SECOND EXPERT REPORT OF PROFESSOR PAUL B. STEPHAN

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1 INTRODUCTION

1. I am the John C. Jeffries, Jr., Distinguished Professor of Law and the John V. Ray Research Professor of Law at the University of Virginia. I previously submitted an Expert Report to this Court, dated March 8, 2017, addressing certain questions of Russian law at issue in this proceeding.

2. I have been asked by Hulley Enterprises Limited, Veteran Petroleum Limited, and Yukos Universal Limited (**HVY**) to respond to the Reports of Professor Alexei S. Avtonomov, dated November 6, 2017, Professor Sergey Y. Marochkin, dated October 24, 2017, Professor Anton V. Asoskov, dated November 10, 2017, and Professor Vladimir V. Yarkov, dated November 27, 2017, that seek to controvert some of the findings in my First Report. The basis for my status as an expert was laid out in my First Report and I will not repeat that discussion here. I note that since the submission of my First Report, I have accepted an invitation from The Hague Academy of International Law to present a special course on public international law in 2022.

3. In light of the Russian Federation's experts' assertions, I revisit in this Second Report the Russian regime on provisional application of treaties in Section 2, and explain in Section 3 that international arbitration of investment disputes is not inconsistent with Russian law.

4. I confirm my genuine belief in the opinions expressed herein.

2 PROVISIONAL APPLICATION OF TREATIES UNDER RUSSIAN LAW

5. In this Section, I again consider the Russian regime on provisional application of treaties in light of the assertions made in the Reports of Professors Avtonomov and Marochkin.

6. My discussion is structured as follows:

- In the introductory Section 2.1, I revisit my First Report to correct mischaracterizations of it found in Professor Avtonomov's Report (Section 2.1.1). I then summarize the main arguments made in the Avtonomov and Marochkin Reports (Section 2.1.2).
- Before rebutting Professor Avtonomov's assertions about the status of provisionally applicable treaties I make certain preliminary comments on Professor Avtonomov's methodology in Section 2.2, explaining that Professor Avtonomov relies on sources that have limited authoritative value in Russian law while he attempts to circumvent the jurisprudence of the Constitutional Court.
- In Section 2.3, I revisit the constitutional status of provisionally applied treaties. In Section 2.3.1, I explain that Professor Avtonomov erroneously relies on the hierarchy of domestic legal norms to determine the legal status of provisionally applied treaties. In Section 2.3.2, I demonstrate that the Constitutional Court expressly stated in its case law that in the Russian legal system provisionally applied treaties that require ratification are equated in their legal force to ratified treaties, i.e., have the same overriding force as treaties approved by the Federal Assembly (the Parliament). In Section 2.3.3, I address the sources on which Professor Avtonomov relies, showing that they are irrelevant to the question whether provisionally applied treaties take precedence over federal laws. Section 2.3.4 focuses on the legislative endorsement of the provisional application of treaties that supersede or supplement Russian law. In addition to the Constitutional Court's case law and legislative endorsement, the Russian Federation's own treaty practice confirms that treaties that are subject to ratification can be applied provisionally overriding conflicting federal laws which is shown in Section 2.3.5. In Section 2.3.6, I will explain how Professor Avtonomov confuses interagency and

intergovernmental agreements with international treaties of the Russian Federation to distort the role of provisional application in the Russian constitutional system of separation of powers. In Section 2.3.7, I demonstrate that the argument of Professor Marochkin that provisionally applicable treaties are not treaties of the Russian Federation is unsupported and inconsistent with the Russian Constitution, Russian legislation, and Russian jurisprudence, in particular that of the Constitutional Court of the Russian Federation.

2.1 Introduction

7. In essence, both Professors Avtonomov and Marochkin focus largely on two issues not relevant to this proceeding: (1) the status under Russian law of international treaties that have been signed but not ratified and that do not provide for provisional application; and (2) the status under Russian law of inter-governmental or interagency treaties that were intended to enter into force without ratification by the Russian legislature (the Federal Assembly). I understand that the question of the jurisdiction of a tribunal under the Energy Charter Treaty (**ECT**) with respect to the Russian Federation turns on the legal force under Russian law of a provisionally applicable international treaty made on behalf of the Russian Federation pending its ratification. Contrary to the reports of Professors Avtonomov and Marochkin, Russian law permits giving immediate domestic effect to the rules found in a provisionally applicable treaty that is made on behalf of the Russian Federation and that contemplates ratification through a legislative act, including where a provisionally applicable treaty is inconsistent with rules found in federal law.[1] The Russian Constitution, as interpreted and applied by the Constitutional Court of the Russian Federation, upholds this result.[2] As the Russian legislature had endorsed this possibility in the 1995 Federal Law "On International Treaties" (**FLIT**) and

[1] Stephan First Report, Section 2.2.2.
[2] Stephan First Report, Section 2.2.3.

the Vienna Convention on the Law of the Treaties (**VCLT**), it is in full conformity with the concept of separation of powers.[3]

2.1.1 Summary of my Expert Report of March 8, 2017

8. In my First Report, I assembled the evidence that demonstrates that, as a matter of Russian law, provisional application of an international treaty made on behalf of the Russian Federation, pending approval of its ratification by the Federal Assembly, is consistent with Russian law, including the constitutional separation of powers provided by the 1993 Constitution.[4] In particular, the Russian Constitutional Court has upheld the application by domestic courts of rules in provisionally applicable international treaties during the period before such treaties' final and definitive entry into force through legislative approval, including where those provisionally applicable treaties provide rules that depart from or are inconsistent with prior legislation.

9. Professor Avtonomov employs an aggressive and inaccurate characterization of my findings to ascribe to me a view that I did not express. In his Report, he states that I regard the Russian Constitution as "render[ing] the Russian Federation constitutionally unable to avail itself of the Limitation Clause contained in the ECT's Article 45(1)."[5] He further contends that the Russian Constitutional Court has rejected the position that he ascribes to me.[6]

10. This is incorrect. As my Report rests on my expertise in Russian law, it makes no attempt to offer an interpretation of the language "such provisional application is not inconsistent with its constitution, laws or regulations" found in Article 45(1) of the ECT. While Professor Avtonomov's statement indicates that he has apparently formed a view on the proper interpretation of the language of this international treaty, that is a matter of international law, not Russian law.

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[3] Stephan First Report, Section 2.2.4.
[4] Stephan First Report, Section 2.
[5] Avtonomov Report at ¶ 22. (Emphasis in original.)
[6] Id. at ¶¶ 24, 137.

11. I was asked by HVY to provide a Report "expressing my expert opinion on issues of Russian law" connected to the arbitration under review in this proceeding.[7] The issue that I addressed in Part 2 of that Report was whether provisional application of a treaty was inconsistent with Russian law and whether Russian law limits or prohibits provisional application of treaties that contain provisions that depart from or contradict laws enacted by the Federal Assembly. The question of the scope and meaning of the precondition expressed by Article 45(1) of the ECT is an issue that neither I nor Professor Avtonomov should address.[8]

12. To the extent that Professor Avtonomov seeks to propose a specific interpretation of Article 45(1) of the ECT in order to find an inconsistency between provisional application of the dispute settlement provisions of the ECT and the requirements of Russian law, I would suggest that he has strayed from the scope of his expertise.

2.1.2 Summary of the positions of Professors Avtonomov and Marochkin

13. Professor Avtonomov asserts that Russian law contains a particular hierarchy of legal norms, pursuant to which acts undertaken by the President or Government must rest on legislation in every instance. He then derives from this hierarchy a categorical claim that a provisionally applicable treaty, which awaits legislative approval, may not supersede a normative act approved by the Russian legislature. Thus he states that "an unratified treaty signed only by the government can *never* supersede a federal statute."[9] Elsewhere he states that there is "no exception" to the principle that a provisionally applicable treaty awaiting ratification may not contravene a federal statute.[10] He denies that, under Article 15(4) of the Constitution (as interpreted and applied by the Constitutional Court), and federal legislation, in particular the

[7] Stephan First Report at ¶ 4.
[8] For this reason, my First Report did not discuss the particular paragraph of the Constitutional Court's Resolution 8-P of March 27, 2012, quoted in the Avtonomov Report at ¶ 23. The First Report nowhere questions the authority of the Russian Federation under domestic law to precondition provisional application of a treaty on specific limitations, including consistency with particular preexisting legal enactments.
[9] Avtonomov Report at ¶ 9. (Emphasis added.)
[10] Id. at ¶ 82.

1978 ratification of the VCLT and the FLIT, provisionally applicable treaties supersede inconsistent legislation.[11]

14. Professor Marochkin contends that provisionally applicable treaties are not international treaties of the Russian Federation for purposes of the Russian Constitution and Russian legislation, including in particular the 1991 and 1999 Federal Laws on Foreign Investment and the FLIT. He seems to suggest that the definitional provisions found in Article 2 of the FLIT erase provisionally applicable treaties from all legislative references to international treaties, including those references in the FLIT itself. He implies that Russian legislation does not recognize any treaties other than those that have entered into final and conclusive force, and therefore does not apply to provisionally applicable treaties.[12]

15. As the remainder of this Report will demonstrate, each of these assertions is incorrect as a description of Russian law. Russian legislation as well as the jurisprudence of the Constitutional Court confirm that the category of "international treaties of the Russian Federation" comprises provisionally applicable treaties. In particular, Article 15(4) of the Russian Constitution, which specifies the effect and hierarchy of international treaties within the Russian system of rule of law, encompasses provisionally applicable international treaties made on behalf of the Russian Federation and awaiting ratification by legislative approval. More generally, the Russian Constitution and significant other Russian legislative acts count provisionally applicable treaties as international treaties of the Russian Federation.

2.2 Preliminary comments on Professor Avtonomov's methodology

16. To justify his conclusions on questions of Russian law, Professor Avtonomov relies heavily on sources that shed no light on the meaning of the Russian Constitution and have little if any authoritative value as a source of Russian law. Symmetrically, he seeks to avoid or distinguish away, rather than accept at face value, the single most important source of authority as to the

[11] Id. at ¶¶ 83-89.
[12] Marochkin Report at ¶ 12.

meaning of the Constitution, namely the jurisprudence of the Constitutional Court of the Russian Federation.[13]

17. Professor Avtonomov devotes a considerable portion of his analysis to a general discussion of the concept of separation of powers, the hierarchy of legal norms, and the practice of European countries regarding presidential or executive law-making authority.[14] This review of the abstract concept of separation of powers, whether in a theoretical or comparative perspective, does not bring us any closer to understanding what I indicated in my Report as the key issue for this appeal, namely the consistency of the provisional application of an international treaty pending its ratification with the particular system of separation of powers that exists under the Russian Constitution. The sources Professor Avtonomov cites either do not support Avtonomov's position or fail to mention provisionally applied treaties at all.[15]

18. That Russia has a system of separation of powers is clearly right. How this system works, and in particular how it applies to provisional application of international treaties, cannot be ascertained by reference to abstract theoretical principles or the practice of other European countries (with their own constitutions and systems of separation of powers). Rather, one must consider the significant and decisive body of legal authority specific to the issue of provisional application of treaties within the Russian Federation. This authority expressly maintains that provisionally applicable treaties fit within the Russian constitution and legal system. In particular, the decisions and reasoning of the Constitutional Court have upheld the consistency of provisional application with the Russian Constitution and its system of separation of powers, including where provisionally applicable treaties contradicted federal

[13] Professor Avtonomov ignores Resolutions of the Constitutional Court of the Russian Federation No. 8-P of March 27, 2012 (**Exhibit S-34**) and No. 6-P of March 19, 2014 (**Exhibit S-35**), as well as Decision of the Constitutional Court No. 1820-O of September 18, 2014 (**Exhibit S-54**). See Stephan First Report at ¶¶ 88-91, 103-108.
[14] Avtonomov Report at ¶¶ 30-48, 70-77.
[15] See Section 2.3.3 of this Report.

statutes.[16] A theoretical analysis of an entirely arbitrary selection of general principles as they were viewed at some point in time by certain persons in Russia or in other nations cannot add to or detract from this analysis. Those views involve legal systems different from Russia's, or times when Russia had a radically different legal and constitutional system than it established in 1993.[17]

19. Professor Avtonomov disregards evidence of Russia's own tradition with respect to the separation of powers, especially when it comes to provisional application. Specifically, he attempts unsuccessfully to explain away decisions by Russian courts that have addressed the question of provisional application, but have done so without any reference to, much less discussion of, foreign authorities or practice. Rather, these courts look at the authoritative legal texts, in particular those that deal expressly with the legal effect of treaties in the Russian legal system, and their own jurisprudence, which holds that a provisionally applicable treaty made on behalf of the Russian Federation can override inconsistent legislation.

20. Authoritative sources make clear that the Russian approach to the constitutional separation of powers is distinctive and by no means a translation of foreign systems into Russian. Professor Avtonomov ignores the clear statement made by the long-time chair of the Constitutional Court of the Russian Federation, quoted in my First Report, that under the Russian Constitution the branches of the state "do actually perform[] certain powers which according

[16] Professor Avtonomov refers to Constitutional Court Resolutions Nos. 2-P of January 18, 1996 (Exhibit ASA-28) and 16-P of May 29, 1998 (Exhibit ASA-038). Avtonomov Report at ¶¶ 36-37. These Resolutions only confirm the existence of a general principle of the separation of powers in the Russian constitutional system, but do not suggest in any way that the immediate and overriding legal effect of provisionally applied treaties in the Russian legal system would somehow run counter to the general constitutional principle of the separation of powers or the specific rules on the allocation of powers in the 1993 Constitution.

[17] By way of example, Professor Avtonomov refers to the views on separation of powers expressed by Academician Andrey Sakharov, which he asserts inspired the framers of the 1993 Constitution. Avtonomov Report at ¶¶ 32-34. Tragically, Sakharov died in 1989 and played no role in the separation of the Russian Federation from the U.S.S.R. or the events surrounding the promulgation of the 1993 Constitution. Andrey Sakharov's draft did not endorse the separation of powers. The other scholars cited by this portion of the Report, ¶ 34, endorsed the concept of separation of powers in the abstract but either did not address the specific decisions about the application of the concept to foreign relations codified in the 1993 Constitution or discussed versions of the draft Constitution that were superseded by the events of 1993, as I discussed in ¶¶ 25-29 of my First Report.

to the classic understandings of the separation of powers would fall within the competence of other organs."[18]

21. Professor Avtonomov, in his effort to diminish the specificities of the Russian approach to the constitutional separation of powers, quarrels with the characterization in my First Report of the Russian presidency as "hypertrophic."[19] He does not recognize that this precise characterization can be found even in the work of Professor Avakiyan, a scholar who submitted a Report on which the Russian Federation relied for its position on the Russian system of separation of powers in the arbitration proceedings under review in this case.[20] In Avakiyan's words:

> At the federal level, the Constitution consolidated a super-presidential republic, *the presidential capacity hypertrophied, the powers of the parliament rather modest*. Our Presidency is not just the head of state; according to the constitutional model, it stands over other branches of power, is not accountable to anyone in terms of legal responsibility (it can be removed only for treason or otherwise serious crime, but no one seriously assumes a person capable of such acts). The President has a ramified apparatus that covers the entire territory of the country (plenipotentiary representatives in federal districts and federal inspectors in each subject of the Russian Federation). He can remove the head of the executive branch of the subject of the Russian Federation and initiate the dissolution of the subject's legislature. The Government of the Russian Federation is, under the Constitution and in reality, the government of the President of the Russian Federation. He is able at any time to dissolve the State Duma. The two chambers have very small possibilities of parliamentary control.[21] (Emphasis added.)

22. Professor Avtonomov attempts to rebut the "hypertrophic" label by noting that, under the Russian Constitution, the President does not have absolute power to overrule all legislation as he chooses.[22] The point, however, is not that the Russian President, and the Government

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[18] Stephan First Report at ¶ 123 (quoting V.D. Zorkin and L.V. Lazarev, Commentary on the Constitution of the Russian Federation, Article 10 point 1 (Eksmo 2010) (**Exhibit S-61**). To similar effect, see S. M. Shakhrai, Constitutional Law of Russian Federation. Textbook for Undergraduate and Postgraduate Students at 74 (Moscow 2017) (describing Russian system of separation of powers as different from the classical variant) (**Exhibit S-111**).
[19] Stephan First Report at ¶ 30 and Avtonomov Report at ¶¶ 101-110.
[20] S. A. Avakiyan, Expert Opinion on the constitutional-legal aspects of the conclusion and application of the international treaties of the Russian Federation, February 21, 2006 (**RF-03.1.C-1.1.4**).
[21] S.A. Avakiyan, The Constitution of Russia: A Complicated Jubilee, 22 Russian Federation Today (2003) (assessment of Russian Constitution on the tenth anniversary of its adoption) (**Exhibit S-112**). See also V.D. Zorkin, Commentary on the Constitution of the Russian Federation at 49 (Moscow 2011) (Chair of Constitutional Court referring to Russia as a "super-presidential republic") (**Exhibit S-113**).
[22] Avtonomov Report at ¶¶ 106-108.

acting on his behalf, have unlimited legal authority, but rather that their freedom from legislative accountability is greater than under most European systems, particularly in foreign policy and treaty making. In particular, as I explain below, the Russian Constitution draws sharp distinctions between the President and Government's authority with respect to international treaties made on behalf of the Russian Federation, on the one hand, and their competence to enact purely domestic law, on the other hand.[23]

23. Moving from the abstract to the concrete, Professor Avtonomov seeks to reinforce his argument about legislative primacy over provisionally applicable international treaties by citing certain statements made by individuals during parliamentary hearings of the State Duma. These statements, he asserts, indicate that Russian lawmakers did not believe that provisional application of the ECT resulted in the application of any treaty provision that was inconsistent with existing legislation.[24] The statements cited, however, do not make that case.

24. None of the testimony referred to in Professor Avtonomov's Report has any authoritative value. Statements submitted by individuals to the State Duma do not reflect the position of the State Duma, and carry no legal weight of their own. If one is to look for a formal position of the State Duma or any other body of state power on the issue of provisional application of treaties, one must refer instead to Dr. Viatkin's submissions on behalf of the State Duma before the Constitutional Court, in the proceeding that produced Resolution 8-P of March 27, 2012. There the State Duma's official representative maintained specifically and explicitly that provisionally applied treaties override conflicting federal laws.[25]

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[23] See ¶¶ 28-29 of this Report.

[24] Avtonomov Report at ¶¶ 96-98.

[25] See Statement of D.F. Viatkin on behalf of the State Duma before the Constitutional Court, March 13, 2012, minutes 18:03-18:29, at http://www.ksrf.ru/ru/Sessions/Pages/ViewItem.aspx?ParamId=74), quoted in ¶ 129 of First Stephan Report ("In case of a discrepancy between a federal law and a provisionally applicable treaty, we nevertheless consider that the international treaty shall apply, as the meaning of provisional application is, precisely, to apply the treaty immediately") (**Exhibit S-62**). Professor Avtonomov's effort to reinterpret Dr. Viatkin's express reference to provisionally applicable treaties as encompassing only ratified treaties (Avtonomov Report at ¶ 148) is manifestly incorrect. His further effort to distinguish the issue of a "treaty's provisional application prior to its entry into force" from a treaty's provisional application before the legislature has adopted an act of ratification (id., at ¶ 149) is incoherent and simply ignores what Dr. Viatkin said. It also ignores that the situation that gave rise to

25. Moreover, besides lacking in authority, none of the statements quoted by Professor Avtonomov indicates a belief that the consent to investor-state arbitration embodied in Article 26 of the ECT could not apply provisionally. Rather, they indicated an apparent concern that the Russian Federation would have to amend various laws governing foreign investment so that it could comply with the ECT's substantive obligations.[26] None of the statements expressed a belief that new legislation was needed to enable the Russian Federation to comply with Article 26's obligation to submit international-law conflicts between investors and the Russian Federation to international arbitration. No Russian law then in effect barred such dispute resolution.

2.3 The legal status of provisionally applicable treaties under the Russian Constitution

2.3.1 Professor Avtonomov's misconceived reliance on the hierarchy of domestic legal norms to determine the legal status of provisionally applicable treaties

26. Professor Avtonomov bases his claim that Russian law does not permit provisional application of an international treaty awaiting ratification on Article 15(1) and (2) of the Russian Constitution. As he observes, Article 15(1) gives the Constitution "supreme juridical force." Article 15(2) in turn subordinates all persons, including bodies of state authority and officials, to the Constitution and laws of the Russian Federation.[27] He asserts that consent to provisional application of an international treaty counts as only a decree of the President, if signed by him, or of the Government, if signed by a lawful representative of the Government, for purposes of this hierarchy. As a result, he argues, such consent can have no greater force than any other official act of the President or the Government.[28]

Resolution No. 8-P happened after the start of the treaty's provisional application and before the Federal Assembly ratified that treaty (the provisional application started on July 1, 2010, the claimant committed the customs offence on July 10, 2010, the Federal Assembly ratified the treaty on April 5, 2011).

[26] Avtonomov Report at ¶ 96. The gaps in Russian legislation that the Government's explanatory note indicated to be inconsistent with the ECT included customs duties, antidumping duties, subsidies, state enterprises, and technical rules. Tellingly, the list did not include dispute resolution.

[27] Article 90(3) in turn states that decrees of the President must conform to the constitution and laws of the Russian Federation, and Article 115(1) states that decisions and orders of the Government must implement the Constitution, Russian legislation, or decrees of the President. Avtonomov Report at ¶ 39.

[28] Avtonomov Report at ¶ 54.

27. Professor Avtonomov's discussion of Article 15(4) of the Russian Constitution suggests that there was a "conflict between Article 15(2) and Article 15(4)" and asserts that the rules for adoption of treaties and the hierarchy of legal norms are the same for treaties and domestic legislation. However, Professor Avtonomov does not address the fact that Article 15(4) provides for a separate and distinct set of hierarchical norms, which differ from the constitutional rule governing the subordination of domestic norms in Article 15(2). Thus, Professor Avtonomov ignores the Russian Constitution's different approach to the separation of powers with respect to the making of international treaties, in contrast with the making of domestic legislation. In essence, the Russian Constitution does not equate international treaties made on behalf of the Russian Federation with domestic legislation.

28. To understand the legal significance of a provisionally applicable treaty under Russian law, one must look not to Article 15(1) or (2), but rather to Article 15(4). This provision, and only this provision, deals expressly with the place of international treaties within the legal hierarchy of the Russian legal system. It specifies that an international treaty "of the Russian Federation" has priority over Russian legislation.[29] This is why the Constitutional Court resolved the question of the legal force and effect (in the Russian legal system) of provisionally applied treaties on the basis of Article 15(4).[30]

29. The distinction between domestic acts of the President or the Government, on the one hand, and international treaties, on the other hand, runs throughout the Constitution. As discussed in my First Report, the Constitution assigns to the Federal Assembly the power to adopt legislation, and contemplates enactment of laws over presidential opposition.[31] By contrast, it assigns to the President and, acting under the President's supervision, the Government, the authority to make international treaties, subject to legislative ratification in circumstances

[29] Id. at ¶ 48.
[30] See Section 2.3.2 of this Report.
[31] Russian Constitution Articles 105, 107(3); see Stephan First Report at ¶¶ 24, 32.

later specified by the FLIT.[32] Treaties thus come into being through official acts of either the President or the Government, coordinated with the official acts of representatives of other state parties to such treaties.[33] In other words, the participation of state parties to the formation of international treaties to some extent displaces parliamentary involvement.

30. To be specific, the Federal Assembly plays no role in the negotiation or articulation of treaties, but rather is confined to approval or rejection of the completed instrument.[34] Unlike legislation, an international treaty of the Russian Federation cannot take effect, either provisionally or by entry into force finally and conclusively, without the prior approval of the President or the Government. And, as explained in my First Report and conceded by Professor Avtonomov, the Russian Constitution establishes a hierarchy that gives precedence to the "international treaties of the Russian Federation" over Russian legislation.[35]

31. The Constitutional Court has explained why the Constitution establishes this hierarchy. The Constitution adopts "the universal approach based on the principle of performance of international obligations in good faith (*pact sunt servanda*)" to recognize "the ever-increasing importance of treaties as a source of international law and as a mean of developing peaceful cooperation among nations, notwithstanding their constitutional and social systems."[36] Accordingly, constitutional checks on the adoption of domestic law do not work in the same way when it comes to international treaties of the Russian Federation.

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[32] Articles 86, 106(d), 114(e) of the Russian Constitution; Stephan First Report, at ¶¶ 43-45.

[33] Professor Avtonomov asserts that presidential authority has no bearing in this case, because the Government, and not the President, signed the ECT on behalf of the Russian Federation. Avtonomov Report at ¶ 105. As this Report indicates, however, when the Government signs a treaty on behalf of the Russian Federation, it implements the foreign policy of the Russian Federation, subject to the President's supervision and control, as provided by Article 114(e) of the Constitution, Articles 3(2) and 13(a) FLIT, and Articles 21 and 28 of the Federal Constitutional Law No. 2-FKZ on the Government of the Russian Federation (**Exhibit S-17**). See at ¶¶ 61-64 of this Report. Accordingly, the constitutional authority of the Government in this capacity is equivalent to that of the President's (see also Stephan First Report, at ¶¶ 39-40).

[34] Under Articles 16 and 25 FLIT, the Federal Assembly is entitled to propose reservations to treaties, but the President and Government are under no obligation to incorporate such reservations into a treaty and may compel the Federal Assembly to approve or reject a treaty without any modifications.

[35] Stephan First Report at ¶¶ 48, 100-01; Avtonomov Report at ¶¶ 55-56.

[36] Resolution No. 8-P of the Constitutional Court of the Russian Federation of March 27, 2012, point 2 (**Exhibit S-34**).

2.3.2 The position of the Constitutional Court on the legal force and effect of provisionally applicable treaties in the Russian legal system

32. Professor Avtonomov concedes that "the Constitutional Court is the authoritative interpreter of the 1993 Constitution within the Russian Federation's judicial system."[37] This authority rests on Article 125 of the Constitution, which establishes the Constitutional Court's jurisdiction. Articles 6, 79 and 106 of the Federal Constitutional Law on the Constitutional Court make clear that its decisions take precedence over all other official acts, including the decisions of other courts:

> The interpretation of the Constitution of the Russian Federation adopted by the Constitutional Court of the Russian Federation shall be official and binding for all representative, executive, and *judicial organs* of State Power, organs of local government, enterprises, agencies, organizations, officials, citizens and their associations.[38] (Emphasis added.)

The Court itself has declared that the other courts in the Russian judicial system, including the Supreme Court and the High Arbitrazh Court, may apply constitutional rules when necessary to decide a case, but have no right to authoritatively expound on the meaning of the Constitution:

> The legal authority to verify the constitutionality of the indicated normative acts has been entrusted only to the Constitutional Court of the Russian Federation, which exercises it through the special judicial procedure of constitutional judicial proceedings.[39]

33. Moreover, the decisions of the Constitutional Court, unlike pronouncements of other judicial bodies in the Russian Federation, are authoritative not only as to their judgment, but as to the reasoning contained in those judgments. As the Court has put it:

> The provisions of the motivation part of a resolution of the Constitutional Court of the Russian Federation that contain interpretations of constitutional rules or reveal the constitutional meaning of a law, on which the Constitutional Court of the Russian Federation bases its conclusion contained in the decision part of this resolution,

[37] Avtonomov Report at ¶ 24.
[38] Article 106 of the Federal Constitutional Law No. FKZ-1 "On the Constitutional Court of the Russian Federation" of July 21, 1994 (**Exhibit S-114**).
[39] Resolution No. 19-P of the Constitutional Court of the Russian Federation of June 16, 1998, point 4 (**Exhibit S-56**).

> reflect the legal position of the Constitutional Court of the Russian Federation and are also binding.[40]

Thus Professor Avtonomov's assertion that "the Constitutional Court's statements regarding matters outside the scope of the dispute are not binding on future courts"[41] is misleading and incorrect. Legal determinations made by the Court as predicates for its ultimate conclusion constitute the motivational part of its decision and, as the Court has indicated, have full (and binding) legal force.

34. In my First Report, I discussed three judgments of the Constitutional Court upholding the constitutionality of applying rules found in provisionally applicable international treaties in the face of inconsistent domestic legislation – Resolution 8-P of March 27, 2012; Resolution 6-P of March 19, 2014, and Decision 1820-O of September 18, 2014.[42] Professor Avtonomov concedes that these decisions address provisional application of international treaties, but argues that they do not mean what they say.

35. Professor Avtonomov attempts to evade the reasoning of Resolution 8-P of March 27, 2012, the Constitutional Court's most important discussion of provisional application of an international treaty, by imposing an implausible gloss on what the Court actually said and decided. He does not engage with the fact that the Constitutional Court expressly held that, as to their legal effect, provisionally applicable treaties are equal to ratified treaties, which is to say that they have the same legal force and effect as treaties ratified by the Federal Assembly and thus override inconsistent Russian legislation. Professor Avtonomov argues that the Court's holding was limited to Article 15(3)'s publication rule, and not the legal status of provisionally applicable treaties under Article 15(4) in the face of conflicting Russian legislation.[43]

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[40] Decision No. 118-O of the Constitutional Court of the Russian Federation of October 8, 1998 (**Exhibit S-115**).
[41] Avtonomov Report at ¶ 142.
[42] Stephan First Report at ¶¶ 89, 102-107.
[43] Avtonomov Report at ¶¶ 138-43.

36. The Court's decision and reasoning contradict this argument. To reach its conclusion that Article 15(3) requires the publication of provisionally applicable treaties, the Constitutional Court had to address the legal force and effect of such treaties in the Russian legal system. In other words, the Constitutional Court had to decide whether provisionally applicable treaties were capable of affecting the rights of individuals in Russia in the same way as ratified treaties. Only if they did would they require publication in accordance with the Russian Constitution in the same manner as ratified treaties. As I explained in my First Report,[44] the Constitutional Court found that, under Article 15(4) of the Constitution, provisionally applicable treaties prevail over federal laws in the same way as ratified treaties and, for that reason, their publication is required:

> Being guided by the Vienna Convention on the Law of Treaties and provisions of the Federal Law "On International Treaties of the Russian Federation," the public authorities and officials in the Russian Federation consistently pursue the legal policy which provides that the rules of a provisionally applied international treaty become a part of the Russian Federation's legal system and, like the international treaties of the Russian Federation that have entered into force, have priority over Russian laws.
> …
> From the point of view of the requirements set forth in Article 15 (part 4) of the Constitution of the Russian Federation in conjunction with its Articles 2, 17 (part 1) and 19 (part 1), provisionally applied international treaties of the Russian Federation by their legal consequences, effect on rights, freedoms and duties of man and citizen in the Russian Federation are essentially equivalent to international treaties that have entered into force, ratified and officially published in accordance with the procedure established by federal legislation.
> …
> In the context of requirements set forth in Article 15 (part 4) of the Constitution of the Russian Federation in conjunction with its Articles 2, 17 (part 1) and 19 (part 1), provisionally applied international treaties of the Russian Federation by their legal consequences, effect on rights, freedoms and duties of man and citizen in the Russian Federation are essentially equivalent to international treaties that have entered into force, ratified and officially published in accordance with the procedure established by federal legislation. Therefore, provisionally applied international treaties shall be officially published (made publicly available) like international treaties that have entered into force. [45]

Thus the determination that, pursuant to Article 15(4), provisionally applicable treaties are, as to their legal effect, equivalent to ratified treaties, is the binding legal position of the

[44] Stephan First Report at ¶ 103.
[45] Resolution 8-P of the Constitutional Court of the Russian Federation of March 27, 2012, point 4.1 (**Exhibit S-34**).

Constitutional Court and not, as Professor Avtonomov would have it, "outside the scope of the dispute."[46]

37. Professor Avtonomov attempts to distract from this holding by arguing that, for procedural reasons, the Constitutional Court did not address the constitutionality of Article 23(1) of the FLIT, which provides for provisional application of treaties.[47] What this argument omits is that the Constitutional Court proceeded to rule that Article 15(4) encompassed provisionally applicable treaties (regardless of the FLIT) and thus gave rules contained therein priority over domestic Russian legislation.[48]

38. Professor Avtonomov also attempts to divert the focus from Resolution 8-P's ruling by devoting considerable attention to the Constitutional Court's brief remark on treaty-based preconditions to provisional application.[49] The Constitutional Court observed that the Russian Federation may insert preconditions to provisional application, if the other state parties to an international treaty concur.[50] This observation was not relevant to the dispute before the Constitutional Court then, and has no bearing on the issues in this proceeding. The Constitutional Court did not rule that the Russian Federation must insist on such preconditions. Rather, it stated that the Russian Constitution does not forbid the acceptance of a requirement of consistency with "the laws or other regulatory legal acts of the Russian

[46] Avtonomov Report at ¶ 142.
[47] Id. at ¶ 140.
[48] Professor Avtonomov similarly attempts to dispose of Decisions No. 476-O-O and 477-O-O of the Constitutional Court of the Russian Federation of April 12, 2012, opinions not cited in my First Report that implemented Resolution No. 8-P with respect to similar facts. He maintains that these cases had nothing to do with Article 15(4) of the Constitution, just as (he asserts) Resolution No. 8-P did not rely on that Article of the Constitution. Avtonomov Report at ¶ 144(a). Again, both of these decisions on their face indicate otherwise. They incorporate by reference the holding Resolution No. 8-P, which, as noted above, expressly invoked the hierarchical rule of Article 15(4) with respect to the provisionally applicable treaty in question.
[49] Avtonomov Report at ¶¶ 136-137.
[50] Resolution 8-P of the Constitutional Court of the Russian Federation of March 27, 2012 (**Exhibit S-34**), point 4: "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."

Federation" as part of indicating consent to provisional application of a treaty, any more than the Russian Constitution mandates such a requirement. As I noted above, whether the ECT itself contains such a precondition to provisional application is not a question either my First Report or this Report addresses, as I focus exclusively on the content and requirements of Russian law.[51] I understand that this is also not a question Professor Avtonomov's Report should address.

39. Finally, and most importantly, the Constitutional Court itself has confirmed in its subsequent case law that the constitutionality and permissibility of provisionally applied international treaties overriding inconsistent Russian (federal) law is precisely the question that the Constitutional Court answered affirmatively in Resolution 8-P. [52]

40. As I observed in my First Report, Resolution 6-P of March 19, 2014 upheld the constitutionality of the treaty between the self-styled Republic of Crimea and the Russian Federation providing for the incorporation of Crimea into the Russian Federation.[53] Professor Avtonomov dismisses the Constitutional Court's holding on the ground that it addressed only the question of whether provisional application was constitutional, and not whether provisional application of the Crimea Annexation Treaty would trigger the hierarchical rule of Article 15(4).[54] But again he disregards the reasoning of the decision, which includes an express reference to Resolution 8-P as the basis for its interpretation of the Constitution.[55]

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[51] See at ¶¶ 10-11 of this Report.

[52] See, for example, Resolution 6-P of the Constitutional Court of the Russian Federation of March 19, 2014 (**Exhibit S-35**), point 3: "At the same time, the possibility of application of an international treaty prior to its entry into force, if so provided for by the treaty or if the signatory parties have agreed to do so, arises from paragraph 1 of Article 25 of the Vienna Convention on the Law of Treaties of 23 May 1969, to which the Russian Federation is a party, with the said paragraph being essentially reproduced in Article 23 of Federal Law No. 101–FZ of 15 July 1995, 'On the International Treaties of the Russian Federation.' The admissibility of this statutory concept has been confirmed by the Constitutional Court of the Russian Federation in its Resolution No. 8–P of March 27, 2012, which states, among other things, that provisional application of an international treaty is generally used by the Russian Federation in its inter-State practices where the subject-matter of a treaty is of special interest to its parties and, therefore, makes them interested in making the treaty effective before its ratification or entry into force."

[53] Stephan First Report at ¶¶ 89-90.

[54] Avtonomov Report at ¶ 144(d).

[55] Resolution 6- P of the Constitutional Court of the Russian Federation of March 19, 2014 (**Exhibit S-35**), point 3: "The permissibility of such a legal framework is confirmed by the Constitutional Court of the Russian Federation in

41. Professor Avtonomov does not dispute that the Crimea Annexation Treaty reviewed by the Constitutional Court in Resolution 6-P imposed a transitional regime in Crimea that displaced certain rules of Russian public and private law during an interval that was to last from the signing of the treaty until the end of 2014.[56] The Constitutional Court described the transitional regime as "a necessary consequence of the formation of the new Russian Federation constituent entities."[57] It noted that details of the transition would be clarified by further legislation. It found no infirmity, however, in the transitional rules that, as a result of provisional application of the Crimea Annexation Treaty, went into effect immediately, before adoption of such legislation. Rather, the Constitutional Court ruled:

> As follows from Article 10 of the Treaty in question, the Treaty shall be applied provisionally from the date of signing and shall enter into force from the date of ratification. Thus, the admission of the Republic of Crimea to the Russian Federation is in effect provided for as an element of application of the Treaty in question prior to its ratification, with the latter serving as a condition for enactment of international treaties in accordance with the law of international treaties.[58]

In upholding the provisional application of the Crimea Annexation Treaty, the Constitutional Court necessarily upheld the provisional application of those of its terms that displaced inconsistent norms of Russian public and private law during the period of provisional application. Accordingly, Resolution 6-P makes clear again that treaties that are applied provisionally before their ratification produce the same legal effect in, and occupy the same position in the normative hierarchy of, the Russian legal system as after their ratification by the Federal Assembly. In reaching its decision in Resolution 6-P, the Constitutional Court also referred directly to its relevant holding in Resolution 8-P that confirms the legal status of rules found in provisionally applicable treaties under Russian law.[59]

Ruling No. 8-P of March 27, 2012, which specifically indicates that provisional application of an international treaty may be used by the Russian Federation in interstate interactions when, as a rule, the subject of the treaty is of special interest to its parties, as a result of which the parties seek to give the treaty effect without waiting for ratification or entry into force."

[56] Articles 6, 9-10 of the Crimea Annexation Treaty (**Exhibit S-39**).

[57] Resolution 6- P of the Constitutional Court of the Russian Federation of March 19, 2014 (**Exhibit S-35**), point 4.

[58] Id. at point 3.

[59] Stephan First Report at ¶ 89.

Further, in Resolution 6-P, the Constitutional Court expressly recognized President Putin's constitutional authority to sign and agree to the provisional application of an international treaty that had the purpose of changing the federal structure and territory of the Russian Federation. Critically, despite of its very significant implications for the Russian legal and constitutional order, the Constitutional Court held expressly that the Crimea Annexation Treaty and the President's exercise of his constitutional powers to sign it and to agree to its immediate provisional application were "not inconsistent with the Constitution of the Russian Federation *in terms of the separation of powers into legislative, executive, and judicial branches* as established by the Constitution or in terms of the delimitation of competence among the federal state bodies."[60]

42. Professor Avtonomov offers a different reason for disregarding the Constitutional Court's Decision No. 1820-O of September 18, 2014. He argues that the case involved a treaty that the Federal Assembly had already ratified, and that was still being applied on a provisional basis.[61] However, the ratification law to which Professor Avtonomov refers addressed an entirely different treaty between Belarus and Russia, but not the Special Economic Zone Agreement at issue in Decision No. 1820-O.[62] Indeed, according to the official information published on the Ministry of Foreign Affairs' website, the Special Economic Zone Agreement continues to be applied provisionally by the Russian Federation to this day.[63] Understandably, the Constitutional Court made no reference to any ratifying act of the Federal Assembly, as none existed, but rather stated that due to its provisional application the provisionally applicable treaty superseded the existing tax exemption (as found in Russian legislation) from

[60] See Resolution 6- P of the Constitutional Court of the Russian Federation of March 19, 2014 (**Exhibit S-35**), point 3. (Emphasis added.)
[61] Avtonomov Report at ¶ 144(b).
[62] Federal Law No. FZ-60 of April 5, 2011, to which Professor Avtonomov refers, ratified the Agreement on the Procedure of Transfer by Individuals of Goods for Personal Use Through the Customs Border of the Customs Union, and Customs Operations Related to Their Release, signed in St. Petersburg on June 18, 2010. Decision No. 1820-O of September 18, 2014 (**Exhibit S-54**), involved the provisional application of an agreement among Belarus, Kazakhstan and Russia, concerning a special economic zone that also was entered into on June 18, 2010.
[63] Print out from the website of the Ministry of Foreign Affairs of February 18, 2019 (**Exhibit S-116**).

the moment that its provisional application commenced.[64] The Constitutional Court cited Article 15(4) of the Russian Constitution as the basis for its conclusion.[65] As in Resolution 8-P, the Constitutional Court held expressly that this provision applies equally to provisionally applicable treaties and ratified treaties.[66]

2.3.3 Professor Avtonomov relies on sources that do not deal with provisional application and that, as such, have no bearing on the question of whether provisionally applicable international treaties take precedence over Russian federal laws

43. Professor Avtonomov confuses his argument by basing it on authorities that do not address provisional application of international treaties of the Russian Federation.[67] He seeks to repurpose these authorities for a proposition that they do not support, namely his assertion that Russian law does not permit a provisionally applicable treaty to contradict existing Russian federal legislation. None does any such thing.

44. Professor Avtonomov cites two pronouncements of the Plenum of the Supreme Court, Resolution No. 8 of October 31, 1995 and Resolution No. 5 of October 10, 2003, as authority for the proposition that a provisionally applicable treaty cannot displace Russian federal legislation.[68] As I explained in my First Report, these Resolutions do not provide the support that Professor Avtonomov claims. Both address only the legal force of a treaty that has

[64] Stephan First Report at ¶ 106 (quoting decision).
[65] Decision No. 1820-O of the Constitutional Court of the Russian Federation of September 18, 2014, point 2.1 (**Exhibit S-54**). The Constitutional Court explains that, as a result of the provisionally applicable treaty, legal entities could not avail themselves of the duty-free procedures otherwise available under the federal law in the Kaliningrad free economic zone. According to the Constitutional Court, the provisionally applicable treaty prevailed over that law at least from July 2010 (when the provisional application started) until December 2011 (when the law was amended to be in line with the rules of the treaty).
[66] My First Report also briefly noted the Judgment No. VAS-13594/09 of the High Arbitrazh Court of December 7, 2009 (**Exhibit S-55**). Stephan First Report at ¶ 107, footnote 98. Professor Avtonomov disposes of this case on the grounds that the international agreement in question was "completely in harmony" with prior legislation. Avtonomov Report at ¶ 144(e). This is not correct. The High Arbitrazh Court applied the international agreement without relying on its consistency with federal law, rather than the Russian statute. The High Arbitrazh Court discussed only the treaty-based exemption and saw no need to address the taxpayer's status under the federal law.
[67] Avtonomov Report at ¶¶ 65-67.
[68] Avtonomov Report at ¶¶ 65-66.

entered into force finally and conclusively, and not through provisional application.[69] As I explained in my First Report, neither is relevant to the question of the legal effect of provisionally applicable international treaties of the Russian Federation.[70] In addition, Plenum Resolutions of the Supreme Court, of course, cannot displace or undermine a judgment of the Constitutional Court (see Section 2.3.2). Professor Avtonomov does not respond to or clarify these fundamental problems when relying on the Plenum Resolutions. These pronouncements of the Supreme Court, which say nothing about provisional application, cannot be understood to rest on the unarticulated proposition that a provisionally applicable treaty has only the status of a presidential decree or a governmental decision under Article 15(2) of the Russian Constitution as Professor Avtonomov erroneously suggests.[71] Tellingly, Professor Avtonomov does not provide a single authority supporting his proposition.

45. Professor Avtonomov also devotes considerable space to the presentation of views of Russian scholars on the question of how Article 15(4) of the Russian Constitution applies to intergovernmental and interagency agreements.[72] With one exception that is not helpful to Professor Avtonomov, these authors and declarants do not discuss, even in passing, provisional application of any international treaty, much less those entered into by the President and Government in the name of (and on behalf of) the Russian Federation and applied provisionally pending their ratification.[73]

46. A case in point is Professor Avtonomov's response to my discussion of the Constitutional Court's Decision No. 1344-O-R of November 19, 2009. My First Report identified this

[69] Stephan First Report at ¶¶ 112-116.
[70] Stephan First Report at ¶ 115.
[71] In ¶ 67, Professor Avtonomov also relies on the Decision of the Supreme Court No. 59-O09-35 of December 29, 2009 (**Exhibit S-59**). As I explained in my First Report, this decision has nothing to do with provisional application and is irrelevant for the discussion. See Stephan First Report, footnote 104.
[72] Avtonomov Report at ¶¶ 63-64, 68-69.
[73] The one document that does comment on provisional application—the statement by Deputy Minister Krylov (Exhibit ASA-019)—does not assist Professor Avtonomov. Contrary to Professor Avtonomov's allegations (at ¶ 88), Krylov's statement suggests that provisionally applicable treaties will apply even when they contradict federal laws. Krylov's statement that the Duma "will monitor such application especially strictly" implies that the Duma would monitor the provisional application of a treaty that contradicts a Russian federal statute precisely because the treaty overrides the statute.

decision as relevant, but not for the reasons that Professor Avtonomov states.[74] Professor Avtonomov suggests that my First Report referred to the decision as further evidence of the Constitutional Court's treatment of provisionally applicable treaties under Article 15(4).[75] As my First Report made clear, however, that case did not involve provisional application of a treaty.[76] Rather, it illustrates a different principle, namely that Russian law recognizes a distinction between international treaties that have entered into force (whether through ratification or upon signature) and unratified treaties.[77] This decision of the Constitutional Court notably shows that Resolutions No. 8 and No. 5 of the Plenum of the Supreme Court concern only treaties that have entered into force, which means that they do not bear on the legal status of treaties applied provisionally prior to their entry into force.[78]

47. As discussed below, Russian law distinguishes between international treaties of the Russian Federation and other kinds of international agreements, such as intergovernmental and interagency treaties.[79] The analysis of the legal effect of intergovernmental and interagency agreements found in the authorities on which Professor Avtonomov relies simply has no bearing on the question of the status under Russian law of the provisional application of a treaty of the Russian Federation.

[74] Stephan First Report at ¶¶ 116-117.
[75] Avtonomov Report at ¶ 144(c).
[76] Stephan First Report at ¶ 116.
[77] Id. The same is true for Decision No. 5-APU15-68 of the Supreme Court of the Russian Federation of September 8, 2015, cited in Avtonomov Report at ¶ 144(c). The case did not deal with provisional application of an international treaty, but rather the domestic legal effect of an unratified treaty that did *not* apply provisionally.
[78] In ¶ 144(c) of his Report, Professor Avtonomov claims that, in Decision No. 1344-O-R (**Exhibit S-60**), the Constitutional Court "stated expressly" that an unratified treaty cannot, by itself, prevail over federal laws. There is no such a statement in the case. The quote from the decision referred to by Professor Avtonomov says only that Protocol No. 6 to the ECHR (the treaty reviewed in that case) did not have "direct" effect because it was not ratified. As the treaty did not apply provisionally and required ratification, this observation by the Constitutional Court is in no way controversial.
[79] See Section 2.3.6 of this Report.

2.3.4 Legislative endorsement of the provisional application of treaties that supersede or supplement Russian law

48. Professor Avtonomov denies that Russian legislation has endorsed the provisional application of international treaties that supersede or supplement particular legislative enactments. Yet, as I have discussed more fully in my First Report,[80] and as also confirmed by the Constitutional Court,[81] the VCLT and especially the FLIT establish that the Russian legislature has endorsed provisional application of a treaty awaiting legislative approval. Moreover, nothing in this legislation indicates that the Russian legislature limited provisional application to instances where the rules in the provisionally applicable treaty neither superseded nor supplemented preexisting Russian law.

49. Professor Avtonomov seeks to undermine this clear legislative endorsement by arguing that Professors Osminin and Khodakov, whose authoritative interpretation of the FLIT was cited in my First Report[82], elsewhere in their work rejected the hierarchical superiority of provisionally applicable treaties.[83] Yet the statements Professor Avtonomov quotes deal not with provisionally applicable treaties, but rather the status of treaties that do not apply provisionally and have not been ratified by a legislative act, that is to say intergovernmental and interagency agreements.

50. Professor Avtonomov concedes that, as I explained in my First Report,[84]Professors Osminin and Khodakov state in their commentary that a provisionally applicable treaty awaiting legislative approval prevails over inconsistent federal laws in the same way as a treaty that has entered into force after ratification.[85] Professor Avtonomov argues, however, that other

[80] Stephan First Report at ¶¶ 15-19, 53-71, 78-81, 126-131.
[81] Resolution No. 8-P of the Constitutional Court of the Russian Federation of March 27, 2012, point 4 (**Exhibit S-34**).
[82] Stephan First Report at ¶ 78.
[83] Avtonomov Report at ¶¶ 113-16.
[84] Stephan First Report at ¶¶ 77-78.
[85] Avtonomov Report at ¶¶ 122-25.

statements in the same commentary contradict that conclusion.[86] Again, however, this supposed contradiction results from Professor Avtonomov's attempt to convert statements in the commentary of Professors Osminin and Khodakov about the status of unratified treaties that are not provisionally applicable into pronouncements about provisional application, which they were not.

2.3.5 The Russian Federation's treaty practice confirms that treaties that are subject to ratification can be applied provisionally, overriding conflicting Russian federal laws

51. In my First Report, I discussed four examples of the Russian Federation's practice of provisional application of treaties that conflict with certain federal statutes, including the Maritime Boundary Agreement[87], the Crimea Annexation Treaty[88], the U.S. Transit Agreement[89] and the EDB Agreement.[90] In response to my analysis, Professor Avtonomov concedes that these treaties are provisionally applicable, but argues that this says little about which "legal norm (the treaty or the statute) should prevail,"[91] implying that in case of conflict, Russian federal law would still prevail.[92] Professor Avtonomov's attempt to deny that provisionally applicable treaties of the Russian Federation that are subject to ratification would prevail over federal law, is not only illogical and unsupported, but contradicted by Russian treaty practice.

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[86] Id. at ¶ 124. Further, in ¶¶ 122-124, Professor Avtonomov wrongly asserts that the Commentary by Professors Osminin and Khodakov relies on Article 25 of the VCLT when discussing the effect of a provisionally applicable treaty. Rather, Professors Osminin and Khodakov ground their conclusion on Article 18 of the VCLT, which provides for the Russian Federation's obligation not to defeat the object and purpose of a treaty prior to its entry into force. See Commentary on the Federal Law "On International Treaties of the Russian Federation" at 75 (V.P. Zvekov, B.I. Osminin, eds., Spark 1996) (**Exhibit S-33**, 74-75) ("if a treaty is not presented to the State Duma within the indicated time period, this does not mean that provisional application will automatically be terminated. Such a result would contradict Article 23 of the Law and Article 18 of the Vienna Convention, according to which it is necessary to clearly express the intention not to become a party to the treaty before provisional application can be terminated. Such intent by no means automatically follows from a failure to present the treaty to the State Duma … by way of Article 15, paragraph 4 of the Russian Constitution, the provisions of *Article 18 of the Vienna Convention of 1969* are also in force in Russia. From this it follows that exception(s) to the federal law on the basis of provisional application are possible." (Emphasis added.))

[87] Stephan First Report at ¶¶ 84-87.

[88] Stephan First Report at ¶¶ 88-91.

[89] Stephan First Report at ¶¶ 92-94.

[90] Stephan First Report at ¶¶ 95-97.

[91] Avtonomov Report at ¶ 151.

[92] Avtonomov Report at ¶¶ 151-152.

52. First, when making the argument that I have "failed to identify any instance where any rule from this list of unratified, provisionally applicable treaties was ever given priority over even a single provision of a federal statute," Professor Avtonomov completely ignores (and leaves uncontested) what I have already explained in my First Report.

53. For example, I explained (and Professor Avtonomov appears unable to deny) that the Crimea Annexation Treaty imposed Russian sovereignty over Crimea and changed numerous norms of Russian private and public law. [93] While the Crimea Annexation Treaty required ratification, by its terms it applied provisionally from the moment of its signing, effectively overriding a variety of Russian federal laws (including those on the Russian Federation's composition and territorial boundaries).

54. In Resolution 6-P, the Constitutional Court confirmed this position, when it held that, as of the time of its signing, the Crimea Annexation Treaty became effective through its provisional application:

> At the same time, the possibility of application of an international treaty prior to its entry into force, if so provided for by the treaty or if the signatory parties have agreed to do so, arises from paragraph 1 of Article 25 of the Vienna Convention on the Law of Treaties of 23 May 1969, to which the Russian Federation is a party, with the said paragraph being essentially reproduced in Article 23 of Federal Law No. 101–FZ of 15 July 1995, "On the International Treaties of the Russian Federation." The admissibility of this statutory concept [provisional application] has been confirmed by the Constitutional Court of the Russian Federation in [the Customs Case], which states, among other things, that provisional application of an international treaty is generally used by the Russian Federation in its inter-State practices where the subject-matter of a treaty is of special interest to its parties and, therefore, makes them interested in making the treaty effective before its ratification or entry into force.
>
> For purposes of the Treaty in question, the use of the opportunity, as permitted under both Russian and international law, to apply an international treaty prior to its entry into force also means that as of the time of the signing of the Treaty in question […] both the Republic of Crimea and the City of Federal Significance Sevastopol have been within the Russian Federation as its subjects.[94]

[93] Stephan First Report at ¶¶ 88-89.
[94] Resolution No. 6-P of the Constitutional Court of the Russian Federation of March 19, 2014, point 3 (**Exhibit S-35**). (Emphasis added.)

55. Second, if one were to accept Professor Avtonomov's assertion that treaty obligations will not trump conflicting Russian federal laws, this would mean that the Russian President and Government routinely deceive their treaty partners by undertaking treaty commitments, while perfectly knowing that they cannot perform. This suggestion is simply absurd. The only interpretation consistent with the presumption that the Russian President and Government have acted in good faith is that Russian law allows provisional application of treaties contradicting Russian federal laws.

56. I further note that, with respect to the examples of the Russian Federation's practice of provisional application of treaties that conflict and override certain Russian federal statutes, Professor Avtonomov has introduced new authorities only in relation to the EDB Agreement. None of these authorities assist Professor Avtonomov. Rather, these authorities only confirm what I already explained in my First Report, namely that the Russian Federation provisionally applied the EDB Agreement, including its provisions creating tax exemptions that were not foreseen in Russian federal tax laws.[95]

57. As a preliminary matter, Professor Avtonomov does not deny that there was a direct conflict between the provisionally applied EDB Agreement and Russian federal tax laws.[96] However, he posits that the EDB Agreement was "arguably incorporated by reference"[97] into another (ratified) treaty, viz., the EDB Establishment Agreement and had thus received sufficient "legislative confirmation."[98] That theory flies in the face of the unambiguous positions adopted by the Ministries of Finance and Foreign Affairs and exposes a fundamental inconsistency in Professor Avtonomov's entire analysis.

58. Before ratification of the EDB Agreement, the Ministry of Foreign Affairs responded to an enquiry of the Federal Tax Service, confirming that the rules of the provisionally applicable

[95] Stephan First Report at ¶¶ 94-96.
[96] Avtonomov Report at ¶¶ 153, 155.
[97] Avtonomov Report at ¶ 160.
[98] Avtonomov Report at ¶ 159.

EDB Agreement applied and governed, even though they altered general rules of Russian federal tax law.[99] Contrary to what Professor Avtonomov now claims, the four letters preceding this response confirm that Russian state practice accepts that provisionally applied international treaties override federal laws.

59. A careful reading of the correspondence between the Ministry of Foreign Affairs, the Ministry of Finance and the Federal Tax Service confirms the analysis in my First Expert Report. The Federal Tax Service asked the Ministry of Finance whether the EDB Agreement was an "international treaty of the Russian Federation" that displaced inconsistent Russian federal tax laws.[100] The Ministry of Finance explicitly confirmed that this was indeed the case.[101] The Federal Tax Service subsequently asked the Ministry of Foreign Affairs for a second opinion, noting that the provisionally applied EDB Agreement creates tax exemptions that are not included in the EDB Establishment Agreement.[102] The Ministry of Foreign Affairs endorsed the Ministry of Finance's conclusion, clarifying that "there is no difference in legal consequences between the provisional application of a treaty and its entry into force,"[103] such that the treaty was to be "applied provisionally in its entirety."[104] The Ministries of Finance and Foreign Affairs based their analyses of the direct and overriding effect of the EDB Agreement solely on its provisional application, and not on any "incorporation by reference" or indirect "legislative approval."

60. More fundamentally, Professor Avtonomov's approach to the EDB Agreement exposes a fatal inconsistency between the positions he and Professor Marochkin advance on provisional application in general, and on the provisional application of the ECT in particular. With respect to the provisionally applied EDB Agreement, Professor Avtonomov suggests that the

[99] Stephan First Report at ¶ 96, discussing the letter from the Ministry of Foreign Affairs No. 6068/10SKG of October 2, 2009 ¶ 1 (**Exhibit S-45**) and the letter of the Federal Tax Service No. ShS-17-3/189@ of October 21, 2009 (**Exhibit S-46**).
[100] Letter of the Federal Tax Service No.3-1-06/556 of July 30, 2009 at ¶¶ 5-6 (ASA-094).
[101] Letter of the Ministry of Foreign Affairs No. 04-02-02/11745 of August 14, 2009 at ¶ 1 (ASA-054).
[102] Letter of the Federal Tax Service No. 3-1-06/694 of September 2, 2009 at ¶¶ 1-2, 12, 17 (ASA-095).
[103] Letter of the Ministry of Foreign Affairs No. 6068/10SKG of October 2, 2009 at ¶ 2 (**Exhibit S-45**).
[104] Id. at ¶¶ 5-6.

reference in another treaty that was ratified (i.e., the EDB Establishment Agreement) to other "applicable international treaties"[105] that define the "Bank's activities" provides sufficient "legislative approval" to allow a provisionally applied treaty such as the EDB Agreement to override inconsistent Russian federal laws. At the same time, however, Professor Marochkin argues that identically phrased references to "international treaties" in Article 9 of the 1991 FIL and Article 10 of the 1999 FIL do not encompass any unratified, provisionally applied treaty.[106] Professors Avtonomov and Marochkin do not attempt to reconcile their inherently contradictory positions and do not point to any authorities or arguments that could do so.

2.3.6 Professor Avtonomov confuses interagency and intergovernmental agreements with international treaties such as the ECT

61. Professor Avtonomov employs a *reductio ad absurdum* argument. He maintains that if provisionally applicable treaties qualify as treaties for purposes of Article 15(4) of the Constitution, then any international agreement, including interdepartmental agreements between agencies of the Russian Government and their foreign counterparts, also would have hierarchical precedence over Russian legislation. He believes, in other words, that provisionally applicable treaties awaiting legislative approval are indistinguishable from any other international agreement that has not been implemented or approved by the Legislature.[107] This argument, however, is incorrect both as a matter of constitutional structure and of treaty-making authority under the FLIT.

62. As a matter of the Constitution, Article 86(b) and (c) assign to the President the authority to negotiate and sign treaties on behalf of the Russian Federation and to sign documents of ratification for them. Article 114(e) in turn empowers the Government as a collective whole to implement the foreign policy of the Russian Federation, subject to the ultimate authority of

[105] Avtonomov Report at ¶ 158. See also Treaty on the Establishment of Eurasian Development Bank dated January 12, 2006 (ASA-091).
[106] Marochkin Report, Part II.C.
[107] Avtonomov Report at ¶¶ 51-58.

the President under Article 86(a) to "govern" that policy. Professor Avtonomov does not dispute that the President and Government's authority to negotiate and sign treaties is enshrined in these constitutional provisions. Article 114(e) has been understood by Russian lawmakers as permitting the Government as a whole, in addition to the President, to negotiate and sign treaties on behalf of the Russian Federation. But there is no authority for finding in Article 114(e) a sub-delegation to components of the Government, such as individual agencies, committees or ministries, of the authority to make international treaties on behalf of the Russian Federation.

63. As I indicated in my First Report, Russian legislation confirms the distinct status of treaties entered into on behalf of the Russian Federation by the President and Government.[108] Article 3(2) of the FLIT distinguishes between, on the one hand, international treaties concluded with foreign states or international organizations on behalf of the Russian Federation, and, on the other hand, treaties concluded on behalf of the Russian Government, which it characterizes as intergovernmental treaties, and treaties concluded on behalf of federal organs of executive power, which it characterizes as treaties of an interdepartmental character (interagency agreements).[109] Article 13(a) then provides that only the President and the Government have the authority to make treaties on behalf of the Russian Federation. The Federal Constitutional Law on the Government of the Russian Federation further provides that the Government, but not its component agencies, has the authority to enter into international treaties on behalf of the Russian Federation.[110]

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[108] Stephan First Report at ¶ 41.

[109] Article 3(2) of the FLIT (**Exhibit S-18**):

> Article 3 International Treaties of the Russian Federation
> …
> 2. International treaties of the Russian Federation are concluded with foreign States and with international organizations on behalf of the Russian Federation (inter-State treaties), on behalf of the Government of the Russian Federation (intergovernmental treaties) and on behalf of federal executive organs (interagency treaties).

[110] Federal Constitutional Law No. 2-FKZ of December 17, 1997, art. 21 (**Exhibit S-17**). Article 21 of this Law bestows the authority to enter into international treaties on behalf of the Russian Federation

64. This confirms that Russian law distinguishes between treaties made on behalf of the Russian Federation and all other treaties and international agreements. It also provides an explanation for the treatment, as a matter of Russian constitutional law (as repeatedly confirmed by the Constitutional Court, most notably in its Resolutions 8-P and 6-P), of provisionally applicable treaties made on behalf of the Russian Federation being covered by the principle of hierarchical superiority of treaties under Article 15(4) of the Russian Constitution. In addition, it reflects the distinct constitutional role of the President and Government in the making of international treaties on behalf of the Russian Federation.[111]

65. The Constitutional Court has applied Article 15(4) time and again to provisionally applicable treaties made on behalf of the Russian Federation, whether signed by the President or the Government as a whole, but not other kinds or treaties, or treaties that await legislative approval but are not provisionally applicable. The Supreme Court decisions, although sparse, are consistent with this distinction.[112] As a result, the absurdity that Professor Avtonomov purports to discover in my account of Russian law, based on the work of the Constitutional Court, the High Arbitrazh Court, and Professors Osminin and Khodakov, does not exist.

2.3.7 Professor Marochkin's contention that provisionally applied international treaties are not "international treaties of the Russian Federation" is incorrect

66. Professor Marochkin argues that all references to "international treaties of the Russian Federation" found in Russian legislation, including in statutes authorizing international arbitration of treaty-based investment disputes, must be understood as limited to treaties that have entered into force finally and conclusively. As a result, he argues, these references do not

upon the Government of the Russian Federation. Article 1 of the same Law in turn provides that the Government of the Russian Federation is (and thus acts as) a collective body.

[111] See at ¶¶ 29-30 of this Report.

[112] In Resolution No. 5 of the Supreme Court of October 10, 2003 (**Exhibit S-48**), the Supreme Court indicated cryptically that a treaty that had entered into force without legislative approval would not have hierarchical superiority over legislation. The Supreme Court did not explain, however, whether this result was dictated by Article 15(4) (unlikely given its lack of any authority to invalidate official acts as unconstitutional) or instead as a direct implication of Article 15(1)(a) of the FLIT, which precludes a treaty providing rules different from legislation from entering into final and conclusive force without confirmation from the Federal Assembly. The Resolution itself did not cite authority or otherwise provide reasons for its conclusion.

incorporate treaties made on behalf of the Russian Federation that are provisionally applicable. Professor Marochkin bases his argument on a strained reading of the definitions provision of the FLIT and provides no authority to support his reading.

67. Article 2(a) of that statute defines "an international agreement of the Russian Federation" as an agreement "concluded" with a foreign state or government or an international organization. Article 2(d) in turn defines "conclusion" as the expression of the Russian Federation's consent to be bound by the international treaty. In addition, Article 2(c) defines a "signing" as either a "stage in the conclusion of a treaty" or the means by which the Russian Federation expresses its consent to be bound by a treaty, if the parties so agree and the representative who signs has sufficient authority to give such consent. These formulations, in the view of Professor Marochkin, mean that all references to international treaties found in Russian law exclude treaties for which the expression of consent to be bound has not yet occurred. In the case of treaties that condition the expression of consent to be bound on subsequent ratification, Professor Marochkin contends, an initial signing of an agreement with foreign states does not make it a treaty.[113] Professor Marochkin's argument is plainly incorrect.

68. First and foremost, Professor Marochkin's argument is contradicted by the language of the Russian Constitution as well as the Constitutional Court's authoritative interpretation of that instrument. As this Report has observed at several points, Article 15(4) gives a superior place in the Russian legal hierarchy to "international treaties of the Russian Federation," without limiting this rule to treaties that have entered into force as a final and conclusive matter. The Constitutional Court has been clear that the hierarchical rule of Article 15(4) encompasses treaties made on behalf of the Russian Federation that by their terms apply provisionally. It has stated:

> In the context of requirements set forth in Article 15 (part 4) of the Constitution of the Russian Federation in conjunction with its Articles 2, 17 (part 1) and 19 (part 1), provisionally applied international treaties of the Russian Federation by their legal

[113] Marochkin Report at ¶¶ 30-38.

> Consequences, effect on rights, freedoms and duties of man and citizen in the Russian Federation are essentially equivalent to international treaties that have entered into force, ratified and officially published in accordance with the procedure established by federal legislation. Therefore, provisionally applied international treaties shall be officially published (made publicly available) like international treaties that have entered into force.[114]

69. The finding of the Constitutional Court—that the phrase "international treaties of the Russian Federation" in Article 15(4) captures equally treaties that have finally entered into force and provisionally applicable treaties—conclusively rebuts Professor Marochkin's strained argument. There is no debate between the parties that the references to "international treaties" in Article 9 and Article 10 of the 1991 and 1999 Foreign Investment Laws (**1991 Law** and **1999 Law**),[115] respectively, reflect the wording in Article 15(4) of the Constitution. Accordingly, these provisions then also allow arbitration of investor-state disputes based on provisionally applicable treaties of the Russian Federation.

70. There are many further problems with Professor Marochkin's imputation to Article 2 of the FLIT construing a general limitation on the legal definition of international treaties in Russian law. First, he fails to note that Article 2 itself does not address provisional application, either by providing a separate definition or by using the concept in any of its other definitions. It therefore does not distinguish between, on the one hand, consent to be bound through provisional application and, other the other hand, consent to be bound once an international treaty has entered into force as a final and conclusive matter.

71. Professor Marochkin also fails to account of copious references to "international treaties of the Russian Federation" in other laws, as the Constitution, the FLIT and the 1978 Law on the

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[114] Resolution 8-P of the Russian Constitutional Court of March 27, 2012, point 4.1 (**Exhibit S-34**). The paragraph of the Resolution immediately preceding the paragraph quoted in text, which also states that the rules contained in a provisionally applied international treaty become part of the legal system of the Russian Federation "like" international treaties that have entered into force, is quoted above in ¶ 36 of this Report.

[115] I note that Professor Marochkin alleges that my First Report interprets Articles 9 and 10 of the Laws broadly (see Marochkin Report at ¶¶ 22 and 47). This is plainly wrong. In my First Report, I explain that Articles 9 and 10 of the Laws must be interpreted in accordance with the normal meaning of the term "international treaty" under Russian constitutional law. See Stephan First Report at ¶¶ 195-196, 206-207, 220.

Procedure for Entry Into, Performance and Denunciation of International Treaties, that clearly encompass treaties that have not yet finally entered into force.

72. To begin with, one should note that the Constitution itself refers to international treaties of the Russian Federation in multiple places. These references are not limited to international treaties that have entered into force finally and conclusively, but rather extend to treaties in various stages of adoption. Provisions of the Constitution self-evidently use the term "international treaties of the Russian Federation" to include specifically those that have not yet finally entered into force. Thus Article 125(2)(d) authorizes the Constitutional Court to consider cases on the constitutionality of "international treaties of the Russian Federation that have not entered into force." To reinforce this point, the Federal Constitutional Law on the Constitutional Court of the Russian Federation refers to "international treaties of the Russian Federation" or "international treaty" in Articles 3(1)(d), 36, 42, 68, 72, 79, 88-91. Each of these references specifies that it encompasses treaties that have not yet finally entered into force.[116] The Constitutional Court in turn has carried out constitutional review of treaties that have not entered into force, as illustrated by Resolution 6-P of March 19, 2014, discussed above.[117] In fact, the Constitutional Court in Resolution 6-P accepted the provisionally applied Crimea Annexation Treaty to be an "international treaty of the Russian Federation."[118]

73. Other provisions of the Constitution reinforce the point that references to "international treaties of the Russian Federation" include treaties in all stages of adoption, not just treaties that have finally and conclusively entered into force. Most relevantly, Article 106(d) requires the Council of the Federation to participate in the consideration of ratification and denunciation of "international treaties of the Russian Federation." Consideration of

[116] Federal Constitutional Law on the Constitutional Court of the Russian Federation, FKZ No. 1 of July 21, 1994 (**Exhibit S-114**).
[117] See at ¶ 40 of this Report.
[118] Resolution No. 6-P of the Constitutional Court of the Russian Federation of March 19, 2014, point 1 (**Exhibit S-35**) ("the point at issue before the Constitutional Court of the Russian Federation in the present case is the international treaty between the Russian Federation and the Republic of Crimea").

ratification must take place prior to the final and conclusive entry into force of a treaty subject to legislative approval. If international treaties in Article 106(d) meant only treaties that have entered into force, Professor Marochkin evidently would require the legislature first to ratify a treaty, and then act again pursuant to that Article.

74. Even within the confines of the FLIT, Professor Marochkin's interpretation is contradicted by other provisions of that statute. Article 1(2) states that "this Federal Law shall apply to international treaties of the Russian Federation." Article 23 of the FLIT, which governs provisionally applicable treaties, manifestly is part of the "Federal Law." In particular, Article 23(1) provides that "an international treaty" may be applied provisionally by the Russian Federation, if that subsection's conditions are satisfied. Moreover, Article 23 is located in Part II of the FLIT, which addresses "Conclusion of International Treaties of the Russian Federation." In addition, Article 30 of the FLIT provides for official publication of "international treaties of the Russian Federation," and paragraph 2.1 of that Article provides specifically for the official publication of provisionally applicable treaties.

75. The internal logic of the FLIT itself thus indicates that provisionally applicable treaties are "international treaties of the Russian Federation." Thus, as Professor Marochkin holds that "international treaties of the Russian Federation" are treaties that the Russian Federation has expressed its intention to be bound to,[119] he must admit that the FLIT considers provisionally applied international treaties to be treaties to which the Russian Federation has expressed its consent to be bound to on a provisional basis. Indeed, no provision of the FLIT distinguishes consent to be bound by provisional application from consent to be bound finally and conclusively upon a treaty's entry into force.

76. Likewise, the 1978 Law on the Procedure for Entry Into, Performance, and Denunciation of International Treaties, which Professor Marochkin appears to believe formed part of "the existing legal rules within the Russian Federation's legal system" until adoption of the

[119] See at ¶ 2.3.7 of this Report.

FLIT,[120] indicates that, for its purposes, international treaties include "all international treaties of the U.S.S.R. regardless of their form or designation."[121] This law did not address in any way the question of provisional application. That the Soviet Union entered into provisionally applicable treaties during the time after adoption of the 1978 Law and up until its extinction as a state, however, indicates that the U.S.S.R. regarded provisionally applicable treaties as international treaties of the U.S.S.R. Thus, Russian law at the time of the commencement of the provisional application of the ECT did not limit the category of "international treaties of the Russian Federation" to those that had entered into force finally and conclusively.

77. Turning specifically to the 1991 Law on Foreign Investment[122], it seems clear that the legislature made no decision to exclude provisionally applicable treaties from the scope of Article 9, which twice refers to an "international treaty in effect on the territory of the R.S.F.S.R." At the time of adoption of the Law, the Russian Federation had not yet negotiated any international treaties on its own behalf with respect to foreign investment. Instead, it was bound by treaties negotiated by the U.S.S.R. The drafters confronted two issues: To what extent would the legislation uphold arbitration provided by treaties already made by the U.S.S.R., and to what extent would it apply to treaties entered into on behalf of the Russian Federation.

78. None of the various documents cited Professor Marochkin on the background to Article 9 of the 1991 Law refer to provisionally applicable treaties—these were mostly treaties in force.[123]

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[120] Marochkin Report at ¶¶ 29-30.

[121] Article 1 Law of the U.S.S.R. of July 6, 1978, "On the Procedure for Entry Into, Performance, and Denunciation of International Treaties of the U.S.S.R." (**Exhibit S-28**).

[122] In all relevant respects, the 1999 Law confirms the basic approach to international arbitration of investment disputes that the 1991 Law established. Like the 1991 Law, it refers to international treaties of the Russian Federation in general, and therefore also does not exclude provisionally applicable treaties. Stephan First Report at ¶¶ 206 et seq.

[123] Marochkin Report at ¶¶ 56-58. Professor Marochkin's references to a 1990 memorandum sent to the Supreme Soviet by Ms. Marysheva (¶¶ 56-56-57, 59) (SYM-08) and a collection of comments by state institutions and foreign companies on the draft of the 1991 Law on Foreign Investment (¶ 58) are equally futile. These sources refer to examples of existing U.S.S.R. treaties that Article 9 was expected to cover and Professor Marochkin infers from these examples that they were the only treaties covered by that Article. None of the quoted sources even suggested such a limitation.

The preparatory materials therefore had no occasion to discuss provisional application, and did not.

79. The interpretation of the phrase "international treaties of the Russian Federation" in Article 10 of the 1999 Law that Professor Marochkin proposes boils down to the same argument as he makes in respect of the 1991 Law, namely that statute's Article 9 covers only those treaties that have entered into force as a final and conclusive matter. However, as explained in this Section, this term is not limited to treaties that have entered into force as a final and conclusive matter.

2.4 Conclusion

80. In sum, in my view Professor Avtonomov is incorrect in his assertion that the priority of international treaties over inconsistent federal law provided by Article 15(4) of the Constitution does not include provisionally applied treaties such as the ECT. Professor Marochkin provides no compelling reason for interpreting Russian legislation in effect at the time of the commencement of provisional application of ECT as barring the acceptance of an agreement to arbitrate an international investment dispute through a provisionally applicable treaty.

3 CONSISTENCY OF INTERNATIONAL ARBITRATION OF INVESTMENT DISPUTES WITH RUSSIAN LAW

3.1 Introduction

3.1.1 Summary of my First Expert Report

81. In my First Report, I demonstrated that Russian law, far from prohibiting international arbitration of treaty-based investment disputes, specifically provides for it. I observed that the Russian legislation in effect at the time of the signing of the ECT anticipated and provided for international arbitration of investment disputes. The 1991 Law contemplated submission of foreign investment disputes to arbitration on the basis of an international treaty and the 1999 Law confirmed the arbitrability of such disputes.[124]

82. I further observed that Russian law concerning contractually based arbitration sometimes distinguishes between disputes based on public law, on the one hand, and private law, on the other hand. I explained that Russian law did not apply this distinction to disputes grounded in international law, because Russian law treats international law as a body of law that is separate and distinct from domestic law.[125]

83. Russian law does not make the arbitrability of disputes based on provisions of a treaty turn on the public-private categorization on which Professor Asoskov relies. The sources cited by Professor Asoskov actually confirm the distinct character of international legal obligations within the Russian legal system and the irrelevance of the public-private distinction to the question of whether disputes arising under international treaties can be settled by arbitration.[126]

84. Russian scholars agree that international law is a separate legal system. Its rules, even though they have effect in the Russian legal system, do not become rules of Russian law but retain

[124] Stephan First Report at ¶¶ 183-219.
[125] Id. at ¶¶ 174-182.
[126] Id. at ¶¶ 175-180.

their international-law character. The Constitutional Court also has recognized the distinctive character of international law within the Russian legal system.[127]

85. I further described the consistent and extensive practice of the Russian Federation of submitting to international arbitration disputes irrespective of any domestic limitations on arbitrability of public law disputes. That treaty practice in particular includes the conclusion of treaties providing for arbitration without requiring prior parliamentary approval.[128]

86. My First Report described two particular instances where the Russian Federation accepted treaty obligations to submit disputes to arbitration without legislative confirmation. These were the Agreement between the Government of the Russian Federation and the Organization for Economic Cooperation and Development on Privileges and Immunities Granted the Organization of June 8, 1994, and the Agreement between the Government of the Russian Federation and the Government of Australia on Air Traffic of June 11, 1994.[129] Both of these treaties were signed a few months before the Russian Federation signed the ECT. The OECD Agreement, which by its terms applied provisionally in advance of its ratification, agreed to submit to international arbitration issues such as taxation and immunity from Russian jurisdiction.[130] These are precisely the type of issues Professor Asoskov categorizes as public law issues. Similarly, the Australian Air Traffic Agreement, which took effect upon signature, agreed to submit to international arbitration issues such as the use of Russian air space, customs control and flight security.[131]

87. Together, these treaties demonstrate that, during the period that it was negotiating and ultimately assenting to the ECT, the government of the Russian Federation acted on, and induced its treaty partners to rely on, its constitutional understanding that legislative approval

[127] Id. at ¶¶ 165-167.
[128] Id. at ¶ 181.
[129] Id. at ¶ 181.
[130] Article 16 of the Agreement between the Government of the Russian Federation and the Organization for Economic Cooperation and Development on Privileges and Immunities Granted to the Organization in the Russian Federation of June 8, 1994 (**Exhibit S-23**).
[131] Article 17 of the Agreement between the Government of the Russian Federation and the Government of Australia on Air Traffic of July 11, 1994 (**Exhibit S-92**).

was not a necessary condition to submission of disputes based on an international agreement to international arbitration.

3.1.2 Summary of the position of Professor Asoskov

88. In his Report to the District Court (**2014 Asoskov Report**), Professor Asoskov described only two types of disputes, public law and private law disputes, and maintained that Russian law contains a deep and pervasive principle as to the non-arbitrability of public law disputes (e.g., tax and bankruptcy disputes), unlike disputes based on private law pursuant to which persons enjoy freedom of contract. In his view, international investment disputes fall into the category of public law disputes and therefore are not arbitrable absent specific and unambiguous legislative derogations. Thus, he declared:

> [T]he basic criteria to distinguish civil law disputes from public-law disputes have been formulated by the Constitutional Court in its Resolution No. 10-P, namely: (i) the nature of the legal relations that give rise to the dispute, and (ii) the composition of the parties to the dispute.[132]
>
> There is no doubt that disputes related to the assessment by tax authorities of additional taxes and tax sanctions are public-law disputes because all of the aforementioned criteria characterizing a public-law dispute are present […].[133]
>
> […] Russian law has always prohibited arbitration of public-law disputes. This prohibition results directly from the main test used for determining the limits of arbitrability of disputes in Russian law, i.e. the criterion of the existence of civil law relations between the parties.[134]
>
> [T]he prevailing opinion is that an investor's claims against the State for compensation of damages (payment of compensation) caused by unlawful actions (failure to act) of State bodies, or by the enactment of unlawful acts, have a public law basis, and thus may not be referred to arbitration.[135]

89. In his more recent opinion submitted to this Court (**2017 Asoskov Report**), Professor Asoskov modifies his views. He now acknowledges the existence of an "additional (third) category of international disputes,"[136] something he had left out of his earlier analysis. He

[132] 2014 Asoskov Report at ¶ 25.
[133] Id. at ¶ 43.
[134] Id. at ¶ 11.
[135] Id. at ¶ 68.
[136] 2017 Asoskov Report at ¶ 70.

concedes that, under Russian law, these international law disputes can be settled through international arbitration.

90. Professor Asoskov, however, attempts to exclude from this category of arbitrable "international disputes" treaty-based investment disputes such as those between HVY and the Russian Federation, which is based on the ECT:

> From the perspective of Russian law and Russian courts, one can refer to an additional (third) category of international disputes only with respect to disputes between sovereign States, international governmental organizations or equivalent persons (so-called nations struggling for self-determination, which some Russian authors recognize as independent actors of international law). Private persons (natural persons and legal entities) cannot act as parties to disputes among sovereign equals.[137]

91. Professor Asoskov reiterates his earlier conclusions in his 2017 Report that (i) the "principle of non-arbitrability of public law disputes is completely applicable to investment disputes between a foreign investor and the state,"[138] (ii) the 1991 and 1999 Laws "do not create exceptions to the general rule of non-arbitrability of public law disputes,"[139] (iii) "an exception to the general rule of non-arbitrability of public law disputes can only be established by a ratified international treaty,"[140] and (iv) the "rules of Article 26 of the ECT are inconsistent with Russian federal statutes."[141]

3.1.3 Summary of the position of Professor Yarkov

92. The Russian Federation has added an argument to the effect that HVY cannot rely upon the 1991 and 1999 Laws because they supposedly include an implicit unwritten preclusion of protection of any foreign investment that does not involve a "foreign contribution of capital."[142] According to the Russian Federation, HVY are "offshore structures owned and controlled at all relevant times by nationals of the Russian Federation."[143]

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[137] Id. at ¶ 70.
[138] Id. at ¶ 53.
[139] Id. at ¶ 21.
[140] Id. at ¶ 21.
[141] Id. at p. 47 (heading).
[142] Yarkov Report at ¶ 8.
[143] Id. at ¶ 7.

93. The Russian Federation has submitted a Report by Professor Yarkov (**Yarkov Report**) in support of its proposition that the 1991 and 1999 Laws require "foreign contribution of capital."[144] Professor Yarkov asserts that HVY's investment does not qualify as a "foreign investment" within the meaning of the 1991 and 1999 Laws.[145] As a result, he concluded, those statutes have no bearing on this dispute:

> As I explain below, the 1991 FIL and the 1999 FIL are indeed legally irrelevant in the present case. Based on the factual circumstances, which I have been asked to assume, HVY's ownership of YUKOS shares was not a "foreign" contribution of capital and, in any event, was not an "investment." Accordingly, Professor Stephan's suggestion that the 1991 FIL or the 1999 FIL authorized HVY to arbitrate claims arising under the ECT against the Russian Federation must be rejected.[146]

3.1.4 Structure of this Section

94. In Section 3.2 of this Report, I review the treatment of public law, private law, and international law disputes under Russian law. Section 3.2.1 demonstrates that Russian law regards a dispute between a foreign investor and a state based on an international investment treaty as neither a public law nor a private law dispute. The legal relations formed by such treaties involve neither hierarchical subordination, as in public law, nor equality of rights under civil law, as in private law. Section 3.2.2 shows that Professor Asoskov wrongly claims that Russian law allows arbitration only of private law disputes. Finally, Section 3.2.3 establishes that Asoskov errs in his assertion that Russian law regards HVY's dispute with the Russian Federation under the ECT as a public law, and not an international law, dispute.

95. In Section 3.3, I explain that Russian Law expressly provides for international arbitration of all aspects of investment disputes arising under a treaty.

96. In Section 3.4, I explain that the Explanatory Note to the ECT submitted by the Russian Government to the Duma shows that arbitration of ECT disputes under Article 26 of that treaty was completely consistent with existing Russian law.

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[144] Id. at ¶ 8.
[145] Id. at ¶¶ 8, 13 and 29.
[146] Id. at ¶ 8.

97. In Section 3.5, I explain that the Yarkov Report is irrelevant to the issues in this case and in any event does not provide an accurate account of Russian law.

3.2 Any distinction in Russian Law between public law disputes and private law disputes has no bearing on this case

3.2.1 Under Russian law, international law disputes are neither public law disputes nor private law disputes

98. My First Report demonstrated that Russian law regards international law as a separate legal system, distinct from Russian domestic law.[147]

99. As that Report indicated, Russian law recognizes several important distinctions between international and domestic law. First, international law does not give the Russian Federation (or any other state) the authority unilaterally to impose legal rights and duties on other subjects of international law, even though its domestic law gives the Russian Federation exactly this authority with respect to the subjects of its domestic law.[148] Second, under international law, the Russian Federation can engage with other subjects of international law only on the basis of sovereign equality.[149] Third, when an international treaty confers rights on third parties, such as private persons or entities that are foreign investors, it imposes a corresponding duty on the Russian Federation, as a party to the treaty, that is owed to the sovereigns with whom it has agreed to recognize such rights and assume such duties. Those rights and duties, based on international law, cannot be modified by the domestic law of the Russian Federation, even though its domestic law may provide means to fulfil its international legal obligations.[150] Fourth, the means of enforcement of international law is autonomous. International law does not allow the Russian Federation unilaterally to compel subjects of international law to submit to the jurisdiction of (certain) Russian courts, just as international

[147] Stephan First Report at ¶¶ 166-168.
[148] Id. at ¶¶ 165-171.
[149] Id. at ¶ 170.
[150] Id. at ¶¶ 169-170.

law does not give subjects of international law the authority to compel the Russian Federation's domestic courts to enforce international legal obligations against the Russian Federation. Any adjustments in the autonomy of the enforcement mechanisms of these separate legal systems must derive from mutual consent based on the principle of sovereign equality.[151]

100. These key features explain why any distinction made in Russian law between public and private legal relations does not work when extended to international legal relations. A handful of Russian scholars have tried to make this extension, but without success.[152] They recognize that the rules of international law share some attributes with those of domestic public law and some with those of domestic private law. This is because international law relations will inevitably have elements that, from a domestic law perspective, can resemble private law relations, and elements that can resemble public law relations. As explained in my First Report, Russian courts do not categorize international law disputes as Russian domestic public or private law disputes, because distinguishing domestic public and private law elements in international law disputes is meaningless. Public and private law elements only have relevance within the purely domestic context.[153]

101. The 2014 Asoskov Report identified application of the principle of "subordination" as the defining aspect of the principle of non-arbitrability of public law disputes under Russian law. Professor Asoskov stated that "[t]he nature of public law relations is characterized by the principle of subordination (subjection)." [154] Yet, under international law, the Russian Federation cannot engage with other subjects of international law on the basis of "subordination."

[151] Id. at ¶¶ 167-172.
[152] Id. at ¶ 173.
[153] Id. at ¶¶ 165-168.
[154] 2014 Asoskov Report at ¶ 35.

102. Professor Asoskov appears to have realized the difficulty with this argument. He has changed the position adopted in his 2014 Report and now accepts that international law disputes may be settled through international arbitration.[155]

103. Professor Asoskov concedes that international disputes do not involve subordination. He correctly observes that Russian law distinguishes international law disputes from domestic law disputes having public law elements, and that international law relies on the principle of sovereign equality. Accordingly, he states that "the distinctive feature of international disputes is that they derive from the relations of sovereign equality."[156]

104. Rather than accepting that disputes based on an international investment treaty are international disputes, however, Professor Asoskov has invented new distinctions to resist this indisputable conclusion.

105. Professor Asoskov now erroneously argues that, from the perspective of Russian law, international law disputes can involve only states, international organizations, and "equivalent persons."[157] No international law dispute "involving private persons" can be considered an international law dispute and "will always be characterized by Russian courts as public law or private law disputes."[158]

106. This new argument has no basis in Russian law, and Professor Asoskov does not provide a single legal authority confirming his position. Once Professor Asoskov accepts that states can delegate to international organizations or "equivalent persons" the capacity to enforce duties owed to states under international law without changing the character of the dispute, he has given away the game. Delegating to a third party the capacity to bring a claim before an international tribunal based on a legal commitment given to another state under international law does not alter the nature of the dispute. Neither international nor Russian law

[155] 2017 Asoskov Report at ¶ 70.
[156] Id. at ¶ 71.
[157] Id. at ¶ 70.
[158] Id. at ¶ 74.

distinguishes between delegations to entities created under international law, such as international organizations, and delegations to persons with legal attributes under domestic law, such as legal or natural persons. No matter to whom international law assigns standing to seek redress for claims created by international law, the assertion of a treaty-based right before an international tribunal constitutes an international law dispute.

107. Professor Asoskov cites no authority or evidence to support his arbitrary truncation of international law disputes to disputes between States, international organizations and "equivalent persons."

108. The following subsections demonstrate the deficiencies of his attempt to shrink this category so as to avoid the obvious conclusion that Russian law contains no general rule barring international arbitration of treaty-based investment disputes.

3.2.1.1 Professor Asoskov fails to recognize the distinct legal nature of international law disputes

109. Russian law regards international law disputes as *sui generis* and not bound by any distinction between public and private law that may have a bearing on arbitrability of domestic legal disputes. In attempting to exclude treaty-based investor-state disputes from the scope of international law disputes, Professor Asoskov ignores the nature of international law disputes as based on the coordinated will of equal sovereigns. He further ignores the fundamental difference between international arbitration based on an agreement between sovereigns and arbitration based on a domestic-law contract. As Russian scholars agree, rules of international law, even though they have effect in the Russian legal system, do not become rules of Russian law but retain their international law character.[159] For the same reason, rules of international law cannot be considered rules of Russian public law or Russian private law.

110. While Professor Asoskov now accepts in his 2017 Report that Russian law treats international law disputes as separate and distinct from disputes under domestic (public or private) law, he

[159] Stephan First Report at ¶ 166.

claims that this is only true when none of the parties to the dispute is a private party (a natural person or private entity). Professor Asoskov offers no evidence to support his assertion that Russian law bases its characterization of a legal controversy as an international law dispute on the nature of the entity asserting the claim, rather than on the legal basis for the dispute. Instead, Professor Asoskov offers an inapposite analogy. After conceding that Russian law recognizes international legal disputes as a distinct category, he seeks to obliterate the category by analogizing everything within it to either public law or private law disputes. Professor Asoskov posits that "public law disputes are characterized by the fact that they arise from the relations of subordination (inequality)."[160] Professor Asoskov derives from "one of the basic principles of international law is the principle of sovereign equality of States"[161] the proposition that accordingly, "international [law] disputes between equal sovereigns are more similar to private law disputes than to public law disputes, since private law disputes are also characterized by the equality of the parties (the principle of coordination)."[162] He then pretends to be able to detect a legally relevant public element in (certain) relations between foreign investors and a state and claims that these relations are thus not arbitrable.[163] Both Professor Asoskov's approach and his reasoning are fundamentally flawed.

111. First, they are inherently contradictory. Professor Asoskov first acknowledges that international law is considered separate and distinct from the domestic law distinction between public and private law, but then attempts to superimpose the very same distinction on international law. This is wrong.

112. The Constitutional Court of the Russian Federation has recognized the distinctive character of disputes based on international law and heard by a tribunal set up under an international treaty. In considering the status under Russian law of judgments of the European Court of

[160] 2017 Asoskov Report at ¶ 72.
[161] Id. at ¶ 71.
[162] Id. at ¶ 72.
[163] Id.

Human Rights, the Constitutional Court recognized that these cases constitute international law disputes even though they have private persons as parties. In Resolution No. 12-P of April 19, 2016, the Constitutional Court characterized a judgment of the European Court of Human Rights as "passed on the basis of the provisions of the Convention on a complaint against Russia with respect to persons participating in the case and within the framework of a specific subject-matter of a dispute."[164] It further ruled that the recognition of such judgments was an integral part of Russia's legal system as a result of the mandate of Article 15(4) of the Constitution.[165]

113. Second, Russian law does not treat international law differently depending on the status of a legal subject invoking it. There is simply no authority that supports such a conclusion. Russian law does not contain any rules that change the nature of international law, depending on how domestic law defines the legal subject, for instance, as either a public body or a private citizen.

114. Professor Asoskov alleges—but does not substantiate or refer to any authority—that disputes involving private entities must be excluded from the category of international law disputes because private entities cannot engage in international law relations with states on the basis of sovereign equality.[166] He overlooks that what private parties invoke, when they exercise the right under an international treaty (such as the ECT) to enforce treaty obligations directly against a state, is a right that arises directly out of the commitments made by states to one another on the basis of sovereign equality. Moreover, when states join treaties that confer on private persons rights to investment protection, they do so precisely to allow these persons to enforce these rights directly against a state on a procedurally equal footing. The international law nature of a sovereign commitment, therefore, does not change just because it is an

[164] Resolution of the Constitutional Court of the Russian Federation No. 12-P of April 19, 2016 (**Exhibit S-117**), point 1.2.
[165] Id.
[166] 2017 Asoskov Report at ¶ 70.

investor rather than its home state who brings the claim. The substantive rule that an investor invokes still originates from treaty commitments that states have made to other states on the basis of sovereign equality and, as such, lacks the element of subordination that Professor Asoskov says is necessary for applying the private-public dichotomy in domestic Russian law.

115. Third, the argument also confuses the status under Russian law of treaty-based international tribunals with that of arbitral bodies that exercise jurisdiction over disputes on the basis of private contracts. The offer to arbitrate treaty-based disputes is not found in a contract between the disputants, but rather in an agreement between two sovereigns. In that sense, the basis for an investor-state arbitration is found in an agreement of two states. The exercise of this jurisdiction represents not an act of subordination of a subject to a state, but rather the fulfilment of an international legal obligation that rests on the principle of sovereign equality.

116. What the 2017 Asoskov Report ignores is that treaty-based investment disputes are international law disputes not only because of the international law basis of the substantive claim made by the investor, but because the means of recourse also rest on international law. From the perspective of Russian law, a failure to accept the jurisdiction of a tribunal established by a treaty is every bit as much a breach of international law as is a violation of the substantive standard of protection set by the same treaty. The exceptional status of treaty obligations under Russian law rests ultimately on Article 15(4) of the Russian Constitution, as discussed in Section 1.3 of my First Report and Section 2.3.1 of this Report.

117. Fourth, Professor Asoskov's attempt to deny the exceptional status of international legal disputes under Russian law is not only illogical, but contradicted by Russian legal practice. As indicated in my First Report, Russia has entered into many treaties that submit to international arbitration matters that, were they to arise in a domestic context, would be considered a public law dispute and could not be made the subject of a domestic contract to arbitrate. In the months before it signed the ECT, the Russian Federation entered into several such

international agreements without seeking parliamentary approval.[167] Another example is the Agreement between the Government of the Russian Federation and the Government of the Republic of Armenia on Conditions of the Purchase and Sale of the Shares and Further Activity of Closed Joint-Stock Company Gazprom Armenia on December 2, 2013 (**Gazprom Armenia Agreement**),[168] pursuant to which Armenia undertook to sell to Gazprom a 20% stake in Gazprom Armenia, its national gas company, giving Gazprom 100% ownership in Gazprom Armenia.[169] The Gazprom Armenia Agreement also provided for a number of obligations that, according to Professor Asoskov's logic, were of a public law nature, for instance, on cooperation in the development of Armenia's gas infrastructure (Article 4), promotion of equal conditions for the States' companies (Article 8), or a number of BIT-like guarantees (Article 6 and 7). Article 9 of Gazprom Armenia Agreement provides for arbitration of "[d]isputes between a Party and *economic entities of the other Party* concerning the application of the present Agreement and the performance of obligations thereunder."[170] The Gazprom Armenia Agreement applied provisionally to the Russian Federation from January 2, 2014, *i.e.*, after 30 days from its signature,[171] and entered into force without ratification on January 8, 2014.

[167] Stephan First Report at ¶ 181.
[168] Agreement between the Government of the Russian Federation and the Government of the Republic of Armenia on Conditions of the Purchase and Sale of the Shares and Further Activity of Closed Joint-Stock Company Gazprom Armenia of December 2, 2013 (**Exhibit S-118**). The original name of Gazprom Armenia was ArmRosgazprom, which was also the name of the agreement's initial title. By Protocol of September 7, 2015, the title was amended to reflect the change of the company's name to Gazprom Armenia.
[169] Id. Article 1.
[170] (Emphasis added.) The term "economic entities" is not defined in the agreement, but clearly applies to legal persons that are not "sovereign States, international governmental organizations or equivalent persons," as Professor Asoskov would have it. 2017 Asoskov Report at ¶ 70. The term certainly includes Gazprom and Gazprom Armenia, but could also include other companies that may become involved in the performance of the agreement.
[171] See Agreement between the Government of the Russian Federation and the Government of the Republic of Armenia on Conditions of the Purchase and Sale of the Shares and Further Activity of Closed Joint-Stock Company Gazprom Armenia of December 2, 2013 (**Exhibit S-118**), Article 11.

118. This practice plainly refutes Professor Asoskov's suggestion that Russian law prohibits arbitration of international law disputes where they bear some resemblance to domestic public law disputes.[172]

3.2.1.2 Professor Asoskov relies on authorities that do not support his claim that international law disputes involving private parties are subject to the domestic private-public law dichotomy

119. Professor Asoskov has introduced new authorities to support his assertion that, under Russian law, international law disputes exclude those where private persons appear as parties. None of these support his thesis. First, Professor Asoskov mischaracterizes my position so that he could offer evidence that contradicts a claim I did not make. Professor Asoskov suggests that my First Report posited that any "application of provisions of international treaties" in a case would "make […] it impossible to classify the dispute as a public law dispute."[173] But this is not what my First Report indicated.

120. First, as I observed in my First Report, [174] and Professor Asoskov does not dispute it, Russian law treats international law as a separate legal system. Its rules, even though they have effect in the Russian legal system, do not become rules of Russian (public or private) law but retain their international law character. Russian law regards an international law dispute as existing in the "international legal order."[175] Such a dispute arises when a subject of international law violates an obligation imposed under international law, in particular an international treaty, and a person empowered by international law seeks recourse under international law for that violation. The rules of international law, and not domestic law, govern such a dispute.[176] That is precisely the case here. The dispute between HVY and the Russian Federation arises out of an international treaty that also provides for international means of dispute resolution and is

[172] 2017 Asoskov Report at ¶ 59.
[173] Id. at ¶¶ 57, 60-61.
[174] Stephan First Report at ¶¶ 166-169.
[175] Id. at ¶ 162.
[176] Id.

governed exclusively by international law. In the arbitration, HVY invoked the Russian Federation's responsibility under international law—they did not put forward claims based on Russian law.

121. By contrast, a domestic law dispute, *e.g.*, between two companies about the enforcement of a contract governed by Russian law, involves domestic legal relations. It is possible that in such domestic law disputes rules originating from international treaties—for example, from the United Nations Convention on Contracts for the International Sale of Goods (CISG), as in the cases referred to by Professor Asoskov—regulate certain aspects of the parties' domestic legal relations (because the CISG is part of the Russian legal system). This does not change the nature of the dispute, which is a domestic law dispute. Accordingly, Professor Asoskov responds to a non-point.

122. Second, without exception, the cases cited by Professor Asoskov, even if read as forcefully as possible in his favor, only prove an irrelevant and inconsequential point. They represent instances where questions of international law arise in the context of a dispute governed by domestic law. International law was only tangentially relevant in these Russian domestic cases and was not the basis for the claims in dispute. None involved arbitration. As a result, these cases do not and cannot provide any answer as to arbitrability of investor-state treaty claims in general or HVY's claims in particular. Indeed, Professor Asoskov cites these cases only because they contain references to international treaties, not because they provide any authority on the issues of arbitrability.[177]

123. Professor Asoskov also argues that references by Russian courts to Chapter 24, Section III of the Arbitrazh Procedural Code as the basis of their jurisdiction over domestic law disputes

[177] See, *e.g.*, 2017 Asoskov Report at ¶¶ 62-65 (citing Resolution No. KG-A40/12036-09 of the Federal Arbitrazh Court for the Moscow Circuit of November 26, 2009 (AVA92); Resolution No. A52-5378/2008 of the Federal Arbitrazh Court for the North-West Circuit of August 10, 2009 (AVA90); Resolution No. A53-7504/2008-C4-10 of the Federal Arbitrazh Court for the North Caucasus Circuit of March 18, 2009 (AVA89)). Each of these cases involved a domestic legal dispute where a person's entitlement to a legal privilege turned on the application of a treaty. Under Russian law, reference by a domestic court with jurisdiction over a domestic legal dispute to a treaty provision that had been incorporated into the domestic legal order did not convert such dispute into an international law dispute.

where an international treaty supplies a substantive rule relevant to the dispute, provides support for his claim that Russian courts will always classify international investment disputes as either public law disputes or private law disputes.[178] He claims that this is so because Chapter 24, Section III of the Arbitrazh Procedural Code refers to "cases arising from administrative and other public law relations."[179] Again, the cases referred to by Professor Asoskov do not involve international law disputes but merely involve disputes arising under domestic laws where questions about international law are relevant in that context. None of these cases involves a Russian court classifying any treaty—let alone an international investment treaty—as a Russian public law or private law. Moreover, neither any of these cases, nor Chapter 24, Section III of the Arbitrazh Procedural Code even suggest that international investment disputes are non-arbitrable public law disputes.

124. Professor Asoskov's claim is further irreconcilable with the jurisprudence of the Constitutional Court, which has made it clear that provisions of the Arbitrazh Procedural Code establishing an arbitrazh court's jurisdiction do not render the disputes covered by those provisions non-arbitrable. In Resolution 10-P of May 26, 2011, the Constitutional Court held:

> The above rule [in Article 248(1)2) of the Code] (in terms of its meaning in the context of other regulations of Chapter 32 "Jurisdiction of Arbitrazh Courts in the Russian Federation to Hear Cases Involving Foreign Persons" of the Arbitrazh Procedure Code of the Russian Federation) is intended to delimit the jurisdiction of courts from different countries to consider cross-border disputes. The interpretation of this rule as establishing exclusive jurisdiction of arbitrazh courts over disputes concerning immovable property, i.e. ruling out the possibility to refer such disputes to arbitration, is not based on the understanding of the exclusive jurisdiction concept as imposing unalterable jurisdictional rules within the system of State courts in order to exclude prorogation agreements, but not preventing the parties from using alternative jurisdictional forms subject to compliance with general rules prescribed for such forms by the law.[180]

The Code's assignment of a category of disputes to judicial jurisdiction, the Court thus concluded, did not render such cases non-arbitrable, if a proper legal basis for arbitration

[178] Id. at ¶¶ 64-65.
[179] Id. at ¶ 64.
[180] Resolution of the Constitutional Court of the Russian Federation No. 10-P of May 26, 2011 (**Exhibit S-76**), point 4.

otherwise existed. An international treaty to which the Russian Federation is a party constitutes exactly such a proper legal basis.

125. Third, Professor Asoskov relies on a single case for the proposition that the "principle of non-arbitrability of public law disputes is completely applicable to investment disputes between a foreign investor and the state exercising its authoritative powers as a sovereign."[181] The case, OOO Aldega v. Krasnozavodsk,[182] involved a dispute between a Russian company and a Russian municipality arising out of the performance of a contract to build residential housing. Significantly, the case involved neither a foreign investor nor international law. Professor Asoskov cannot derive any support from this decision for the alleged rule that disputes between investors and states under international law are non-arbitrable, nor can he point to any other authority under Russian law.

126. Fourth, Professor Asoskov asserts that the "legal regulation of foreign investments is based on the classical division into public law (administrative law) and private law (civil law)."[183] Yet the evidence he presents shows only that this "classical division" is relevant to domestic legal regulation. He fails to present a single item indicating that this division is relevant to international law, much less to the specific question of the arbitrability of disputes arising from the international legal regulation of foreign investment. Thus he cites to part of a dissertation that discusses Russian domestic legal regulation of investments in Russia, but not treaty regulation.[184] In ¶ 68, Professor Asoskov refers again to the work of S.I. Krupko. I have already addressed it in my First Report.[185] In particular, I explained that, regardless of her attempt to categorize investor-state disputes as to their "origin" into those with predominant public or private "aspects," S.I. Krupko admitted that investor-state disputes can be submitted

[181] 2017 Asoskov Report at ¶ 53.
[182] Resolution No. 17042/11 of April 3, 2012, of the Presidium of the High Arbitrazh Court of the Russian Federation (AVA17), discussed in 2017 Asoskov Report at ¶¶ 54-55.
[183] 2017 Asoskov Report at ¶ 69.
[184] Id. (citing N.G. Doronina, Legal Regulation of Foreign Investments (Articulation of Problems and Alternate Solutions), Dissertation for a Doctor's of Law Degree, The Institute of Legislation and Comparative Law under the Government of the Russian Federation. Moscow, 1996, pp. 63-64 (AVA66).
[185] Stephan First Report at ¶ 173 and accompanying footnotes.

to arbitration if there is a corresponding arbitration agreement.[186] Professor Asoskov's claim that in referring to "arbitration agreements" S.I. Krupko has only bilateral investment treaties (**BITs**) in mind[187] misinterprets what S.I. Krupko said and is not supported by the text. He also cites to cases where Russian domestic law incorporates by reference rules found in international treaties and applies them to domestic disputes of a public law character.[188] Throughout, he confuses domestic law disputes that have international law elements, which may be characterized as public or private depending on their domestic legal character, with disputes governed fully by international law, including the provision of recourse and remedy, as in this case.

127. Finally, the case law of the Supreme Court of the Russian Federation shows, contrary to Professor Asoskov's position, that even domestic public law disputes can be considered arbitrable if the legal relation involved has an "international character." In its Resolution No. 305-ES15-20073 of July 28, 2017, a panel of the Chamber for Commercial Disputes addressed the issue of the arbitrability of a contract between two legal persons for the

[186] S.I. Krupko herself appears to accept the "permissibility of settlement in international commercial arbitration of investment disputes of public-law character." S.I. Krupko, Investment Disputes Between a State and a Foreign Investor at 107 (BEK 2002) (**Exhibit S-84**). As I explained in my First Report ¶ 173 some Russian scholars have attempted to apply the public-private dichotomy to investment disputes. However, these authors do not claim that this would limit or bar this submission of such investment dispute under international treaties to international arbitration. See also S. N. Tagaeva, Problems of Choice of Law in Resolving International Disputes, 3-4 Business, Management and Law (2017) (**Exhibit S-119**), p. 3:

> Investment disputes of a public-law nature arising from non-compliance with the provisions of international instruments on the promotion and reciprocal protection of investments. Most often these are disputes relating to the issues of compensation for expropriation and nationalisation, i.e., the dispute between the investor and the recipient state is related to "unilateral sovereign acts of the state to interfere in investment activities – a change in the conditions of investment activity by means of amending the legislation of the recipient state, the expropriation of investments or measures similar to it; other actions of state bodies and officials that infringe the rights of foreign investors; the granting of fiscal benefits and privileges. In this category of disputes the state primarily acts as a sovereign". In their turn, states which have concluded international treaties on the protection of investments, act as parties to a dispute. Quite often investment disputes of a public-law nature are considered by arbitration tribunals.

[187] 2017 Asoskov Report, footnote 56.

[188] Thus Professor Asoskov cites an academic commentary as authority for the uncontested claim that Russian law does not provide a mechanism for settlement of domestic trade law disputes, such as customs payments, by arbitration. 2017 Asoskov Report at ¶ 29 (citing Commentary on the Law of the Russian Federation "On International Commercial Arbitration" (A.S. Komarov, S.N. Lebedev, V.A. Musin, eds., St. Petersburg, 2007, at pp. 26-27 (AVA86)).

establishment of a utility connection.[189] The Supreme Court determined that the contract's arbitration clause was unenforceable because the petitioner, although formally a private entity, had been delegated certain public functions and drew on the state budget to cover its costs, including those based on the contract.[190] The Supreme Court observed, however, that a different outcome could follow if the matter were an international law dispute:

> [S]uch disputes may be deemed arbitrable, if the legal relations from which the dispute arose assure a more important public interest (in particular, a public need for goods, works, services that cannot be assured otherwise, for example *in relations of an international character*).[191] (Emphasis added.)

The Supreme Court indicated, in other words, that even in the domestic law context, the presence of an international element can make arbitrable an otherwise non-arbitrable dispute, including when one of the parties is a private party.

3.2.2 Professor Asoskov wrongly asserts that Russian law allows arbitration only of private law disputes

128. In his 2017 Report, Professor Asoskov argues, on the basis of three federal statutes which he claims are "three key federal statutes governing questions of arbitrability,"[192] that Russian law permits arbitration only of "private law (civil law) disputes."[193] These statutes are the Federal Law No. 5338-1 of July 7, 1993, on International Commercial Arbitration, the 1964 Civil Procedure Code of the R.S.F.S.R., and the 1992 Arbitrazh Procedure Code of the R.S.F.S.R.[194] Each of these enactments was in effect at the time that the Russian Federation signed the ECT. None, however, imposed the limit on arbitration that the Report ascribed to them.

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[189] Decision of the Supreme Court of the Russian Federation in the case No. 305-ЭС15-20073, A40-188599/2014 of July 28, 2017 (**Exhibit S-120**).
[190] Id.
[191] Id. at pp. 13-14. This wording was repeated in Resolutions of Arbitrazh Court of Moscow District No. F05-11789/2017 in case No. A40-40850/2017 of August 17, 2017 (**Exhibit S-121**) and No. F05-15362/2017 in case No. A40-70470/17 of October 24, 2017 (**Exhibit S-122**).
[192] 2017 Asoskov Report at ¶ 24.
[193] Id. at ¶ 23.
[194] Id. at ¶ 24. Throughout the text of his 2014 Report presented to the District Court, Professor Asoskov incorrectly, and perhaps misleadingly, referred to the first of these statutes as the "International Arbitration Law," thereby eliding its limitation to commercial, and not investment, arbitration. 2014 Asoskov Report, ¶ 13. He did use a correct translation in footnote 7 of the 2014 Report. The 2017 Asoskov Report accurately translated the name of the law.

129. First of all, Professor Asoskov does not explain why these statutes are "key" for determining the arbitrability of international investment disputes between a state and a foreign investor. To the contrary, Professor Asoskov concedes that the matter of investor-state arbitration is regulated by different statutes—*viz.*, the 1991 and 1999 Laws discussed in Section 3.3 of this Report—which contain no reference to any distinction between private law and public law.[195] The three federal laws referenced by Professor Asoskov do not purport to regulate or limit any issues (including any arbitrability issues) that fall outside their carefully circumscribed scope. A typical example is Article 1(4) of the International Commercial Arbitration Law, which provided that the law "does not affect any other law [...] by virtue of which certain disputes may not be submitted to arbitration or *may be submitted to arbitration only according to provisions other than those of the present law*."[196]

130. Moreover, as indicated in my First Report, each of these enactments expressly states that their rules apply only in the absence of others imposed by an international treaty.[197] Article 1(5) of the 1993 International Commercial Arbitration Law provided:

> If an *international treaty of the Russian Federation establishes rules other than those which are contained in the Russian legislation* relating to arbitration (third-party tribunal), *the rules of the international treaty shall be applied.*[198] (Emphasis added.)

131. Article 25 of the 1964 Civil Procedural Code, in the amended version in effect at the time of the signing of the ECT, provided:

> Courts shall also review cases with foreign citizens, stateless persons, foreign enterprises, and organizations participating in them, *provided that no alternative is stated in interstate agreements, international agreements, or agreements between the parties*.[199] (Emphasis added.)

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[195] 2014 Asoskov Report at ¶ 69.
[196] Article 1(4) of the Federal Law No. 5338-1 of July 7, 1993, "On International Commercial Arbitration" (**Exhibit S-85**). (Emphasis added.)
[197] Stephan First Report at ¶¶ 175, 177-78.
[198] Article 1(5) of the Federal Law No. 5338-1 of July 7, 1993, on International Commercial Arbitration (**Exhibit S-85**).
[199] Civil Procedure Code of the R.S.F.S.R, as adopted in 1964 and subsequently amended (**Exhibit S-87**). Similarly, Article 1(2) of the 2002 Civil Procedure Code (2002 Civil Procedure Code of the Russian Federation (**Exhibit S-89**)) now provides:
> [i]f an international treaty of the Russian Federation has established the rules for the civil court procedure different from those stipulated by the law, the rules of the international treaty shall be applied.

132. Article 3(3) of the 1995 Arbitrazh Procedure Code—the version of that Code that aligned the 1992 version with Article 15(4) of the 1993 Constitution—provided:

> If the rules of the court proceedings, established by an international treaty of the Russian Federation, differ from those stipulated by the legislation of the Russian Federation, *the rules of the international treaty shall be applied*.[200] (Emphasis added.)

133. Far from prohibiting arbitration of public law disputes, each of these enactments envisioned the possibility of treaty-based international arbitration with no subject-matter limitations.

134. In his 2017 Report, unlike his 2014 Report, Professor Asoskov acknowledges that these laws contain carve-outs for treaty-based arbitration. However, he maintains that these carve-out provisions do not undermine his argument about the limitation of arbitration to private law matters.[201] In order to support this contention, Professor Asoskov misrepresents the content of Article 1(2) of the 1993 ICA Law.[202] The two sub-points contained in this provision refer to separate forms of disputes. From a plain reading of the provision it becomes apparent that the second sub-point is not limited to private law disputes. The commentary that Professor Asoskov cites in support of his contention refers exclusively to the private law limitation under the first sub-point of Article 1(2) of the 1993 ICA Law.[203]

135. Professor Asoskov claims that each of these provisions should be read as referring only to ratified treaties.[204] Professor Asoskov does not proffer any evidence to support this latest argument, but rather relies on assertions made in the Reports of Professors Marochkin and Avtonomov to sustain his interpretation of the provisions of the International Commercial Arbitration Law, the Civil Procedure Code, and the Arbitrazh Procedure Code as to

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[200] Article 3(3) of the 1995 Arbitrazh Procedure Code (**Exhibit S-90**). Article 3(3) of the 2002 Arbitrazh Procedure Code is to the same effect (**Exhibit S-91**).
[201] 2017 Asoskov Report at ¶¶ 29-30.
[202] 2017 Asoskov Report at ¶ 29.
[203] Commentary on the Law of the Russian Federation "On International Commercial Arbitration": an article-by-article, scientific practical commentary // edited by Prof. Komarov A.S., Lebedev S.N., Musin V.A., St. Petersburg, 2007, pp. 26-27 (AVA86).
[204] 2017 Asoskov Report at ¶ 30.

international treaties.[205] A review of the Reports of Professors Marochkin and Avtonomov, however, makes clear that they do not support Professor Asoskov's interpretation.

136. Professor Marochkin's Report seeks to exclude from the definition of "international treaties of the Russian Federation" any treaty that has not yet definitively and conclusively come into force.[206] His argument, in other words, is meant to exile only provisionally applied treaties from the definition of "international treaties of the Russian Federation," which pending their ratification have not yet definitively and conclusively entered into effect. As a result, Professor Marochkin embraces a definition of international treaties that includes intergovernmental agreements, which do not require ratification through a federal law to come into force, but not provisionally applied international treaties of the Russian Federation. Thus Professor Marochkin's argument, far from supporting Professor Asoskov's claim that references to international treaties must be understood as limited to treaties that have been ratified by a federal law, actually reaches the opposite conclusion.

137. Similarly, Professor Avtonomov, while arguing over the legal priority of provisionally applicable international treaties and intergovernmental treaties for purposes of Article 15(4) of the Constitution, does not maintain that these instruments are not international treaties of the Russian Federation. In fact, Professor Avtonomov admits that international treaties "can have direct effect within the legal system of the Russian Federation,"[207] without excluding provisionally applied treaties. Therefore, his argument again does not do what Professor Asoskov would like it to do.

138. Professor Asoskov maintains that the federal laws that he refers to express a general prohibition of arbitration of any dispute that is not a "civil law dispute," and that this alleged prohibition applies equally to international law disputes. The points made in my First Report, and left undisputed by Professor Asoskov in his 2017 Report, are the following:

[205] Id. at ¶¶ 36, 43, 116, 118.
[206] Marochkin Report at ¶ 12.
[207] Avtonomov Report at ¶ 56.

(i) None of the statutes contains language that in fact purports to limit or prohibit any form of international arbitration on the basis of international law,[208] and

(ii) To the contrary, each and every one of these statutes explicitly affirms that any rules on dispute resolution contained in an international treaty remain valid under Russian law notwithstanding the rules provided by theses statutes.[209]

Thus, none of the statutes cited by Professor Asoskov express the general prohibition that he claims exists in these and other federal laws.

139. As I show earlier in this Report, Russian treaty practice also contradicts Professor Asoskov's interpretation.[210] In the months before signing the ECT, the Russian Federation entered into two international treaties that submitted to international arbitration issues that, according to Professor Asoskov's theory, would be deemed "public law disputes."[211] One with the OECD applied provisionally pending legislative ratification and consented to international arbitration of disputes over immunity from judicial jurisdiction and taxation.[212] Another one with Australia took effect as an intergovernmental agreement upon signature and without legislative approval; it consented to international arbitration over matters such as use of airspace, customs control, and security.[213] The Gazprom Armenia Agreement concerned the sale of a stake in Gazprom Armenia. It was applied provisionally and entered into force without ratification. Were Professor Asoskov's interpretation of the International Commercial Arbitration Law, the Civil Procedure Code, and the Arbitrazh Procedure Code correct, these treaties would have violated Russian law. The contrary is, of course, true. The willingness of the Russian government to make these treaties indicates that Russian law imposed no barrier

[208] Stephan First Report at ¶¶ 175, 177-179.
[209] Id.
[210] See at ¶¶ 85 et seq. of this Report and Stephan First Report at ¶ 181, which explains that the Russian Federation can agree to arbitrate international law disputes with private parties without parliamentary approval.
[211] Stephan First Report at ¶ 181.
[212] Id.
[213] Id.

to it doing so, notwithstanding Professor Asoskov's argument in his Report submitted to this Court.[214]

140. In sum, Russian legislation does not forbid treaty-based arbitration of disputes that regulate matters that are governed by domestic public laws. In particular, federal statutes that provide a legal basis for arbitration of private law disputes do not forbid or otherwise create a barrier to treaty-based arbitration of all cases containing non-private law questions. To the contrary, these statutes expressly disclaim such a purpose. Assertions to the contrary in the 2017 Asoskov Report lack any basis in Russian law.

3.2.3 Professor Asoskov's claim of a "general principle of non-arbitrability of public law disputes" is in any case unfounded

141. Professor Asoskov asserts that Russian law contains a "*general principle of non-arbitrability of public law disputes* that also applies to investment disputes between foreign investors and the Russian Federation, including disputes involving the application of rules from international treaties."[215] Proceeding from that premise, Professor Asoskov maintains that settling an international investment dispute through arbitration is permissible only if "*exceptions from the general principle of non-arbitrability of public law disputes* [are] established […] by federal statutes" or "ratified international treaties."[216] According to Professor Asoskov, the 1991 and 1999 Laws do not qualify as an "exception" that, in Professor Asoskov's analysis, is strictly required to avoid the application of the "general principle of non-arbitrability of public law disputes."[217]

142. Professor Asoskov rests his claim for the existence of this "general principle" in Russian law on the Constitutional Court's Resolution No. 10-P,[218] which involved neither foreign investment nor international treaties. On examination, that judgment did not enunciate or

[214] 2017 Asoskov Report at ¶ 30.
[215] Id. at ¶ 142. (Emphasis added.)
[216] Id. (Emphasis added.)
[217] Id. at ¶¶ 12, 78, 93, 104, 112, 125.
[218] Resolution No. 10-P of the Constitutional Court of the Russian Federation of May 26, 2011 (**Exhibit S-76**).

espouse a general principle of law on arbitrability of disputes, and in particular said nothing of relevance to the arbitrability of treaty-based disputes.

143. Resolution No. 10-P dealt with specific provisions of the Russian Civil Code and the Law on State Registration of Real Estate and Transaction, pursuant to which it is possible to settle disputes over "immovable property" through domestic commercial arbitration.[219] The petitioner, the Presidium of the Higher Arbitrazh Court, asserted that the Russian Civil Code and the Federal Law "On the Registration of Immovable Property and Transactions" were unconstitutional. These statutes, the petition claimed, did not make clear which civil law disputes relating to immovable property were non-arbitrable in light of the public law nature of registration of transfers of title to such property:

> [S]ince neither the courts nor parties to business transactions may clearly determine *which civil law disputes relating to immovable property (including the public law component of such disputes) do not fall within the jurisdiction of arbitral tribunals* (international commercial arbitration courts), this creates the conditions for controversial law enforcement practices and results in *a violation of the constitutional principle of stability of economic management*, contradicts public interests and is *inconsistent with Articles 8(1), 34(1), 35(1) and (3), 45(2), 47(1), 55 and 118 of the Constitution of the Russian Federation*.[220] (Emphasis added.)

144. The Constitutional Court rejected the Presidium of the Supreme Arbitrazh Court's claim. It concluded that the challenged provisions were not unclear. They provided for the possibility to refer to arbitration "disputes arising out of civil law relations, including relations concerning immovable property" and the public law requirements for "State registration of transfer of title to such property does not per se change the nature of the relations" that determine whether or not a dispute may be submitted to arbitration. It ruled that "within the current regulatory framework" the challenged legislation presented:

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[219] Id., p. 14. Article 11(1) of the Civil Code provides: "Violated or contested civil rights shall be protected by a court of general jurisdiction, arbitrazh court or arbitral tribunal of competent jurisdiction established by procedural legislation." Article 28 of the Federal Law "On the State Registration of Real Estate Rights and Transactions Therewith" provides for state registration of rights to immovable property established by the decision of a court of general jurisdiction, an arbitrazh court or an arbitral tribunal.

[220] Resolution No. 10-P of the Constitutional Court of the Russian Federation of May 26, 2011 (**Exhibit S-76**), point 1.1.

> no uncertainties as regards possible referral to arbitration of disputes arising out of civil law relations including relations concerning immovable property, which require further registration of transfer of title to such property, since the right of parties to a dispute to freely enjoy their civil rights derives from Articles 34(1) and 45(2) of the Constitution of the Russian Federation, and the requirement for State registration of transfer of title to the property in dispute does not per se change the nature of the relations that is crucial for determining the possible jurisdiction of an arbitral tribunal to hear such dispute.[221]

145. In the course of reaching its conclusion about the constitutionality of this legislation, the Constitutional Court observed that "the current regulatory framework does not allow the referral to an arbitral tribunal of disputes arising out of administrative or other public-law relations." [222] Professor Asoskov believes that he can derive from this statement confirmation for his categorical claim that (i) there is a general prohibition of settling any public law disputes through arbitration, and (ii) this prohibition applies equally to international law disputes.[223]

146. Professor Asoskov, however, ignores several crucial aspects of Resolution No. 10-P.

147. First, the Constitutional Court considered the constitutionality of specific legislation, namely the Russian Civil Code, the Federal Law "On Arbitral Tribunals in the Russian Federation", the Federal Law "On the State Registration of Real Estate Rights and Transactions Therewith", and the Federal Law "On Mortgage (Pledge of Immovable Property)".[224] This was the "current regulatory framework" to which the Constitutional Court referred. The Constitutional Court looked at arbitrability only within this framework and with respect to "civil disputes relating to immovable property (including the public law component of such disputes)."[225] The Court did not articulate an abstract position on the arbitrability of disputes that could be applied in other areas of the law where different statutory frameworks applied. Indeed, in its concluding section the Court observed:

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[221] Id. at point 7.
[222] Id. at point 3.1.
[223] 2017 Asoskov Report at ¶ 46.
[224] Resolution No. 10-P of the Constitutional Court of the Russian Federation of May 26, 2011 (AVA1) at point 1.
[225] Id. at point 1.1.

> [C]onsidering that the Constitution of the Russian Federation does not establish any direct criteria for referring any particular types of civil disputes to the jurisdiction of arbitral tribunals, the federal legislator, in exercising its discretionary powers, may amend the current regulatory framework of arbitral proceedings, including with regard to this Resolution […].[226]

148. Second, Resolution No. 10-P involved a question of the (non-)arbitrability of a specific class of disputes arising under domestic Russian laws. The Constitutional Court did not have to address, and did not address, disputes arising under international law. [227]

149. In summary, to consider whether a particular type of dispute, such as one involving foreign investment and treaties, is regarded by Russian law as arbitrable, one must consider relevant legislation. In the next section of this Report, I discuss two federal laws that provide for the arbitrability of treaty-based disputes between foreign investors and the Russian Federation, namely the 1991 and 1999 Laws.

3.3 Russian law expressly provides for arbitration of all aspects of investment disputes arising under a treaty

150. As I documented in my First Report, Russian law, far from forbidding arbitration of investment disputes arising under a treaty, expressly authorizes this practice.[228] I reviewed Article 9 of the 1991 Law and Article 10 of the 1999 Law, each of which endorses the use of "international means" (the 1991 Law) or "international arbitration" (the 1999 Law) to resolve

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[226] Id. at point 7.

[227] The Constitutional Court expressly declined to rule on the constitutionality of the Federal Law "On International Commercial Arbitration" (Id. at point 1.1):

> In those cases the supervisory review of which is suspended by the Presidium of the Supreme Arbitrazh Court of the Russian Federation in connection with an application to the Constitutional Court of the Russian Federation, the subject of the dispute is the pledgee's claim for the issuance of writs of execution for enforcement of the arbitral award on the recovery of debts under loan agreements and on the levy of execution upon immovable property pledged under mortgage agreements. In such cases that involve the debtors and the pledgor as the parties to the proceedings, *rules of law defining the jurisdiction of an international commercial arbitration court shall not applied, and, therefore, the verification on the constitutionality of the Russian Federation Law "On International Commercial Arbitration"* in the given case would actually mean its verification as an abstract compliance check on the basis of Article 125(2) of the Constitution of the Russian Federation. Therefore, proceedings in this case to such extent must be terminated on the basis of Article 43(1)(2) and Article 68 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation." (Emphasis added.)

[228] Stephan First Report at ¶¶ 183-219.

disputes involving foreign investment. These provisions, I concluded, show that Russian law regards treaty-based investment disputes as arbitrable.[229]

151. In particular, Article 9 of the 1991 Law provides:

> Investment disputes, including disputes on matters of the size, terms, or manner of payment of compensation shall be decided in the Supreme Court of the RSFSR or in the High Arbitrazh Court of the RSFSR, unless another manner has been provided by an international treaty in effect on the territory of the RSFSR.
>
> Disputes of foreign investors and of enterprises with foreign investments with state bodies of the RSFSR, enterprises, societal organizations and other legal persons of the RSFSR, disputes between investors and enterprises with foreign investments on matters connected with their commercial activity and also disputes between participants in an enterprise with foreign investment and such enterprise itself are subject to consideration in the courts of the RSFSR or, upon agreement of the parties, in an arbitration tribunal, and in cases provided by legislation, in bodies for the consideration of commercial disputes.
>
> An international agreement in effect on the territory of the RSFSR may envisage the use of international means for settling disputes arising in connection with making foreign investments on the territory of the RSFSR.[230]

In turn, Article 10 of the 1999 Law provides:

> 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). [231]

By their express terms, these Laws acknowledge the validity of the settlement of international investment disputes through arbitration and do not limit their application to a particular sub-class of investment disputes. Professor Asoskov fails to provide any evidence to support the notion that provisions in federal legislation expressly endorsing treaty-based arbitration of investment disputes were meant under Russian law to be hollow and inconsequential.

152. My First Report also pointed out errors regarding this legislation contained in the 2014 Asoskov Report. Professor Asoskov attempted to read into the 1991 Law limitations

[229] Stephan First Report at ¶¶ 188-189, 192-196.
[230] Certified translation of Article 9 of the Law of the R.S.F.S.R. No. 1545-1 "On Foreign Investment in the R.S.F.S.R." of July 4, 1991 (**Exhibit S-123**).
[231] Certified translation of Article 10 of the Federal Law No. 160-FZ "On Foreign Investment in the Russian Federation" of July 9, 1999 (**Exhibit S-124**).

expressed in subsequently enacted Soviet legislation, in spite of the R.S.F.S.R.'s rejection of the legal force of such Soviet enactments.[232] I also showed that his argument that Article 10 of the 1999 Law was a provision of no legal consequence has no foundation in Russian Law.[233]

153. The 2017 Asoskov Report offers new arguments for reading a private law limitation into Article 9 of the 1991 Law and for reducing Article 10 of the 1999 Law to a legal nullity. None of these arguments is supported by any Russian legal authority. To the contrary, both the 1991 and 1999 Laws prove that Russian law regards all aspects of treaty-based disputes involving foreign investment to be arbitrable. Accordingly, the acceptance by the Russian Federation of an international legal obligation to submit this category of disputes to international arbitration is not inconsistent with Russian law.

3.3.1 The 1991 and 1999 Laws represent express legislative endorsements of international arbitration of all aspects of investment disputes arising under an international treaty

3.3.1.1 Professor Asoskov seeks to confuse the issue of arbitrability with the question of consent to arbitration

154. In my First Report, I explained that Article 9 of the 1991 Law and Article 10 of the 1999 Law permit international arbitration of all aspects of a treaty-based dispute concerning foreign investment. These provisions leave it to particular treaties to express consent to international arbitration of disputes arising from such treaties as well as to provide for the particular mechanism of arbitration, including a choice of the arbitral forum and the design of procedural rules. Thus, I demonstrated, both of these legislative provisions establish the arbitrability of this category of disputes, but look to treaties to express the consent of the Russian Federation to arbitration of specific disputes.[234]

155. I concluded that this puts beyond doubt that international investment disputes arising under a treaty are arbitrable under Russian law and that it was not inconsistent with Russian law for

[232] Id. at ¶¶ 199-203.
[233] Id. at ¶¶ 207-209.
[234] Id. at ¶ 219.

the Russian Federation to consent through Article 26 ECT to arbitration of all disputes with investors arising under the ECT.[235]

156. The 2017 Asoskov Report seeks to treat the issue of arbitrability and the issue of consent as if they were identical. It argues that because neither Article 9 of the 1991 Law nor Article 10 of the 1999 Law expresses consent to arbitration under particular treaties, these provisions "cannot remove the inconsistency between Article 26 of the ECT and Russian law."[236]

157. The confusion in Professor Asoskov's argument is evident. Professor Asoskov starts from the false premise that there is an inconsistency that the 1991 and 1999 Laws must "remove." To the contrary, the 1991 and 1999 Laws establish that international arbitration of disputes arising under a foreign investment treaty is consistent with Russian law. To be specific, they confirm that Russian law regards this category of disputes as arbitrable. As a result, a particular treaty's specific expression of consent to arbitrate disputes is consistent with these enactments.

158. Professor Asoskov appears to embrace the confusion of the District Court of The Hague between the issue of arbitrability and the issue of consent. There is no basis for the proposition that he derives from this confusion. Russian law does not hold that consent given in a treaty like the ECT can be consistent with the 1991 and 1999 Laws only if the Russian Federation through a separate legislative enactment gives the very same consent (to the arbitration of disputes under any investment treaty, including the ECT) that these Laws contemplate. In enacting the 1991 and 1999 Laws (and specifically in adopting Articles 9 and 10 as they now stand), the Russian legislature expressly authorized the Russian Federation to give such consent in a subsequent international treaty. This necessarily means that an agreement by the Russian Federation to arbitrate international investment disputes arising under a treaty is consistent with Russian law.

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[235] Id.
[236] 2017 Asoskov Report at ¶¶ 79 and 105.

159. Any other reading of Article 9 of the 1991 Law and Article 10 of the 1999 Law would deny these provisions the legal meaning given to them in clear terms by the Russian legislature. There is no basis in Russian law for Professor Asoskov's suggestion that the Russian legislature must give additional approval for international investment treaties to provide for international arbitration.[237]

160. To the extent that Article 26 of the ECT constitutes an expression of consent to arbitration—an issue of treaty interpretation rather than of Russian law, and therefore an issue on which I do not offer an expert opinion—Article 9 of the 1991 Law and Article 10 of the 1999 Law indicate that this expression is legislatively authorized, and therefore is consistent with Russian law. In other words, these statutory provisions confirm the arbitrability of treaty-based investment disputes.

3.3.1.2 Neither the 1991 Law nor the 1999 Law carves out public law disputes from its endorsement of arbitrability

161. In my First Report, I observed that all three paragraphs of Article 9 of the 1991 Law recognize international arbitration as a permitted means of resolving disputes, although each addresses different aspects of dispute resolution and authorize different means of pursuing claims in the absence of an applicable international treaty.[238] Professor Asoskov ascribed to this observation a "fundamental error" of regarding the three paragraphs as regulating the same "kinds of investment disputes between the Russian Federation and foreign investors."[239] He then argues that the first two paragraphs of Article 9 distinguish between public law disputes, which may be submitted only to Russian courts, and private law disputes, which may be submitted to arbitration. He interprets the reference to "the use of international means for settling disputes" in the third paragraph as limited to the European Court of Human Rights, although he admits

[237] Id. at ¶ 114.
[238] Stephan First Report ¶ 194.
[239] 2017 Asoskov Report at ¶ 80.

that this language might also include other treaties into which the Russian Federation might later enter.[240]

162. Professor Asoskov's interpretation of these three paragraphs is misconceived. All three paragraphs of Article 9 of the 1991 Law recognize international investment arbitration as a permissible means of resolving disputes between an investor and the Russian state or Russian state bodies, while none of the three paragraphs limited the availability of arbitration to private law matters.[241] If a limitation to certain types of international investment disputes, *e.g.*, "civil law disputes" existed, this would and should have been set forth expressly in this provision.

163. Similarly, Article 10 of the 1999 Law contains a categorical and unqualified authorization for treaty-based international arbitration:

> *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).[242] (Emphasis added.)

164. Professor Asoskov argues that because the 1991 Law did not mean to permit arbitration of public law disputes, the 1999 Law should be read as containing the same limitation.[243] He avoids pointing to any part of the 1999 Law itself or any authority that would exhibit the implied limitation he seeks to read into the 1999 Law. As both my First Report and this Report demonstrate, however, neither the 1991 Law nor the 1999 Law can be read to include any of the limitations Professor Asoskov claims.[244]

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[240] Id. at ¶¶ 102-103. Professor Asoskov's description of my Report's reference to the third paragraph of Article 9 of the 1991 Law as the "first time" I had raised the issue, id. ¶ 102, seems somewhat odd to me. My First Report, as the name indicates, was my first submission in any stage of this dispute. I did not submit a report during the arbitral proceedings or in the proceeding before the District Court. Accordingly, every argument I provided to this Court in my First Report was the first time I had raised that argument.
[241] Stephan First Report at ¶ 195.
[242] Certified translation of Article 10 of the Federal Law No. 160-FZ "On Foreign Investment in the Russian Federation" of July 9, 1999 (**Exhibit S-124**).
[243] 2017 Asoskov Report at ¶ 106.
[244] Stephan First Report at ¶ 206.

165. In sum, the 1991 and 1999 Laws on Foreign Investment not only confirm the arbitrability of disputes based on investment treaties under Russian law, but they contain no limitation, expressed or implied, on the scope of arbitrability of treaty-based disputes.

3.3.1.3 Professor Asoskov is mistaken in asserting that U.S.S.R. legislation can impose a limitation on the 1991 Foreign Investment Law

166. Professor Asoskov in his 2017 Report continues to claim that the U.S.S.R. Fundamentals of Legislation on Foreign Investment in the U.S.S.R. (**U.S.S.R. Fundamentals**) limited the scope of the R.S.F.S.R.'s 1991 Law on Foreign Investment.[245] He ignores two fundamental points. First, the U.S.S.R. Fundamentals did not impose rules that applied at any time in the Russian Federation. The U.S.S.R. Fundamentals left it to the U.S.S.R.'s Republics, such as the Russian Federation, to enact their own investment laws and tailor them to their own investment policies. Second, the Russian Federation—and other Union Republics—were in the midst of severing their ties with the U.S.S.R. Indeed, Russia (then still the "Russian Soviet Federative Socialist Republic" or R.S.F.S.R.) declared sovereignty (including as to its economic policies) long before the U.S.S.R. Fundamentals were adopted.[246] The U.S.S.R. itself came to an end just a few months after the 1991 Law was enacted. Accordingly, the Russian Federation was not bound in any way by the contents of the U.S.S.R. Fundamentals and was free to determine the contents of the 1991 Law. More importantly, the Russian Federation was free to define the permissibility of treaty-based resolution of investment disputes in Article 9 of the 1991 Law on its own terms, which the Russian Federation did.

167. Professor Asoskov does not deny these core points. Instead, he wrongly attributes to my First Report a much more generic, and irrelevant claim "that the U.S.S.R. Fundamentals have *nothing to do* with the 1991 Law."[247] He then proceeds to argue an equally irrelevant point on

[245] 2017 Asoskov Report at ¶¶ 98-101.
[246] Declaration on the State Sovereignty of the R.S.F.S.R. of June 12, 1990 (**Exhibit S-1**), ¶¶ 1,5.
[247] 2017 Asoskov Report at ¶ 99. (Emphasis added.) (referring to Stephan First Report, ¶¶ 200-203).

the basis of Russian literature that generally states that the language of the 1991 Law includes a "great number of borrowings from the [U.S.S.R. Fundamentals]."[248]

168. Even within the context of Soviet law, Professor Asoskov ignores essential facts. The reference to "civil law" that he seeks to transplant from the second paragraph of Article 43 of the U.S.S.R. Fundamentals into Article 9 of the 1991 Law is simply not present in the latter provision, and that omission was a choice of the Russian sovereign legislature. Therefore, Professor Asoskov does not dispute that the wording of Article 9 of the 1991 Law departs from the U.S.S.R. Fundamentals. Further, Article 9 of the 1991 Law includes an entire third paragraph that is not found in Article 43 of the U.S.S.R. Fundamentals. This paragraph categorically permitted the settlement of international investment disputes through "international means of settling disputes" included in a treaty. In any case, the first paragraph of both Article 9 of the 1991 Law and Article 43 of the U.S.S.R. Fundamentals categorically permit the agreement through a treaty to the arbitration of international investment disputes, without any limitation or reference to "civil law" disputes.[249]

169. Professor Asoskov's attempt to read a "civil law" limitation into Article 9 of the 1991 Law, which does not contain such language, thus gains no support from the U.S.S.R. Fundamentals.

170. The flawed nature of Professor Asoskov's interpretation and construction of the 1991 Law becomes even more apparent when he tries to impose it on Article 10 of the 1999 Law. Professor Asoskov does not attempt to argue that any link could be drawn (or any similarities established) between Article 10 of the 1999 Law and the U.S.S.R. Fundamentals. This

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[248] Id. (referring to N.G. Doronina & N.G. Semilutina, Legal Regulation of Foreign Investments in Russia and Abroad, Moscow, 1993, p. 74 (AVA56)).

[249] Article 43 of the Fundamentals of Legislation on Foreign Investment in the U.S.S.R. No. 2302-1 (**Exhibit S-109**). Moreover, the U.S.S.R. Fundamentals also recognized an exception for investor rights based on international treaties, as did the 1991 Law in Article 5. See Article 44 of the Fundamentals of Legislation on Foreign Investment in the U.S.S.R. No. 2302-1 (**Exhibit S-125**):

> If an international treaty of the U.S.S.R. establishes other rules than those that contained in the legislation of the U.S.S.R. and the republics of foreign investment, the rules of the international treaty apply.

concession only confirms that there is no basis to apply any alleged limitations in the U.S.S.R. Fundamentals to the 1991 and 1999 Laws.

3.3.1.4 Professor Asoskov mischaracterizes the contents of Article 9 of the 1991 Law and misconstrues Article 7 of the 1991 Law

171. Far from limiting the arbitration of disputes between foreign investors and the Russian Federation, the first and third paragraphs of Article 9 of the 1991 Law confirm the arbitrability of this category of disputes.

172. The first paragraph of Article 9 provides that "investment disputes, including disputes on matters of size, terms, or manner of payment of compensation,"[250] may be settled by means addressed in a treaty. Professor Asoskov argues that this provision applies only to civil law disputes and that the term "including" should be taken to mean "only."[251] The language clearly indicates, to the contrary, that examples provided following that term are illustrative and not exhaustive. Indeed, Professor Asoskov at multiple points in his Report uses the word "including" as having a non-restrictive meaning and offers no explanation as to why the first paragraph of Article 9 is different.[252]

173. Similarly, the third paragraph refers unambiguously to any and all "disputes arising in connection with making foreign investments on the territory of the R.S.F.S.R." It contains no words of limitation as to the nature of the disputes that a foreign investor might refer to arbitration under the terms of a treaty.

174. Professor Asoskov attempts to restrict this clear statutory language through citations to academic works that, he claims, recognize his proposed reading. The works cited, however, do not support his position.

[250] Certified translation of Article 9 of the Law of the R.S.F.S.R. No. 1545-1 "On Foreign Investment in the R.S.F.S.R." of July 4, 1991 (**Exhibit S-123**).
[251] 2017 Asoskov Report at ¶ 91.
[252] Id. at ¶¶ 21(4), 23 and 54.

175. First, Professor Asoskov offers an abridged quotation from a treatise by Professors Boguslavsky and Orlov.[253] Reference to the unexpurgated passage makes clear that these authors considered investor-state disputes and concluded that, "[i]f it is so provided by the agreement of the parties or by the international treaty, such disputes may be considered by the arbitral tribunal."[254] At no point do they endorse the "civil law" restriction that Professor Asoskov professes.

176. Second, Professor Asoskov refers to a treatise that in passing addresses the meaning of "investment disputes" as used by the first paragraph of Article 9.[255] Significantly, the authors do not indicate that investment disputes are non-arbitrable, but rather discuss only the limits of the bestowal of judicial jurisdiction by that paragraph. Indeed, the authors do not address the question of arbitrability at all.

177. In addition to citing to authorities that do not support his argument, Professor Asoskov strains to create a context for the third paragraph of Article 9 that would support his effort to narrow its scope. He claims, without any supporting evidence, that the phrase "international means for settling disputes" refers to "supranational courts created on the basis of international treaties," rather than arbitration tribunals established by treaties.[256] He argues in particular that this language was intended to anticipate Russia's participation in the European Convention on Human Rights and the European Court of Human Rights.[257]

178. Again, Professor Asoskov provides no support for his claim. The statutory language is capacious and makes no distinction between international courts and tribunals, both of which in 1991 were commonly used "international means for settling disputes." Given that the 1991 Law was enacted at a time when the R.S.F.S.R. was still part of the Soviet Union (the

[253] Id. at ¶ 96.
[254] M.M. Boguslavsky & L.N. Orlov, Russian Legislation on Joint Ventures: A Commentary, Moscow, 1993, p. 108 (AVA54).
[255] 2017 Asoskov Report at ¶ 91 (quoting N.G. Doronina & N.G. Semilutina, The Investment Dispute Settlement Procedure, 1995 Legislation and Economy, No. 7/8, at p. 39 (AVA63)).
[256] 2017 Asoskov Report at ¶ 103.
[257] Id.

U.S.S.R.) and back then not actively engaged in treaty projects, and that Russian participation in the European Convention on Human Rights was at that time many years distant, the suggestion that the language was meant to apply specifically to the European Court of Human Rights is, at best, far-fetched.[258]

179. Perhaps aware of the deficiencies in his proposed gloss on Article 9, Professor Asoskov in his 2017 Report argues that the only provision of the 1991 Law that is relevant to the present dispute is the third paragraph of Article 7.[259] That provision states: "Decisions of bodies of state administration regarding the expropriation of foreign investments may be appealed in the courts of the R.S.F.S.R."[260] Professor Asoskov contends that because HVY assert that the Russian Federation had expropriated their property, their only recourse under the 1991 Law was to seek relief in Russian courts pursuant to this provision. He further claims that this provision was exclusive rather than permissive, and thus precluded arbitration of disputes over expropriation.[261]

180. A review of the 1991 Law shows that Article 7(3) has nothing to do with this dispute, and in particular does not impose an obstacle to its international arbitration. One cannot understand the meaning of the third paragraph of that Article without considering the language of the second. It provides: "Decisions on nationalization are made by the Supreme Council of the R.S.F.S.R. Decisions on requisition and confiscation are made under the procedure prescribed by the legislation in effect in the territory of the R.S.F.S.R." [262] Once one reads these two paragraphs in tandem, it becomes clear that the right of access specified in the third paragraph is limited to legal challenges to decisions described in the second paragraph. Article 7(3) of

[258] The Russian Federation signed the Convention on February 28, 1996, and the Convention went into force as to the Russian Federation on May 5, 1998.
[259] 2017 Asoskov Report at ¶ 92.
[260] Certified translation of Article 7 of the Law of the R.S.F.S.R. No. 1545-1 "On Foreign Investment in the R.S.F.S.R." of July 4, 1991 (**Exhibit S-123**).
[261] 2017 Asoskov Report at ¶¶ 83-84.
[262] Certified translation of Article 7 of the Law of the R.S.F.S.R. No. 1545-1 "On Foreign Investment in the R.S.F.S.R." of July 4, 1991 (**Exhibit S-123**).

the 1991 Law is strictly limited to expropriation (nationalization) decisions taken by specific state bodies.

181. Moreover, Article 7(3) deals only with an "appeal[]" from a decision of a body of state administration that effected an expropriation. Under Russian law, a suit to overturn a decision of a state body is distinct from, and indeed completely unrelated to, a treaty-based proceeding to provide a protected investor with compensation for the losses suffered as a result of breaches of that treaty.

182. To the best of my knowledge, no Russian body invoked its expropriation authority under Russian law with respect to HVY's property. Rather, the central issue that divides HVY and the Russian Federation is whether the acts undertaken by Russian officials, nominally characterized as exercises of law enforcement with respect to tax and bankruptcy legislation, meet the definition of expropriation under the ECT, an international treaty. Article 9 of the 1991 Law, not Article 7, addresses treaty-based disputes.[263]

183. In sum, this argument is contradicted by the express language of the 1991 Law, which distinguished treaty-based disputes from those based on Russian law.

3.3.1.5 Professor Asoskov's effort to read Soviet ideology and treaty practice into the interpretation of the 1991 Foreign Investment Law lacks any basis in Russian law

184. Professor Asoskov in his 2017 Report argues that the 1991 Law must be read in light of Soviet treaty practice.[264] He refers to an academic article on investment treaties that discusses the alleged practice of the U.S.S.R. to limit agreement to international investment arbitration to

[263] As I explained in my First Report at ¶ 192, Article 7(3) is couched in permissive rather than proscriptive terms. It says that decisions on expropriation "may be appealed to the courts." It does not state that such decisions may be appealed only before Russian courts; in other words, it does not establish the exclusive jurisdiction of the Russian courts over expropriation-related questions. Professor Asoskov now seems to agree. He does not say that Article 7(3) excludes or prohibits other dispute resolution options. He says only that Article 7(3) "does not by itself indicate the availability" of arbitration (2017 Asoskov Report, ¶ 84). But HVY's claims are not based on or derived from Article 7(3). Article 9 expressly states that international arbitration is available (including for expropriation disputes). Article 7(3) does not affect in any way the scope of Article 9.

[264] 2017 Asoskov Report at ¶ 89.

issues surrounding compensation for expropriation.[265] The Soviet Union had entered into only a handful of bilateral investment treaties at the time of the R.S.F.S.R.'s enactment of the Law, in part because Soviet ideology had precluded private ownership of investment property. Professor Asoskov posits that the few investment treaties that the U.S.S.R. did enter into, all limited treaty protection and a right to international arbitration to disputes over the amount of compensation following an officially acknowledged expropriation. Professor Asoskov claims that, because these treaties excluded from international protection limits on official acts that seize investor assets without acknowledging their expropriatory purpose, one must read such a limitation into the 1991 Law.[266]

185. As I have indicated earlier in this Report, Professor Asoskov's effort to portray the 1991 Law as implementing traditional Soviet policy, rather than as departing from it, has no historical foundation.[267] There is no basis whatsoever for the suggestion that the "ideology" of the U.S.S.R. era treaty practice was to be imported into the 1991 Law.[268] This point is in any case irrelevant, as I understand the question in this case to be not whether the consent of the Russian Federation to international investment arbitration under the ECT was in line with the "ideology" and practice of the U.S.S.R. (which was dissolved in December 1991). The only relevant question is whether the consent of the Russian Federation is not inconsistent with Russian law.[269]

186. In fact, Professor Asoskov concedes that the treaty practice of the Russian Federation after enactment of the 1991 Law was to extend the scope of treaty-based dispute resolution to include all matters arising out of an investment, including the issue of whether an illegal expropriation had occurred.[270] As he acknowledges, the Russian Federation in 1992 adopted a

[265] Id. at ¶ 88.
[266] Id. at ¶ 89.
[267] See ¶¶ 166 et seq. of this Report.
[268] 2017 Asoskov Report at ¶¶ 89-90.
[269] As I explained in my First Report, the 1991 Law and the practice of the Russian Federation before and after signing of the ECT clearly show that this is so. Stephan First Report at ¶¶ 181, 189.
[270] 2017 Asoskov Report at ¶¶ 87, 89, 127-128.

Model Bilateral Investment Treaty (dealing with investor-state arbitration) that served as a template for its future treaties.[271] What he does not disclose is that Article 6 of that Model Bilateral Investment Treaty employed the same terminology of the first paragraph of Article 9 of the 1991 Law, indicating that its drafter saw continuity rather than change between the 1991 Law and the anticipated Russian investment treaties that, he concedes, embraced international arbitration of all manner of investment disputes.

187. In sum, Professor Asoskov presented no evidence to support his claim that the 1991 Law was intended only to support Soviet treaty policy and did not anticipate the possibility that the R.S.F.S.R. would conform to widespread international practice regarding investment treaties. His attempt to impose a crabbed interpretation on the 1991 Law does not have any basis in Russian law.

3.3.2 Professor Asoskov's interpretation of Article 10 of the 1999 Law as "void of its own content" lacks any basis in Russian law

188. My First Report explained that Article 10 of the 1999 Law represents an unambiguous affirmation of the arbitrability of investment disputes arising under international treaties of the Russian Federation.[272]

189. This provision clearly envisages (and unambiguously permits) treaty-based arbitration of disputes between foreign investors and the Russian Federation. Professor Asoskov in his 2017 Report provides no authority to the contrary.

190. First, Professor Asoskov in his 2017 Report asserts that because my First Report noted the equivalence of this provision and Article 9 of the 1991 Law, I necessarily regarded the limitations on arbitrability that he discerned in Article 9 as carrying over to the 1999 Law. As I have indicated in this Report, it is my opinion that the limitations Professor Asoskov tried to

[271] Id. at ¶ 87 and footnote 77.
[272] Stephan First Report at ¶¶ 205-207. The full text of this provision is set forth above at ¶ 151.

impose on the 1991 Law did not have any basis in Russian law at that time.[273] Accordingly, there is no ground to read into Article 10 of the 1999 Law restrictions that were not imposed onto Article 9 of the 1991 Law.

191. Second, Professor Asoskov seeks to undermine the significance of Article 10 by dismissing it as a "blanket provision" of no normative significance and "void of its own content."[274] He also suggests that it would be unconstitutional for the legislature generally to allow the President or the Government to agree to international arbitration of investment disputes (*i.e.*, in a "blanket" form). Professor Asoskov does not provide any support for the suggestion that any Russian court or other state organ would characterize Article 10 of the 1999 Law in the abstract as a "blanket provision," and would deny it any meaning on that basis.

192. His argument mischaracterizes the role and significance of such provisions under Russian law. Rather than lacking normative significance, a blanket provision creates a legal predicate for a second legal measure that, when connected to the blanket provision, has normative legal consequences. Thus, as explained in my First Report, even if Article 10 of the 1999 Law were a blanket provision, this does not mean that the norm it contains can be ignored.[275]

193. In essence, Professor Asoskov used this argument to muddle the distinction between arbitrability and an offer to arbitrate, as indicated earlier in this Report.[276] He attempts to use the fact that Article 10 of the 1999 Law does not itself contain the specific consent for submitting a particular international investment dispute to international arbitration but instead provides that this consent can be given inter alia through an international treaty, to suggest that it does not resolve the question of whether international investment disputes are arbitrable. This is clearly wrong. What Article 10 of the 1999 Law does is precisely to determine that international investment disputes can be submitted to arbitration through an

[273] See ¶¶ 166 et seq. of this Report..
[274] 2017 Asoskov Report at ¶ 107.
[275] Stephan First Report at ¶ 208.
[276] See ¶ 156 of this Report.

international treaty. This clearly provides legislative endorsement for the submission of international investment disputes to arbitration and confirmation that such a submission is consistent with Russian law.

194. The Constitutional Court of the Russian Federation has confirmed this analysis of blanket provisions found in the Russian legislation. In Resolution No. 22-P, the Constitutional Court rejected a claim that blanket provisions, because their operation depends on the content of other legal acts, are unconstitutional on the grounds of uncertainty.[277] The Constitutional Court ruled that a blanket provision represents a legitimate and enforceable exercise of legislative power, even in such a key sphere as criminal law:

> Evaluating such a model of legislative regulation, the Constitutional Court of the Russian Federation has reached the following conclusion: *by itself, the blanket nature of the norms may not be indicative of their unconstitutionality*, since regulations directly establishing certain rules of behaviour may not necessarily be contained in the same normative legal act as the rules stipulating the legal liability for their violation, and because the evaluation of the degree of certainty of the concepts set out in a law must be based not only on the text of the law and the language used in it, but also their place in the system of regulations, as well as taking into account related offences (resolutions of 27 May 2003, No. 9-P; 31 March 2011, No. 3-P; 14 February 2013, No. 4-P; and 17 June 2014, No. 18-P et al.) *Moreover, the constitutionality of a blanket construction as such is not questioned also in cases where the norms, whose non-observance entails criminal responsibility, are established in regulatory legal acts*. (Emphasis added.)
>
> *Legal structures of a blanket nature may refer to the provisions not only of laws and the regulations in normative unity with them, but also to international treaties of the Russian Federation*, inasmuch as the Constitution of the Russian Federation recognizes them as an integral part of the Russian legal system and establishes the priority of the rules established by them in law enforcement practice (article 15, part 4), and also provides for the possibility of Russia's participation in intergovernmental associations and the transfer to them of a part of its powers under international treaties, unless it entails restrictions on human and civil rights and freedoms and does not contradict the foundations of the constitutional system of the Russian Federation.[278] (Emphasis added.)

195. Accordingly, the normative legal force of a provision such as Article 10 of the 1999 Law (providing for the arbitrability of disputes arising under a class of international treaties) is manifested as long as a corresponding treaty (in this case, one expressing the acceptance of

[277] Resolution No. 22-P of the Constitutional Court of the Russian Federation of July 16, 2015 (**Exhibit S-126**).
[278] Id. at point 2.

the Russian Federation to submit disputes arising under that treaty to a prescribed form of international arbitration) applies.

196. The Constitutional Court's jurisprudence makes clear that Russian law does not support Professor Asoskov's assertion that "the only possible conclusion is that the 1999 Law does not affect the issue of non-arbitrability of disputes between foreign investors and the Russian Federation."[279] Rather, the 1999 Law unambiguously establishes the arbitrability of disputes arising under an international treaty of the Russian Federation, thus approving of particular treaties that express consent to arbitration.

197. Third, Professor Asoskov suggested that Article 10 of the 1999 Law "implicitly" refers to the Arbitrazh Procedural Code of the Russian Federation and the Civil Procedural Code of the Russian Federation for the determination of whether international investment disputes may be submitted to arbitration.[280] As I explained in my First Report, however, neither of those Codes regulated treaty-based international arbitration.[281] Professor Asoskov also fails to substantiate this claim. His attempt to import into the 1999 Law limitations that did not and do not exist in the legislation where he purports to find them thus is unavailing.

198. In sum, Article 10 of the 1999 Law contains an unambiguous confirmation of the arbitrability of disputes arising under an international treaty of the Russian Federation. Russian law does not support Professor Asoskov's attempt to dismiss this provision as legally meaningless or circumscribed by other legislation.

[279] 2017 Asoskov Report at ¶ 111. As I explained in my First Report, even the authorities cited by Professor Asoskov himself note that a blanket provision is not an empty text but a legal rule organized in a specific way (see Stephan First Report at ¶ 209). The 2017 Asoskov Report quotes another scholar, Professor Nersesyants, who also comments on the nature of blanket provisions under Russian law (see 2017 Asoskov Report at ¶ 110). Contrary to Professor Asoskov's position, Professor Nersesyants notes that a blanket provision is not an empty text but a specifically arranged "rule of law." He gives a telling example of a blanket provision, Article 249 of the Russian Criminal Code, and explains that this rule "provides for criminal liability for violation of veterinary rules," although without itself outlining these veterinary rules (see V.S. Nersesyants, General Theory of the Law and the State: Textbook at 399 (Norma 2012) (AVA-94)).

[280] Id. at ¶ 108.

[281] Stephan First Report at ¶¶ 177, 181.

3.3.3 Professor Asoskov's assertion that the 1991 and 1999 Laws only permit arbitrability of disputes arising under ratified treaties has no basis in Russian law

199. Professor Asoskov asserts that references to international treaties of the Russian Federation found in Article 9 of the 1991 Law and Article 10 of the 1999 Law mean only treaties that have been ratified through legislative enactment. He argues that neither of these provisions encompasses an international treaty that has effect in the Russian Federation as a result of its provisional application.[282]

200. Professor Asoskov bases this argument on a strained interpretation of the Constitutional Court's Resolution No. 10-P.[283] I have discussed this Resolution earlier in this Report and demonstrated why it has no bearing on this dispute.[284] As to the specifics of Professor Asoskov's argument regarding the 1991 and 1999 Laws, his citation of the quoted language, for which he provides no context,[285] is especially inapt. Resolution No. 10-P does not address treaties or treaty-making in any way, nor does it deal with treaty-based arbitration.

201. Professor Asoskov attempts to overcome the obvious difficulties with his reliance on Resolution No. 10-P by asserting that Article 10 of the 1999 Law, unlike Article 9 of the 1991 Law, expressly required a (second) legislative enactment as a condition of applying its rule on the arbitrability of treaty-based international investment disputes.[286] The language in question states that "[a] dispute of a foreign investor arising in connection with its investments and

[282] 2017 Asoskov Report at ¶¶ 115-116. As Professor Asoskov agrees, Article 9 and Article 10 reflect Article 15(4) of the Constitution. As is explained in Part 2 of this Report, the Constitution embraces provisionally applicable treaties and equates them with ratified treaties. Provisionally applicable treaties, therefore, are covered by the 1991 and 1999 Laws.
[283] Resolution No. 10-P of the Constitutional Court of the Russian Federation of May 26, 2011 (**Exhibit S-76**).
[284] See at ¶¶ 141 et seq. of this Report.
[285] 2017 Asoskov Report at ¶¶ 115-116. The language quoted by Professor Asoskov also does not relate to a discussion by the Constitutional Court of "a principle of non-arbitrability of public law disputes" being "set up" at the level of federal statutes and that required "exception" from the "federal legislator" to allow for arbitration. A plain reading of the paragraph before the paragraph quoted by Professor Asoskov from Resolution 10-P shows that the Constitutional Court was discussing the freedom of "citizens" and "legal entities" to establish "their rights and obligations on the basis of an agreement" and only in this context noted that " [t]his does not affect the right of the federal legislator "to regulate this issue […] due to the necessity of ensuring the balance of private and public interests."
[286] 2017 Asoskov Report at ¶ 126.

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*."[287] This language merely indicates that federal laws may also (and thus not exclusively) provide for arbitration of investment disputes. Again, nothing in Article 10 of the 1999 Law suggests that the international treaties referred to must be ratified.

202. Professor Asoskov also relies on Russian investment treaty practice as the basis for a further argument about an implied limitation in Article 9 of the 1991 Law and Article 10 of 1999 Law to treaties that have been ratified.[288]

203. Professor Asoskov rests this argument on the contention that "all the BITs, without exception, made by the Russian Federation (formerly the U.S.S.R.) had been ratified by the Russian (formerly the Soviet) Parliament."[289] He supports this assertion with an analysis of five BITs that, in his view, were ratified because they were inconsistent with Russian legislation on the dispute resolution. More broadly, he asserts that the dispute resolution mechanism found in bilateral investment treaties require modifications to existing legislation before they can take effect.[290]

204. Ultimately, Professor Asoskov's interpretation of the 1991 and 1999 Laws rest on two erroneous claims, namely that Russian law categorically forbids international arbitration of treaty-based disputes absent a separate legislative act confirming the treaty,[291] and that the dispute resolution mechanism found in bilateral investment treaties, as distinguished from a treaty's substantive provisions, requires modifications to existing legislation.[292].

205. International treaties are subject to ratification if they set out rules different from those provided by law according to Article 15 of the FLIT. Both the 1991 and 1999 Laws permit

[287] Certified translation of Article 10 of the Federal Law No. 160-FZ "On Foreign Investment in the Russian Federation" of July 9, 1999 (**Exhibit S-127**). (Emphasis added.)
[288] 2017 Asoskov Report at ¶¶ 127-132.
[289] Id. at ¶ 127.
[290] Id. at ¶ 128.
[291] Id. at ¶ 133.
[292] Id. at ¶ 134.

international arbitration of investment disputes, and the dispute resolution mechanism provided in the bilateral investment treaties brought about such a right to submit investment disputes to international arbitration.

206. Professor Asoskov quotes from the explanatory notes with which BITs have been presented to the Parliament for ratification.[293] Taken in the most favorable way possible for Professor Asoskov, these notes indicate only that existing Russian legislation had not provided the specific "mechanism" for settlement of investment disputes as contemplated by the treaties. This unsurprising observation does not show that Russian legislation did not recognize the possibility of submitting to arbitration an international investment dispute arising under a treaty. In particular, none of the treaties to which Professor Asoskov refers provided for provisional application pending ratification. The Russian Parliament has meanwhile ratified more than 80 investment treaties,[294] all of which Professor Asoskov would treat as exceptions to the general principle that he posits. This practice affords little space for his purported general prohibition of arbitration of investment disputes.

207. In sum, Professor Asoskov has provided no evidence that supports his conclusion that the 1991 and 1999 Laws exclude provisionally applied international treaties that have not been ratified.

[293] Explanatory Note "On Ratification of the Agreement Between the Government of the Russian Federation and the Government of the Argentine Republic on Promotion and Reciprocal Protection of Investments" (AVA73); Explanatory Note "On Ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on Promotion and Reciprocal Protection of Investments" (AVA81); Explanatory Note "To the Draft Federal Law 'On Ratification of the Agreement Between the Government of the Russian Federation and the Government of the Republic of Yemen on Promotion and Reciprocal Protection of Investments'" (R33); Explanatory Note "To the Draft Federal Law 'On Ratification of the Agreement Between the Government of the Russian Federation and the Government of the Republic of Armenia on Promotion and Reciprocal Protection of Investments'" (R32); Explanatory Note "To the Draft Federal Law 'On Ratification of the Agreement Between the Government of the Russian Federation and the Government of the Syrian Arab Republic on Promotion and Reciprocal Protection of Investments'" (R34).

[294] See for an overview of BITs concluded by the Russian Federation https://investmentpolicyhub.unctad.org/IIA/CountryBits/175.

3.4 The Explanatory Note submitted to the Duma in connection with the ECT demonstrates that arbitration of ECT disputes under Article 26 of the ECT was consistent with existing Russian law

208. In my First Report, I explained how the Explanatory Note submitted by the Russian government in 1996 as part of the package of materials related to parliamentary consideration of the ECT confirmed the consistency of Article 26 of the ECT with Russian law.[295] Professor Asoskov in his 2017 Report deprecates the significance of this document by claiming, implausibly, that the Note addressed only the post-ratification consistency of the ECT with Russian law.[296] Neither the language of the Note nor its legal context support Professor Asoskov's characterization.

209. First, Professor Asoskov argues that because the ECT by its own terms required ratification, the Government bore no burden of demonstrating why Article 15(1)(a) of the FLIT would or would not require ratification. This argument overlooks Article 16(4) of the FLIT, which requires submission of a report that explains the conformity of the treaty with Russian law in addition to a statement of the reasons for ratification:

> A proposal to ratify an international treaty must contain a notarized copy of the official text of the international treaty, a statement of reasons for its ratification, *a finding that the draft treaty conforms to Russian Federation law*, and an evaluation of potential financial, economic and other effects of making the treaty, including, if necessary, the Russian Federation Government finding provided for by Article 104 of the Russian Federation Constitution.[297] (Emphasis added.)

210. Article 16(4) does not anticipate a discussion of the post-ratification consistency of a submitted treaty with Russian law, as such an analysis normally would be pointless. Under Article 15(4) of the Russian Constitution, norms contained in an international treaty like the ECT automatically supersede inconsistent Russian federal laws. Professor Asoskov also ignores the fact that, pursuant to Article 15(4) of the Constitution, treaty provisions override

[295] Stephan First Report at ¶¶ 210-211.
[296] 2017 Asoskov Report at ¶¶ 136-138.
[297] Article 16(4) of the FLIT (**Exhibit S-18**).

inconsistent federal statutes not only upon ratification but also when the treaty is applied provisionally before its ratification.

211. Professor Asoskov further argued that a Note of the sort submitted by the Government has no legal significance, as it cannot bind the legislature.[298] However, the Note is credible evidence of the views of the Government as to the state of Russian law. These are the views that treaty parties necessarily must rely on when concluding an international treaty with the Russian Federation.

212. Finally, Professor Asoskov refers to various statements made by officials and private persons in parliamentary hearings regarding supposed conflicts between the ECT and Russian law.[299] I discuss these statements in ¶¶ 23-25 of this Report. None of this testimony represented the considered view of the Government, as a Note submitted in accordance with Article 16(4) of the FLIT does. Neither does the statement of any particular participant of parliamentary hearings indicate the view of the State Duma. In any event, none of the statements identified any conflict or inconsistency between the ECT dispute resolution mechanism and a specific federal law.

213. In sum, Professor Asoskov's effort to undermine the evidentiary significance of the 1996 Explanatory Note is unavailing.

[298] 2017 Asoskov Report at ¶ 139. It is a bit rich for Professor Asoskov to have made this argument, given his own reliance on similar Notes in his Report. See id. at ¶¶ 128-131.

[299] Id. at ¶ 139. As is apparent from exhibits submitted by Professor Asoskov, both parliamentary hearings did not result in official recommendations but drafts. See State Duma Economic Policy Committee Draft Recommendations of the Parliamentary Hearing "On the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated June 17, 1997 (ASA-035) and State Duma Transcript of the Parliamentary Hearings "On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated January 16, 2001, p. 77 (ASA-044).

3.5 The limitations that Professor Yarkov seeks to impose on the 1991 and 1999 Laws are irrelevant to this case as well as unfounded under Russian law

3.5.1 Introduction

3.5.1.1 Summary of the position of Professor Yarkov

214. The Russian Federation has added an argument to the effect that HVY cannot rely upon the 1991 and 1999 Laws because, it asserts, HVY are "offshore structures owned and controlled at all relevant times by nationals of the Russian Federation." It supports this claim with a Report by Professor Yarkov (**Yarkov Report**), which maintains that the 1991 and 1999 Laws exclude from their scope any foreign investment that does not involve a "foreign contribution of capital":

> As I explain below, the 1991 FIL and the 1999 FIL are indeed legally irrelevant in the present case. Based on the factual circumstances, which I have been asked to assume, HVY's ownership of YUKOS shares was not a "foreign" contribution of capital and, in any event, was not an "investment." Accordingly, Professor Stephan's suggestion that the 1991 FIL or the 1999 FIL authorized HVY to arbitrate claims arising under the ECT against the Russian Federation must be rejected.[300]

215. Professor Yarkov bases his analysis of the 1991 and 1999 Laws on a short review of the text and "analogous"[301] judicial practice addressing the concept of "investment" under Law No. 1488-1 on Investment Activity in the R.S.F.S.R. (**Investment Activity Law**). He concedes that he lacks direct authority to support his gloss of the 1991 and 1999 Laws,[302] but asserts that practice under different legislation closes the gap. As I discuss below, Professor Yarkov's account of the 1991 and 1999 Laws is clearly incorrect and in any case has no bearing on the question of whether a treaty consenting to international arbitration of international investment disputes is consistent with Russian law.

[300] Yarkov Report at ¶ 8.
[301] Id. at ¶ 16.
[302] Id. at ¶ 18.

3.5.2 Professor Yarkov's analysis is both irrelevant and unfounded in Russian law

3.5.2.1 The HVY entities do not rely on the 1991 and 1999 Laws as the basis for their claims

216. Professor Yarkov mischaracterizes the position developed in my First Report and, therefore, attempts to disprove an irrelevant point. He asserts that I posited in my First Report that HVY "invoke Article 9 of the 1991 [Law] or Article 10 of the 1999 [Law] as a lawful basis for arbitrating their claims against the Russian Federation."[303] This misrepresents what my First Report said.

217. My First Report assumed throughout that HVY relied on Article 26 of the ECT as the jurisdictional basis for their international law claim, and do not make a claim under Russian law.[304] As a result, I do not understand HVY to rely on the 1991 or 1999 Laws as a basis for their claim against the Russian Federation or to assert that these Laws (as opposed to the ECT) provided them any protection for which the Russian Federation must answer in an international tribunal.

218. To the contrary, my First Report referred to the 1991 and 1999 Laws to show that Russian legislation in effect at the time of the signing of the ECT anticipated and provided for international arbitration of investment disputes, including disputes over whether acts of the Russian Federation constituted an expropriation within the terms of a treaty. Moreover, my First Report showed that the 1991 Law contemplated submission of such disputes to arbitration on the basis of an international treaty.[305] The 1999 Law further confirmed the arbitrability of foreign investment disputes. What the First Report demonstrates, in short, is that Russian legislation dealing specifically with foreign investment establishes that the arbitration obligations contained in Article 26 of the ECT did not transgress any limits on arbitrability imposed by Russian law and thus were fully consistent with Russian law at the time that the Russian Federation signed the ECT.

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[303] Id. at ¶ 29.
[304] Stephan First Report at ¶ 4.
[305] Stephan First Report at ¶¶ 22, 219.

219. In other words, the issue that my First Report addressed is whether the 1991 and 1999 Laws support the conclusion that treaty-based arbitration of a foreign investment dispute is consistent with Russian law. The question of whether HVY also qualified for protection under those Laws does not arise in this dispute. Because HVY do not base their claims on these Laws, I have not addressed whether they could have addressed their grievances to the Russian courts under those Laws irrespective of the protection offered by the ECT.

3.5.2.2 Professor Yarkov misconstrues the contents of the 1991 and 1999 Laws

220. Aside from the fundamental point that HVY do not base their claims on the 1991 and 1999 Laws, Professor Yarkov's interpretation of these laws lacks any foundation in Russian law. Imposing on these statutes limitations that cannot be found in their text, Professor Yarkov argues that they apply only to "genuine foreign investment," which he claims requires a foreign contribution of capital.[306] Neither Law says this.

221. Article 2 of the 1991 Law defines foreign investment as follows:

> All types of property and intellectual assets, invested by foreigners in business venture and other types of activity with the aim of deriving profit (income), shall be deemed foreign investments.[307]

The relevant restriction is that the investment must be "by foreigners." One can find no reference to a "genuine" foreign investment that is limited to a contribution of capital that has a foreign provenance.

222. Moreover, Article 1 states that foreign investors "may include […] foreign juridical persons, including, specifically, any companies, firms, enterprises, organizations or associations, set up and entitled to make investments in conformity with the legislation of the country where they are located."[308] What is obviously missing from this provision is any restriction on foreign legal entities that might be owned or otherwise subject to control by Russian nationals.

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[306] Id. at ¶¶ 13-14.
[307] Certified translation of Article 2 of the Law of the R.S.F.S.R. No. 1545-1 "On Foreign Investments in the R.S.F.S.R." of July 4, 1991 (**Exhibit S-123**).
[308] Id. at Article 1.

223. Professor Yarkov's proposition that the 1991 Law should be limited to "genuine" foreign investments, understood as those not made with resources with a Russian provenance or by persons under the control or influence of Russian nationals, lacks any basis in the text of the statute.

224. First, the statute refers to "all types" of property and assets. This indicates an open class, not one limited by the history and origins of the things invested. It is the identity of the investor, not the source of the investor's property, that matters.

225. Second, other provisions of the 1991 Law bolster this point. Article 3 allows foreign investors to employ Soviet currency to purchase shares as a form of investment. Article 4 ensures that investors may pursue any object not prohibited by legislation, including securities and property rights. These assurances indicate that a foreign person who engages in investment can employ any and all assets under its control, regardless of their provenance, in the absence of a specific legislative prohibition.

226. The 1999 Law, although using slightly different terminology, also places no restriction on the provenance of the assets invested by a foreigner. Its Article 2 defines "foreign investment" as:

> [T]he investment of foreign capital in objects of business activity on the territory of the Russian Federation in the form of objects of civil rights belonging to a foreign investor, unless such objects are excluded from the turnover or are restricted in the Russian Federation pursuant to federal laws. including money. securities (denominated in foreign currency or in the currency of the Russian Federation), other property. property rights, exclusive rights to the results of intellectual activities (intellectual property) which can be evaluated in a monetary form, and services and information.[309]

This definition refers to "foreign capital," but indicates that foreign means "belonging to a foreign investor." As with the 1991 Law, there is no indication that the invested capital must have a foreign provenance as well as ownership. To the contrary, the remainder of the definition indicates that all investments are permitted unless prohibited by specific other legislation. In particular, the definition of a foreign investor includes "foreign legal entities,

[309] Certified translation of Article 2 of the Federal Law No. 160-FZ "On Foreign Investment in the Russian Federation" of July 9, 1999 (**Exhibit S-124**).

the civil legal capacity of which shall be determined by the laws of the jurisdiction of their incorporation and which have the right to invest on the territory of the Russian Federation under the Laws of the jurisdiction of incorporation."[310] Again, one can find no restriction as to the nationality of stockholders or controlling persons of such entities. Moreover, Article 4(2) of the 1999 Law provides that:

> Restrictive exemptions for foreign investors may be established by federal laws only to the extent required for the purposes of protecting the constitutional system, public morals and health, the rights and legal interests of individuals and legal entities and the defense and security of the State.[311]

This guarantee of the principle of legality, comparable to that found in Article 4 of the 1991 Law, is inconsistent with Professor Yarkov's attempt to impose unwritten restrictions through inventive use of analogy.

227. If one had any doubts about this understanding of the 1991 and 1999 Laws as broadly protective of foreign investors and excluding provenance limits on its protection, recent Russian legislation should dispel them. In 2018, the Russian Legislature enacted amendments to the 1999 Law to introduce into Russian law the very rules that Professor Yarkov claims were already in force.[312] It changed the definition of "foreign investor" so as to exclude "a foreign legal entity controlled by a citizen of the Russian Federation and/or a Russian legal entity" as well as foreign nationals who also have Russian citizenship.[313] It also amended the definition of a foreign investment to require that the investment be "carried out by a foreign investor directly and independently."[314] Only with these changes did Russian law contain the limitations that, according to Professor Yarkov, would deny HVY the protection of the 1999 Law.

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[310] Id.
[311] Id. at Article 4(2).
[312] Federal Law No. 122-FZ "On Amending Certain Legislative Acts of the Russian Federation to Clarify the Concept of 'Foreign Investor'" of May 31, 2018 (**Exhibit S-127**).
[313] Id. at Article 2(1).
[314] Id. at Article 2(2).

228. The legislative history to these amendments confirms that, in the view of the Russian Government, these amendments changed the law and did not simply reaffirm what already was implicit in existing legislation. The Government's Explanatory Note accompanying the submission of the draft law stated:

> [T]here are many cases where Russian legal entities and citizens abuse the rights of foreign investors in respect of investment projects actually being carried out by such parties using companies registered abroad.
>
> The key goals of the Draft Law are to create an effective mechanism to stop Russian legal entitles and citizens obtaining unjustified advantages specified for foreign investors and also to improve the provisions of the investment legislation. […]
> The proposed amendments to the legislation will help to prevent capital flight from the Russian Federation.[315]

The Government clearly believed that the amendment was necessary to close a gap in existing law.

229. The relevant Committee of the Russian legislature confirmed this understanding of the relationship between the amendments and prior law. The Opinion of the Budget and Financial Markets Committee of the Council of Federation dated May 29, 2018 stated that:

> [F]or the purposes of the Federal Law "On Foreign Investment in the Russian Federation," by contrast to the current wording, a foreign organization under the direct or indirect control of a citizen of the Russian Federation or a Russian legal entity, and also a foreign citizen who also has Russian Federation citizenship, is not deemed to be a foreign investor.[316]

In the view of the Russian legislature, the "contrast" produced a change in the law, not a ratification of the status quo.

[315] Explanatory Note of the Government of the Russian Federation on the Draft Federal Law "On Amending Certain Legislative Acts of the Russian Federation (to clarify the concept of 'foreign investor')" of December 25, 2017 (**Exhibit S-128**).
[316] Opinion of the Budget and Financial Markets Committee of the Council of Federation of the Federal Assembly of the Russian Federation on the Federal Law "On Amending Certain Legislative Acts of the Russian Federation to Clarify the Concept of 'Foreign Investor'" of May 29, 2018 (**Exhibit S-129**).

3.5.2.3 Professors Yarkov and Asoskov contradict each other on the sources of interpretation of "foreign investments"

230. Conceding that no judicial practice supports his restrictive interpretation of the 1991 and 1999 Laws, Professor Yarkov argues that he instead can rely on judicial decisions applying the Investment Activity Law. He claims that this statute, enacted before the 1991 Law, is sufficiently analogous to the 1991 and 1999 Laws to justify this interposition of judicial interpretation.[317] The contention, however, is groundless.

231. First, the Investment Activity Law does not purport to define "foreign investor" or "foreign investment," terms for which the 1991 and 1999 Laws provide fulsome definitions. For this reason alone the statutes clearly are not analogous.[318] For the same reason, the judicial decisions addressing gaps in the Investment Activity Law tell us nothing about what a Russian court would do when facing the legislatively defined terms in the 1991 and 1999 Laws.

232. Moreover, Professor Yarkov's effort to analogize the Investment Activity Law to the 1991 and 1999 Laws conflicts directly with Professor Asoskov's analysis of the Investment Activity Law. In his 2014 Report, Professor Asoskov observed that, in addition to "the special legislation on foreign investments […] Russian law previously contained and currently contains laws on investment activity [including the Investment Activity Law]."[319] Having noted the existence of this statute, he proceeded to explain why this legislation had no bearing on the issues in dispute in this case.

233. Professor Asoskov stated that :

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[317] Yarkov Report at ¶¶ 18-20.

[318] All the sources on which Professor Yarkov relies to substantiate his "analogy of law" argument— Article 6 of the Civil Code of the Russian Federation (Part One) dated November 30, 1994 (VVY-03), Article 2(4) of the Administrative Procedure Code of the Russian Federation dated March 8, 2015 (VVY-19), Article 13(6) of the Commercial [Arbitrazh] Procedure Code of the Russian Federation dated July 24, 2002 (VVY-05), Civil Procedure Code of the Russian Federation, Resolution of the Federal Commercial Court of Moscow Circuit in Case No. KA-A41/8778-03 dated November 14, 2003 (VVY-07); Resolution of Fifteenth Commercial [Arbitrazh] Appellate Court No. 15AP-5638/17 dated May 22, 2017 (VVY-24)—allow using this analogy only where the relevant legal relations are not regulated directly. The 1991 and 1999 Laws directly establish what "foreign investment" and "foreign investor" are and, accordingly, the analogy of law cannot be used.

[319] 2014 Asoskov Report at ¶ 96.

> [T]he prevailing view in contemporary Russian doctrine is that the [Investment Activity Law is] applicable only to specific relations involving capital development projects construction of buildings, structures and other immovable property), regardless of whether the investor is foreign or not.[320]

To substantiate this claim, Professor Asoskov quoted from a book of Professor Farkhutdinov. That quotation in turn reviews other scholarship, including the work of N.G. Doronina and N.G. Semilyutina, to bolster the conclusion that the Investment Activity Law:

> is not applicable in its entirety to the determination of legal treatment of foreign investments. This law, like its later counterpart – the Law on Investment Activity dated February 25, 1999 – proceeds from an outdated concept, which linked the notions of "investments," "investing" and "investor" solely to relations involving capital development projects.[321]

The quoted segment concluded that, as of the date of writing (2014), the 1999 Law "is the only general federal law that directly and expressly regulates foreign investments in this country."

234. Professor Asoskov thus concluded that the Investment Activity Law is "not applicable in the present case, because the dispute here does not involve matters relating to capital development projects (construction of buildings, structures and other immovable property) in the Russian Federation."[322]

235. On this one point, Professor Asoskov is clearly correct. Judicial interpretation of a statute that predated the 1991 Law and did not purport to regulate foreign investment has no bearing on legislation that deals directly with that subject and contains express language that forecloses the results reached in the cases that invoked the Investment Activity Law.

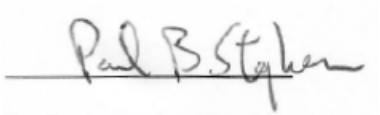
236. In sum, Professor Yarkov answers the wrong question when he argues that the 1991 and 1999 Laws excluded HVY from their protection. Moreover, even as to the question he does tackle, his answer is wrong. Until 2018, Russian legislation did not exclude foreign entities under the

[320] Id. at ¶ 97.
[321] Id. at ¶ 98.
[322] Id. at ¶ 99.

effective control of Russian persons, whether physical or natural, as well as their investments, from the protection generally proved to foreign investors.

3.6 Conclusion

237. It is my opinion that Professor Avtonomov is incorrect in his assertion that the priority of international treaties over inconsistent federal law provided by Article 15(4) of the Constitution does not include provisionally applied treaties such as the ECT. It also is my opinion that Professor Marochkin is incorrect in his assertion that references to international treaties of the Russian Federation, including those found in legislation in force at that time of the commencement of the provisional application of the ECT, do not encompass international treaties made on behalf of the Russian Federation that apply provisionally in advance of legislative approval of their ratification. I also disagree with Professor Asoskov's contention that the agreement of the Russian Federation to settle international investment disputes under the ECT through international arbitration contravenes Russian law. To the contrary, Russian laws in effect at the time of signing of the ECT and at the time of commencement of the arbitration between HVY and the Russian Federation expressly mandate settling international investment disputes through arbitration. Finally, Professor Yarkov's effort to restrict the scope of the 1991 and 1999 Laws on Foreign Investment is both irrelevant and incorrect as a matter of Russian law. Accordingly, it remains my opinion that neither the Constitution of the Russian Federation nor any other law in force in the Russian Federation in December 1994 (and at the time when the arbitrations were commenced) was inconsistent with the provisional application of the agreement to submit to arbitration found in Article 26 of the ECT.

by: 

Professor Paul B. Stephan

LIST OF EXHIBITS

Exhibit S-1	Declaration on the State Sovereignty of the R.S.F.S.R. of June 12, 1990, ¶¶ 1, 5.
Exhibit S-2	Paul B. Stephan, Soviet Law and Foreign Investment: Perestroyka's Gordian Knot, 25 Int'l Law. 741 at 751-753 (1991).
Exhibit S-3	Jane Henderson, The Constitution of the Russian Federation – A Contextual Analysis at 62 (Hart Publishing 2011).
Exhibit S-4	Robert B. Ahdieh, Russia's Constitutional Revolution – Legal Consciousness and the Transition to Democracy 1985-1996 at 48-52 (Pennsylvania State University Press, 1997)
Exhibit S-5	Decree of the President of the Russian Federation No. 718 of May 20, 1993, preamble.
Exhibit S-6	Decree of the President of the Russian Federation No. 1400 of September 21, 1993, ¶ 1.
Exhibit S-7	Opinion of the Constitutional Court of the Russian Federation No. 2-3 of September 21, 1993.
Exhibit S-8	Decree of the President of the Russian Federation No. 1612 of October 7, 1993.
Exhibit S-9	Draft Constitution of the Russian Federation prepared by the Constitutional Commission of the Congress of People's Deputies of the Russian Federation, July 16, 1993.
Exhibit S-10	Robert Sharlet, Russian Constitutional Change: An Opportunity Missed, 7 Demokratizatsiya 437, 437 (1999)
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Exhibit S-13	G.M. Danilenko, The New Russian Constitution and International Law, 88 Am. J. Int'l L. 451, at 459 (1994)

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Exhibit S-16	The Law No. 4174-1 of December 22, 1992, on the Council of Ministers
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Exhibit S-58 Jane Henderson, Developments in Russia, 21 Eur. Pub. L. 229, 231-33 (2015)

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