finding on construction of this sentence.

⁸¹¹ *KT Asia*, paras. 166-167 (**Exhibit RL-56**), citing *Malicorp Ltd v. Egypt* ICSID Case No ARB/08/18, Award (7 February 2011) (“*Malicorp*”), para. 110. See also Douglas, Rules 22 & 23 (**Exhibit CL-35**).

450. Both elements must be present to constitute an investment. As it was put in *KT Asia*:

The assets listed in Article 1(1)(a) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of ... the BIT.

...

[A]ssets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.⁸¹²

451. Each of these elements entails a different type of enquiry.

452. The legal materialization of the Investment is to be determined according to the law applicable to the asset in question, which requires a *renvoi* to municipal law. The tribunal in *Emmis International Holding BV v. Hungary* explained this point in the following way:

The need to identify a proprietary interest ... is confirmed by the definition of ‘investment’ in the Treaties. In each case, the Treaty refers compendiously to ‘every kind of asset[s]’. The Oxford English Dictionary definition of ‘asset’ is:

(usually **assets**) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies.

The definitions in the Treaties go on to provide particular examples of types of property or rights that may constitute an asset for this purpose. But these examples are not exhaustive.

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law. As the *EnCana* Tribunal put it:

⁸¹² *KT Asia*, paras. 166-167 (**Exhibit RL-56**), citing *Malicorp*, para. 110. See also Douglas, Rules 22 & 23 (**Exhibit CL-35**).

[F]or there to have been an expropriation of an investment or return ... the rights affected must exist under the law which creates them. [...].⁸¹³

453. In its challenge to the jurisdiction of the Tribunal, the Respondent does not seek to challenge the validity of the Loans according to the law applicable to them.⁸¹⁴ The result is that the legal materialization of the Loans must be treated as having been satisfied for the purpose of determining this element of “Investment.”
454. The concept of the economic materialization of an investment is concerned with an essentially factual question, namely whether the investor has in fact made a “commitment of resources.” In the case of the ECT, such a contribution must be “associated with an Economic Activity in the Energy Sector.”
455. In the present case, the fact that funds extended under the Loans were transferred to Yukos Oil in Russia is undisputed. The Respondent nevertheless submits that inherent in the ECT concept of “Investment” are the twin elements of “contribution” and “risk” and that assessment of these requires consideration of the “economic substance” of the transaction. The Tribunal will take each of these elements in turn.

(d) Contribution

456. The Tribunal has already found that the economic materialization of an investment within the ECT assumes that the Investor makes a contribution associated with an Economic Activity in the Energy Sector.
457. The Respondent advances its argument under this head on two bases: origin of capital and the alleged economic effect of the loans as a dividend. Each of these submissions may be summarised as follows:

- (a) *Origin of capital.* In economic terms, the funds that were used originated in Russia. The Respondent submits that the funds were being “round-tripped from the Russian Federation to the Russian Federation at the request of the Russian

⁸¹³ *Emmis*, paras. 161-162 (**Exhibit CL-59**) citing *EnCana Corp v Ecuador*, LCIA Case No. UN3481, Award (3 February 2006), para. 184.

⁸¹⁴ See para. 427(b) above.

parent company.”⁸¹⁵ The return of the same funds to Russia thus affords no “contribution” to economic activities within Russia.

(b) *Economic effect of a loan as a dividend.* The Respondent argues that the loan was in economic substance a dividend to Yukos Oil, the parent company of the group; that being the objective that Yukos Oil desired to achieve.

458. These allegations raise questions of fact to which the Tribunal will shortly turn. It is first necessary to consider the parameters of the issues as a matter of law.

459. The first of the arguments raises two preliminary questions:

(a) The relevance as a matter of law of the origin of the capital utilised by an investor to make its investment.

(b) The extent to which an intra-group loan, funded within a corporate group, may itself constitute an “Investment.”

460. *Origin of capital.* Construction of the terms of the ECT does not indicate that the jurisdictional requirement of an “Investment” is to be tested by reference to the origin of the funds drawn upon by the Investor for the purpose of making its investment. The requirement is simply that the Investment be “owned or controlled directly or indirectly by an Investor.” An “Investor” means relevantly “a company or other organization organized in accordance with the law applicable in that Contracting Party.”⁸¹⁶ It is not disputed in this case that the Claimant is an “Investor.”

461. Generally, the origin of the funds used by an investor is legally irrelevant to the jurisdictional question of whether that person has made an investment, absent an express provision to the contrary. The tribunal in *Caratube International Oil Company LLP v. Republic of Kazakhstan* (“*Caratube*”) summarises the position:

[S]ubject to express provisions to the contrary, the origin of capital used to make an investment is immaterial for jurisdiction purposes. However, there still needs to be

⁸¹⁵ T5/100/15-22.

⁸¹⁶ ECT, Art. 1(7).

some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor.⁸¹⁷

462. The *Caratube* tribunal adds an important footnote to this passage: “*The capital can come from the investor’s own funds located in any country, from its subsidiaries or affiliates located in any country, from loan, credit or other arrangements.*”⁸¹⁸
463. This principle confirms the interpretation arrived at by reference to the ordinary meaning of the words of Article 1 of the ECT. That this is necessarily so (absent an express decision on the part of treaty parties to create a special contrary regime) results from consideration both of the nature of capital and the purpose of investment promotion and protection by treaty. Money is by its nature fungible, and, save in exceptional circumstances, it will not usually be possible to trace funds so as to be able to find that sums in the account of one person are the same as, or specifically derived from, those in the account of another person. In both cases they are likely in the nature of things to have been mixed with funds from other sources.
464. Tracing the origin of funds is not the concern of investment treaties. Such treaties do not ask how the investor raised the funds that it drew upon in order to invest. It might do so on the capital markets; or by borrowing funds from a commercial bank or from a related company. The investor is not restricted to utilising funds from its own commercial operations (funds that may in any event “originate” with third parties with which it trades). What matters for the purpose of an investment treaty is that the investor has decided to contribute those funds towards an enterprise or economic activity in the host state and in the process has acquired and owns an asset that leaves the investor with a stake in that enterprise or economic activity.
465. It would be contrary to the object and purpose of the ECT to circumscribe the ways in which an investor is permitted to acquire the capital needed to make an investment. That would not “create a climate favourable to the operation of enterprises and to the flow of investments” or “promot[e] best possible access to capital.”⁸¹⁹

⁸¹⁷ *Caratube*, para. 355 (internal citation of additional authorities omitted) (**Exhibit RL-59**).

⁸¹⁸ *Caratube*, n. 25 (emphasis added) (**Exhibit RL-59**).

⁸¹⁹ Concluding Document of The Hague Conference on the European Energy Charter (17 December 1991), p. 216 (**Exhibit C-1**).

466. *Intra-group loans*. Does it matter for this purpose if the funds that are utilised are derived from intra-group transfers within a group of companies? The award on which the Respondent places particular reliance in this regard is *KT Asia*. In that case, the tribunal had to address the question whether the claimant “must itself have made a contribution or whether it can benefit from a contribution made by someone else.”⁸²⁰ The claimant did not dispute that it made no injection of fresh capital. It argued that an inter-company transfer in the context of an internal restructuring within a group of companies still amounts to a contribution. The tribunal assumed for the sake of discussion that no new investment is required where an investment is transferred from one group affiliate to another. It then addressed whether there was in the case before it “a corporate group as this concept is generally understood in corporate and tax law as well as under accounting and financial reporting standards.”⁸²¹

467. The tribunal in *KT Asia* characterised the concept of a group of companies in the following terms:

It is common knowledge that a group of companies – such as Exxon Mobil in the first case invoked by the Claimant or Nomura in the second – exists when two or more corporations are under common corporate ownership or control. Ordinarily, companies owned or controlled by one individual do not qualify as a corporate group though sometimes national legislation may so treat them. Although composed of separate legal entities, which must comply with the legal and regulatory requirements applicable to them, groups generally operate as a single economic entity with a common objective and strategy and a group management. In such a case, the group may report its financial results on a consolidated basis; its group status may be taken into account for tax purposes (subject to dealing at arms' length); and national law may impose certain liabilities to sanction any misuse of the group structure.⁸²²

468. It then contrasted the position in the facts before it:

In the present case, Mr Abylazov beneficially owned and controlled many companies through nominees and individuals whom he trusted and who (directly or indirectly)

⁸²⁰ *KT Asia*, para. 192 (**Exhibit RL-56**).

⁸²¹ *KT Asia*, para. 194 (**Exhibit RL-56**).

⁸²² *KT Asia*, para. 195 (**Exhibit RL-56**).

owned or controlled the shares. These nominees and other individuals acted on Mr Ablyazov's instructions and were required not to disclose that they held or controlled the shares for his benefit. Mr Ablyazov was never himself a shareholder in any of the companies. Indeed, it is the Tribunal's understanding that there was no single person (whether corporate or individual) who had legal title to the shares in the companies held for the ultimate benefit of Mr Ablyazov.

Consequently, there was no holding company and no single individual shareholder directly or indirectly connecting all the companies of which Mr Ablyazov was the beneficial owner. Neither was there a single economic unity, not to speak of consolidation for financial reporting or tax purposes. This aggregation of assets in the form of a myriad of companies is in reality the antithesis of a group. To treat Mr Ablyazov's ultimate beneficial ownership of all the various companies via nominees and trusted agents as a sufficient connecting factor to create a group would be nonsensical. Indeed, the whole purpose of the structure was to conceal Mr Ablyazov's interest and make it look as if the different entities that held blocks of shares in BTA were independent of him and of each other.⁸²³

469. The tribunal concluded that:

[T]here was a number of entities all owned by nominees of Mr Ablyazov, who disposed of the companies and their assets as of his own without regard to their separate legal personalities Mr Ablyazov used the companies as his 'pockets' shifting assets from one to the other solely to suit his own purposes There may be nothing unlawful in Mr Ablyazov treating the assets of companies formally owned by other persons as his personal property. However, he cannot do so and at the same time argue that the companies should be treated as a conventional commercial group when it comes to claiming treaty protection.⁸²⁴

470. The essence of the tribunal's finding in *KT Asia* is that the assets in question were the property of Mr Ablyazov and not that of the claimant, which was a bare nominee or sham designed to conceal Mr Ablyazov's true beneficial interest. In making this finding, the tribunal contrasted the position with that of inter-company transfers within a corporate group. While the *KT Asia* tribunal was not called upon to decide the circumstances in

⁸²³ *KT Asia*, paras. 196-197 (**Exhibit RL-56**).

⁸²⁴ *KT Asia*, paras. 204-205 (**Exhibit RL-56**).

which an inter-company transfer within a corporate group might amount to a contribution for the purpose of finding an “Investment,” it did not decide that such an arrangement *per se* fails to qualify.

471. The Tribunal does not consider that an inter-company transfer within a corporate group can be excluded as such from qualifying as a contribution for the purpose of investment law. As the first cited passage from the *KT Asia* award explains very well, there may be a real distinction between the treatment of a corporate group as a “single economic entity” in economic terms and for purposes of consolidated group accounting and the legal and regulatory requirements applicable to the separate legal entities within such a group. There is no inconsistency in this distinction. It reflects the simple fact that the disciplines of economics and consolidated accounting on the one hand, and law on the other, are addressed to different aspects of business activity.
472. The ECT promotes and protects “Investments” “associated with Economic Activities in the Energy Sector” within the “Area” of each signatory State, being “the territory under its sovereignty.”⁸²⁵ These objectives proceed from the premise that states will benefit under the ECT by the flow of investments and capital into economic activities in their territory.
473. This structure reflects an elementary fact of the organisation of contemporary economic life in the relation between commercial enterprises and sovereign states. A corporate group may be organised into numerous different companies that operate in diverse different states. By contrast, a state is defined in part by reference to territory. This is reflected in the terms of the ECT, which, in Article 1(10), defines “Area” with respect to a state that is a Contracting Party by reference to “the territory under its sovereignty.” The objectives that the signatories to the European Energy Charter sought to achieve for each participating state are objectives that must produce their effects within the territory of that state. “Investment” is therefore inherently concerned with a contribution associated with economic activities in such territory.
474. In approaching this question, the Tribunal does not consider that the concept of the economic materialization of an Investment protected under Article 1(6) of the ECT is

⁸²⁵ ECT, Art. 1(10) (**Exhibit C-1**).

limited in such a way that it would exclude loans made between two companies within the same corporate group. A decision on the part of one subsidiary company within a multinational oil and gas group to make a loan to another group company that is engaged in economic activities in the energy sector in another state party to the ECT would (in principle and absent other contrary evidence) constitute an “Investment.” It would be a “contribution” to those economic activities in the energy sector within the host state and thus meet the object and purpose of the Treaty. If the loan had not been made, the funds may still be within the multinational group in economic terms (and for the purpose of consolidated group accounts). The funds, however, not having been applied by way of a loan, would lack both of the elements of an Investment. There would be no legal materialization. Nor would the funds have given rise to an economic materialization by being associated with an economic activity within the territory of the host state.

475. The Tribunal must therefore now analyse on the facts as adduced before it whether the particular features of this transaction operate in such a way that these particular Loans, though their legal materialization is not disputed, cannot be regarded as making an economic contribution to Russia.
476. The Tribunal has already found on the facts that funds advanced under the December 2003 Loan came to Yukos Capital through Brittany from the profits of oil trading activities within the Yukos Group, including those held by two of its Russian subsidiaries, Ratibor and Fargoil.⁸²⁶
477. The funds advanced under the August 2004 Loan were derived from the sale of Hedgerow’s shareholding in Rospan, a Russian company. Yukos Oil was the ultimate owner of that equity interest through intermediate holding companies.⁸²⁷
478. Mr Misamore explained that he took a deliberate decision to repatriate the proceeds of these sales as loans for the following reason:

The only reason why the funds were repatriated to Yukos [Oil] in Russia through the use of intra-company loans is simple: tax minimization and cash management flexibility strategy, which was and continues to be today a common practice not only

⁸²⁶ See para. 330 above; Gleichenhau 1, para. 33; Misamore Record of Interview, p. 37 (**Exhibit R-39**).

⁸²⁷ See para. 333 above.

for Russian companies, but by virtually all companies involved in international commerce.

...

Specifically, if a foreign subsidiary of a multi-national corporation repatriates its funds in the offshore accounts to a parent in Russia permanently, such as through a dividend payment, the company must pay withholding tax in the jurisdiction where the company is incorporated and/or domiciled. If, on the other hand, the foreign entity loans the funds to either a holding company or its subsidiary in Russia, then the transfer qualifies for either 0% or a minimal, depending on a local tax regime, withholding tax.⁸²⁸

479. It follows from this that the Treasury Department of Yukos Oil identified that it had to make a specific choice between making inter-group company payments by way of dividend and by way of loan.
480. The initial payments from the Russian trading subsidiaries Ratibor and Fargoil to their Cyprus affiliates were made by dividend. Those payments were taxed at the rate prescribed in the Russia-Cyprus Double Tax Treaty.⁸²⁹ It forms no part of the evidence before the Tribunal at this jurisdictional stage to suggest that this expatriation of funds was unlawful under Russian law.⁸³⁰ At that point, these funds had left the sovereign territory of Russia. They were no longer devoted to economic activities within the energy sector in Russia. They could have been applied to the economic activities of the Yukos group outside Russia.⁸³¹
481. At the second stage of the transfers from Brittany or Hedgerow to the Claimant and from the Claimant to Yukos Oil, the sums were transferred by way of loan. The Claimant admits that this was a deliberate decision in order to make the working capital available to Yukos Oil without having to pay tax on it, as would have been the case were the sums to have been paid as a dividend.

⁸²⁸ Misamore Record of Interview, p. 34 (**Exhibit R-39**).

⁸²⁹ See para. 339 above.

⁸³⁰ See para. 308(b) above.

⁸³¹ T5/102/18 – T5/103//13.

482. Such a choice would, in the Tribunal's view, only fall outside the concept of "Investment" when either: (a) the Loans were found to be invalid or a sham as a matter of their legal materialization (which is not alleged here); or (b) if the Loans were to be treated as in substance a dividend because there was no intent to repay.

483. The evidence before the Tribunal is that the transactions were treated as loans:

(a) They appear as a contingent liability in the 2004 audited accounts of Yukos Oil.⁸³²

(b) Yukos Oil made scheduled repayments under the Loans until its accounts in Russia were frozen, and the Claimant made subsequent demands for payment.⁸³³

(c) The Moscow City Arbitration Court did not call into question that the Loans should be treated as such when ruling on their admissibility in the Yukos Oil bankruptcy proceedings. Rather, it decided that the claim was premature, the due date for fulfillment of the obligations under the Loans not having arisen as at the date of the receivership.⁸³⁴

484. This evidence is all consistent with an intent on the part of Yukos Oil to repay the Claimant and thus with a subsisting asset in the form of a loan held by Yukos Capital.

485. This is not negated by the fact that these sums were liable to consolidation in the Consolidated Group Accounts of the Yukos Group. This follows from the nature of consolidated accounts as presenting the global economic position of a group of companies, not the economic position of any particular company within the group.

486. Nor is the position affected by the fact that part of the loan to Yukos Oil was used by it in turn to pay a dividend to its shareholders. The evidence advanced by the Claimant on this aspect is that this dividend was paid in order to support the proposed merger between

⁸³² 2004 Explanatory Note, pp. 17-18 (**Exhibit C-137**).

⁸³³ *See* para. 336 above.

⁸³⁴ Moscow City Arbitration Court Ruling (19 July 2006), p. 2 (**Exhibit C-71**).

Yukos Oil and Sibneft.⁸³⁵ Mr Misamore gave detailed evidence about this in his witness statements.⁸³⁶ His account was not challenged on cross-examination.

487. The Tribunal finds that, to the extent that part of the loan proceeds were at the time intended to be used for this purpose, that would also be “associated with an Economic Activity in the Energy Sector.”

488. Accordingly, the Tribunal finds that the Loans are a “debt of a company” that constitutes an “Investment” for the purpose of Article 1(6) of the ECT. This finding, however, does not conclude its enquiry.

(e) Risk

489. The second aspect of the Respondent’s argument as to the economic substance of the transaction is that the Claimant did not make an investment, since it bore no risk under the Loans. Such risk, it is said, was passed on to Brittany or Hedgerow by virtue of the back-to-back nature of the loan documentation. As a result, the asset is not to be treated in economic terms as “owned” by the Claimant.

490. It is a commonplace to observe that an element of risk is inherent in the economic materialization of an investment. This is another ground upon which an investment is distinguished from a sales transaction.

491. The Tribunal is bound to observe, however, that, in its view, there are two difficulties that arise on the Respondent’s legal case under this head.

492. In the first place, the factor of risk, however useful it may be as an indicator to distinguish a sale from an investment, can have only limited value where the investor makes its investment by way of a loan. In the case of a sale transaction, there is no investment because the seller retains, by virtue of a contract of sale, no proprietary interest in an economic venture in the host state. By contrast, as the Tribunal has already found,⁸³⁷ an investment is commonly made by way of a debt, provided that such a debt is associated

⁸³⁵ See paras. 405 & 418 above.

⁸³⁶ Misamore 1, paras. 23-36; Misamore 2, paras. 35-44.

⁸³⁷ See paras. 430-437 above.

with an enterprise or economic activity in the host state. This form of legal materialization of an investment is expressly contemplated by Article 1(6)(b) of the ECT.

493. Where the mechanism of a loan is used, the investor retains the right to repayment of capital; has the ability to fix its returns through a specified interest rate; and may also have other legal mechanisms open to it to limit its risk. This form of investment is therefore of its nature quite different from an equity investment, in which the value of the investment will be much more directly influenced by the success or failure of the economic venture. In the case of an equity investment, the risk element constitutes a much more direct connection between the investor's asset and the venture in which it owns a stake.
494. These differences do not make a loan any the less an investment. A loan to an enterprise or economic venture in the host state still involves risk as to the success or failure of the venture. At the point that the investor disburses funds under the loan to the venture, it is committed to its success or failure. The investor has a stake in that venture. Its risk materializes in a failure to repay. That is a risk of a different order to non-payment for specific goods delivered under a contract of sale. The element of risk is, therefore, in reality another way of expressing the same underlying concept of "contribution" already discussed.
495. There is a second difficulty in the instant case with the specific way in which the Respondent advances its case. The Respondent does not for this purpose challenge the legal materialization of the investment. It does not seek to argue that the Loans are invalid or to be set aside under their applicable law. Yet the requirement of Article 1(6) of the ECT to which its submissions on the back-to-back nature of the loan transactions must be directed is the requirement that the Investment be "owned" by the Investor.
496. Ownership is a legal estate. It describes a legal relationship between person and property. As the Tribunal has already held,⁸³⁸ international law does not create rights in property. It must refer to national law to do so. Although the Respondent suggested that the

⁸³⁸ See para. 452 above.

Claimant was to be treated as an “agent” of Brittany or Hedgerow,⁸³⁹ it developed no legal case under the applicable law in this respect.

497. Nor did the Respondent submit that there was any other basis for treating Brittany or Hedgerow as the owner – legal or beneficial – of the chose in action constituted by the debt. On the contrary, the Respondent emphasises that its case “does not mean that you’re piercing the corporate veil, does not mean that you’re obliterating what legal obligations or rights those parties might have in other spheres.”⁸⁴⁰ It adds that the finding that it seeks “has no consequence for the parties to the transaction as to their legal obligations.”⁸⁴¹ Nor, it bears repeating, did the Respondent submit that the Claimant was not an Investor. It did not argue that the Claimant was a sham or a shell company established to disguise the real owner (as was found to be the case in *KT Asia*). It did not submit that Brittany or Hedgerow was to be treated as the owner of the debt.⁸⁴²
498. The Respondent’s case is not founded upon the legal character of the arrangements, but on a submission as to what it submitted was the “true economic position”: that Brittany or Hedgerow were “the economic actors” and that Yukos Capital was “just a passive conduit.”⁸⁴³ Since the Respondent does not advance a submission impugning the legal character of the arrangements, and since the Tribunal has not been presented with evidence on the arbitration file for this jurisdiction hearing that might support such a submission, it must approach the determination of its jurisdiction on the basis that the legal arrangements between the Claimant and Brittany/Hedgerow are valid and carry the legal incidents and consequences that appear on their face.

⁸³⁹ See para. 338 above.

⁸⁴⁰ T5/80/22-25.

⁸⁴¹ T5/81/16-18.

⁸⁴² When a member of the Tribunal put this possible analysis to counsel for Respondent, he submitted: “One *might analogize* to beneficial ownership, but I think *the true economic position* here is that Brittany and Hedgerow were the *economic actors*.”: T5/87/9-11 (emphasis added). Neither Party introduced into the record *Occidental Petroleum Corporation v. The Republic of Ecuador* (Award) ICSID Case No ARB/06/11 (5 October 2012, Fortier P, Williams & Stern (dissenting)). The Decision on Annulment in that case (2 November 2015, Fernandez-Armesto P, Feliciano & Oreamuno) was rendered after the hearing on jurisdiction in the present case. Neither Party applied for leave to introduce that Decision into the record or to make submissions on it. For the substantive reasons set out in this part of the Award, a majority of the Tribunal does not consider the principle stated in that Decision at paras. 262-4 (referred to in the Dissenting Opinion of Arbitrator Stern at paras. 124 & 141) to be applicable to the present case, because, in the view of the majority, neither Brittany nor Hedgerow owned any beneficial interest in the Loans.

⁸⁴³ T5/87/10-13.

499. Seen in this light, there is no doubt that the loans from Brittany/Hedgerow provided the capital to the Claimant that it, in turn, used to extend the Loans to Yukos Oil. The Brittany/Hedgerow loan agreements did so on terms that closely matched the Loans between the Claimant and Yukos Oil. As described above,⁸⁴⁴ the Claimant's agreements with Brittany and Hedgerow provided that they had no recourse against the Claimant in the event that the Claimant was unable to make payment because it had not been paid by Yukos Oil.⁸⁴⁵
500. Does that have the consequence that the Claimant was not itself a lender with an Investment that is capable of founding the Tribunal's jurisdiction? A majority of the Tribunal does not consider that this is so.
501. In order to explain why it has reached this conclusion, it is now necessary for the Tribunal to analyse the nature of the relationships between Yukos Capital and, respectively, its borrower and lender. For this purpose, it suffices to take the Yukos Oil and Brittany pair of loan transactions.
502. The Agreement between Yukos Capital and Yukos Oil dated 2 December 2003 (the "**Yukos Capital Loan Agreement**") establishes a loan between Yukos Capital (defined as "Lender") and Yukos Oil (defined as "Borrower"). It provides in relevant part:⁸⁴⁶

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

1.2. Each loan designated to be granted by the Lender to the Borrower hereunder shall be lent as a separate drawdown.

1.3. Each loan designated to be granted by the Lender to the Borrower within Loan Amount Stipulated in paragraph 1.1. hereof, shall be requested by a separate Notice of Drawdown, stating terms of such drawdown.

⁸⁴⁴ See para. 327 above.

⁸⁴⁵ See further para. 504 below.

⁸⁴⁶ 2003 Loan Agreement (**Exhibit C-9**).

2. RIGHTS AND OBLIGATIONS OF THE PARTIES

2.1. The Lender undertakes to grant loans to the Borrower within 2 (two) business days from the date when the Borrower submitted to the Lender a Notice of Drawdown, stating drawdown amount, which neither separately nor in aggregate with other loans granted earlier hereunder may exceed Loan Amount as defined in paragraph 1.1. hereof, and other terms of such drawdown.

A loan shall be deemed to have been granted by the Lender at the time when the funds have been credited to the Borrower's bank account.

2.2. The Borrower is entitled to return loans obtained hereunder prior to their maturity (before expiration of terms, stipulated in respective Notice of Drawdown, submitted by the Borrower to the Lender)

2.3. The Borrower undertakes to submit to the Lender a copy of its quarterly balance sheet with stamp of tax office evidencing its acceptance by the latter not later than the 10th of second month following the end of each quarter.

2.4. The Borrower undertakes to repay all loans, borrowed hereunder, to the Lender not later than 31st December 2008. Such term of maturity of the loans may be adjusted by mutual agreement of the Parties made in writing. The interest on the loans granted hereunder shall accrue quarterly and shall be payable not later than last business day of the last month in the quarter. The loan shall be deemed to be repaid in full at the time when respective funds have been credited to the Lender's bank account. At the request of the Lender the Borrower shall return the loan before maturity as stated above in the events as follows:

2.4.1. the Lender shall sufficient grounds to reckon that financial position of the Borrower does not allow timely repayment of the loan.

2.4.2 in other events, defined by the laws of the Russian Federation from time to time in force being.

3. RESPONSIBILITY OF THE PARTIES

3.1. In the event of nonfulfillment and/or not due fulfillment of obligations, hereunder the parties shall be liable in accordance with civil legislation of the Russian Federation from time to time in force being.

3.2. In the event of delay in the repayment of the loan by the Borrower the Lender is entitled to require that penalty be payable by the Borrower in the amount of 0,1 (zero point one) per cent of the amount overdue. The payment of the penalty shall not relieve the Borrower from fulfillment of the obligation in kind (i.e. of the repayment

of the loan and/or of payment of interest for using the loan).

4. FORCE MAJEURE

4.1. The Parties shall not bear responsibility for non-fulfillment or not due fulfillment of their obligations should such hereunder breach be caused events beyond their control (force majeure), i.e. extraordinary and unforeseen circumstances, which being beyond control of the Party in breach prevented such Party from due fulfillment of its obligations.

503. The Agreement between Yukos Capital and Brittany dated 20 November 2003 (the “**Brittany Loan Agreement**”)⁸⁴⁷ establishes a loan between Brittany (defined as “Lender”) and Yukos Capital (defined as “Borrower”). It provides in relevant part:

WHEREAS:

(a) Borrower intends to provide a loan facility to OAO "NK "YUKOS", 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:

1. Definitions

As used herein, the following terms shall have the following respective meanings:

Advance

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

Business day

Shall mean any day, other than Saturday or Sunday, on which banks are not required or authorised to close in the city or cities specified; provided if no city is specified, Business day shall mean a Business day in Cyprus, in New York and in Luxembourg.

⁸⁴⁷ Brittany Loan Agreement (**Exhibit C-130**).

Debt

Means all indebtedness of Borrower in respect of outstanding amounts under this Agreement.

Drawdown Date

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

Disbursement date

Shall mean the date on which the Loan amount is credited in cleared funds to Borrower's account.

Facility amount

Means 80'000'000'000-00 (Eighty billion) Russian Rubles.

Final Repayment date

2nd January 2009, which date may be either accelerated or postponed by mutual agreement in miring by the Parties hereto. Such Final Repayment date will not be later than one Business Day after the date on which the Sub-Lending is redeemed.

Interest rate

Means 8,9375% per annum payable quarterly and on the Final Repayment date. Such interest rate may be reduced by any Russian withholding taxes and other statutory deductions from the interest on 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, which accumulation in the amount sufficient to meet Sub-Borrower's request is to be completed in any case prior to any of the Drawdown date (should Sub-Lending be effected in several advances).

3. Repayment

Borrower shall repay the amount outstanding within one Business Day upon redemption of any part of Sub-Lending. The indebtedness shall be repaid in Russian Rubles or, on the mutual agreement between the Parties, in another currency as if converted using the Central Bank of the Russian Federation exchange rate on the date of repayment. Repayment may be made in installments.

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.

5. Hedge

Notwithstanding the foregoing and for the avoidance of doubt 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;
- (b) Sovereign risk, which means any of the following:
 - (i) the enactment, imposition, enforcement or modification of any governmental or regulatory restriction on the payment of any portion of the principal or interest due on Sub-Lending;
 - (ii) the existence, enactment, imposition, enforcement, or modification of any governmental or regulatory restriction on the payment or receipt of any amounts by non Russian residents;
 - (iii) the adoption, enactment or implementation of any rule, regulation or statute by any Governmental Authority, any modification thereof or any action whatsoever, which has the effect of imposing any exchange controls, limitations or restrictions on the transfer of securities and any other holding of Sub-Lending, or cash proceeds arising from the maintenance, redemption, purchase sale or holding of Sub-Lending;
- (c) Foreign exchange risk, which means the risk that Lender may either not be able to convert proceeds in Russian Rubles into hard currency upon repayment hereunder by Borrower or proceeds from such conversion may not be sufficient to recover funds advanced by Lender as Advances under this Agreement or that non Russian Rubles proceeds when translated into Russian Rubles are less than the funds advanced by Lender as Advances under this Agreement;
- (d) Tax risk, which means that interest receivable by Borrower on Sub-Lending may be reduced by any Russian withholding taxes and other statutory deductions.

504. What was the substance of this set of transactions? Undoubtedly, Yukos Capital's obligation to repay Brittany only arose if and to the extent that Yukos Oil repaid its debt

to Yukos Capital.⁸⁴⁸ 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 and of Russian sovereign, foreign exchange and tax risks.⁸⁴⁹ Brittany has no right of recourse against Yukos Capital if and to the extent that Yukos Oil does not repay its loan to Yukos Capital.

505. Does this affect the substance of the transaction between Yukos Capital and Yukos Oil? A majority of the Tribunal's view is that it does not. 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.⁸⁵⁰ Yukos Capital does, therefore, have an economic interest in the Loans, since it is Yukos Capital that holds the debt.
506. Those synallagmatic obligations between Yukos Oil and Yukos Capital are not held by the latter on behalf of Brittany or any other third party. This conclusion is confirmed by reference to both the Yukos Capital Loan Agreement and the Brittany Loan Agreement. Brittany has no right to claim recovery of Yukos Oil's debt. Yukos Capital has not transferred that right – legally or beneficially – to Brittany. Brittany does not receive under the Brittany Loan Agreement any right to Yukos Oil's debt to Yukos Capital or any ability to pursue a claim against Yukos Oil in respect of that debt. It merely limits its own rights of recovery vis-à-vis Yukos Capital by assuming the risk if and to the extent that Yukos Capital is not repaid.
507. Nor has Brittany indemnified Yukos Capital under the Brittany Loan Agreement against any loss that Yukos Capital may suffer as a result of default by Yukos Oil under the Yukos Capital Agreement. The right to seek repayment – and to invoke Yukos Oil's liability for nonfulfilment of its obligations⁸⁵¹ – remains solely held by Yukos Capital on its own behalf.

⁸⁴⁸ Brittany Loan Agreement, cl. 3 (**Exhibit C-130**).

⁸⁴⁹ Brittany Loan Agreement, cl. 5 (**Exhibit C-130**).

⁸⁵⁰ 2003 Loan Agreement, cls. 1.1 & 2.4 (**Exhibit C-9**).

⁸⁵¹ 2003 Loan Agreement, cl. 3.1 (**Exhibit C-9**).

508. The fact that Yukos Capital's own liability to its lender, Brittany, is limited by the terms of the Brittany Loan Agreement, may potentially give rise to questions as to the extent of its loss. In the present proceedings, that would be a question to be determined in the event that the Tribunal were to find liability. It does not shift the right to reclaim the debt owed by Yukos Oil from Yukos Capital to Brittany.
509. In 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.⁸⁵² This spread was not covered by the back-to-back arrangements. It was specifically notified to the Luxembourg tax authorities and treated by them as sufficient to justify the characterisation of the transaction as a valid loan made by a Luxembourg company for the purpose of the double tax treaty with Russia.⁸⁵³ The Tribunal's analysis of the nature and incidents of the Loans has an important consequence in the context of the larger issue with which the Tribunal is presently concerned, namely the question whether Yukos Capital made an investment associated with an economic activity in the Respondent's Area sufficient to meet the jurisdictional threshold required by the ECT.
510. The Tribunal has already held that the origin of capital used to make an investment is not germane to the enquiry whether the Investor has in fact made such an Investment. This is so including where another company within a corporate group supplies the capital and including where (as will often be the case) the Investor raises the capital by borrowing the funds. It follows that the terms upon which the capital is raised are not relevant to the question at hand, unless exceptionally they lead to an argument of the kind successfully raised in *KT Asia* that would support a finding that the investment company is a sham or shell used to hide the identity of the true beneficial owner.
511. The effect of the Loans was to take funds that were outside Russia and to invest those funds in the Area of the Respondent in an enterprise, Yukos Oil, which was engaged in an Economic Activity in the Energy Sector. The result of this investment was that the lender assumed the *operational* risk that the funds might not be repaid. The funds were

⁸⁵² See para. 325 above.

⁸⁵³ Loyens & Loeff Letter to Luxembourg Revenue (27 February 2003) (**Exhibit B-22**); Loyens & Loeff Letter to Luxembourg Revenue (9 April 2004) (**Exhibit B-23**).

at the risk of any factor that might affect Yukos Oil's economic activity in Russia. The Loans were placed at risk of the failure of that business to deliver sufficient returns to enable repayment. Such risk includes the risks of sovereign intervention, the protection against which is the function of Part III of the ECT. This fundamental risk remains irrespective of the internal inter-group arrangements between the Claimant and its lenders.

512. In reaching these conclusions for the purpose of determining its jurisdiction, the Tribunal emphasises that it leaves open for the merits phase of the proceedings the questions that arise from the nature of these arrangements as to what loss the Claimant may have suffered in the event that the Tribunal were to find in its favour on liability.

513. For these reasons, 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]."

C. DOES THE "DENIAL-OF-BENEFITS" PROVISION (ARTICLE 17) OF THE ECT BAR THE CLAIMS?

514. The third objection to jurisdiction for consideration in this phase of the arbitration concerns Article 17 of the ECT. That Article comes within Part III of the ECT and provides, in relevant part:

Each Contracting Party reserves the right to deny the advantages of this Part to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;

515. The Respondent says that it was entitled to deny the benefits of Part III of the ECT to the Claimant at any time before the deadline for raising jurisdictional objections. It says that the Claimant has at relevant times been controlled by nationals of a third state (namely the United States) and has not had substantial business activities in Luxembourg. As a consequence, the Respondent says that, the Claimant having been denied the benefits of

Part III, it has no claim that it may assert before the Tribunal, which must dismiss the claims for lack of jurisdiction or declare them inadmissible.⁸⁵⁴

516. The Claimant maintains that the Respondent's purported denial of benefits cannot constitute a challenge to jurisdiction; its invocation of Article 17 of the ECT after the commencement of the arbitration cannot have retrospective effect; and the two cumulative requirements of Article 17(1) of the ECT have not been met.⁸⁵⁵

1. The Parties' submissions

517. The Tribunal now summarises the Parties' arguments.

(a) Can Article 17(1) give rise to a jurisdictional challenge?

(i) The Respondent's position

518. According to the Respondent, denying the benefits under Article 17(1) of the ECT can lead to a jurisdictional challenge.⁸⁵⁶ The Respondent argues that "[a] Contracting Party's consent to arbitration under Article 26 ECT extends only to '[d]isputes . . . which concern an alleged breach of an obligation of [a Contracting Party] under Part III'," thus making such an alleged breach "a necessary predicate of jurisdiction."⁸⁵⁷ An "investor that has been denied the advantages of Part III is not owed any obligations under Part III," and its allegations of fact are thus not capable of amounting to a breach of an obligation under Part III;⁸⁵⁸ in those circumstances there cannot be a dispute concerning an alleged breach of an obligation under Part III.⁸⁵⁹

(ii) The Claimant's position

519. The Claimant maintains, referring to Article 31(1) of the VCLT, that the reservation of the right to deny benefits pursuant to Article 17(1) of the ECT applies only to Part III, but

⁸⁵⁴ Memorial, para. 187.

⁸⁵⁵ Counter-Memorial, para. 230; Rejoinder, paras. 245-246.

⁸⁵⁶ Reply, para. 331.

⁸⁵⁷ Reply, para. 331, *citing* ECT, Art. 26(1) (**Exhibit C-1**).

⁸⁵⁸ Reply, paras. 331-337, *citing* various awards and submitting that there is no consistent jurisprudence on the matter.

⁸⁵⁹ Reply, para. 338.

that the reservation does not apply to Part V, in which Article 26 sets forth the right to arbitration.⁸⁶⁰ The Claimant submits that the awards cited by the Respondent are all “irrelevant, as in each case the denial of benefits provisions expressly applied to the contracting parties’ consent to arbitrate”⁸⁶¹ and thus the state had the right to deny the benefit of consent to arbitration. This does not retrospectively deny the other benefits, but removes the avenue for addressing the breach of those provisions.⁸⁶²

(b) Was the Respondent entitled to invoke Article 17(1) after the commencement of the arbitration?

(i) The Respondent’s position

520. The Respondent argues that it has the right, by virtue of Article 17(1) of the ECT, to deny to the Claimant the benefits of Part III of the ECT “at any time” within the period prescribed by the applicable arbitration rules for raising objections to jurisdiction or admissibility,⁸⁶³ as long as the Respondent fulfills the provision’s requirements;⁸⁶⁴ and, accordingly, that it is entitled to invoke Article 17(1) in these proceedings. It invokes a number of awards in support. Criticising the *Plama v. Bulgaria* decision, it submits that restricting the provision to having prospective effect denies it of any meaningful application.⁸⁶⁵ It submits that the Claimant’s interpretation would render the clause nugatory, and would require a respondent state to attempt to monitor in the territories of each of the 48 ECT contracting states the ownership and control structures of potential claimants.⁸⁶⁶

521. The Respondent submits that “a shell company owned or controlled by third State citizens or nationals could have had no legitimate expectation that it will not be denied the advantages of Part III of the ECT unless it has been upfront about its ownership and control and its lack of substantial business activities and obtained a specific representation

⁸⁶⁰ Counter-Memorial, paras. 231-235, *citing* various awards; Rejoinder, paras. 248, 257.

⁸⁶¹ Rejoinder, paras. 250-251.

⁸⁶² T1/209/1 – T1/211/18; T/229/9-16. The Claimant submits that the ECT cases on which the Respondent relies did not address this issue: T1/211/19 – T1/216/18. *See also* T1/216/19 – T1/218/6 with respect to commentary.

⁸⁶³ T1/94/1-5.

⁸⁶⁴ Memorial, para. 163-167; Reply, paras. 329-330; T1/94/6 – T/95/20.

⁸⁶⁵ Reply, para. 348-356, *citing* *Plama* (**Exhibit RL-88**); Douglas, paras. 879-880 (**Exhibit RL-64**).

⁸⁶⁶ T1/96/3-13.

from the Contracting Party concerned that it will not be denied benefits,” something that Yukos Capital did not do.⁸⁶⁷

(ii) The Claimant’s position

522. The Claimant maintains that Article 17(1) of the ECT does not operate automatically but is a right reserved to states that must be positively exercised; that it has no effect until then and is not retrospective.⁸⁶⁸ By the time the Respondent exercised this right on 11 April 2014, the benefit of the protections had been enjoyed and the breach of those protections perpetrated.⁸⁶⁹ The Respondent’s interpretation would be to “retrospectively introduce conditions to its unconditional consent to arbitrate.”⁸⁷⁰ This would have the effect of negating all the other benefits of the Treaty that the Claimant had enjoyed and depriving it of the ability to enforce those rights.⁸⁷¹ While “a contracting party’s obligations under Part III are a corollary of an investor’s advantages,” the Claimant alleges that “it does not follow that such obligations automatically evaporate once advantages are unilaterally denied, nor that the host states are the judges of this determination.”⁸⁷² It cites jurisprudence in support⁸⁷³ and distinguishes the authorities cited by the Respondent.⁸⁷⁴
523. Any investor has a legitimate expectation that it is entitled to the benefits of the ECT until they are denied. The object and purpose of the ECT in promoting “long-term co-operation in the energy field” supports the proposition that Article 17 has prospective effect.⁸⁷⁵ A requirement that an investor seek a representation from the state that it would not be

⁸⁶⁷ Reply, para. 352.

⁸⁶⁸ Counter-Memorial, paras. 240-244, citing *Plama*, paras. 155-158 (**Exhibit RL-88**); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010), para. 224 (**Exhibit CL-13**); *Hulley Enterprises*, paras. 455-456 (**Exhibit CL-9**); Rejoinder, para. 288.

⁸⁶⁹ Counter-Memorial, para. 248.

⁸⁷⁰ Rejoinder, paras. 259-260.

⁸⁷¹ T1/222/9-23, contrasting cases where the treaty gives the state the right to deny the benefit of an arbitration clause; T1/229/9-24.

⁸⁷² Rejoinder, paras. 264, 268.

⁸⁷³ Rejoinder, paras. 271-274, 277-8, 298.

⁸⁷⁴ Counter-Memorial, paras. 245, 247, referring to the Respondent’s citation of *Guaracachi* (**Exhibit CL-80**); *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award (12 June 2012) and *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (14 October 2016), paras. 4.2-4.4.

⁸⁷⁵ Counter-Memorial, paras. 249, 251, 285.

denied the benefits of Part III would “require a revision of the whole structure of the ECT.”⁸⁷⁶

(c) Is the Claimant owned or controlled by nationals of a third state?

(i) The Respondent’s position

524. The Respondent submits that “control” in Article 17(1) of the ECT “includes control in fact, including a financial or equity interest in a company, the ability to exercise substantial influence over its management and operation, and the selection of members of its board of directors or other managing body.”⁸⁷⁷ The Respondent disputes that questions of “control” are always based on the ownership of a shareholding interest in the relevant person, which conflates ownership and control and deprives the latter concept of meaning.⁸⁷⁸ The Respondent argues that control over a legal entity may be asserted through an ability to exercise substantial influence over the entity’s management and operation or the selection of the members of its managing body,⁸⁷⁹ and that in the ECT context control means control in fact.⁸⁸⁰ The Respondent distinguishes the cases cited by the Claimant, which concern companies controlled by direct or indirect shareholders, from the current arbitration, which concerns a *Stichting* that “has no owners and is managed and controlled solely by its Board.”⁸⁸¹

525. The Respondent says that the *Stichting* controls Yukos Capital through its 100% shareholding in Yukos International, which, in turn, owns 100% of Yukos Capital.⁸⁸² The Respondent submits that the purpose of a *Stichting Administratiekantoor* is to transfer control over a limited liability company from the company’s shareholders to the members of the *Stichting*’s board, who exercise the combined powers of the company’s

⁸⁷⁶ Rejoinder, para. 295.

⁸⁷⁷ Memorial, paras. 177, 185; Reply, para. 397.

⁸⁷⁸ Reply, paras. 399, 403-404.

⁸⁷⁹ Reply, paras. 400-401, *citing* cases; Reply, para. 402, *citing* Understandings, Final Act of the European Energy Charter Conference (17 December 1994), para. IV(3) (**Exhibit C-1**).

⁸⁸⁰ Reply, para. 402, *citing* Understandings, Final Act of the European Energy Charter Conference (17 December 1994), para. IV(3) (**Exhibit C-1**).

⁸⁸¹ Reply, para. 405.

⁸⁸² Memorial, paras. 180-181 (footnote omitted). *See also* Reply, para. 398.

management and its shareholders.⁸⁸³ The *Stichting* exercises its voting and other shareholder rights “at its sole discretion,” and controls the selection of the Claimant’s managing directors.⁸⁸⁴ The *Stichting* has no owners and is managed and controlled solely by its Board, which “represents the *Stichting*” and adopts resolutions by absolute majority of its members.⁸⁸⁵ Thus the members of the *Stichting*’s board have sole control over the assets transferred to the *Stichting*.⁸⁸⁶ The majority of the *Stichting*’s Board members have at all times been American citizens.⁸⁸⁷ The United States is not a contracting party to the ECT.⁸⁸⁸

526. The Respondent further rejects the Claimant’s argument that the nationality of Board members is irrelevant because they act collectively as the Board; because the Board is subject to the supervision of the Dutch courts; and because the Board members have a duty to consider the interests of the Claimant and the other entities and shareholders of the Yukos Group. It says that the nationality of the majority of Board members is what determines whether nationals of a third state control the *Stichting*.⁸⁸⁹ The Board members’ duty to comply with Dutch law does not mean they do not control the *Stichting*,⁸⁹⁰ and the concepts of beneficial ownership and control must not be conflated.⁸⁹¹

(ii) The Claimant’s position

527. The Claimant says that the Respondent wrongly leaps from the Board having control of the *Stichting*, to control being exercised by the individual directors that comprise the

⁸⁸³ T1/98/5 – T1/101/8, *citing* Expert Opinion of Professor Dr. Riemert Pieter Jan Lucris Tjittes (2 March 2015) (“**Tjittes**”); *Stichting* Articles of Association (19 March 2008) (**Exhibit R-74**); *Stichting* Articles of Association (**Exhibit R-166**).

⁸⁸⁴ Memorial, para. 181.

⁸⁸⁵ Memorial, para. 182.

⁸⁸⁶ T/97/20 – T/98/4.

⁸⁸⁷ T1/101/8-15, *citing* *Stichting* Excerpt from the Dutch Trade Register (**Exhibit R-70**).

⁸⁸⁸ Memorial, paras. 178, 185; Reply, para. 414.

⁸⁸⁹ Reply, paras. 409-410.

⁸⁹⁰ Reply, paras. 409, 411-412.

⁸⁹¹ Reply, para. 413, *citing* *Hulley Enterprises*, paras. 465-466 (**Exhibit CL-9**). The Respondent also notes that the majority of the members of the board are also interested parties whose interests the *Stichting* must further pursuant to Article 2(2) of the Articles of Association (**Exhibit R-74**): T1/101/16 – T1/102/6.

Board.⁸⁹² Individual directors do not control the *Stichting*. Rather the Board is a Dutch body subject to the ultimate supervision of the Dutch courts that makes decisions over the *Stichting*.⁸⁹³

528. The Claimant says that the question of control is based on ownership of a shareholding interest.⁸⁹⁴ In this case, the Board collectively pursues its line of business in the interests of all its stakeholders and to the extent that the *Stichting* exercises control over Yukos Capital, such control is exercised by the legal person of the *Stichting*.⁸⁹⁵ Without the necessary participating ownership interest, no person could draw on the benefits of Part III or would have standing to make a claim.⁸⁹⁶ Article 17(1) is concerned with cases “where the ‘real’ investor is from a third state which benefits from the Investment but would not afford the same protection to the Investors of the host state.” The United States does not benefit from an investment protected under the ECT just because some American nationals are directors of the *Stichting*, and the directors are not the “real” investors.⁸⁹⁷

529. The fact that the Board has corporate powers similar to those held by shareholders under Dutch law does not transform the directors of such Board into pseudo-shareholders within the meaning of Article 17.⁸⁹⁸ Professor Tjittes’ expert report does not support the conclusion that individual Board members can control the *Stichting* such that the nationality of the majority of the Board members would determine whether the *Stichting* is controlled by a third state. Board members have a fiduciary duty to act in the best interests of the *Stichting*, which is different from the liberty that shareholders hold to pursue their own interests as long as such pursuit does not harm other shareholders.⁸⁹⁹

⁸⁹² Counter-Memorial, para. 293.

⁸⁹³ Counter-Memorial, paras. 296-299, 304, *citing* Expert Report of Prof. Justice J.H.M. (HUUB) Willems LLM (31 October 2014) (“**Willems 1**”), paras. 20-21, 23, 27-29, 35-38.

⁸⁹⁴ Counter-Memorial, para. 301.

⁸⁹⁵ Counter-Memorial, paras. 303-304.

⁸⁹⁶ Rejoinder, paras. 362-366.

⁸⁹⁷ Rejoinder, paras. 368-369; T1/232/5-9.

⁸⁹⁸ Rejoinder, para. 372.

⁸⁹⁹ Rejoinder, paras. 373-374. *See also* T1/234/20 – T1/235/21.

530. The Board is an organ within the *Stichting* and not a separate legal entity,⁹⁰⁰ and has no economic interest in the *Stichting* or standing to make claims.⁹⁰¹ So the “board doesn’t own or control the stichting or Yukos Capital, and individual board members do not have rights of ownership or control.”⁹⁰²
531. The Claimant rejects the submission that, since the *Stichting* does not have any shareholders, it must be the nationality of the majority of the members of the *Stichting* Board that determines control.⁹⁰³ The lack of shareholders does not “suddenly invest the board ... or individual investors with rights of shareholders just because there are no shareholders.”⁹⁰⁴

(d) Has the Respondent established that the Claimant had “no substantial business activities” in Luxembourg?

(i) The Respondent’s position

532. The Respondent argues that the Claimant “is a paradigmatic shell company,” with activities in Luxembourg that “meet only the bare legal requirements for its corporate existence” and, therefore, did not have “substantial business activities” in terms of Article 17(1) of the ECT.⁹⁰⁵ The mere fact of registration does not connote a real presence. A registration certificate from the Russian Ministry for Tax referred to by the Claimant does not show the level of business activity conducted in Luxembourg, only that Yukos Capital was incorporated there.⁹⁰⁶
533. The Respondent notes that whether or not the Claimant’s loan agreements were executed in Luxembourg (which it questions⁹⁰⁷) the Claimant did not lend to or borrow from Luxembourg entities,⁹⁰⁸ its decision-making activities also being performed out of

⁹⁰⁰ T1/233/8-20, *citing* Willems 1, paras. 4, 10, 11.

⁹⁰¹ T1/234/1-6.

⁹⁰² T1/233/21-25.

⁹⁰³ Rejoinder, para. 383.

⁹⁰⁴ Rejoinder, paras. 384-385; T1/233/4-7; T1/236/3-6, *discussing, inter alia, Hulley Enterprises (Exhibit CL-9)*.

⁹⁰⁵ Memorial, para. 170.

⁹⁰⁶ Reply, paras. 392-393. *See* Counter-Memorial, para. 286, *citing* Certificate of Registration, Russian Tax Authority (20 January 2004) (*Exhibit C-127*), which the Respondent says proves nothing more than incorporation.

⁹⁰⁷ Reply, para. 381.

⁹⁰⁸ Reply, paras. 376-378.

Luxembourg, and loan letters signed by TMF employees or by Mr Feldman apparently outside Luxembourg.⁹⁰⁹ Its “sole manifestation” in the country, according to the Respondent, is “as a client of the Luxembourg branch of TMF Group . . . a corporate services provider . . . to shell companies,” whose address, phone and fax numbers the Claimant is using as contact points.⁹¹⁰

534. Four of the eight activities cited by the Claimant – filing accounts, signing board resolutions and holding board and shareholders’ meetings – are merely activities that Yukos Capital had to do to remain a corporation and, as such, cannot constitute “substantial business activities.”⁹¹¹ The board resolutions,⁹¹² board meetings (of which there is inadequate proof),⁹¹³ shareholders’ meetings and resolutions (post-dating the notice of dispute, and only one of which was executed in Luxembourg by TMF),⁹¹⁴ do not evidence substantial business activities. Rather they show that the Claimant’s activities were being conducted by Mr Godfrey, “who never resided or worked in Luxembourg.”⁹¹⁵
535. “[T]he passive receipt” of interest rate spreads cannot qualify as “substantial business activity,” and the money received was never intended to flow into Luxembourg.⁹¹⁶ The Claimant only contends that bank accounts were “opened and closed” from Luxembourg, not used there.⁹¹⁷ Authority to operate them was, it is submitted, outside Luxembourg and the Claimant’s banking was not conducted from Luxembourg.⁹¹⁸
536. Evidence of tax filing and tax paying cannot be used to prove that substantial business activities took place.⁹¹⁹ Yukos Capital paid “no taxes related to actual operations” and

⁹⁰⁹ Memorial, paras. 171-174 (footnote omitted); Reply, paras. 377-378, 383.

⁹¹⁰ Memorial, para. 173; Reply, paras. 374-375, *citing* Expert Report of Mr. Lionel Noguera (2 March 2015) (“**Noguera Report**”), para. 28.

⁹¹¹ Reply, para. 363.

⁹¹² Reply, paras. 362-368.

⁹¹³ Reply, paras. 369-371.

⁹¹⁴ Reply, paras. 372-373; T1/105/12 – 106/2.

⁹¹⁵ Reply, paras. 362, 368.

⁹¹⁶ Reply, para. 379.

⁹¹⁷ Reply, para. 386.

⁹¹⁸ Reply, paras. 386-389.

⁹¹⁹ Reply, para. 390.

tax residence does not demonstrate substantial business activities, contrasting the position with a traditional holding company that “actively holds shares in subsidiaries which employ personnel and produce goods or services to third parties.”⁹²⁰

(ii) The Claimant’s position

537. The Claimant says that it was not the kind of “mailbox investor” which Article 17 was aimed at controlling. Rather it was established as a lucrative Luxembourg-based group finance company.⁹²¹ TMF conducted substantial everyday business activities in Luxembourg on its behalf.⁹²² The Claimant’s business activities and ownership structure had to change as a direct result of the Respondent’s breaches and the Respondent cannot deny the Claimant the benefit of protections in reliance on them.⁹²³
538. The Claimant says the ordinary meaning of “business activities” “encompasses a wide range of commercial and administrative actions taken by or on behalf of an enterprise.”⁹²⁴ The “substantial” threshold must be assessed in the context of the Claimant’s business, and means “of substance, not merely of form”; materiality not magnitude is the test.⁹²⁵
539. The Claimant notes that the Luxembourg law on incorporation requires that a company has a “real” presence in Luxembourg.⁹²⁶ The Claimant rejects the Noguera Report’s conclusion that Yukos Capital could not satisfy the minimum criteria for business activity in Luxembourg.⁹²⁷ There is no basis for casting any doubt on the representations made to the tax authorities.⁹²⁸ At the relevant time, the “Claimant was resident in Luxembourg within the meaning of Article 4 of the Tax Convention between Luxembourg and Russia,

⁹²⁰ Reply, paras. 390-391, 394.

⁹²¹ T1/230/5-8.

⁹²² Counter-Memorial, para. 287; Rejoinder, paras. 308-310.

⁹²³ T1/230/5-15.

⁹²⁴ Counter-Memorial, para. 267.

⁹²⁵ Counter-Memorial, paras. 266-267, *citing* *Amto*, para. 69 (**Exhibit RL-77**).

⁹²⁶ Counter-Memorial, para. 269, *citing* Luxembourg Law of 10 August 1915 on Commercial Companies, Art. 2 (**Exhibit CL-50**); Luxembourg Law of 31 May 1999 governing the Domiciliation of Companies, Art. 1(1) (**Exhibit CL-51**).

⁹²⁷ Rejoinder, paras. 312-316, *citing* Noguera Report.

⁹²⁸ Rejoinder, para. 315.

was not a holding company and had no permanent establishment in Russia.”⁹²⁹ With respect to the certificate of residency, the Claimant says the Luxembourg authorities approved its business activities in Luxembourg on the basis of full and honest disclosure by the Claimant, and the existence or lack of inquiry is a matter for the Luxembourg authorities to decide.⁹³⁰

540. The Claimant submits that it was established as an active company incorporated to provide financing to companies within the same group, with “a designated functioning office in Luxembourg,” a Luxembourg address and contact details; that its sole director until 6 February 2007, TMF Luxembourg, executed corporate documents and commercial transactions on behalf of the Claimant in Luxembourg; and that Board meetings as well as shareholder meetings “have been and continue to be held in Luxembourg.”⁹³¹ This includes 40 loan agreements, including the Loans.⁹³² Whether or not the Claimant lent to or borrowed from Luxembourg companies is irrelevant, because it was established as an intra-group finance company.⁹³³ It is beside the point that business operations were being conducted by TMF rather than by direct employees,⁹³⁴ and the engagement of a full-time corporate director is evidence of substantial business activities in Luxembourg and contribution to the Luxembourg economy by paying fees.⁹³⁵

541. The Claimant refers to minutes from an extraordinary general shareholders’ meeting in 2004, and notes that until February 2007, TMF was Yukos Capital’s sole director and thus did not need to hold and document formal meetings.⁹³⁶ Yukos Capital intended to make a profit on its lending and did so. To the extent that such profits were not realized ultimately was because of the expropriation.⁹³⁷ Its “main business activity by necessity consisted in the enforcement and recovery of debts deprived by Respondent’s

⁹²⁹ Counter-Memorial, paras. 280-286, *citing e.g.*, Certificate of Residence (9 February 2004) (**Exhibit C-126**); Certificate of Registration (20 January 2004) (**Exhibit C-127**).

⁹³⁰ Rejoinder, paras. 356-357.

⁹³¹ Counter-Memorial, paras. 272-276, 289(a)-(f) (in relation to (c) *citing* Letter from Loyens and Loeff to the Luxembourg Tax Authority (27 February 2003) (**Exhibit C-128**)).

⁹³² Counter-Memorial, para. 270; Rejoinder, para. 350.

⁹³³ Rejoinder, paras. 327, 344-345.

⁹³⁴ Rejoinder, paras. 331-332.

⁹³⁵ T1/237/16 – T1/240/1.

⁹³⁶ Rejoinder, paras. 337-339.

⁹³⁷ Rejoinder, para. 351; T1/240/2 – T2/241/19.

expropriatory actions.”⁹³⁸ Likewise, its lack of taxable outputs directly resulted from the Respondent’s expropriation.⁹³⁹

2. The Tribunal’s analysis

(a) The issue

542. In PO No 1, the Tribunal ruled that the following objection to jurisdiction and admissibility (as formulated in the Respondent’s letter dated 11 April 2014) should be determined in a preliminary phase (together with the two issues already dealt with above):

Since Claimant is a shell company with no substantial business activities in Luxembourg and is ultimately controlled by nationals of a third State, Respondent is entitled to deny Claimant the advantages of Part III of the ECT pursuant to Article 17 ECT.⁹⁴⁰

543. The Tribunal considers that the specific issue that it is necessary for it to decide under this head is:

Did “citizens or nationals of a third state ... control” the Claimant on 11 April 2014 when the Respondent sought to deny it the benefits of Part III ECT pursuant to Article 17(1)?

This corresponds to issue (c) of the pleaded issues summarised above.

544. In framing the issue in this way, the Tribunal acknowledges that the Parties also presented arguments on several other aspects of the construction and application of Article 17(1) of the ECT in the present case.

545. The second condition for the invocation of a denial of advantages under Article 17(1) of the ECT – that the entity “has no substantial business activities” in Luxembourg (pleaded issue (d) above) – is additional to the requirement of ownership or control by nationals of a third state. Both requirements must be met in order for a contracting state to be entitled validly to deny a legal entity the advantages of Part III of the ECT. If either one or the

⁹³⁸ Rejoinder, para. 319.

⁹³⁹ Rejoinder, para. 355.

⁹⁴⁰ PO No. 1, para. 2.1(c), *citing* Letter from the Respondent (11 April 2014).

other element is not present, Article 17(1) may not be invoked. The Tribunal proposes first to examine the issue of control by nationals of a third state, since, if this were not established on the evidence, it would be unnecessary to consider whether the second element of no substantial business activities were made out.

546. The question whether Article 17(1) has retrospective or merely prospective effect (pleaded issue (b) above) would only arise for decision in the event that the Tribunal were to find that both of the two factual predicates for a valid invocation of Article 17(1) were established on the evidence. If the Tribunal were satisfied that the two conditions were met, it would have to proceed to decide whether, on its proper construction, a denial of the advantages of Part III of the ECT under Article 17(1) is capable of applying to alleged breaches of Part III that had occurred prior to the notice of denial. Conversely, this question will be academic in the present case, if the factual predicates to Article 17(1) are not made out in any event.
547. The Parties also differ on the question whether the issue raised by the Respondent under Article 17(1) is properly a matter that is to be resolved as a question of jurisdiction or admissibility and is thus capable of determination at this stage in the proceedings (pleaded issue (a) above). The Respondent invites the Tribunal to determine the issue at this stage, arguing that the jurisdiction of the Tribunal under Article 26 of the ECT extends only to a dispute concerning “an alleged breach of an obligation ... under Part III.” If the advantages of Part III have been effectively denied to the Claimant, there can be no dispute that arises for the Tribunal’s determination and thus no jurisdiction. By contrast, the Claimant submits that, Article 17 being expressly confined to Part III, it is by its terms concerned only with the substantive protections of the Treaty. This is a merits issue, it argues, and does not relate to the jurisdiction of the Tribunal, which is conferred by Article 26 under Part V “Dispute Settlement”.
548. On this question, the Tribunal agrees with the Respondent. The provisions of Article 17 determine the jurisdictional scope *ratione personae* of the ECT. That is to say, where Article 17 is validly invoked, it excludes from the scope of the Treaty a person that would otherwise be entitled to invoke the Treaty as an “Investor.”
549. The essential interrelation between Article 17 and the operative provisions of the Treaty may be seen from an analysis of the Treaty text. Article 26 provides for the settlement of

disputes according to arbitration between a contracting party and an “Investor of another Contracting Party ... which concern an alleged breach of an obligation of the former under Part III.”

550. “Investor” is defined in Article 1(7) as meaning:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a “third state”, natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

551. Where a Contracting Party denies advantages under Article 17(1), the effect is that:

(a) A legal entity that would otherwise meet the criteria to be an Investor under Article 1(7) and be entitled as such to pursue a claim for breach of the Treaty may not do so; and,

(b) The contracting state no longer owes that entity any obligation under Part III that may form the subject of a dispute.

552. The result is that the question whether the advantages of Part III have been denied to a particular person determines the scope *ratione personae* of the claims that the Tribunal may entertain, not the merits of any such claim. For this reason, the Tribunal remains of the view that it took in PO No 1 that the Respondent’s objection under Article 17 is properly regarded as a jurisdictional objection and is ripe for determination in this present preliminary phase.

553. The Tribunal will now turn to consider the evidence on the issue identified above at paragraph 543 and to rule on it.

(b) Control by nationals of a third state

554. The Respondent alleges that the Claimant was, at the time of the denial of benefits, as a result of a corporate re-organisation, controlled in fact by nationals of a third state, namely the United States of America.⁹⁴¹

555. The basic facts relevant to this case are not in dispute:

(a) From its incorporation in January 2003 until April 2005, Yukos Capital was owned by Yukos Oil through Yukos Finance, a Dutch subsidiary of Yukos Oil.⁹⁴²

(b) In 2005, the ownership of Yukos Capital was reorganised. A Dutch *stichting* was created on 14 April 2005.⁹⁴³ The *Stichting* became the sole shareholder of Yukos Capital through Yukos International, another Dutch company in the Yukos Group.⁹⁴⁴

(c) As at 29 May 2014, four of the five members of the Board of the *Stichting* were nationals of the United States of America (Messrs Theede, Godfrey, Misamore and Fleischman) and the Board has always consisted of a majority of United States citizens.⁹⁴⁵

556. The issue is whether these undisputed facts suffice to establish control in fact by nationals of a third state.

557. The Claimant is owned by an entity that is a national of a contracting party, namely, the *Stichting*, which is an “organization organized in accordance with the law applicable” in The Netherlands.

⁹⁴¹ Memorial, para. 177.

⁹⁴² Notice of Arbitration, para. 10; Memorial, para. 179.

⁹⁴³ *Stichting* Excerpt from Dutch Trade Register (**Exhibit R-70**).

⁹⁴⁴ Notice of Arbitration, para. 10; Memorial, para. 180; Yukos Capital Financial Statements 2011 (20 July 2012), p. 4 (**Exhibit R-75**).

⁹⁴⁵ Memorial, para. 185, *citing Stichting* Excerpt from Dutch Trade Register (**Exhibit R-70**); *Stichting* History Excerpt from Dutch Trade Register (**Exhibit R-71**). The fifth, Mr de Guillenschmidt, is a national of France. Mr Misamore deposed that he resigned from the board on 14 August 2015: T2/214/20 – T2/215/2.

558. Pursuant to Article 2:285 of the Dutch Civil Code, the *Stichting* has no owners and is managed and controlled solely by its Board, which represents the *Stichting*.⁹⁴⁶
559. The Respondent's challenge therefore turns on whether it suffices in order to establish control by nationals of a third state that a majority of the members of the owner's Board are nationals of a third state.
560. This question requires consideration of the manner in which a *stichting* is itself controlled as a matter of Dutch law.
561. On this question, the Tribunal had the benefit of expert evidence of two distinguished Dutch jurists: Professor Justice J. H. M. Willems for the Claimant and Professor Dr. R. P. J. L. Tjittes for the Respondent. Each expert filed reports.⁹⁴⁷
562. The Parties agreed to dispense with cross-examination, but tendered the experts in the event that the Tribunal had any questions for them.⁹⁴⁸ With the agreement of the Parties, the Tribunal took the opportunity to address its own questions to them together on one point.⁹⁴⁹
563. The relevant passage in the transcript of the hearing is as follows:⁹⁵⁰

THE CHAIRMAN: We have been much assisted by our reading of both of your respective reports in our understanding of the legal structure and incidence of the Dutch institution of the *stichting*, and this particular type of *stichting* that was created for the purpose of holding the assets ultimately in the Claimant company.

The general understanding which we derive from your respective reports, which I wish to test in order to ensure that our understanding is correct, is that the organ of the *stichting* which exercises the deliberative powers of the *stichting*, makes its decisions, is the board. Is that correct Professor Tjittes?

⁹⁴⁶ Dutch Civil Code, Art. 2:285 (**Exhibit R-66**): – 1. “A Foundation (“*stichting*”) is a legal person formed by means of a juridical act, that has no members”; – 3. “The objective (purpose) of a Foundation (“*stichting*”) may not include the making of distributions to its founders (incorporators) or to those who are participating in its bodies”; Memorial, para. 182; *Stichting* Articles of Association (19 March 2008) (**Exhibit R-74**).

⁹⁴⁷ Willems 1, Willems 2; Tittjes 1.

⁹⁴⁸ T4/96/1-13: The parties were given the opportunity to ask questions arising out of the Tribunal's questions.

⁹⁴⁹ T4/96/15 – T4/97/14.

⁹⁵⁰ T4/99/10 – T4/101/8.

A. (Professor Tjittes) That's correct, Mr Chairman.

THE CHAIRMAN: And Professor Willems?

A. (Professor Willems) That is correct, Mr Chairman.

THE CHAIRMAN: And that in exercising its powers, the board is obliged to act as a collectivity; is that right, Professor Tjittes?

A. (Professor Tjittes) That is correct, Mr Chairman.

A. (Professor Willems) That is correct, Mr Chairman.

THE CHAIRMAN: In that sense, therefore, the board operates as an organ which is distinct from the individual natural persons that comprise its individual members; is that right, Professor Tjittes?

A. (Professor Tjittes) That is correct, Mr Chairman; although individual members may have some obligations individually towards the stichting itself, or towards third parties, like creditors of the stichting. But as such, your presumption is correct.

THE CHAIRMAN: Professor Willems?

A. (Professor Willems) That is correct, what you have put, Mr Chairman. I wouldn't use the terminology my colleague has used concerning individual obligations. In my opinion, it is possible to divide more or less the working load between the different members of the board, but that does not make that specific member having a separate duty or position or whatever. It's a sort of practical way of organising your system; I would frame it like that.

THE CHAIRMAN: Yes, of course. One moment. (Pause) We understand that the board itself nominates and appoints board members. Is that right, Professor Tjittes?

A. (Professor Tjittes) That is correct, Mr Chairman.

THE CHAIRMAN: Professor Willems?

A. (Professor Willems) That is correct, Mr Chairman.

564. This agreed evidence from both experts confirms that, as a matter of Dutch law, it is the board as an organ that controls the *stichting* and not the individual natural persons that comprise its members.
565. In the present case, this has the necessary consequence that the “control” of Yukos Capital for the purposes of Article 17(1) of the ECT is exercised by an organisation organised under the laws of a Contracting State, namely the *Stichting* acting by its Board. It is not controlled by nationals of a third state, since it is the Board as a collective organ and not its individual members that exercise control over the *Stichting*’s affairs.
566. Having reached the conclusion that the first of the two factual predicates for the valid invocation of a denial of advantages is not made out, it is unnecessary for the Tribunal to determine whether the additional requirement – that the Claimant “has no substantial business activities” in Luxembourg – was also present.

VIII. DECISION

567. **For all of the foregoing reasons, the Tribunal hereby DECIDES that:**

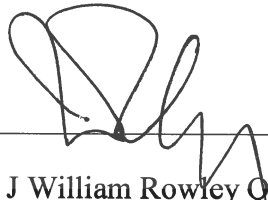
- (1) The Respondent’s provisional application of the Energy Charter Treaty under the terms of Article 45(1) does include its consent to international arbitration under Article 26(3)(a) (by majority).**
- (2) The Claimant does own an asset constituted by a debt of a company associated with an Economic 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 relates (by majority).**
- (3) Citizens or nationals of a third state did not control the Claimant on 11 April 2014 when the Respondent sought to deny the Claimant the advantages of Part III of the Energy Charter Treaty, such that the Respondent was not entitled to invoke the provisions of Article 17(1).**
- (4) The three objections to jurisdiction and admissibility raised by Respondent in its Notice dated 11 April 2014 that the Tribunal set down for determination in**

a preliminary phase by Procedural Order No 1 dated 24 April 2014 are therefore dismissed (by majority in respect of objections (1) and (2)).

- (5) Any other objections to jurisdiction and admissibility are, pursuant to Procedural Order No 1, joined to the merits.**
- (6) The stay of proceedings on the merits ordered in Procedural Order No 1 is lifted with effect from 28 days following the communication of this Interim Award on Jurisdiction to the Parties.**
- (7) The Tribunal shall thereafter fix by procedural order, after consultation with the Parties, a revised timetable for further pleadings and a hearing on the merits.**
- (8) All costs of and occasioned by the hearing of these objections to jurisdiction shall be reserved.**

Geneva, Switzerland

18 January 2017



Mr J William Rowley QC



Professor Brigitte Stern



Professor Campbell McLachlan QC

Chairman