

**EXPERT REPORT OF PROFESSOR ANTON V. ASOSKOV**

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## A. INTRODUCTION

1. I am Anton Vladimirovich Asoskov, doctor of law, Professor of the International Private Law Department at the Russian School of Private Law and Assistant Professor of the Civil Law Department at M.V. Lomonosov Moscow State University. The areas of my academic interests are Russian civil law and international private law. I am a member of the working group organized under the auspices of the President's Council on Codification of Civil Legislation and participated in drafting the Development Concept for Civil Legislation of the Russian Federation and the preparation of draft amendments to the Civil Code of the Russian Federation (Section VI "International Private Law"). I am an Arbitrator of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, and I also have experience as an arbitrator in proceedings under the Arbitration Rules of the International Chamber of Commerce (ICC) and the UNCITRAL Arbitration Rules. My concise *curriculum vitae* is attached as Appendix 1 to this report (the "**Report**").
2. I have been asked by the law firm Cleary Gottlieb Steen & Hamilton LLP to prepare an expert opinion on certain issues of Russian law in connection with proceedings to set aside the arbitral awards issued in PCA Case Nos. AA226, AA227 and AA228, brought under the Energy Charter Treaty (the "**ECT**"). In particular, I have been asked to examine the following question under Russian law as of December 17, 1994, and its further development up to the date of this Report:

Does Russian law authorize or permit the arbitration of disputes concerning  
(i) taxation measures; (ii) enforcement measures related to tax assessments; and  
(iii) bankruptcy matters?
3. Section B sets forth my analysis of the question that I have been asked to address, followed by my conclusions in Section C.
4. I have reviewed the Interim Awards on Jurisdiction and Admissibility of November 30, 2009 issued in PCA Case Nos. AA226, AA227 and AA228. I have also reviewed the Opinion of Professor Alexey Alexandrovich Kostin on Certain Issues of Arbitrability dated February 21, 2006 and related materials submitted in the arbitrations. My Report is, however, limited to the matters set forth herein.

5. I am independent from the parties, their counsel and the members of the tribunal in PCA Case Nos. AA226, AA227 and AA228.

## **B. ANALYSIS**

**Does Russian law authorize or permit the arbitration of disputes concerning (i) taxation measures; (ii) enforcement measures related to tax assessments; and (iii) bankruptcy matters?**

*Constitutional framework for identifying the limits of arbitrability of disputes under Russian law*

6. I start my analysis with the Constitution of the Russian Federation (the “**Constitution**”),<sup>1</sup> which takes precedence over all other laws within the Russian Federation. Laws and regulations enacted in the Russian Federation shall not contradict the Constitution.<sup>2</sup> The Constitutional Court of the Russian Federation (the “**Constitutional Court**”) has the power to interpret the Constitution and review other Russian laws for consistency with the Constitution. While reviewing relevant cases, the Constitutional Court interprets the relevant constitutional provisions, identifies the correct interpretation of the laws in accordance with the Constitution and establishes legal principles that are binding on other Russian courts.<sup>3</sup>
7. In its Resolution No. 10-P dated May 26, 2011,<sup>4</sup> the Constitutional Court determined the limits for consideration of various categories of disputes through arbitration. This Resolution was rendered in connection with the request of the Supreme Arbitrazh Court of the Russian Federation for verification of the constitutionality of certain provisions of Russian legislation, which permitted the resolution of disputes concerning immovable property (in particular, disputes concerning the enforcement of a mortgage against immovable property)

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<sup>1</sup> The Constitution was approved at a referendum on December 12, 1993 and entered into force on December 25, 1993.

<sup>2</sup> Article 15(1) of the Constitution of the Russian Federation (Exhibit R-163).

<sup>3</sup> Apart from the Constitutional Court, there are two main branches of State courts in the Russian Federation – courts of general jurisdiction, which resolve primarily criminal cases and civil cases involving individuals, and arbitrazh (commercial) courts, which resolve primarily commercial disputes involving legal entities and individual entrepreneurs. Before August 2014 the system of courts of general jurisdiction was headed by the Supreme Court of the Russian Federation, and the system of arbitrazh courts by the Supreme Arbitrazh Court of the Russian Federation. In August 2014, an integrated Supreme Court of the Russian Federation was established, which is now the highest court of instance for both courts of general jurisdiction and the system of arbitrazh courts. Proceedings in courts of general jurisdiction are governed by the Civil Procedure Code of the Russian Federation (the “**Civil Procedure Code**”), and proceedings in arbitrazh courts by the Arbitrazh Procedure Code of the Russian Federation (the “**Arbitrazh Procedure Code**”).

<sup>4</sup> Resolution of the Constitutional Court of the Russian Federation No. 10-P dated May 26, 2011 (Exhibit AVA1).

by arbitral tribunals. The Constitutional Court confirmed that such disputes are civil law disputes and, hence, arbitrable. At the same time, the Constitutional Court formulated criteria to be relied upon in determining whether a particular dispute may be referred to arbitration.

8. The Constitutional Court came to the conclusion that the parties' voluntary waiver of the right to trial (the right to litigate a case in a State court) derives from the principles of autonomy of will and of freedom of contract (see the last paragraph of section 2 of the reasoning of the Resolution), and the procedural discretion (the possibility of referring a dispute to arbitration) results from discretion in the substantive (civil) law (see the third paragraph of section 3.1 of the reasoning of the Resolution).

9. Since the principles of party autonomy, freedom of contract and discretion are not applicable (or applicable to a very limited extent) within the framework of public law relations, the following conclusion of the Constitutional Court is logical:

*"... the current regulatory framework does not allow the referral to an arbitral tribunal of disputes arising out of administrative or other public law relations ..."*<sup>5</sup>

10. In its Resolution No. 10-P dated May 26, 2011, the Constitutional Court also made a very important conclusion on the criteria to distinguish public law disputes (that, according to the general rule, cannot be resolved through arbitration) from private law disputes (that, according to the general rule, can be referred to arbitration):

*"The public law nature of disputes, which dictates the impossibility to refer them to arbitration, is determined by the nature of the legal relations giving rise to the dispute regarding such property and the composition of the parties to the dispute rather than the type of such property (movable or immovable)."*<sup>6</sup>

*Non-arbitrability of public law disputes under Russian law*

11. On the basis of the constitutional law framework described above, 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.

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<sup>5</sup> See the second paragraph of Section 3.1 of the reasoning of Resolution of the Constitutional Court of the Russian Federation No. 10-P dated May 26, 2011 (Exhibit AVA1).

<sup>6</sup> See the sixth paragraph of Section 4 of the reasoning of Resolution of the Constitutional Court of the Russian Federation No. 10-P dated May 26, 2011 (Exhibit AVA1).

12. I will discuss below how this test of arbitrability was set forth in Russian law **as of December 17, 1994**, the date of the signature of the ECT.

13. Law of the Russian Federation No. 5338-1 dated July 7, 1993 “On International Commercial Arbitration” (the “**1993 International Arbitration Law**”) provides (Article 1(2)):

*“The following kinds of disputes shall be submitted for international commercial arbitration by agreement between the parties: disputes arising from contractual and other civil law relationships arising from the maintenance of foreign trade and other international economic relations, if the commercial enterprise of at least one of the parties is located abroad...”*<sup>7</sup>

14. The Civil Procedure Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1964 provided (Article 27):

*“In cases provided by law or by international treaties, a dispute arising from civil law relationships, upon agreement of the parties, may be submitted for resolution by an arbitral tribunal, Maritime Arbitration Commission, or Foreign Trade Arbitration Commission of the Chamber of Industry and Trade of the USSR.”*<sup>8</sup>

15. The Arbitrazh Procedure Code of the Russian Federation of 1992 provided (Article 21):

*“By agreement of the parties, an economic dispute that has arisen or may arise and that falls within the jurisdiction of arbitrazh courts can be submitted to arbitration before an arbitrazh court has commenced the proceedings.”*<sup>9</sup>

16. The Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes, approved by Resolution of the Supreme Council of the Russian Federation No. 3115-1 dated June 24, 1992, provided (Article 1(1)):

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<sup>7</sup> Article 1(2) of Law of the Russian Federation No. 5338-1 dated July 7, 1993 “On International Commercial Arbitration” (Exhibit R-311). This rule is applicable until the present with no changes. Unless otherwise indicated here and elsewhere, the emphasis in the quoted text is mine.

<sup>8</sup> Article 27 of the Civil Procedure Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1964 (Exhibit R-900). This law of the Soviet period was applicable until the enactment of the new Civil Procedure Code of 2002 (*i.e.* up to February 1, 2003).

<sup>9</sup> Article 21 of the Arbitrazh Procedure Code of the Russian Federation of 1992 (Exhibit AVA2). Prior to the enactment of the restated Arbitrazh Procedure Code of 1995 (*i.e.* up to July 1, 1995), all disputes involving foreign persons (including disputes of a commercial nature) were subject to the jurisdiction of courts of general jurisdiction and governed by the Civil Procedure Code of the RSFSR, unless otherwise provided by international treaties or by agreement of the parties (Article 20(2) of the Arbitrazh Procedure Code of 1992).

*“This Provisional Regulation (hereinafter, the Regulation) is applicable in the event of submission to arbitration of disputes arising out of civil law relations and falling within the jurisdiction of arbitrazh courts.”*<sup>10</sup>

**17. A similar approach, pursuant to which only disputes arising out of civil law relations can be recognized as arbitrable, has remained unchanged until the present.** Below I will discuss the Russian legislative acts that were enacted **after December 17, 1994** and in which this approach has been reflected.

18. The Arbitrazh Procedure Code of the Russian Federation of 1995 provided (Article 23):

*“By agreement of the parties, a dispute that has arisen or may arise and that arises out of civil law relations and falls within the jurisdiction of arbitrazh courts can be referred to arbitration before it has been resolved by an arbitrazh court.”*<sup>11</sup>

19. The Arbitrazh Procedure Code of the Russian Federation of 2002 that is in force until the present provides (Article 4(6)):

*“By agreement of the parties, before an arbitrazh court of the first instance has rendered a judgment concluding the trial on the merits, a dispute arising out of civil law relations and falling within the jurisdiction of arbitrazh courts can be referred by the parties to an arbitral tribunal, unless otherwise provided by federal law.”*<sup>12</sup>

20. The Law on Arbitral Tribunals provides (Article 1(2)):

*“By agreement of the parties to arbitration proceedings (hereinafter referred to as the parties), any dispute resulting from civil law relations may be referred to the arbitration tribunal, unless otherwise provided by the federal law.”*<sup>13</sup>

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<sup>10</sup> Article 1(1) of the Provisional Regulation on Arbitral Tribunal for Resolving Economic Disputes, approved by Resolution of the Supreme Council of the Russian Federation No. 3115-1 dated June 24, 1992 (Exhibit AVA3). This Regulation was in force until the enactment of Federal Law No. 102-FZ dated July 24, 2002 “On Arbitral Tribunals in the Russian Federation” (the “**Law on Arbitral Tribunals**”), *i.e.* up to July 27, 2002 and was applicable only to domestic arbitration proceedings pursuant to its Article 1(2).

<sup>11</sup> Article 23 of the Arbitrazh Procedure Code of 1995 (Exhibit AVA4). The Arbitrazh Procedure Code of 1995 entered into force on July 1, 1995. Commercial disputes involving foreign companies and individual entrepreneurs thereby became subject to the jurisdiction of arbitrazh courts.

<sup>12</sup> Article 4(6) of the Arbitrazh Procedure Code of 2002 (Exhibit AVA5). The Arbitrazh Procedure Code of 2002 entered into force on September 1, 2002.

<sup>13</sup> Article 1(2) of the Law on Arbitral Tribunals (Exhibit R-306). The Law on Arbitral Tribunals is applicable only to domestic arbitral proceedings pursuant to its Article 1(3).

21. The Civil Procedure Code of the Russian Federation of 2002 that is in force until the present provides (Article 3(3)):

*“By agreement of the parties, before a court of the first instance has rendered a judgment concluding the civil trial on the merits, a dispute arising out of civil law relations and falling within the jurisdiction of the court can be referred by the parties to an arbitral tribunal, unless otherwise provided by federal law.”*<sup>14</sup>

22. **Thus, Russian law has always stressed the civil law nature of parties’ relations as a criterion of arbitrability, which directly entails the non-arbitrability of any type of public law dispute.**

23. This conclusion is unequivocally recognized in Russian doctrine. For instance, S.M. Kurochkin points out:

*“Reference to the civil law nature of a dispute as a criterion of the possibility to resolve it by arbitration means that the current regulatory system does not permit the arbitration of disputes arising out of administrative and other public law relations ...”*<sup>15</sup>

24. Similarly, the authors of a leading treatise on international commercial arbitration, commenting on Article 1(2) of the 1993 International Arbitration Law cited above, come to the following unequivocal conclusion:

*“Therefore, if relations between the parties are of a public law nature, then a dispute arising out of such relations cannot be referred to international commercial arbitration.”*<sup>16</sup>

*Which disputes are qualified as public law disputes in Russian law?*

25. As described above (paragraphs 7-10 of this Report), the 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.

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<sup>14</sup> Article 3(3) of the Civil Procedure Code of 2002 (Exhibit AVA6). The Civil Procedure Code of 2002 entered into force on February 1, 2003.

<sup>15</sup> S.A. Kurochkin. *International Commercial Arbitration and Arbitral Proceedings*. Moscow, 2013. Page 139 (Exhibit AVA7). Unless otherwise indicated here and elsewhere, footnotes are omitted.

<sup>16</sup> *International Commercial Arbitration: Treatise*. Edited by Prof. V.A. Musin and Prof. O.Yu. Skvortsov. St. Petersburg, 2012. Page 24 (Exhibit AVA8).

26. In Russian court practice and doctrine, the phrase “*nature of the legal relations*” means the form (method) of the legal regulation of relations. Civil (private) law governs relations between equal parties, in which neither of the parties has a coercive power with respect to the other party, *i.e.*, one party may not dictate mandatory rules of conduct to the other party or take coercive measures against such a party, implemented through the mechanism of State coercion. This method of legal regulation is generally called “principle of coordination (compromise).”

27. By contrast, in public law relations, one party (a State, a government or municipal authority) is inherently superior to the other party (an individual or legal entity): the first party may unilaterally dictate mandatory rules of conduct to the other party and may take coercive measures, implemented through the mechanism of State coercion, in case of violation of such rules. This method of legal regulation is generally called “principle of subordination (subjection).”

28. One of the leading treatises on Russian civil law describes this distinction in the “*nature of the legal relations*” as follows:

*“Private law is based on the principle of coordination (compromise) of the activities of legally equal parties to regulated relations, who implement their own (private) interests, and, therefore, constitutes the system of their de-centralized regulation (to a considerable extent – self-regulation). Public law, by contrast, is based on the principle of subordination (subjection) of unequal parties, whose activities involve the implementation of State and social (public) interests and, therefore, constitutes a system of centralized regulation of the respective relations.”<sup>17</sup>*

29. The principle of subordination (subjection) is also widely used as the main criterion to distinguish between civil law and public law relations in Russian court practice. For example, the Letter of the Supreme Arbitrazh Court of the Russian Federation No. VAS-S06/OPP-1200 dated August 23, 2007 states that:

*“In interpreting the first criterion [the criterion of the nature of the legal relations] it should be noted that the sphere of legal relationships that may be subject to arbitration is limited exclusively to the sphere of civil legal relationships, i.e., if the disputed relationships arose*

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<sup>17</sup> Civil Law: Treatise. 4 volumes. Vol. 1: General Part, edited by Prof. E.A. Sukhanov. 3rd edition. Moscow, 2008 (Exhibit AVA9). The text has been sourced from ConsultantPlus legal database.

*from administrative or other relationships based on the parties' subordination, on relationships of authority and hierarchy, then, notwithstanding the existence of the respective arbitration agreement, the tribunal has no right to accept the case for examination or to resolve it on the merits. If it [examination and resolution of the dispute by an arbitral tribunal] nonetheless occurs, an arbitral award will not have any legal consequences because it will not be legalized by a State court.”<sup>18</sup>*

30. The Supreme Arbitrazh Court of the Russian Federation almost literally repeats the conclusion that had been reached before in Russian doctrine by Professor O.Yu. Skvortsov:

*“Thus, the subject matter of arbitration is limited to the sphere of civil law relationships. This means that if legal relationships underlying a dispute have arisen from administrative or other relationships based on subordination, or relations of power and subordination, i.e., public law relationships, irrespective of an arbitration clause, an arbitration tribunal has no power to take such a dispute into consideration and settle it on the merits.”<sup>19</sup>*

31. In public law relations based on the principle of the parties' subordination (subjection), State and municipal authorities make decisions to exercise their authority and regulatory powers, i.e. coercive power over private entities that are within the jurisdiction of the State (e.g., decisions on the imposition of tax liability, the collection of additional tax payments, the forced sale of assets to enforce the decisions of judicial and administrative bodies, etc.). Claims challenging the validity or lawfulness of such decisions of State and municipal authorities cannot be considered by an arbitral tribunal because they arise out of public law relations:

*“It is obvious that a claim challenging the decisions of public authorities or requesting their decision cannot be filed with an arbitral tribunal: in tax law – challenging decisions on taxpayers' liability for tax offences, in antitrust law – challenging the imposition of fines or the issuance of special orders intended to protect competition and limit monopolistic activities, in subsoil law – challenging refusals to provide subsoil licenses or decisions to*

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<sup>18</sup> Letter of the Supreme Arbitrazh Court of the Russian Federation No. VAS-S06/OPP-1200 dated August 23, 2007 (Exhibit AVA10). Although the specific conclusions of this Letter of the Supreme Arbitrazh Court of the Russian Federation concerning the non-arbitrability of disputes concerning immovable property are no longer applicable, as they contradict Resolution No. 10-P of the Constitutional Court, the cited statement of the Letter is valid and consistent with the legal positions expressed by the Constitutional Court in Resolution No. 10-P (Exhibit AVA1).

<sup>19</sup> O.Yu. Skvortsov. Arbitration of Entrepreneurial Disputes in Russia: Problems. Tendencies. Perspectives. Wolterskluwer, Moscow, 2005. Page 427 (Exhibit AVA11).

*terminate such licenses before the expiration of their term, challenging standards, norms, technological rules related to subsoil use and subsoil and environmental protection that contravene the laws. The opposing party in such cases is a governmental body having authority and regulatory powers. Therefore, the public nature of the relations between the parties raises no doubt ...*”<sup>20</sup>

32. Another criterion for distinguishing between civil law and public law disputes is the “*composition of the parties to the dispute.*” The distinctive feature of all public law relations is that one of the parties in such relations is the State, municipal entity or government or municipal bodies.<sup>21</sup>

33. It should be noted that Russian court practice and doctrine pay significant attention to the criterion of the composition of the parties to the dispute. Involvement of the State as a party to the dispute, combined with other factors (as described in detail below), has led Russian courts to conclude that a dispute is not arbitrable, even though the relations between the parties were based on a civil law contract.

34. When referring to the “*composition of the parties to the dispute*” as a criterion for distinguishing civil law disputes from public law disputes, Russian courts formulate a test of “*concentration of socially significant public elements.*” Such significant public elements usually include: (i) the existence of an apparent public interest, (ii) involvement of a public entity, and (iii) the use of budgetary funds. Set forth below are the most typical examples from the jurisprudence of the Supreme Arbitrazh Court of the Russian Federation:

- i. Disputes arising from government contracts are deemed non-arbitrable notwithstanding the fact that the relations between the parties are based on a contract: “*Relations arising from the placement of orders are characterized by a combination of the following specific features: a contract is entered into in the public interest, by a special public entity (a State or municipal entity or a State-owned enterprise) and its purpose is to meet State or municipal needs, and such needs are financed through respective budgetary funds ... The concentration of such socially significant public*

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<sup>20</sup> V.N. Anurov. Permissibility of Arbitration Agreement // Arbitral Tribunal. 2005. No. 4. Pages 111-112 (Exhibit AVA12).

<sup>21</sup> Pursuant to Article 124 of the Civil Code of the Russian Federation (Exhibit AVA13), the State, as well as municipal entities, may also be parties to civil law relations, provided that they act “*on equal terms with other parties to such relations - individuals and legal entities.*” Thus, the criterion concerning the “nature of the legal relations” (*i.e.* the existence of the principle of subordination or the principle of coordination) distinguishes civil law relations from public law relations.

*elements in a single legal relation does not permit the recognition of disputes arising from the contracts as disputes of a solely private nature between private entities that can be resolved privately by arbitral tribunals.”* (Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11535/13 dated January 28, 2014 in the case *ArbatStroi vs. the State Public Health Care Institution of the City of Moscow “Industrial and Technology Association for Major Repairs and Construction of the Public Health Department of the City of Moscow”*);<sup>22</sup>

- ii. Disputes arising from agreements to lease forest land plots are deemed non-arbitrable, even though the parties’ relations are based on a contract: *“Therefore, relations arising in the event of the lease of forest land plots are distinguished by a combination of the following conditions: an agreement is concluded by a special entity (State authorities or local self-government bodies); the leased property is a forest land plot that is State-owned or municipally owned; an agreement is concluded with the aim of ensuring rational, permanent and sustainable forestry in order to satisfy the public demand for forest and forest resources; the lease payments are a source of income for both the federal budget and the budget of the territorial unit of the Russian Federation ... In the event of the lease of forest land, there is a combination of public interest, involvement of a public entity and budgetary funds.”* (Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11059/13 dated February 11, 2014 in the case *Ministry of Natural Resources and Ecology of the Republic of Karelia vs. Forest-Group LLC*);<sup>23</sup>
- iii. Disputes related to the privatization of State-owned or municipally-owned property are deemed non-arbitrable notwithstanding that the government (or municipality)

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<sup>22</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11535/13 dated January 28, 2014 (Exhibit AVA14). Resolutions of the Presidium of the Supreme Arbitrazh Court of the Russian Federation are an important means to establish the correct interpretation of rules of Russian law. The rules of Russian procedural law emphasize a special (quasi-precedent) status for resolutions of the Presidium of the Supreme Arbitrazh Court of the Russian Federation. For instance, in accordance with the last paragraph of Article 170(4) of the Arbitrazh Procedure Code (Exhibit AVA5), arbitrazh courts substantiate their decisions by reference not only to the provisions of laws and regulations, but also to the resolutions of the Presidium of the Supreme Arbitrazh Court of the Russian Federation (since August 2014, to the extent not abrogated by the new integrated Supreme Court). Pursuant to Article 311(3)(5) of the Arbitrazh Procedure Code (Exhibit AVA5), until August 2014, a determination on the practice of application of a legal provision, or a change in such practice, established in a resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, was considered a new circumstance that allowed for review of judgments in cases involving third parties, where the same provision had been applied by lower arbitrazh courts based on a different interpretation.

<sup>23</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11059/13 dated February 11, 2014 (Exhibit AVA15).

enters into an agreement for the sale of the property in the course of privatization: “However, by its nature, the dispute that has arisen between the property fund and the company cannot be subject to arbitration, as the assets that were disposed of for compensation (privatized) were owned by a public entity (the Russian Federation) whose right to dispose of its property is limited by privatization law.” (Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 3515/00 dated April 10, 2001 in the case *Property Fund of the Kaliningrad Region vs. Finvest Ltd.*);<sup>24</sup>

- iv. Disputes arising from investment contracts for the construction of buildings by private companies on land plots owned by the State or a municipality are deemed non-arbitrable (Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 17043/11 dated April 3, 2012 in the case *ALDEGA LLC vs. the Municipality “Town of Krasnozavodsk”*).<sup>25</sup>

**35. Therefore, in order to classify a dispute as a public law dispute that is not arbitrable under Russian law, two criteria are used: (i) the nature of the legal relations, and (ii) the composition of the parties to the dispute. The nature of public law relations is characterized by the principle of subordination (subjection). When analyzing the composition of the parties to a dispute, Russian courts place special emphasis on the “concentration of socially significant public elements,” which are (i) public interest, (ii) involvement of a public entity and (iii) impact on budgetary funds.**

*Should acts of public law specifically indicate that public law disputes are not arbitrable?*

36. In civil law relations, it is presumed that disputes are arbitrable. In order to rule out the possibility to refer certain categories of civil law disputes to arbitration, their arbitrability must be expressly prohibited by law. This general approach is reflected, in particular, in Article 1(4) of the 1993 International Arbitration Law:

*“This Law does not invade the sphere of jurisdiction of any other law of the Russian Federation by dint of which certain disputes may not be submitted to a court of arbitration*

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<sup>24</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 3515/00 dated April 10, 2001 (Exhibit AVA16).

<sup>25</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 17043/11 dated April 3, 2012 (Exhibit AVA17).

*or may be submitted to them only in conformity with the provisions other than those contained in this Law.”*<sup>26</sup>

37. Therefore, a general reference to the resolution of civil law disputes “*in court*” in a law governing civil law relations does not by itself rule out arbitration of the respective category of disputes. This conclusion also follows from Article 11 of the Civil Code of the Russian Federation (the “**Civil Code**”), which provides that in the context of the Civil Code, the term “*court*” means not only State courts (courts of general jurisdiction and arbitrazh courts), but also arbitral tribunals.<sup>27</sup>

38. The situation is quite different for public law legislation that governs public law disputes. The provisions of Article 11 of the Civil Code are not applicable to such acts. This follows expressly from the provisions of the Civil Code itself (Article 2(3)):

*“Civil legislation does not apply to property relations based on administrative or other authoritative subordination of one party to another, including tax and other fiscal or administrative relations, unless otherwise stipulated by the legislation.”*<sup>28</sup>

39. Contrary to civil law relations, it is presumed that disputes involving public law relations are not arbitrable, so there is no need to specifically indicate in legislation that such disputes cannot be referred to arbitral tribunals. If public law provisions refer to judicial resolution of disputes and there is no specific permission to refer public law disputes to arbitration, this automatically means that the Russian legislator confirms the general principle of non-arbitrability of public law disputes and does not make any exception from this general principle.

40. This approach to the interpretation of Russian public law rules is widely used in Russian court practice. For instance, in its Resolution No. 11535/13 dated January 28, 2014 in the case of *ArbatStroi*, where the key issue was the arbitrability of disputes arising out of State contracts concluded pursuant to Federal Law No. 94-FZ dated July 21, 2005 “On the Placing of Orders for Supplies of Goods, Performance of Work and Rendering of Services for State and Municipal Needs,” the Presidium of the Supreme Arbitrazh Court of the Russian Federation pointed out the following:

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<sup>26</sup> Article 1(4) of the International Arbitration Law (Exhibit R-311).

<sup>27</sup> Article 11 of the Civil Code of the Russian Federation (Exhibit AVA13).

<sup>28</sup> Article 2(3) of the Civil Code of the Russian Federation (Exhibit AVA13).

*“The set of rules of the Law [Federal Law No. 94-FZ dated July 21, 2005 “On the Placing of Orders for Supplies of Goods, Performance of Work and Rendering of Services for State and Municipal Needs”] evidences that it is a complex legislative act, which contains rules of both public and private law. The Law on Placing of Orders does not mention arbitral tribunals and the term ‘court’ used therein cannot be considered a collective term covering arbitral tribunals...”<sup>29</sup>*

41. A similar conclusion was reached by the Presidium of the Supreme Arbitrazh Court of the Russian Federation in its Resolution No. 11059/13 dated February 11, 2014 in the case of *Forest-Group*, where the issue in dispute was the arbitrability of disputes arising out of agreements to lease forest land plots that were governed by the Forestry Code of the Russian Federation, which contains primarily public law rules:

*“Taking into account the scope of regulation of the Forestry Code, its determination of the procedure for dispute resolution by judicial means (Article 101 of the Forestry Code) does not require supplementing such procedure with a special prohibition ruling out the competence of arbitral tribunals.”<sup>30</sup>*

42. **Therefore, since it is presumed that public law disputes are not arbitrable, their non-arbitrability does not have to be explicitly stated in public law legislation.**

*Non-arbitrability of disputes related to the assessment and collection of taxes and tax sanctions*

43. 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: (i) relationship of subordination (subjection) between the tax authority and the taxpayer, (ii) involvement of a government body vested with authority and regulatory powers, and (iii) “*concentration of socially significant public elements*” (apparent public interest and impact on budgetary funds).
44. Therefore, this category of public law disputes may not be examined or resolved by arbitral tribunals. This is also confirmed by an analysis of Russian tax laws.

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<sup>29</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11535/13 dated January 28, 2014 (Exhibit AVA14).

<sup>30</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 11059/13 dated February 11, 2014 (Exhibit AVA15).

45. As of December 17, 1994, general issues of taxation and the collection of taxes and tax sanctions were governed by Law of the Russian Federation No. 2118-1 dated December 27, 1991 “On Fundamentals of the Tax System in the Russian Federation,” which provided that:

*“[p]rotection of the rights and interests of taxpayers and the State is exercised by judicial or other procedure provided for by the legislation of the Russian Federation” (Article 17).<sup>31</sup>*

46. “Other” procedure means the right of a taxpayer to challenge the actions of a tax authority before a higher tax authority. (A hierarchical system of tax bodies based on the principle of subordination of lower tax authorities to higher tax authorities previously existed and currently exists in the Russian Federation.)

47. Part One of the Tax Code of the Russian Federation (the “**Tax Code**”), in its initial version, which entered into force on January 1, 1999, provided that “*acts of tax authorities, the actions or omissions of their officials may be appealed to a higher tax authority (higher tax official) or a court*” (Article 138(1)).<sup>32</sup> Legal persons and individual entrepreneurs were required to apply to arbitrazh courts in accordance with the Arbitrazh Procedure Code, and individuals who were not individual entrepreneurs to courts of general jurisdiction in accordance with the Civil Procedure Code (Article 138(2)). Subsequently, the language of Article 138 of the Tax Code underwent some changes, but the provision on challenging the acts of tax authorities and the actions or failure to act of their officials in State courts has remained unchanged.

48. The non-arbitrability of tax disputes between tax authorities and taxpayers is consistently recognized in Russian doctrine. For example, A.I. Minina concludes that Article 138 of the Tax Code of the Russian Federation leaves no doubt that this category of public law disputes is non-arbitrable:

*“... certain laws prohibit the referral of certain disputes to arbitration by way of their referral to the exclusive competence of courts or other government authorities. Similar provisions are found in Article 138 of the Tax Code of the Russian Federation No. 146-FZ*

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<sup>31</sup> Article 17 of Law of the Russian Federation No. 2118-1 dated December 27, 1991 “On Fundamentals of the Tax System in the Russian Federation,” (Exhibit AVA18). This Law was in force until January 1, 1999 when Part One of the Tax Code of the Russian Federation entered into force.

<sup>32</sup> Article 138 of the Tax Code of the Russian Federation (Part One) of 1999 (Exhibit AVA19).

*dated July 31, 1998 (tax disputes). Thus, as a general rule, provisions of positive law quite definitively establish the limits beyond which arbitration proceedings are not allowed.*<sup>33</sup>

**49. Thus, disputes concerning the assessment by tax authorities of additional taxes and tax sanctions are non-arbitrable under Russian law and cannot be referred to arbitration.**

*Non-arbitrability of disputes concerning enforcement of the decisions of tax authorities or other actions of governmental authorities performed pursuant to the legislation on enforcement proceedings*

50. There is no doubt that disputes concerning enforcement of the decisions of tax authorities or other actions of governmental authorities performed pursuant to the legislation on enforcement proceedings are public law disputes because all of the aforementioned criteria characterizing a public law dispute are present, namely: (i) relationship of subordination (subjection) between the governmental body in charge of enforcement (tax authority or court bailiff) and the debtor (taxpayer), (ii) involvement of a government body vested with authority and regulatory powers, and (iii) “*concentration of socially significant public elements*” (apparent public interest and impact on budgetary funds).

51. Therefore, this category of public law disputes may not be examined or resolved by arbitral tribunals. This is also confirmed by an analysis of the Russian legislation on enforcement proceedings.

52. As of December 17, 1994, issues relating to enforcement proceedings were governed by the Civil Procedure Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1964 because bailiffs were attached to trial courts of general jurisdiction.<sup>34</sup>

53. Article 428 of the 1964 Civil Procedure Code of the RSFSR provided for the possibility of challenging court bailiff actions only in the court of general jurisdiction to which the court bailiff was attached:

*“A claimant or a debtor may file a complaint, and a prosecutor may file a challenge, against court bailiff actions related to the enforcement of a decision or a refusal to perform such*

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<sup>33</sup> A.I. Minina. Objective Arbitrability in Russian Legislation, Doctrine and Arbitration Practice //Relevant Issues of Russian Law. 2014. No. 1 (Exhibit AVA20). The text has been sourced from ConsultantPlus legal database.

<sup>34</sup> Article 348 of the Civil Procedure Code of the RSFSR 1964 (Exhibit AVA21). The provisions of the 1964 Civil Procedure Code of the RSFSR on enforcement proceedings were applicable until November 5, 1997.

*actions. Such a complaint or challenge shall be submitted to the court to which that court bailiff is attached or to the judge who made the decision within 10 days from the date of the court bailiff's action or from the date when the aforementioned persons who were not notified of the time and place of such action became aware of it.”<sup>35</sup>*

54. Pursuant to Federal Law No. 118-FZ dated July 21, 1997 “On Court Bailiffs,” the Federal Bailiff Service was formed as a separate State body authorized to enforce court decisions and other documents subject to enforcement. On the same date, Federal Law No. 119-FZ dated July 21, 1997 “On Enforcement Proceedings,” was adopted; pursuant to this law, court bailiff actions could be challenged only in a State arbitrazh court (if the writ of execution was issued by a State arbitrazh court) or in a court of general jurisdiction (in all other instances) (Article 90(1)):

*“A judgment creditor or debtor can contest the bailiff's actions in respect of the enforcement of a writ of execution issued by the Arbitrazh Court or [translation note: its] refusal to take such actions, including refusal to grant a challenge against the bailiff, can be contested with an Arbitrazh Court at the venue of the bailiff [translation note: i.e. having competence over the bailiff] within 10 days from the day when the action was taken (or refused to be taken).*

*In all other cases the bailiff's enforcement actions or refusal to take such actions, including refusal to grant a challenge against the bailiff, can be contested with a court of general competence at the venue of the bailiff [translation note: i.e. having competence over the bailiff] within 10 days from the day when the action was taken (or refused to be taken).*

*For the person who has not been notified about the time and place of the enforcement action (about the refusal to take such action), such [translation note: 10-day] period shall start as of the day, on which such person became aware of the same.”<sup>36</sup>*

55. Similar rules are found in Federal Law No. 229-FZ dated October 2, 2007 “On Enforcement Proceedings,” which is currently in force (Article 128):

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<sup>35</sup> Article 428 of the Civil Procedure Code of the RSFSR 1964 (Exhibit AVA21).

<sup>36</sup> Article 90(1) of Federal Law No. 119-FZ dated July 21, 1997 “On Enforcement Proceedings” (Exhibit RME-1671). This law, like Federal Law No. 118-FZ dated July 21, 1997 “On Court Bailiffs” (Exhibit AVA22), entered into force on November 5, 1997 and was applicable until February 1, 2008.

*“Resolutions of an official of the bailiff service, his/her actions (failure to act) concerning the execution of an enforcement document may be challenged in an arbitrazh court or a court of general jurisdiction in the area where such person performs his/her duties.”<sup>37</sup>*

**56. Thus, disputes concerning enforcement of the decisions of tax authorities and other actions performed by governmental authorities pursuant to legislation on enforcement proceedings are non-arbitrable under Russian law and cannot be referred to arbitration.**

*Non-arbitrability of disputes concerning the bankruptcy of Russian legal entities*

57. Cases concerning the declaration of bankruptcy of a Russian legal entity (bankruptcy cases) have always been treated as non-arbitrable under Russian law. A bankruptcy case includes proceedings in which the court establishes a legal entity’s inability to satisfy its creditors’ claims and introduces special procedures intended to restore the debtor’s solvency or liquidates the debtor under the supervision of a court-appointed bankruptcy receiver.<sup>38</sup> A bankruptcy case also includes matters concerning the composition of the bankruptcy creditors’ register (*i.e.* the inclusion of, or a refusal to include, creditors’ claims in the register of admitted claims to be satisfied out of the debtor’s bankruptcy estate) and their order of priority.

58. Russian legal doctrine mentions significant public interest as the reason for the non-arbitrability of bankruptcy cases:

*“Removal of these cases from the jurisdiction of arbitral tribunals is explained by their particular significance for the country’s economic life and the necessity to introduce State control over the processes of forced liquidation of business entities.”<sup>39</sup>*

59. V.N. Anurov stresses that only a State court may properly protect the interests of all creditors in a particular bankruptcy procedure and assess the legality of actions taken by the court-appointed bankruptcy receiver.<sup>40</sup>

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<sup>37</sup> Article 128 of Federal Law No. 229-FZ dated October 2, 2007 “On Enforcement Proceedings” (Exhibit AVA23).

<sup>38</sup> This section therefore does not discuss the issue of arbitrability of contractual disputes in a context where a State court has initiated bankruptcy proceedings in respect of one of the parties.

<sup>39</sup> O.Yu. Skvortsov. *Arbitration of Entrepreneurial Disputes in Russia: Problems. Tendencies. Perspectives.* Moscow, 2005. Page 394 (Exhibit AVA11).

60. Therefore, this category of public law disputes may not be examined or resolved by arbitral tribunals. This conclusion also derives from Russian laws on bankruptcy, which include an express statement that bankruptcy cases may not be resolved in arbitration.
61. Law of the Russian Federation No. 3929-1 dated November 19, 1992 “On Insolvency (Bankruptcy) of Business Entities,” provided that bankruptcy cases could only be tried by the arbitrazh courts of the relevant constituent entity of the Russian Federation, depending on the debtor’s location, as specified in its founding documents.<sup>41</sup>
62. Federal Law No. 6-FZ dated January 8, 1998 “On Insolvency (Bankruptcy)” expressly provided that “[n]o bankruptcy case may be referred to an arbitral tribunal for resolution” (Article 29(3)).<sup>42</sup> This rule has been restated in Federal Law No. 127-FZ dated October 26, 2002 “On Insolvency (Bankruptcy)” (Article 33(3)) which is currently in force.<sup>43</sup>
- 63. Thus, cases concerning the bankruptcy of Russian legal entities have always been non-arbitrable under Russian law and may not be referred to arbitral tribunals.**

*Non-arbitrability of disputes concerning compensation for damages caused by the State and by State bodies exercising their authority*

64. Under Russian law, public law relations connected with the exercise by the State and State bodies of their authority and regulatory powers may give rise to a civil law (tort) claim against the State by an injured private person for compensation of damages caused by the unlawful actions of State bodies or the adoption of unlawful legal acts. This special type of tort is governed by Articles 16 and 1069 of the Russian Civil Code:

*“Article 16. Compensation for Damages Caused by State Bodies and Bodies of Local Self-Government*

*Damages caused to an individual or a legal entity as a result of unlawful actions (or failure to act) by State bodies, bodies of local self-government, or officials of these bodies, including*

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<sup>40</sup> V.N. Anurov. Permissibility of Arbitration Agreement // Arbitral Tribunal. 2005. No. 4. Pages 125-126 (Exhibit AVA12).

<sup>41</sup> Article 3(1) of Law of the Russian Federation No. 3929-1 dated November 19, 1992 “On Insolvency (Bankruptcy) of Business Entities” (Exhibit AVA24). This Law was in force from March 1, 1993 until March 1, 1998.

<sup>42</sup> Article 29(3) of Federal Law No. 6-FZ dated January 8, 1998 “On Insolvency (Bankruptcy)” (Exhibit AVA25). This Law was in force from March 1, 1998 until December 2, 2002.

<sup>43</sup> Article 33(3) of Federal Law No. 127-FZ dated October 26, 2002 “On Insolvency (Bankruptcy)” (Exhibit RME-776).

*the adoption of an act by a State body or a body of local self-government that is inconsistent with a law or other regulatory act, shall be compensated by the Russian Federation, the respective Russian Federation subject, or the municipal formation.*

*Article 1069. Liability for Harm Caused by State Bodies, Bodies of Local Self-Government and Their Officials*

*Harm caused to an individual or a legal entity as a result of unlawful actions (or failure to act) by State bodies, bodies of local self-government or officials of these bodies, including as a result of the adoption of an act by a State body or a body of local self-government that is inconsistent with a law or other regulatory act, shall be compensated. The harm shall be compensated at the expense of the treasury of the Russian Federation, the treasury of the Russian Federation subject, or the treasury of a municipal formation, respectively.”<sup>44</sup>*

65. However, as a result of the public law basis of this tort, which inevitably requires assessment of the legality of actions (or failure to act) by Russian State authorities exercising their authority and regulatory powers, such kinds of disputes are also viewed, in the prevailing opinion, as non-arbitrable under Russian law.<sup>45</sup>

66. This point of view has been meticulously substantiated in the publication authored by Professor O.Yu. Skvortsov:

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<sup>44</sup> Articles 16 and 1069 of the Civil Code of the Russian Federation (Exhibit AVA13).

<sup>45</sup> The view that claims involving incidental review of the validity or lawfulness of acts adopted by Russian governmental authorities exercising their authority and regulatory powers are not arbitrable is also reflected in the practice of the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation (the leading arbitration institution in the territory of the former Soviet Union). Professor M.G. Rozenberg, a member of the Presidium of the ICAC, who was extensively involved in the general analysis and publication of ICAC practice, gives the following examples in his book: “*The subject-matter jurisdiction of the ICAC was discussed in particular in cases where part of the claims asserted by the claimant exceeded the scope of civil law relations that may be the subject of disputes that the ICAC is competent to settle in accordance with the ICAC Regulations. For example, in one of the cases, the claimant raised the issue of unlawfulness of the exclusion of a joint venture (in which the claimant participated) from the respective register. Having recognized that resolution of such an issue goes beyond the ICAC’s jurisdiction, whereas other claims of the claimant may not be considered without resolution of this issue, the ICAC suspended the proceedings pending the results of consideration of the claimant’s complaint by the appropriate administrative body or court of general jurisdiction. In another case it was found that the claimant’s claim for dividends depended on resolution of the issue of the correctness of a calculation of joint venture revenues for the respective year, which was being litigated by the joint venture and the tax inspectorate in a court of general jurisdiction. Here again, the ICAC suspended the proceedings until the results of a consideration of the dispute by a court of general jurisdiction were obtained.*” See M.G. Rozenberg. *Contract of International Sale and Purchase. Contemporary Practice of Conclusion. Dispute Resolution*. 5<sup>th</sup> edition. Moscow, 2007 (Exhibit AVA26). The text has been sourced from ConsultantPlus legal database.

*“Damages may be caused to one or another subject of civil law by a 'person of public law', i.e. State body or official in the process of exercising authoritative or other publicly significant functions, or may result from involvement of a public body in civil transactions. It is not by accident that in this regard there is a separate provision in the Civil Code of the RF (Article 16) that imposes on State bodies and bodies of local administration an obligation to compensate damages caused to an individual or a legal entity as a result of illegal actions (omissions). The tort liability, including the one related to the compensation of the damages caused, is governed in more detail by Article 1069 of the Civil Code of the RF. The relationships between the State body (body of local administration), on the one hand, and an individual (legal person) on the other, are governed in this case by the rules of civil legislation. However, although the aforementioned relationships are regulated by civil legislation, they are public in nature, as they are determined by the activity of State bodies in the exercise of authority. This gives grounds for the conclusion on the impossibility of submission for the consideration by an arbitral tribunal of those disputes for the recovery of damages that arose as a result of illegal actions of State bodies and officials in their exercise of public-law functions.”*

*Quite another matter is damages caused by the actions of public law entities in the context of civil law transactions (sale and purchase, supply transactions or works contract, etc.). Taking into account the nature of the matters in dispute (civil law relations), this type of dispute is very well arbitrable, i.e. can be the subject of arbitral proceedings.”<sup>46</sup>*

67. S.I. Krupko expressly classifies claims seeking a declaration that e.g. an expropriation has occurred, as well as claims of compensation for expropriation, as a category of public law disputes, and suggests that disputes involving foreign investors be distinguished as public law disputes and private law disputes as follows:

*“By reason of origin investment disputes can be divided into two groups:*

*- The first group comprises disputes involving unilateral sovereign acts of a State intervening in investment operations - changing the investment environment by amending the laws of the receiving State, expropriating investments and taking similar measures; other acts of State bodies and officials violating investors' rights; providing fiscal benefits and*

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<sup>46</sup> O.Yu. Skvortsov. About Certain Matters Concerning Recovery of Damages in Arbitration Proceedings // Damages and Practice of Their Recovery: Collection of Publications / Publishing Editor M. A. Rozhkova. Moscow, 2006. Pages 525-526 (Exhibit AVA27).

*preferences. In the context of these disputes, the State acts primarily as a sovereign, and therefore the public law aspect of the relations between the host State and a foreign investor is preponderant. Disputes of this category would feature two types of claims. These would be declaratory claims (e.g., seeking confirmation of the deterioration of the investment environment), and claims for compensation.*

*- The second group comprises disputes involving investment agreements (pre-contractual disputes, interpretation of the terms of the investment agreement, a party's failure to perform or properly perform its obligations under the investment agreement, amendments to the investment agreement, termination of the investment agreement). The focus of these types of disputes would be private law relations between the host State and a foreign investor, where the State would be acting as a party to the agreement.”<sup>47</sup>*

**68. Thus, the 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.**

*Do Russian laws on foreign investments provide for the arbitrability of public law disputes initiated by foreign investors against the Russian Federation?*

69. The following special laws governing foreign investments in the Russian Federation have been adopted:

- a. The Fundamentals of Legislation on Foreign Investments in the USSR adopted by the Supreme Council of the USSR under No. 2302-1 on July 5, 1991 (the “**USSR Fundamentals**”);<sup>48</sup>
- b. Law of the RSFSR No. 1545-1 dated July 4, 1991 “On Foreign Investments in the RSFSR” (the “**1991 Law**”);<sup>49</sup>

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<sup>47</sup> S.I. Krupko. Investment Disputes Between a State and a Foreign Investor: a Training and Practical Guide. Moscow, 2002. Pages 19-20 (Exhibit AVA28).

<sup>48</sup> Fundamentals of Legislation on Foreign Investments in the USSR adopted by the Supreme Council of the USSR under No. 2302-1 on July 5, 1991 (Exhibit R-902, Exhibit AVA29). The scope of application of this Soviet law in the Russian Federation is not entirely clear. After the collapse of the USSR in December 1991, Soviet legislative acts continued to be applicable in the territory of the Russian Federation, but only to the extent the relevant issues were not regulated by Russian laws. The prevailing opinion has been that Law of the RSFSR No. 1545-1 dated July 4, 1991 “On Foreign Investments in the RSFSR”, left no matters to be regulated by the USSR Fundamentals, and therefore the Soviet law should be deemed to have ceased to be in effect in the Russian Federation following the collapse of the USSR.

- c. Federal Law No. 160-FZ dated July 9, 1999 “On Foreign Investments in the Russian Federation” (the “**1999 Law**”).<sup>50</sup>

*Analysis of the USSR Fundamentals and the 1991 Law*

70. When defining the procedure for resolving disputes involving foreign investors, the USSR Fundamentals clearly differentiates between two types of disputes.

71. First, there are disputes between foreign investors and the State, *i.e.* investment disputes within the strict meaning of this term:

*“Disputes between foreign investors and the State are subject to consideration in the USSR in courts, unless otherwise provided by international treaties of the USSR.”* (Article 43(1))<sup>51</sup>

72. Second, there are disputes between foreign investors or enterprises with foreign investments and other subjects of law, including Soviet legal entities, as well as Soviet State bodies that, in this context, act as parties to civil law relations and do not exercise authority and regulatory powers:

*“Disputes of foreign investors and enterprises with foreign investments with Soviet State bodies acting as a party to relationships regulated by civil legislation, enterprises, social organizations and other Soviet legal entities, disputes between participants of the enterprise with foreign investments and the enterprise itself are subject to consideration in the USSR in courts or, upon agreement of the parties, in arbitration proceedings, *inter alia*, abroad, and in cases provided by legislative acts of the Union of SSR and the republics - in arbitrazh courts, economic courts and others.”* (Article 43(2))<sup>52</sup>

73. The present case clearly involves a dispute of the first type (an investment dispute within the strict meaning of this term), because the claim has been asserted against the Russian Federation in connection with the exercise of its public law functions, sovereign authority and regulatory powers. The USSR Fundamentals provides for resolution of this kind of

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<sup>49</sup> Law of the RSFSR No. 1545-1 dated July 4, 1991 “On Foreign Investments in the RSFSR” (Exhibit R-310, Exhibit AVA30). The 1991 Law entered into force on September 1, 1991 and was applicable until the enactment of Federal Law No. 160-FZ dated July 9, 1999 “On Foreign Investments in the Russian Federation”, *i.e.*, until July 14, 1999 (Exhibit R-307, Exhibit AVA31).

<sup>50</sup> Federal Law No. 160-FZ dated July 9, 1999 “On Foreign Investments in the Russian Federation” (Exhibit R-307, Exhibit AVA31).

<sup>51</sup> Article 43(1) of the USSR Fundamentals (Exhibit R-902).

<sup>52</sup> Article 43(2) of the USSR Fundamentals (Exhibit R-902).

dispute only in State courts (recognizing that international treaties may provide for another procedure with respect to these disputes).

**74. Thus, the USSR Fundamentals does not convert public law disputes initiated by foreign investors against the Russian Federation into arbitrable disputes.**

75. A similar approach was taken by the 1991 Law. Like the USSR Fundamentals, Article 9 of the 1991 Law differentiates between two types of disputes involving foreign investors – investment disputes within the strict meaning of this term and disputes between parties to civil law relations – in specifying the applicable dispute resolution procedure.

76. First, these are the investment disputes within the strict meaning of this term. The 1991 Law subdivides the matters arising in the context of expropriation disputes into two categories:

- (i) Public law issues related to assessment of the validity and lawfulness of decisions made by State bodies concerning the expropriation of foreign investments, which could be examined only by State courts (Article 7(3)),<sup>53</sup> and
- (ii) Civil law issues related to determination of the amount, conditions and procedure of the payment of compensation following an expropriation of foreign investments, which, in the event of a dispute, a State court has already recognized as having taken place.<sup>54</sup> As a general rule, such issues of compensation were also referred to State courts, but an international treaty could provide for another mechanism for their resolution (Article 9(1)).<sup>55</sup>

77. Secondly, Article 9 of the 1991 Law refers to disputes of foreign investors and enterprises with foreign investments against other subjects of law, including Russian legal entities and RSFSR State bodies (and, as in the USSR Fundamentals, it is implied that RSFSR government authorities act as parties to civil law relations in such cases):

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<sup>53</sup> “Decisions of governmental bodies on expropriation of foreign investments may be contested in the RSFSR courts.” (Article 7(3) of the 1991 Law) (Exhibit AVA30).

<sup>54</sup> See also R. Nagapetyants. Treaties for the Promotion and Reciprocal Protection of Investments // Foreign Trade. 1991. No. 5. Page 14 (Exhibit AVA32): “In treaties for the protection of investments that the USSR concludes with foreign States, the USSR gives its consent to the consideration [of investment disputes] in international arbitral tribunals. The scope of such disputes is limited to civil law issues only (primarily, determination of the amount of compensation and the procedure for its payment in the event of nationalization of investments and transfer of profits and other payments due to the investor).”

<sup>55</sup> “Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR.” (Article 9(1) of the 1991 Law) (Exhibit AVA30).

*“Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies, disputes between investors and enterprises with foreign investments involving matters relating to their operations, as well as disputes between participants of an enterprise with foreign investments and the enterprise itself shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal, or, in cases specified by the laws, by authorities authorized to consider economic disputes.” (Article 9(2))*<sup>56</sup>

78. The differentiation in Article 9 of the 1991 Law between two types of disputes (investment disputes within the strict meaning of this term and disputes between parties to civil law relations) is emphasized in Russian doctrine:

*“...[Article 9] of the Law on Foreign Investments in the RSFSR divided disputes with the participation of foreign investors into two groups. One group comprised investment disputes as such, including the disputes on the issues of the amount, terms and procedure of payment of compensation in case of nationalization or confiscation. ... The other group comprised disputes related to economic activity of the enterprises with foreign investments.”*<sup>57</sup>

79. As was noted in the context of the USSR Fundamentals, the present case clearly involves a dispute of the first type (an investment dispute within the strict meaning of this word), because the claim has been filed against the Russian Federation in connection with the exercise of its public law functions, sovereign authority and regulatory powers. The 1991 Law provides for resolution of this kind of dispute only in State courts (recognizing that international treaties may provide for another resolution procedure with respect to matters concerning the amount of compensation for expropriation of foreign investments and the conditions and procedure of its payment, where a State court has already recognized that an expropriation of foreign investments has taken place).

**80. Thus, the 1991 Law also does not convert public law disputes initiated by foreign investors against the Russian Federation into arbitrable disputes.**

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<sup>56</sup> It is clear that Article 9(2) does not cover investment disputes within the strict meaning of this term, because those are expressly addressed in Articles 7(3) and 9(1) of the 1991 Law (Exhibit AVA30). The aforementioned provisions of Article 7 and Article 9 of the 1991 Law were slightly amended by Federal Law No. 144-FZ dated November 16, 1997 (Exhibit AVA33), following a redistribution of jurisdiction between various types of Russian State courts. These amendments are irrelevant for the matter of arbitrability and are therefore not reviewed in this Report.

<sup>57</sup> B.N. Topornin. *Russian Law and Foreign Investments: Topical Issues // Legal Regulation of Foreign Investments in Russia*. Publishing Editor: A.G. Svetlanov. Moscow, 1995. Pages 30-31 (Exhibit R-903).

81. The 1999 Law offers the following general wording on the resolution of disputes involving foreign investors:

*“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).” (Article 10)<sup>58</sup>*

82. Article 10 of the 1999 Law is a typical example of a declaratory provision. It does not in itself formulate a new substantive rule of arbitrability, but merely refers to the appropriate dispute resolution mechanism provided by other regulatory instruments. This type of provision is defined by Russian law as a “*blanket provision.*”

83. Blanket provisions are widely used in Russian legislation, in particular in omnibus acts, *i.e.* acts that combine provisions from various fields of law (*e.g.*, civil law and administrative law provisions). The 1999 Law is exactly such an omnibus act.

84. Blanket provisions are described as follows in a fundamental treatise of the Soviet period on the general theory of law, which later formed the backbone of Russian doctrine:

*“Elements of a legal provision can be set out using three techniques: direct, referential, and blanket. Depending on the above, legal provisions can be distinguished accordingly: direct, referential and blanket.*

*In the case of a direct provision, all elements of the provision are directly set out in an article of the regulatory act.*

*In the case of a referential provision, certain elements of the provision are not set out directly in the article; the article itself provides a reference to another provision containing the required instructions. This technique is used to establish connections between parts of a particular set of rules, and in order to avoid repetitions.*

*In the case of a blanket provision, certain elements of the provision are not set out directly, and its missing elements are not compensated for by some clearly referenced provision, but*

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<sup>58</sup> Article 10 of the 1999 Law (Exhibit AVA31).

*rather by rules of a certain kind that can evolve with time. In other words, the provision contains an 'empty blank,' a reference to a certain type of rule.*

*... Blanket provisions permit not only the elimination of unnecessary repetitions, but also ensure the stability of legal regulation in case of changes in the current laws (rules)."* (original emphasis)<sup>59</sup>

85. A similar classification of legal provisions is also used in modern Russian publications on general theory of law:

*"There are three methods for establishing a correlation between a legal provision and an article of a regulatory act, as expressed in the mode of exposition: 1) the direct mode, where the legal provision is set out directly in the article of a regulatory act; 2) the referential mode, where the article of a regulatory act does not set out the legal provision, but provides for a reference to another article of the same regulatory act ...; 3) the blanket mode, where the article provides for a reference not to a specific article, but to a set of other regulatory acts, rules..."*<sup>60</sup>

86. Professor M.N. Marchenko describes the specific features of a blanket provision as follows:

*"Blanket provisions differ from other legal provisions in that they establish rules of behavior in a very general form, without elaborating the same. Rules elaborating on blanket provisions can be found in special regulatory acts existing separately from blanket provisions. They are cited in blanket provisions."*<sup>61</sup>

87. The blanket nature of Article 10 of the 1999 Law is demonstrated by the fact that, instead of a direct indication of the fora competent to resolve disputes involving foreign investors, it enumerates in the abstract all possible types of authorities that are able to issue mandatory decisions (courts of general jurisdiction, arbitrazh courts and arbitral tribunals), stating that these authorities would be competent to resolve the disputes only *"in accordance with international treaties of the Russian Federation and federal laws."*

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<sup>59</sup> S.S. Alexeev. General Theory of Law: in two volumes. Vol. II. Moscow, 1982. Pages 283-284 (Exhibit AVA34).

<sup>60</sup> N.I. Matuzov, A.V. Malko. Theory of State and Law: Treatise. Moscow, 2004 (Exhibit AVA35). The text has been sourced from ConsultantPlus legal database.

<sup>61</sup> M.N. Marchenko. Issues of General Theory of State and Law: Treatise: in two volumes. Vol. 2. Law. 2nd edition. Moscow, 2007. Page 585 (Exhibit AVA36).

88. **The 1999 Law therefore does not address the issue of the arbitrability of a dispute (i.e. the possibility for an arbitral tribunal to resolve a dispute). Instead, it refers this issue to other Russian laws and international treaties of the Russian Federation.**

89. In order to demonstrate the difference between the blanket provision of Article 10 of the 1999 Law and a direct provision, one can cite Article 22 of Federal Law No. 225-FZ dated December 30, 1995 “On Production-Sharing Agreements”:

*“Disputes between the State and an investor connected with the performance, termination, or invalidity of agreements shall be resolved in accordance with the terms of the agreement in a court, arbitrazh court, or arbitral tribunal (including international arbitration institutions).”<sup>62</sup>*

90. In contrast to Article 10 of the 1999 Law, this particular provision does not refer to other Russian laws or international treaties, but instead directly authorizes parties to include in their production-sharing agreements an arbitration clause providing for resolution of disputes before an arbitral tribunal, or a forum selection clause providing for resolution of disputes in a particular State court.

91. The declaratory nature of the provisions of the 1999 Law (including Article 10) has been emphasised by many Russian authors:

*“However, unfortunately, many of its provisions [provisions of the 1999 Law] are of a declaratory or blanket nature only and do not add anything to the regulatory treatment of foreign investments. Instead of provisions that are empty in substance, the Law should include rules that would provide efficient protection for foreign investments.”<sup>63</sup>*

92. In the same publication its authors evaluate the contents of Article 10 of the 1999 Law as follows:

*“Article 10 of the Law On Foreign Investments declares that ‘a dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian Federation and federal laws in court, arbitrazh court or through international*

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<sup>62</sup> Article 22 of Federal Law No. 225-FZ dated December 30, 1995 “On Production-Sharing Agreements” (Exhibit AVA37).

<sup>63</sup> I.Z. Farkhutdinov, A.A. Danelian, M.Sh. Magomedov. National Regulation of Foreign Investments in Russia // Zakon. 2013. No. 1 (Exhibit AVA38). The text has been sourced from ConsultantPlus legal database.

*arbitration (arbitral tribunal).’ In substance, it makes the investor’s right to resolution of its dispute conditional upon the existence of an international treaty or relevant provision in a federal law.*”<sup>64</sup>

93. Professor M.M. Boguslavsky describes Article 10 of the 1999 Law as “*too generic.*”<sup>65</sup>

94. Another scholar, V.V. Silkin, concludes that the content of Article 10 of the 1999 Law is limited to a general reference to Russian procedural legislation, including the procedure for resolving investment disputes within the strict meaning of this term:

*“Article 10 of the Federal Law on Foreign Investments contains the ‘guarantee of ensuring proper settlement of a dispute arising in connection with investments and business activities on the territory of the RF’. This guarantee means that a dispute of a foreign investor arising in connection with investments and business activities on the territory of the RF shall be resolved, in accordance with international treaties of the RF and federal laws, in a court or arbitrazh court, or in an international arbitration tribunal. In other words, for the issues of procedural capacity of foreign investors and rules of jurisdiction and venue of disputes with their participation, a reference is made to federal legislation on the issues of civil and arbitrazh procedure (i.e. to the Civil Procedure Code of the RF and Arbitrazh Procedure Code of the RF), as well as to the law of the RF ‘On international commercial arbitration’.*

*... The [1999] Federal Law on Foreign Investments does not distinguish investment disputes as a separate category, and, accordingly, does not establish any special rules of jurisdiction and venue for them. Therefore, with respect to both investment disputes and disputes arising between the investors and entities that are equal to them in status, general rules of jurisdiction and venue provided by arbitrazh procedure legislation should be used.*”<sup>66</sup>

95. **Thus, the 1999 Law does not convert public law disputes between foreign investors and the Russian Federation into arbitrable disputes.**

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<sup>64</sup> Ibid.

<sup>65</sup> Legal Regulation of Foreign Trade. Edited by Prof. A.S. Komarov. Moscow, 2001. Chapter 4 authored by Prof. M.M. Boguslavsky, Page 135 (Exhibit AVA39).

<sup>66</sup> V.V. Silkin. Direct Foreign Investments in Russia: Legal Forms of Their Attraction and Protection. Moscow, 2003. Pages 180-182 (Exhibit AVA40).

*Analysis of legislative acts on investment activity*

96. In addition to the special legislation on foreign investments described above, Russian law previously contained and currently contains laws on investment activity. Such laws and regulations are as follows:
- a. The Fundamentals of Legislation on Investment Activity in the USSR, approved by Resolution of the Supreme Council of the USSR No. 1820-1 dated December 10, 1990;<sup>67</sup>
  - b. Law of the RSFSR No. 1488-1 dated June 26, 1991 “On Investment Activity in the RSFSR;”<sup>68</sup>
  - c. Federal Law No. 39-FZ dated February 25, 1999 “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments”<sup>69</sup> (the three aforementioned legislative acts on investment activity are hereinafter jointly referred to as the “**Laws on Investment Activity**”).
97. Russian experts have expressed various opinions on whether the Laws on Investment Activity are applicable to foreign investments. While previously the general opinion was that the Laws on Investment Activity constitute *lex generalis* with respect to the special laws on foreign investment (which were considered *lex specialis*), the prevailing view in contemporary Russian doctrine is that the Laws on Investment Activity are 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.

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<sup>67</sup> Fundamentals of Legislation on Investment Activity in the USSR, approved by Resolution of the Supreme Council of the USSR No. 1820-1 dated December 10, 1990 (Exhibit AVA41). This Soviet law entered into force on January 1, 1991. The scope of its application in the Russian Federation is not entirely clear. After the collapse of the USSR in December 1991, Soviet legislative acts continued to be applicable on the territory of the Russian Federation, but only to the extent the relevant issues were not regulated by Russian laws. The prevailing opinion has been that Law of the RSFSR No. 1488-1 dated June 26, 1991 “On Investment Activity in the RSFSR” left no matters to be regulated by the Fundamentals of Legislation on Investment Activity in the USSR, and therefore the Soviet law should be deemed to have ceased to be in effect in the Russian Federation following the collapse of the USSR.

<sup>68</sup> Law of the RSFSR No. 1488-1 dated June 26, 1991 “On Investment Activity in the RSFSR” (Exhibit AVA42). This Law entered into force on July 18, 1991. The Law has not been officially abrogated, but it does not apply to the extent it is inconsistent with Federal Law No. 39-FZ dated February 25, 1999 “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments.”

<sup>69</sup> Federal Law No. 39-FZ dated February 25, 1999 “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments” (Exhibit AVA43). This Law entered into force on March 1, 1999 and is in force until the present.

98. The most detailed discussion of the matter can be found in a book by Professor I.Z. Farkhutdinov:

*“A natural question arises as to what the correlation is between Federal Law No. 39-FZ (sic) dated July 9, 1999 ‘On Foreign Investments in the Russian Federation’ and Federal Law No. 160-FZ (sic) dated February 25, 1999 ‘On Investment Activity in the Russian Federation Carried in the Form of Capital Investments’ and the Law of the RSFSR dated June 26, 1991 ‘On Investment Activity in the RSFSR,’ which is applicable to the extent it is not inconsistent with the latter law [the 1999 law on investment activity].*

*The preambles of the two latter laws provide that they are aimed at providing a legal framework for the investment process as a whole, i.e., they are, therefore, meant to serve as lex generalis with respect to the Federal Law ‘On Foreign Investments in the Russian Federation.’ Following this logic, the provisions set forth in the two aforementioned acts should be used to fill the gaps contained in the Law on Foreign Investments.*

*... It seems that V.V. Silkin, who, after N.G. Doronina and N.G. Semilyutina, finds it unlawful to treat the law ‘On Investment Activity in the Russian Federation Carried in the Form of Capital Investments’ as lex generalis with respect to specific investment laws, is right. N.G. Doronina and N.G. Semilyutina were the first to express the point of view that the Law ‘On Investment Activity in the RSFSR’ 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.*

*... Consequently, the Federal Law of July 9, 1999 ‘On Foreign Investments in the Russian Federation’ is the only general federal law that directly and expressly regulates foreign investments in this country. Other federal laws are special sources comprising the regulatory framework for foreign investment activity in various spheres. This viewpoint, I believe, should be endorsed.”<sup>70</sup>*

99. Thus, under the currently prevailing view, the Laws on Investment Activity are not applicable in the present case, because the dispute here does not involve matters relating to

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<sup>70</sup> I.Z. Farkhutdinov. International Investment Law and Procedure: Treatise. Moscow, 2014. Pages 130-131 (Exhibit AVA44).

capital development projects (construction of buildings, structures and other immovable property) in the Russian Federation.

100. Nevertheless, even if we adhere to the position that the Laws on Investment Activity may be used to resolve issues that are not regulated by special legislative acts governing foreign investments (*i.e.* may be applied as *lex generalis*), the provisions of these laws provide no grounds to consider public law disputes between foreign investors and the Russian Federation as arbitrable.

101. This conclusion is based on the fact that the Laws on Investment Activity contain blanket provisions governing the procedure for resolving disputes between entities involved in investment activities, which refer this matter to Russian procedural laws:

- a. The 1990 Fundamentals of Legislation on Investment Activity in the USSR contains the following blanket provision:

*“Disputes arising as a result of investment activities shall be considered by courts, State arbitrazh courts and arbitral tribunals, as applicable.”* (Article 23(3))<sup>71</sup>

- b. The 1991 RSFSR Law “On Investment Activity in the RSFSR” contains the following blanket provision:

*“Disputes arising during investment activities shall be considered in accordance with the procedure established by the law effective in the territory of the RSFSR.”* (Article 16(4))<sup>72</sup>

- c. A similar blanket provision can be found in the 1999 Federal Law “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments”:

*“Disputes arising in connection with investment activities carried in the form of capital investments shall be resolved in accordance with the procedure established by*

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<sup>71</sup> Article 23(3) of Fundamentals of Legislation on Investment Activity in the USSR, approved by Resolution of the Supreme Council of the USSR No. 1820-1 dated December 10, 1990 (Exhibit AVA41).

<sup>72</sup> Article 16(4) of Law of the RSFSR No. 1488-1 dated June 26, 1991 “On Investment Activity in the RSFSR” (Exhibit AVA42).

*the legislation of the Russian Federation and international treaties of the Russian Federation.” (Article 17(2))<sup>73</sup>*

**102. Thus, the 1990 Fundamentals of Legislation on Investment Activity in the USSR, the 1991 RSFSR Law “On Investment Activity in the RSFSR” and the 1999 Federal Law “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments” do not convert public law disputes initiated by foreign investors against the Russian Federation into arbitrable disputes.**

### **C. CONCLUSIONS**

103. Russian law has always prohibited arbitration of any type of public law dispute. This prohibition results directly from the main criterion of arbitrability, namely the civil law nature of the parties’ relations.

104. In order to characterize a dispute as a public law dispute, which is not arbitrable under Russian law, two criteria are used: (i) the nature of the legal relations that give rise to the dispute, and (ii) the composition of the parties to the dispute. The nature of the legal relations is characterized by use of the principle of subordination (subjection). When analyzing the composition of the parties to a dispute, Russian courts place special emphasis on a “*concentration of socially significant public elements,*” which are (i) public interest, (ii) involvement of a public entity and (iii) impact on budgetary funds.

105. Disputes concerning the assessment by tax authorities of additional taxes and tax sanctions, disputes concerning the enforcement of decisions of tax authorities and other actions performed by governmental authorities pursuant to legislation on enforcement proceedings, as well as bankruptcy cases, have always been non-arbitrable under Russian law.

106. Neither Russian laws on foreign investments (the 1991 Fundamentals of Legislation on Foreign Investments in the USSR, the 1991 RSFSR Law “On Foreign Investments in the RSFSR” and the 1999 Federal Law “On Foreign Investments in the Russian Federation”), nor Russian laws on investment activity (the 1990 Fundamentals of Legislation on Investment Activity in the USSR, the 1991 RSFSR Law “On Investment Activity in the RSFSR” and the 1999 Federal Law “On Investment Activity in the Russian Federation

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<sup>73</sup> Article 17(2) Federal Law No. 39-FZ dated February 25, 1999 “On Investment Activity in the Russian Federation Carried in the Form of Capital Investments.” (Exhibit AVA43).

Carried in the Form of Capital Investments”), convert public law disputes initiated by foreign investors against the Russian Federation into arbitrable disputes.

107. The opinions expressed in this Report represent my genuine belief based on independent research and analysis.

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**ANTON V. ASOSKOV**

Moscow, October 30, 2014

## **APPENDIX 1**

### **ANTON VLADIMIROVICH ASOSKOV**

#### **CURRICULUM VITAE**

I am a doctor of law, Professor of the International Private Law Department at the Russian School of Private Law and Assistant Professor of the Civil Law Department at M.V. Lomonosov Moscow State University.

My address is 39 Blvd. Marshala Rokossovskogo, bld. 1, app. 80, Moscow 107258, Russian Federation.

In 1998, I graduated with honours from M.V. Lomonosov Moscow State University. In 1998-2000, I pursued post-graduate studies at the Russian School of Private Law and in 2000 I defended, with honours, my Master of Law thesis “Legal Status of Corporate Entities Acting Outside the State of their Nationality.” In 2001, I defended my candidate of law thesis “Approaches to Regulation of Legal Status of Corporate Entities Acting in the Territory of Foreign States.” In 2009-2010, I was a scholar at the Max-Planck Institute of Foreign and International Private Law (Hamburg, Germany). In 2012, I defended my doctor of law thesis “Choice-of-Law Considerations in the Field of Contractual Obligations.”

Since 2001, I am an Assistant Professor of the Civil Law Department at M.V. Lomonosov Moscow State University, where I teach courses on international private law and Russian civil law. Since 2008, I am also a Professor of the International Private Law Department of the Russian School of Private Law, where I teach courses on legal entities and contractual obligations in international private law.

In 2008, I became a member of the working group organized under the auspices of the President’s Council on Codification of Russian Civil Legislation and participated in drafting the Development Concept for Civil Legislation of the Russian Federation and the preparation of draft amendments to the Civil Code of the Russian Federation (Section VI “International Private Law”).

Since 2001, I have been a Reporter at, and in 2009 became an Arbitrator of, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC). I am an Arbitrator of the International Arbitration Court at the Chamber of Commerce and Industry of Kazakhstan, the Arbitration Commission at OJSC MICEX-RTS (Russian stock exchange) and the Arbitration Court of the Association of Russian Banks. I have

participated in over sixty international arbitration proceedings, including proceedings under the Arbitration Rules of the International Chamber of Commerce (ICC) and the UNCITRAL Arbitration Rules.

In 2011-2013, I was a consultant of the Moscow office of the law firm “Debevoise & Plimpton LLP” on issues of international commercial arbitration and litigation. Also, from 2000 through 2009 I was Head of the Legal Department of one of the major Russian geophysical companies (JSC “Central Geophysical Expedition”) and from 1997 through 2000 I was a lawyer at the Russian-Singapore Joint Venture “Algeok.”

Since 2009, I have been a member of the Editorial Board of the leading Russian journal on issues of international commercial arbitration - Bulletin of International Commercial Arbitration.

I am also the author of the following monographs:

- Vienna Convention 1980 on the International Sale of Goods: Commentary to the Articles on the Sphere of Application, Moscow, 2013;
- Fundamental Issues of Conflict of Laws, Moscow, 2012;
- Contractual Obligations in Conflict of Laws, Moscow, 2012; and
- Legal Entities and International Commerce, Moscow, 2003.

I have authored over 60 articles in law journals on various aspects of Russian civil law and comparative and international private law, including the following:

- Section “Russian Federation” in European Encyclopedia of Private International Law. In 3 Vol. Eds. J. Basedow, F. Ferrari, P. de Miguel Asensio and G. Rühl. To be published in early 2015.
- Reform of Section VI “International Private Law” of the Civil Code of the Russian Federation // Business and Law. 2014. No. 2
- Are Russian Courts Able to Keep Control over the Unruly Horse? The Long-Awaited Guidance of Russia’s Highest Commercial Court on the Concept of Public Policy // Journal of International Arbitration. 2013. No. 5 (co-authored by A. Kucher)
- England and Russia: Resolving Jurisdictional Disputes // Law Society Gazette. April 22, 2013 (co-authored by R. Cox, T. Nesterchuk)
- Permissibility of Agreements Excluding Challenges to Decisions of International Commercial Arbitration Made in the Territory of Russia // Liber Amicorum in honour of

the 50th birthday of A.N. Zhiltsov. Transnational trade and law. Research editors: A.I. Muranov, V.V. Plekhanov. Moscow, 2013

- Influence of Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms on Arbitral Proceedings // Bulletin of the Supreme Arbitrazh Court of the Russian Federation. 2013. No. 9
- Presidium of the Supreme Arbitrazh Court of the Russian Federation Has Defined Approaches to the Concept of Public Policy: Brief Commentary to Information Letter No.156 dated February 26, 2013 // Bulletin of International Commercial Arbitration. 2013. No. 1
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- Do Provisions of a Bilateral Treaty on Legal Assistance Influence Arbitral Proceedings Conducted on the Territory of the State which is a Party to such Treaty? // Bulletin of International Commercial Arbitration. 2011. No. 2
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- Commentary to Recommendations of the International Law Association on the Application of *lis pendens* and *res judicata* Doctrines to Arbitration: Main Provisions and Prospects of Use in Russian Practice // International Commercial Arbitration. 2008. No. 2
- Parallel Proceedings in a State Court and International Commercial Arbitration: are International Commercial Arbitration Proceedings Conducted in Russia Bound by Acts of

Foreign Courts of the States with which Russia Has Agreements on Mutual Recognition and Enforcement Of Court Decisions? // International Commercial Arbitration. 2007. No. 3

- Issues of International Commercial Arbitration in the New Review of the Presidium of the Supreme Arbitrazh Court of the Russian Federation: Search for Right Decisions // International Commercial Arbitration. 2006. No. 2