

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LOTUS HOLDING ANONIM ŞİRKETİ

Claimant

and

REPUBLIC OF TURKMENISTAN

Respondent

ICSID Case No. ARB/17/30

AWARD

Members of the Tribunal

Professor Vaughan Lowe QC, President

Mr. James H. Boykin

Professor Brigitte Stern

Secretary of the Tribunal

Ms. Ella Rosenberg

Date of dispatch to the Parties: 6 April 2020

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TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	The Turkey-Turkmenistan Bilateral Investment Treaty of 2 May 1992
ECT	The Energy Charter Treaty of 17 December 1994
C-[#]	Claimant’s Exhibit
CL-[#]	Claimant’s Legal Authority
Claimant’s Response	Claimant’s Response to Turkmenistan’s Application Under ICSID Arbitration Rule 41(5) on 30 May 2018
Claimant’s Rejoinder	Claimant’s Response to Turkmenistan’s submission in further support of its Application under ICSID Arbitration Rule 41(5) on 17 June 2018
Claimant’s Response to Updated Application	Claimant’s Response to Respondent’s Updated Application Under ICSID Arbitration Rule 41(5) on 1 August 2019
Hearing	Hearing on the Respondent’s Rule 41(5) Application held 17 September 2019
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent’s Exhibit
RL-[#]	Respondent’s Legal Authority
Request for Arbitration or Request	Claimant’s Request for Arbitration on 28 July 2017
Rule 41(5) Application or Application	Turkmenistan’s Application Under ICSID Arbitration Rule 41(5) on 4 May 2018

Respondent's Reply	Turkmenistan's Reply Submission in Further Support of its Application Under ICSID Arbitration Rule 41(5) on 8 June 2018
Updated Rule 41(5) Application	Respondent's Updated Application Under ICSID Arbitration Rule 41(5) on 27 June 2019
Transcript, [page, line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 5 April 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Turkey-Turkmenistan Bilateral Investment Treaty which entered into force on 2 May 1992 (the “**BIT**” or “**Treaty**”), the Energy Charter Treaty (“**ECT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”). The dispute arose from certain energy projects in the Republic of Turkmenistan (“**Turkmenistan**”) in which the Claimant was involved.
2. On 28 July 2017, ICSID received a request for arbitration dated 28 July 2017 from Lotus Holding Anonim Şirketi against the Government of Turkmenistan (the “**Request**” or “**Request for Arbitration**”).
3. The Claimant is Lotus Holding Anonim Şirketi (“**Lotus**” or the “**Claimant**”), a company incorporated under the laws of the Republic of Turkey.
4. Funding support for Claimant is provided by LexShares, based in New York City.¹
5. The Respondent is the Republic of Turkmenistan (the “**Respondent**” or “**Turkmenistan**”), represented by its Government.
6. The Claimant and the Respondent are collectively referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page i.
7. This Award is made in the context of the Respondent’s application under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), seeking summary dismissal of all the Claimant’s claims.

¹ Transcript, p. 138, ll. 21-23.

II. PROCEDURAL HISTORY

8. On 28 July 2017, the Claimant filed its Request against Turkmenistan.
9. On 15 August 2017, ICSID sent a letter to the Claimant asking for further clarifications, which were provided by the Claimant on 16 August 2017.
10. On 22 August 2017, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.
11. By letter of 11 October 2017, the Respondent conveyed its concerns regarding the registration of the Request. It argued that there were numerous deficiencies and irregularities in the documents that were relied upon in registering the case and reserved its rights to seek remedies. These alleged deficiencies related (i) to the authorizations for pursuing the claims at issue, and (ii) to the Claimant's non-compliance with the requirements of the Treaty on which it relied as the basis for consent to arbitration.
12. By letter of 24 October 2017, the Claimant informed ICSID that it wished the claim to be heard by a tribunal constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention. In the same letter, the Claimant appointed Mr. James H. Boykin, a national of the United States of America, as arbitrator, and proposed to appoint a candidate as President of the arbitral tribunal.
13. On 25 October 2017, ICSID notified the Parties that Mr. Boykin had accepted his appointment as arbitrator in this case.
14. By letter of 20 November 2017, the Respondent: (i) appointed Professor Brigitte Stern, a national of France, as arbitrator; (ii) informed ICSID that it did not accept the Claimant's proposal for the presiding arbitrator; and (iii) proposed another candidate for the presiding arbitrator.
15. On 27 November 2017, ICSID notified the Parties that Prof. Stern had accepted her appointment as arbitrator in this case.

16. By letter of 28 November 2017, the Claimant informed ICSID that it did not accept the Respondent's proposed presiding arbitrator and requested that the Chairman of the ICSID Administrative Council appoint the arbitrator not yet appointed and designate him or her to be the President of the arbitral tribunal pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4.
17. By letter of the same date, ICSID informed the Parties that it would conduct a ballot to assist the Parties in selecting a mutually agreeable presiding arbitrator.
18. On 13 December 2017, ICSID sent a ballot to the Parties with five names to consider as presiding arbitrators and invited the Parties to submit their ballots.
19. On 5 March 2018, ICSID informed the Parties that the ballot process did not result in the selection of a mutually acceptable candidate and that the appointment of the President of the arbitral tribunal would proceed pursuant to Articles 38 and 40(1) of the ICSID Convention.
20. On 22 March 2018, ICSID proposed the appointment of Professor Vaughan Lowe QC, a national of the United Kingdom of Great Britain and Northern Ireland, as the presiding arbitrator in this case and invited the Parties to submit their observations by 28 March 2018.
21. On 5 April 2018, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was constituted on that date.
22. By letter of 6 April 2018, ICSID requested that each Party make an initial advance payment of USD125,000 by 7 May 2018, in accordance with ICSID Administrative and Financial Regulation 14(3).
23. On 4 May 2018, the Respondent submitted an Application under ICSID Arbitration Rule 41(5) (the "**Application**" or the "**Rule 41(5) Application**"), together with exhibits R- 01 through R-16, for dismissal of the claim on the ground that it is manifestly without legal merit.

24. On 7 May 2018, the Tribunal invited the Claimant to submit a response to the Respondent's Application by 21 May 2018 and informed the Parties that it would hear the Parties on the Respondent's Application during the first session of the Tribunal, which was scheduled to take place on 1 June 2018.
25. By letter of 14 May 2018, ICSID informed the Parties that it had not received payment from either Party as requested in its 6 April 2018 letter.
26. By email of 14 May 2018, the Claimant requested that the Tribunal grant it an extension to submit its response to Respondent's Rule 41(5) Application.
27. On 15 May 2018, the Tribunal granted the Claimant's request for an extension of time until 25 May 2018.
28. On 23 May 2018, the Claimant requested that the Tribunal grant a further extension of time to submit its response to Respondent's Application until 31 May 2018.
29. By email of the same date, the Respondent (i) objected to the Claimant's request for a further extension; (ii) noted that the Claimant had still not paid its share of the advance payment; and (iii) suggested that the case be suspended if such payment had not been made by the 30 May 2018 deadline.
30. On 24 May 2018, the Claimant responded to the Respondent's objection and renewed its request for an extension of time.
31. On the same date, the Tribunal informed the Parties that it: (i) granted the Claimant's request for an extension to file its Response to the Respondent's Rule 41(5) Application by 30 May 2018; (ii) would schedule a further round of written submissions on the Rule 41(5) Application; and (iii) would schedule an oral hearing on the Rule 41(5) Application after the written submissions were complete if the Tribunal considered that it would find it helpful to hear oral argument. The Tribunal further noted that the 30 May 2018 deadline also applied to the transmission of the advance payments and that the first session scheduled on 1 June 2018 would only take place if the funds had been received by 30 May 2018 as requested in the Centre's notice of default dated 14 May 2018.

32. On 25 May 2018, the Parties filed a joint submission with their respective comments on draft Procedural Order No. 1.
33. By letter of 28 May 2018, the Respondent informed the Tribunal that it would pay its share of the advance payment only if and when the Claimant paid its share.
34. On 30 May 2018, the Tribunal notified the Parties that if the initial advance payment was not received by ICSID by the end of the same day, the first session scheduled for 1 June 2018 would be cancelled.
35. On 30 May 2018, the Claimant submitted its Response to Turkmenistan's Application under ICSID Arbitration Rule 41(5) ("**Claimant's Response**"), together with exhibits C-1 through C-9.
36. On 31 May 2018, the Tribunal informed the Parties that since no funds had been received by the 30 May 2018 deadline, the first session scheduled for 1 June 2018 was cancelled.
37. On 8 June 2018, the Respondent submitted its Reply Submission in further support of its Application under ICSID Arbitration Rule 41(5) ("**Respondent's Reply**"), together with exhibits R-17 through R-22.
38. On 12 June 2018, the Tribunal invited the Parties to provide an update of the status of their payments by 15 June 2018.
39. On 17 June 2018, the Claimant submitted its Response to the Respondent's Reply ("**Claimant's Rejoinder**"), together with exhibits C-10 through C-17.
40. On 18 June 2018, the Tribunal reiterated its invitation to the Parties to provide an update of the status of their payments by the end of the day.
41. By letter of 19 June 2018, the Claimant informed the Tribunal that it would be able to remit its share of the advance payment by the end of July 2018.
42. By letter of 25 June 2018, the Respondent requested that the Tribunal: (i) invite the Claimant to explain the reason for its failure to pay its share of the advance; and (ii)

discontinue the proceeding and issue a costs award in its favour, if the Claimant failed to offer a legitimate and compelling reason for its failure to pay its share of the advance.

43. On 26 June 2018, the Tribunal noted that neither Party had paid the requested advances. It invited the Claimant to pay its share by 31 July 2018 and the Respondent to pay its share by 10 August 2018.
44. On 2 August 2018, the Claimant informed the Tribunal that it would be able to pay by 15 September 2018 and requested an extension for making the advance payment until 30 September 2018.
45. On 3 August 2018, the Tribunal denied the Claimant's request and informed the Parties that given both Parties' default, the Secretary-General would move to the Tribunal to stay the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
46. By letter of 13 August 2018, ICSID informed the Parties that the Tribunal had suspended the proceeding pursuant to Regulation 14(3)(d) of ICSID Administrative and Financial Regulation.
47. By letter of 24 January 2019, ICSID notified the Parties that the six-month period provided in ICSID Administrative and Financial Regulation 14(3)(d) in relation to the discontinuation of proceedings would end on 13 February 2019 and invited the Parties to pay the advance initially requested by the Centre on 6 April 2018.
48. By letter of 12 February 2019, the Claimant informed the Tribunal about its financial situation and requested additional time to remit its share of the advance payment until 30 April 2019.
49. By letter of 14 February 2019, the Respondent requested that the Tribunal (i) deny the Claimant's request for a further extension; and (ii) issue an order discontinuing the proceeding pursuant to Regulation 14(3)(d) of ICSID Administrative and Financial Regulation.

50. On 15 February 2019, the Claimant responded to the Respondent's letter of 14 February 2019 and renewed its request for an extension.
51. On 27 February 2019, the Tribunal granted the Claimant's request for an extension until 30 April 2019.
52. On 28 February 2019, the Respondent informed the Tribunal that it was now represented by Squire Patton Boggs LLP and submitted a power of attorney.
53. By letter of 1 May 2019, the Claimant informed the Tribunal and the Respondent that it had remitted its share of the first advance payment and that it would "shortly seek to add Lotus Enerji, the fully-owned subsidiary of Claimant Lotus, as co-claimant."
54. On 15 May 2019, the Centre acknowledged receipt of the Claimant's payment of its share of the advance.
55. By letter of 18 May 2019, the Respondent: (i) commented on the Claimant's intention to add an additional co-claimant; (ii) informed the Tribunal and the Claimant that it would pay its share of the advance; and (iii) requested that the Tribunal proceed to issue a decision on the Respondent's Rule 41(5) Application.
56. On 20 May 2019, the Centre acknowledged receipt of the Respondent's payment of its share of the first advance.
57. By letter of 30 May 2019, the Claimant responded to the Respondent's letter of 18 May 2019.
58. On 3 June 2019, the Respondent requested that the Tribunal give it an opportunity to respond to the Claimant's letter of 30 May 2019.
59. On 4 June 2019, the Tribunal informed the Parties that it wished to have updated submissions from both Parties concerning the Respondent's Rule 41(5) Application.
60. On 6 June 2019, the Parties informed the Tribunal that they had agreed on a revised schedule to file updated submissions that would accommodate both Parties' schedules.

61. By letter of 17 June 2019, the Tribunal sought the Parties' agreement to hold the first session together with the hearing on the Respondent's Rule 41(5) Application, and proposed dates for that session. The Tribunal further proposed to hold a pre-hearing organizational meeting by telephone conference with the President alone, on the understanding that any substantive decision would be discussed with and determined by the full Tribunal. The Tribunal also circulated the Parties' agreed comments on draft Procedural Order No. 1 and invited the Parties (i) to review and confirm or amend the comments on the draft Procedural Order; and (ii) to consult and agree, as far as possible, on a procedural calendar in the event the Respondent's Rule 41(5) Application would not succeed.
62. By emails of 19 and 21 June 2019, the Claimant and the Respondent, respectively, confirmed their availability on the dates proposed by the Tribunal.
63. On 27 June 2019, the Respondent filed its Updated Application under ICSID Arbitration Rule 41(5) ("**Updated Rule 41(5) Application**").
64. By letter of 2 July 2019, the Tribunal confirmed that the President alone would hold the pre-hearing telephone conference with the Parties on 22 August 2019 and that the first session and the hearing on the Respondent's Rule 41(5) Application would take place on 17 September 2019, in Paris.
65. On 1 August 2019, the Claimant filed its response to the Respondent's Updated Rule 41(5) Application ("**Claimant's Response to Updated Application**").
66. On 22 August 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
67. On 5 September 2019, Prof. Stern transmitted an additional statement to the Parties and the other Members of the Tribunal.
68. On 16 September 2019, the Parties submitted joint comments on draft Procedural Order No. 1.

69. By email of the same day, the Claimant submitted the following documents:
- 1) Lotus Holding’s Renewed Petition to the Lotus Enerji Directorate seeking its permission to request leave to add Lotus Proje Akaryakıt Enerji Madencilik Telekomünikasyon İnşaat Sanayi Taahhüt ve Ticaret Anonim Şirketi (“**Lotus Enerji**”) as a co-claimant in this arbitration and its English translation;
 - 2) Two documents submitted as Turkmenbashi Refinery’s Petition to the Directorate, as an alleged creditor of Lotus Enerji, to exclude Lotus Holding’s counsel Egemenoglu from representing it in the bankruptcy process and to deny Lotus Holding’s Renewed Petition; and
 - 3) English translations of the two documents contained in (2).
70. By email of the same day, the Respondent objected to the Claimant’s submission of new documents and to the alleged mischaracterization of these documents by the Claimant.
71. By further email of the same date, the Claimant argued that “Turkmenistan’s attempts to thwart any action by Lotus Holding to bring Lotus Enerji into the mix continue” and it reserved its right to seek a provisional measure barring Turkmenistan from interfering in the Lotus Enerji bankruptcy, specifically with respect to the issues relating to the arbitration process.
72. Also on 16 September 2019, the Respondent submitted a document which it claimed was “an attachment to Claimant’s undated application to the Turkish Bankruptcy Directorate” circulated by the Claimant earlier on the same day.
73. On 17 September 2019, the Tribunal held a first session with the Parties and a hearing on the Respondent’s Rule 41(5) Application at the offices of the World Bank in Paris (the “**Hearing**”). The following people attended the Hearing:

Members of the Tribunal:

Professor Vaughan Lowe QC	President of the Tribunal
Mr. James H. Boykin	Arbitrator
Professor Brigitte Stern	Arbitrator

ICSID Secretariat:

Ms. Ella Rosenberg

Secretary of the Tribunal

For the Claimant:

Mr. Akin Alcitepe

Offit Kurman P. A.

Mr. Egemen Egemenoglu

Egemenoglu Law Firm

Ms. Didem Keles Pinar

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For the Respondent:

Ms. Miriam K. Harwood

Squire Patton Boggs (US) LLP

Mr. Ali R. Gursel

Squire Patton Boggs (US) LLP

Mr. Lorenzo Windham

Squire Patton Boggs

Ms. Tereza Psutkova

Squire Patton Boggs

Court Reporter:

Ms. Diana Burden

Diana Burden

Ms. Alice Burden

Diana Burden

74. During the Hearing, each Party presented its case orally and made a visual Slide Presentation (“**Slide Presentation**”). Hard copies of the slides were also submitted.
75. On 18 September 2019, the Claimant submitted a power of attorney as well as three additional documents (originally submitted on 16 September) in the form that they had been presented during the Hearing.
76. On 1 October 2019, the Parties submitted a joint submission with the corrections to the transcript of the Hearing.
77. By letter of 2 October 2019, the Claimant sought to admit into the record, as exhibit C-26, a notarized power of attorney which allegedly had retroactive effect under Turkish law.
78. On 4 October 2019, the Tribunal issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues.
79. Also on 4 October 2019, the Parties filed their respective Submissions on Costs.
80. On 16 October 2019, the Respondent responded to the Claimant’s letter of 2 October 2019 and objected to the introduction of exhibit C-26.

81. On 18 October 2019, the Tribunal declined to admit exhibit C-26 into the record at this stage in the proceedings.
82. On 6 February 2020, the Respondent submitted a letter requesting leave to submit the award in *Almasryia for Operating & Maintaining Touristic Construction Co., LLC v. the State of Kuwait*, ICSID Case No. ARB/18/2, (“*Almasryia v. Kuwait*”), Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules dated 1 November 2019, and its Dissenting Opinion.
83. On 12 February 2020, the Tribunal informed the Parties that “it has completed its deliberations and intends to issue its ruling on the Respondent’s Rule 41(5) Application shortly.” Accordingly, the Tribunal declined to accept the award in *Almasryia v. Kuwait*.

III. RELIEF SOUGHT

84. The Respondent’s Updated Rule 41(5) Application requests the Tribunal to:

DISMISS all the claims set forth in the Request for Arbitration in an Award issued under ICSID Arbitration Rules 41(5) and 41(6), as the claims are manifestly without legal merit.²

ORDER the Claimant “to pay all costs incurred by Respondent in connection with this arbitration, including, but not limited to, legal fees and expenses, administrative costs of ICSID, and any other reasonably incurred expenses.”³

85. The Claimant’s Response to Updated Rule 41(5) Application requests that the Tribunal deny the Respondent’s Application and award the Claimant costs related to this phase of the arbitration including, but not limited to, legal fees and other expenses.⁴

² Updated Rule 41(5) Application, para. 81.

³ Updated Rule 41(5) Application, para. 81.

⁴ Claimant’s Response to Updated Application, para. 62.

IV. RELEVANT FACTS

86. Given the nature of proceedings under ICSID Arbitration Rule 41(5), it is appropriate to set out in full the Claimant's own summary of the facts of the dispute contained in paragraphs 17–27 of the Request for Arbitration (footnotes omitted):

B. Summary of Relevant Facts

17. Mr. Erdal Celik, the Chairman of Lotus Holding, has conducted business in Turkmenistan starting from 1998. For the first 10 years of his tenure in Turkmenistan, Mr. Celik worked as a General Manager of Calik Enerji, a large Turkish energy and construction company, which is currently doing business in Turkmenistan. Since 2007, as the Chairman of Lotus Holding and Lotus Enerji, he has been involved in various large EPC Projects in Turkmenistan.

18. Since 2007, Lotus Holding, through its investment vehicle Lotus Enerji, was awarded eight major industrial projects with a contract value totaling about 1.5 billion USD. Lotus Enerji completed and commissioned seven major industrial project contracts with success.

19. One of the projects was an investment embodied in Contract No. MLO-I-L dated 03.01.2011 between Lotus Enerji and the Energy Ministry of Turkmenistan whereby Lotus Energy was to perform control-revision and construction-installation works for five facilities (OHL-220kV “Farap-Watan”, OHL-220kV “Serdar-Farap”, OHL-500kV “Mary-Des-Atamurat”, OHL-500kV “Atamurat-Afghanistan Border” and OHL-220kV “Pelwert-Atamurat”). The total contract price for these facilities was 325,000,000.00 USD.

20. Lotus Enerji completed the works required under these contracts successfully and pursuant to a closeout agreement in 2016, between itself and the Energy Ministry of Turkmenistan (as well as the contract), is due 5 percent of the contract value as retention held by the latter in the amount of 15,650,000.00 USD.

21. Lotus Enerji also signed the DCU & SDA Contract no. 41/1 IG dated December 15, 2007 with the Turkmenbashi Refinery of Turkmenistan, a state entity, as its eighth Contract in Turkmenistan. Despite the delayed payments, and unexpected term extensions as well as unilateral design changes made in contravention of the parties' agreement causing serious financial losses, Lotus Holding's

investment vehicle, Lotus Enerji, worked harder in order to complete the Project.

22. The changing economic conditions and the unstable actions by the government caused the completion term to be extended for an additional 40 months with no additional financial compensation to Lotus Enerji. Despite the mentioned reasons as well as among others (i.e., the Refinery making untimely revisions to design of the facility and long-lead items to be manufactured for the facility at the eleventh hour, thereby delaying the project), Lotus Enerji committed to allocate its available resources to complete the Project to Turkmenbashi Refinery's satisfaction.

23. However, Refinery management unilaterally terminated the Contract. Several major equipment was ordered, manufactured, and shipped to the Refinery for which Lotus Enerji had paid in full or in part. Lotus made significant payment to the manufacturers, incurred tremendous losses for the completion of the aforementioned Project. Consequently, Lotus Holding incurred damages of at least 35,000,000.00 Euros in termination costs as well as potential profit that was not realized as a result of Turkmenistan's unjust termination of Lotus Enerji. These losses are comprised of 1) unpaid amounts due to Lotus Enerji for 3,576,133.16 Euros for 5 percent of the Price of Engineering Services and 10 percent of the Price of Construction and Installation Works as mandated by the DCU & SDA Contract, 2) 12,521,564.74 Euros for payments made to vendors for project-specific manufactured equipment which Lotus cannot now utilize due to Lotus Enerji's termination and 3) 18,400,000.00 Euros for loss of profit associated with the wrongful termination of Lotus Enerji, plus interest for the above items.

24. Lotus Holding, through Lotus Enerji, further invested in Turkmenistan through a 184,000,000.00 Euro turnkey agreement with the Turkmen Ministry of Energy (Contract No. GT-7L) dated 19 April 2008 for the construction of the 254 MW Avaza Power Plant and supply of power transmission and distribution in the National Touristic Zone of Avaza.

25. While Lotus Enerji completed the project as required by the above-mentioned turnkey agreement, Turkmenistan failed to make the required payments, specifically the 5 percent retention it was obligated to pay upon completion of the project. As such, Lotus Holding is owed an additional 9.2 million Euros for non-payment of the retention.

26. Lotus Holding is further owed additional amounts from two agreements it entered into with state entities in Respondent's territory. First was Contract No. JKT-02.05 dated 2 May 2008 with The State Concern (Turkmengas) for the construction of a facility for the refueling of vehicles with gasoline and compressed gas in Ashgabat. The second was an agreement for the construction of a power supply system for outdoor lighting of Archabil Shaloly and Garahsyzyk Shaloly in Ashgabat with Turkmenenergogurlushyk dated 18 April 2008.

27. Respondent again failed to make required payments to Lotus Enerji under the two agreements for 5,625,000.00 Euros and 2,650,000.00 Euros, respectively and therefore Claimant is owed those amounts.

87. Thus, five contracts or agreements underlie this dispute. To summarize, for clarity, they are:

- Contract No. MLO-1-L dated 1 March 2011, signed by Lotus Enerji and the Energy Ministry of Turkmenistan, relating to control-revision and construction-installation works for five facilities (Farap-Watan, Serdar-Farap, Mary-Des-Atamurat, Atamurat-Afghanistan Border, and Pelwert-Atamurat);⁵
- DCU & SDA Contract No. 41/11G dated 15 December 2007, signed by Lotus Enerji and the Turkmenbashy Refinery of Turkmenistan;⁶
- Contract No. GT-7L dated 8 April 2008, signed by Lotus Enerji and the Energy Ministry of Turkmenistan, relating to the Avaza Power Plant;⁷
- Contract No. JKT-02.05 dated 2 May 2008, signed by Lotus Enerji and the State Concern "Turkmengas", relating to a refuelling facility in Ashgabat;⁸

⁵ Request for Arbitration, Annex 6 and Annex 7.

⁶ Request for Arbitration, Annex 8.

⁷ Request for Arbitration, Annex 9.

⁸ Request for Arbitration, Annex 11.

- Contract dated 8 April 2008, signed by Lotus Enerji and the concern “Turkmenenergogurlushyk”, relating to a power supply for lighting in Ashgabat;⁹

88. It is also appropriate to set out in full the Claimant’s own description of the claims in this case. This appears in paragraphs 80–82 of the Request for Arbitration:

D. DAMAGES

80. As a result of the above breaches of the BIT, the ECT, and international legal obligations by Respondent, Claimant has sustained losses (“damnum emergens”), including but not limited to unpaid payments (including retention), loss of profits, monies paid to third parties and not reimbursed by Respondent, loss of business opportunities, and loss of enterprise value plus interest and costs incurred in conjunction with these proceedings. Claimant’s losses are being further analyzed, substantiated and quantified by forensic experts and will be presented in due course on this arbitration. Some of the non-exclusive damages incurred by Lotus holding are summarized below.

DCU & SDA Project

Unpaid amounts under the contract	3,576,133.16 Euros
Payments made to vendors for which Respondent is responsible ...	12,251,564.74 Euros
Loss of profit	18,400,000.00 Euros

Ministry of Energy LPTD (Five Facilities) Project

Unpaid retention	15,650,000.00 USD
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Ministry of Energy Awaza Project

Unpaid retention	9,200,000.00 Euros
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Turkmengas Project

Unpaid amounts per agreement	5,625,000.00 Euros
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Outdoor Lighting Project

Unpaid amounts per agreement	2,650,000.00 Euros
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⁹ Request for Arbitration, Annex 12.

81. As mentioned above, Claimant reserves its right to substantiate, amend and supplement the aforementioned amounts through expert analysis, including, but not limited to, addition of interest, costs and amounts associated with loss of business opportunities, and loss of enterprise value.

E. RELIEF SOUGHT

82. The Claimant respectfully requests that the Arbitral Tribunal, without prejudice to any other/further claims to which the Claimant may be entitled, declare that Respondent has breached its obligations toward Claimant under the ECT, the BIT, and customary international law, and accordingly order the Respondent:

- to pay the Claimant damages equivalent to the financial loss and damage, which Claimant has suffered as a result of Turkmenistan's breaches of the ECT, the Treaty, as well as of its obligations under international law and the laws of Turkmenistan;

- to pay the Claimant damages arising out of the confiscation of its assets by Turkmenistan;

- to pay all costs incurred in connection with these arbitration proceedings;

- to pay interest, at a rate to be established, on the above amounts as of the date these amounts are determined to have been due to the Claimant; and

- to provide such other and further relief as the Arbitral Tribunal shall deem appropriate.

89. On 21 April 2016, Lotus Enerji (not the Claimant Lotus Holding) sent what it describes as a "final notification letter"¹⁰ to the Cabinet of Ministers of Turkmenistan.

90. On 24 November 2016, Lotus Enerji was declared bankrupt by the 1st Commercial Court of First Instance in Ankara, Turkey.¹¹ It is accepted by both Parties that Lotus Enerji

¹⁰ Request for Arbitration para. 4 and Annex 1; Exhibit R-16.

¹¹ Rule 41(5) Application, para. 42; Exhibit R-2.

remains in bankruptcy proceedings and that the Turkish Bankruptcy Directorate currently controls Lotus Enerji.¹²

V. POSITIONS OF THE PARTIES

A. THE RESPONDENT'S POSITION

91. As to the procedural requirements for an application under ICSID Arbitration Rule 41(5), the Respondent submits that it has complied with those requirements because no other expedited procedure was agreed to by the Parties, and because its objections are timely. The Respondent's Rule 41(5) Application was filed within 30 days of the constitution of the Tribunal, and well before the first session of the Tribunal.¹³
92. The Respondent argues that its objections are appropriate for resolution under the "manifest lack of legal merit" standard of ICSID Arbitration Rule 41(5). It submits that the Claimant's claims manifestly lack legal merit because:
- i. The Claimant's board resolutions were not sufficient to authorize it to pursue this arbitration.
 - ii. The Claimant does not have independent claims. The Respondent emphasizes that the contracts upon which the Claimant's Request for Arbitration is based were not signed by the Claimant, but by a separate entity, Lotus Enerji which is not before this Tribunal;
 - iii. Lotus Enerji is in bankruptcy proceedings under the control of the Turkish bankruptcy authorities, and the Claimant has no authorization from that authority to pursue Lotus Enerji's claims; and
 - iv. The Claimant did not satisfy the requirements of Article VII of the BIT or the ECT.¹⁴

¹² Transcript, p. 16, ll. 13-16.

¹³ Rule 41(5) Application, para. 35.

¹⁴ Rule 41(5) Application, Section III; Respondent's Reply, Section III; Updated Rule 41(5) Application, Section V.

93. In response to statements from the Claimant articulating its intention to add Lotus Enerji as a “co-claimant” in this proceeding, the Respondent argues that the ICSID Arbitration Rules do not allow joinder of a new “co-claimant” in cases such as this one, unless all the parties consent to such joinder. Here, the Respondent has not consented to the addition of a new “co-claimant.”¹⁵

(1) The legal standard of ICSID Arbitration Rule 41(5)

94. The Respondent relies on the summary dismissal procedure that is set forth in ICSID Arbitration Rule 41(5),¹⁶ which provides as follows:

[A] party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.¹⁷

95. The Respondent argues that ICSID Arbitration Rule 41(5) “allows the Tribunal, unlike ICSID, to assess for itself whether dismissal is appropriate at the outset of the case, on jurisdictional or merits grounds, without requiring the parties to go through the cost and burden of years of arbitration proceedings.”¹⁸

96. The Respondent relies on the following cases in setting out the legal standard to assess whether a claim is manifestly without legal merit under ICSID Arbitration Rule 41(5):

Trans-Global v. Jordan – where the tribunal explained the legal standard as follows:
“these legal materials confirm that the ordinary meaning of the word requires the

¹⁵ Updated Rule 41(5) Application, Section IV.

¹⁶ Rule 41(5) Application, para. 22.

¹⁷ ICSID Arbitration Rule 41(5).

¹⁸ Rule 41(5) Application, para. 24.

respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognizes that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the Parties, together with questions addressed by the tribunal to those Parties. The exercise may thus be complicated; but it should never be difficult.”¹⁹

Brandes v. Venezuela – where the tribunal stated: “‘legal merit’ covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal.”²⁰

MOL v. Croatia – where the tribunal agreed with the approach adopted in *Trans-Global v. Jordan* and further explained that ICSID Arbitration Rule 41(5) “envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright,” and a “clear-cut” objection that “could be decided virtually on the papers or with a minimum of supplementary argument.”²¹

*Emmis v. Hungary*²² and *Accession Mezzanine v. Hungary*²³ – where the tribunals “granted Rule 41(5) applications, dismissing claims for various alleged breaches of the

¹⁹ *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, (“*Trans-Global v. Jordan*”), Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 [RL-2], para. 88; Rule 41(5) Application, para. 25.

²⁰ *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, (“*Brandes v. Venezuela*”), Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules dated 2 February 2009 [RL-4], para. 55; Rule 41(5) Application, para. 26.

²¹ *MOL Hungarian Oil and Gas Company PLC v. Republic of Croatia*, ICSID Case No. ARB/13/32, (“*MOL v. Croatia*”), Decision on Respondent’s Application under ICSID Arbitration Rule 41(5) dated 2 December 2014 [RL- 5], para. 44; Rule 41(5) Application, paras. 26-27.

²² *Emmis International Holding, B.V. and Others v. Hungary*, ICSID Case No. ARB/12/2, (“*Emmis v. Hungary*”), Decision on Respondent’s Objection Under ICSID Arbitration Rule 41(5) dated 11 March 2013 [RL-6].

²³ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, (“*Accession Mezzanine v. Hungary*”), Decision on Respondent’s Objection under Arbitration Rules 41(5) dated 16 January 2013 [RL-7].

applicable BIT, [...] on the ground that the treaty did not provide for arbitration of claims other than expropriation.”²⁴

97. The Respondent submits that, for purposes of an ICSID Arbitration Rule 41(5) application, “a tribunal may assume at ‘face value’ the facts alleged by the Claimant; however, the Tribunal should not accept factual allegations that are ‘incredible, frivolous, vexatious or inaccurate or made in bad faith’ or ‘plainly without any foundation.’”²⁵
98. The Respondent further submits that, “[i]n deciding when a particular legal question is suitable for determination on an expedited basis, the *Global Trading v. Ukraine* tribunal considered whether the question at issue was settled enough from a legal perspective to decide the matter under Rule 41(5).”²⁶ The Respondent underlines that, “[i]t is well-settled that objections under Rule 41(5) may pertain to either jurisdiction or the merits.”²⁷
99. Based on the above, the Respondent concludes that its objections under ICSID Arbitration Rule 41(5) “are appropriate for resolution under the ‘manifest lack of legal merit’ standard of ICSID Arbitration Rule 41(5),” as they are “clear-cut and obvious and capable of being established with ‘relative ease and dispatch.’”²⁸

(2) The Claimant’s claims manifestly lack legal merit

a. The Claimant’s board resolutions were insufficient

100. According to the Respondent, the Claimant lacks authorization to pursue this arbitration in its own right and has not submitted the proper authorization to commence this arbitration. The Respondent argues that “[u]nder ICSID Institution Rule 2, a claimant must submit a

²⁴ Rule 41(5) Application, para. 29.

²⁵ Rule 41(5) Application, para. 30 (footnotes omitted).

²⁶ Rule 41(5) Application, para. 31; *see Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, (“*Global Trading v. Ukraine*”), Award dated 1 December 2010 [RL-3].

²⁷ Rule 41(5) Application, para. 32; *see RSM Production Corporation and Others v. Grenada*, ICSID Case No. ARB/10/6, (“*RSM v. Grenada*”), Award dated 10 December 2010 [RL-8], para. 4.2.1; *see also Eskosol S.p.A. In Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, (“*Eskosol v. Italy*”), Decision on Respondent’s Application Under Rules 41(5) dated 20 March 2017 [RL-9], para. 35.

²⁸ Rule 41(5) Application, para. 33.

valid authorization to initiate an ICSID arbitration at the time the Request for Arbitration is filed. If the claimant is a company, as in this case, ICSID Institution Rule 2 requires that the claimant present documentation to prove that the company ‘has taken all necessary internal actions to authorize the request.’”²⁹

101. According to the Respondent, the two powers of attorney³⁰ provided by the Claimant with the Request, were actually resolutions of the Board of Directors of the Claimant dated 15 June 2017 (a month prior to filing the Request for Arbitration). Both documents are signed by Mr. Erdal Çelik, who is listed as the “Chairman of the Board of Directors” of the Claimant,³¹ and is also “the only person listed under ‘Meeting Attendees.’”³² They are not notarized as the Respondent submits would have been standard practice in Turkey.³³
102. At the Hearing held on 17 September 2019, the Claimant presented a new power of attorney dated 29 August 2019 which was issued by a public notary in Turkey (the “**August 2019 POA**”). According to the Claimant, the August 2019 POA authorized it to bring this arbitration. However, in response to a question from the Tribunal, the Claimant admitted that the August 2019 POA did not have retroactive effect.³⁴
103. By letter of 2 October 2019, the Claimant attempted to admit into the record another notarized power of attorney which it argued did have retroactive effect under Turkish law.³⁵ By letter of 16 October 2019, the Respondent objected to the admission of the new

²⁹ Rule 41(5) Application, para. 51.

³⁰ Request for Arbitration, Annex 5, “Powers of Attorney and Document Authorizing the initiation of ICSID Arbitration on behalf of Claimant.”

³¹ Rule 41(5) Application, para. 54.

³² Rule 41(5) Application, para. 55.

³³ Rule 41(5) Application, para. 63.

³⁴ Transcript, p. 227, ll. 8-18. (NB: The August 2019 POA was sent to the Tribunal on 18 September 2019).

³⁵ Claimant’s letter of 2 October 2019.

document into the record.³⁶ On 18 October 2019, the Tribunal decided not to admit the new document into the record at this time.³⁷

104. Finally, the Respondent argues that even if there was a valid authorization for the Claimant to initiate this arbitration, which it denies, the claims asserted by the Claimant “exceed the scope of the resolution of Lotus Holding’s ‘board of directors.’”³⁸

b. The Claimant does not have independent claims

105. The Respondent describes this arbitration as involving claims arising under “five contracts for the construction and installation of various facilities in Turkmenistan, entered into in the period of 2007-2011.”³⁹ It underlines that the Claimant is not a signatory to any of these contracts. The signatory of all them is Lotus Enerji, which is not a party to this arbitration.⁴⁰

106. Lotus Enerji is a fully-owned subsidiary of the Claimant, which is its sole shareholder. In turn, Mr. Erdal Çelik is the sole shareholder of the Claimant. Mr. Çelik is also the Chairman of both the Claimant and Lotus Enerji.⁴¹

107. The Respondent submits that the Claimant “did not even exist at the time that Lotus Enerji entered into four of the five contracts,” as it was only incorporated on 23 July 2008, after the first four of the Contracts were already signed.⁴² Moreover, the Claimant never alleged that Lotus Enerji had assigned “any of the contacts or rights thereunder to Lotus Holding.”⁴³

³⁶ Respondent’s letter of 16 October 2019.

³⁷ Tribunal’s message to the Parties dated 18 October 2019.

³⁸ Rule 41(5) Application, para. 69.

³⁹ Rule 41(5) Application, para. 2; Request for Arbitration, paras. 19, 21, 24, 26, 80.

⁴⁰ Rule 41(5) Application, para. 3.

⁴¹ Rule 41(5) Application, para. 4.

⁴² Rule 41(5) Application, para. 37; Request for Arbitration, para. 7.

⁴³ Rule 41(5) Application, para. 37.

108. The Respondent argues that the “Claimant has not asserted any independent claims for damages other than the right to payment of the amounts due to Lotus Enerji under the five Contracts,”⁴⁴ and that the Claimant’s claims are “expressly pleaded contract claims.”⁴⁵
109. The Respondent further argues that the Claimant’s arguments that “Lotus Enerji itself and ‘its claims to money’ qualify as the Claimant’s ‘investment’ under Article 1(6) of the ECT,” are “untenable.”⁴⁶ According to the Respondent, “Article 1(6) of the ECT clearly mandates that the investment be ‘owned or controlled’ by the investor.”⁴⁷ Since Lotus Enerji has been under the sole control of the Turkish Bankruptcy authorities since November 2016, *i.e.*, eight months before the Claimant filed the Request for Arbitration, the “Claimant does not ‘own or control’ either Lotus Enerji itself, or the claims to money supposedly owed to [it], which belong to its bankruptcy estate.”⁴⁸
110. The Respondent also argues that the Claimant does not have legal standing to make claims for the contracts and assets of Lotus Enerji, in which it is a shareholder. According to the Respondent “[i]t is a fundamental principle universally recognised by international authorities that a shareholder does not have legal standing to make claims for the contracts and assets of the company in which it is a shareholder.”⁴⁹
111. The Respondent makes a distinction between “shareholders’ property” and the “company’s property,” and cites Prof. Zachary Douglas to support its position that an international tribunal cannot “wholly discard the basic distinction between the shareholder’s property and the company’s property merely because the cause of action arises in international law” and that a shareholder that “benefits from the separate legal personality and limited liability

⁴⁴ Rule 41(5) Application, para. 38.

⁴⁵ Rule 41(5) Application, para. 40.

⁴⁶ Respondent’s Reply, para. 23; *see* Claimant’s Response, paras. 12, 13.

⁴⁷ Respondent’s Reply, para. 23.

⁴⁸ Respondent’s Reply, para. 23.

⁴⁹ Rule 41(5) Application, para. 85.

must accept the inconveniences as well as the advantages.”⁵⁰ The Respondent argues that the assets belong to the company, not to the shareholders.⁵¹

112. In response to the Claimant’s argument that the claimed money “would have been paid as ‘dividends’ to Claimant, and that dividends qualify as an ‘investment’ under Article 1 of the BIT,”⁵² the Respondent argues that this is manifestly flawed for several reasons:

First, [Claimant] and Lotus Enerji are separately incorporated, distinct entities. Claimant does not have the authority to speak on behalf of Lotus Enerji as to what it ‘would have’ done with its receivables ... This argument presumes that a company that was engaging in multiple construction projects would not need or use any of the money it was being paid under the contracts for those projects to actually carry out the works. That view is completely divorced from reality.

[Second], [i]n order to pay dividends, a company must have profits remaining after having satisfied its liabilities and expenses incurred in the ordinary course of conducting its business operations ... which is expressly required under the Turkish Commercial Code. ... Thus, the premise of Claimant’s ‘would-be dividends’ argument is fundamentally flawed.

Moreover, Claimant’s argument would require the Tribunal to make a determination regarding the financial status of Lotus Enerji during the relevant period, a party that is not before it, that is not represented by any authorized representative in this arbitration, that cannot speak for itself and cannot submit its own evidence. Yet the Tribunal would have to make an assessment of Lotus Enerji’s assets and liabilities, and, in order to do so, evaluate and determine the many pending claims of creditors and other obligations, which are currently subject to determination by the Turkish bankruptcy

⁵⁰ See Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press 2009), Chapter 11, paras. 749-751 [RL-28]; Respondent’s Reply, paras. 86-87. See also slide 16 of the Respondent’s Opening presentation.

⁵¹ Respondent’s Reply, para. 87; See A. V. Lowe, *Shareholders’ Rights to Control and Manage: From Barcelona Traction to ELSI, LIBER AMICORUM JUDGE SHIGERU ODA* (Brill Academic 2002), p. 278 [RL-52]; see also Respondent’s Reply, para. 87. See also *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, (“*Poštová v. Hellenic Republic*”), Award dated 9 April 2015 [RL-11].

⁵² Respondent’s Reply, para. 24; see Claimant’s Response, paras. 9, 16, 17, 20.

authorities in its liquidation proceedings. This exercise would not only be improper, but also impossible ...

[Fourth], Claimant's argument essentially would require the Tribunal to essentially adjudicate multiple disputes between the bankrupt entity and its creditors, which are pending in the bankruptcy proceeding, before it could determine Claimant's claim that dividends would have been available for distribution to [the Claimant] ... Neither Lotus Enerji nor its creditors have consented to the jurisdiction of this Tribunal.⁵³

c. The Claimant has no authorization from the Turkish bankruptcy authorities to pursue Lotus Enerji's claims in this arbitration

113. The Respondent underlines that Lotus Enerji is "in liquidation proceedings in Turkey, having been declared bankrupt and put under the supervision and control of the Turkish bankruptcy authorities in November 2016."⁵⁴ The Respondent submits that "[c]laims for money owed to a bankrupt company belong to its bankruptcy estate and can only be pursued by the proper party, with the authorization of the Turkish bankruptcy authorities, in accordance with the requirements of Turkish law, and are payable only to the bankruptcy estate."⁵⁵

114. According to the Respondent, under Turkish bankruptcy law:

[T]he only proper way for Claimant to receive any recovery, based on its status as a shareholder of the bankrupt entity, of amounts allegedly due to the bankrupt entity under its contracts, is through the Turkish bankruptcy proceedings. That would occur only after the Bankruptcy Directorate administers the estate, determines and makes distributions due to Lotus Enerji's creditors, and determines any residual assets remaining in the estate which could be distributed to a shareholder such as Claimant. Maintaining itself as a claimant or co-claimant in this arbitration does not allow [the Claimant] to escape or alter the proper procedures for obtaining a

⁵³ Respondent's Reply, paras. 24-28.

⁵⁴ Rule 41(5) Application, para. 5.

⁵⁵ Rule 41(5) Application, para. 5.

recovery as a shareholder of Lotus Enerji under Turkish bankruptcy law, nor does it improve its position in that process.⁵⁶

115. Such authorization, it submits, “would require an actual, notarized power of attorney from the Turkish Bankruptcy Directorate, expressly appointing counsel to act on behalf of the bankrupt entity, Lotus Enerji, to pursue its claims in this case and collect its receivables for the bankruptcy estate.”⁵⁷
116. The Respondent argues that the Claimant has no authorization from the Turkish bankruptcy authorities to pursue the claims of Lotus Enerji in this arbitration, and no such authorization has been presented in this case.⁵⁸ It contrasts this with what happened in the *Muhammet Çap & Bankrupt Sehil v. Turkmenistan* case where express authorization had been given by the Turkish bankruptcy authorities for bankrupt Sehil to pursue its claims against Turkmenistan in that arbitration.⁵⁹
117. Based on the above, the Respondent argues that “[t]he only conclusion that can be reached is that Claimant is pursuing a strategy to avoid the scrutiny of the Turkish Bankruptcy Directorate supervising Lotus Enerji’s liquidation proceeding, and to avoid Lotus Enerji’s creditors, by ensuring that proceeds of claims under Lotus Enerji’s Contracts are not paid to the bankruptcy estate, but to [the Claimant] and thereby, to the latter’s sole shareholder, Mr. [Ç]elik.”⁶⁰ The Respondent submits that “an attempt to bypass the creditors of an entity in bankruptcy would be illegal, invalid, and even possibly criminal, under Turkish law.”⁶¹
118. The Respondent underlines that Mr. Çelik obviously knew that Lotus Enerji was in bankruptcy proceedings when he signed the resolutions.⁶² For the Respondent, the

⁵⁶ Updated Rule 41(5) Application, para. 36.

⁵⁷ Rule 41(5) Application, para. 45.

⁵⁸ Rule 41(5) Application, paras. 6, 7 and 42-50.

⁵⁹ *Muhammet Çap & Bankrupt Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, (“*Muhammet Çap & Bankrupt Sehil v. Turkmenistan*”); Rule 41(5) Application, para. 7.

⁶⁰ Rule 41(5) Application, para. 50.

⁶¹ Rule 41(5) Application, para. 44.

⁶² Rule 41(5) Application, para. 55.

Claimant filed the Request for Arbitration in its name to “[avoid] creditors in the bankruptcy proceeding,” and to “avoid liability on potential counterclaims against Lotus Enerji.”⁶³ The Respondent thus concludes that “there is an abuse of process in this arbitration.”⁶⁴

d. The Claimant failed to fulfil the requirements of the BIT and the ECT

119. The Respondent submits that:

Under Article VII (1)-(2) of the Turkey-Turkmenistan BIT, an investor must give written notice of a dispute to the State with ‘detailed information’ concerning the claims, and it must allow a six-month period for the parties to engage in negotiations to attempt to reach an amicable settlement of the identified dispute. The BIT also requires the investor to submit the disputes to domestic courts, and to allow a one-year period for the courts to issue a decision. Article 26 of the Energy Charter Treaty also requires an investor to attempt amicable settlement of disputes with a host State, including a three-month “cooling off” period.⁶⁵

120. The Respondent argues that this Tribunal lacks jurisdiction to hear the Claimant’s claims because the Claimant failed to satisfy the requirements of Article VII of the BIT and Article 26 (1)-(2) of the ECT.⁶⁶

(i) The Claimant failed to comply with the notice requirements of Article VII of the BIT and Article 26 of the ECT

121. The Respondent submits that the allegation by the Claimant that it satisfied the notice requirements of Article VII of the BIT is “manifestly incorrect,” and that the documents⁶⁷ that the Claimant relies on fail to satisfy such requirements.⁶⁸

⁶³ Rule 41(5) Application, para. 67.

⁶⁴ Respondent’s Reply, para. 38.

⁶⁵ Rule 41(5) Application, para. 72 (original citations omitted).

⁶⁶ Rule 41(5) Application, paras. 73, 80.

⁶⁷ Request for Arbitration, Annex 1, enclosing a letter dated 21 April 2016 and prior correspondence sent in 2016.

⁶⁸ Rule 41(5) Application, paras. 74-75.

122. The Respondent argues that “[t]he importance of providing sufficient notice has been widely recognized by ICSID tribunals.” It lists several ICSID cases including, *inter alia*, *Western NIS v. Ukraine*, *Goetz v. Burundi*, *Burlington Resources v. Ecuador* and *Supervisión v. Costa Rica* as examples.⁶⁹ For the Respondent, the Claimant failed to satisfy the notice requirements of the BIT and the ECT because:

Lotus Enerji, not Lotus Holding, sent those communications; the communications only referred to one of the Contracts; they failed to mention the BIT or the ECT and they do not actually refer to arbitration. Similarly, the “draft arbitration request” sent to the Ministry of Energy of Turkmenistan via email on February 1, 2017 does not satisfy these requirements. It did not refer to the five Contracts or the ECT, and claimant initiated this arbitration before the six-month period elapsed.⁷⁰

123. The Respondent argues that the Claimant also failed to observe the six-month waiting period for the Parties to engage in negotiations to attempt to reach an amicable settlement of the dispute as mandated by the BIT, and the three-month cooling off period contained in Article 26 of the ECT.⁷¹

(ii) The Claimant failed to comply with Article VII (2) of the BIT

124. The Respondent points out that the Claimant does not deny that it failed to comply with Article VII (2) of the BIT, whereby an investor must submit its dispute to the national courts of the host State before commencing international arbitration and allow a one-year

⁶⁹ Respondent’s Reply, paras. 59-61; see *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, (“*Western NIS v. Ukraine*”), Order dated 16 March 2006, para. 5 [RL-21]; *Antoine Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, (“*Goetz v. Burundi*”), Award dated 10 February 1999, paras. 90-93 [RL-22]; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, (“*Burlington Resources v. Ecuador*”), Decision on Jurisdiction dated 2 June 2010 [RL-23], paras. 291-293; *Supervisión y Control, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/12/4, (“*Supervisión v. Costa Rica*”), Award dated 18 January 2017, [RL-24], paras. 344-346.

⁷⁰ Updated Rule 41(5) Application, para. 72.

⁷¹ Respondent’s Reply, para. 56.

period for the courts to render a decision. Instead, the Claimant submits that this provision is not mandatory.⁷²

125. The Respondent supports its position by relying on *Kiliç v. Turkmenistan*⁷³ and *İçkale v. Turkmenistan*,⁷⁴ where those tribunals “found the language in Article VII (2) of the Turkey-Turkmenistan BIT to contain mandatory language requiring submission to local courts before international arbitration may be commenced.”⁷⁵

e. The Claimant’s intention to add Lotus Enerji as a “co-claimant”

126. The Respondent argues that the Claimant cannot simply join a new co-claimant to the proceeding under the ICSID Arbitration Rules and emphasizes that the Claimant “has not provided any basis or authority permitting joinder.”⁷⁶ The Respondent argues that “there is no provision in the ICSID Rules that allows for joinder of a third party to an arbitration proceeding after it has been commenced,” and in a few cases on this issue, “tribunals have held that joinder of a new party could only occur with the consent of all parties to the arbitration.”⁷⁷ In the present case, the Respondent has not given its consent.

127. The Respondent relies on the following cases:

*Churchill v. Indonesia*⁷⁸ – The tribunal explained that “[p]ursuant to Article 36(2) of the ICSID Convention and ICSID Institutional Rule 2(1), the request for arbitration must identify each party to the proceedings with precision and indicate the date and the

⁷² Respondent’s Reply, para. 63.

⁷³ *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, (“*Kiliç v. Turkmenistan*”), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 7 May 2012 [RL-26], para. 11.1(c).

⁷⁴ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, (“*İçkale v. Turkmenistan*”), Award dated 8 March 2016 [RL-27], para. 228.

⁷⁵ Respondent’s Reply, paras. 64-65.

⁷⁶ Updated Rule 41(5) Application, para. 40.

⁷⁷ Updated Rule 41(5) Application, para. 40 (emphasis in original).

⁷⁸ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, (“*Churchill v. Indonesia*”), Procedural Order No. 4 dated 18 March 2013 [RL-53].

instrument by which each has given its consent to arbitration. **Thereafter, no new party can be added except if all the others agree to its joinder ...**⁷⁹

*Continental Casualty v. Argentina*⁸⁰ – The tribunal rejected the claimant’s application to join its subsidiary as a claimant because it found that Article 46 of the ICSID Convention does not allow “the introduction into that arbitration of an additional third person with its own new claim.”⁸¹

*Ambiente Ufficio v. Argentina*⁸² – The tribunal stated that “[t]here can be no doubt that such an *ex post* joinder or consolidation of proceedings is subject to a specific consent of the Parties.”⁸³

128. In conclusion, because the Respondent does not consent to the joinder of Lotus Enerji in this proceeding,⁸⁴ it cannot be joined as a “co-claimant” in this arbitration.⁸⁵

(3) The Claimant’s allegations of the Respondent’s bad faith

129. The Respondent notes that the Claimant argues that the Respondent’s Application, as well as its opposition to the joinder of Lotus Enerji constitute “bad faith” attempts to prevent the Claimant or Lotus Enerji from “‘vindication’ of their rights.”⁸⁶

⁷⁹ *Churchill v. Indonesia*, Procedural Order No. 4 dated 18 March 2013 [RL-53], para. 1.6; Updated Rule 41(5) Application, para. 41 (emphasis in original).

⁸⁰ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, (“*Continental Casualty v. Argentina*”), Award dated 5 September 2008 [RL-54].

⁸¹ *Continental Casualty v. Argentina*, Award dated 5 September 2008 [RL-54], para. 97; Updated Rule 41(5) Application, paras. 42-43.

⁸² *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, (“*Ambiente Ufficio v. Argentina*”), Decision on Jurisdiction and Admissibility dated 8 February 2013 [RL-55].

⁸³ *Ambiente Ufficio v. Argentina*, Decision on Jurisdiction and Admissibility dated 8 February 2013 [RL-55], para. 123; Updated Rule 41(5) Application, para. 44.

⁸⁴ Updated Rule 41(5) Application, para. 40.

⁸⁵ Updated Rule 41(5) Application, para. 45.

⁸⁶ Updated Rule 41(5) Application, para. 77.

130. The Respondent argues that “Claimant’s accusations of ‘bad faith’ ring hollow. It is Claimant who has sought to abuse this ICSID arbitration, circumvent the Turkish bankruptcy proceedings, and avoid the rights of Lotus Enerji’s creditors. Claimant is in no position to accuse others of ‘bad faith,’ and there is no merit to that charge.”⁸⁷

B. THE CLAIMANT’S POSITION

131. The Claimant contends that the Respondent’s Application should be denied because:
- i. The Claimant was duly authorized to file this arbitration;
 - ii. The claims brought in this arbitration belong to the Claimant regardless of the status of Lotus Enerji;⁸⁸
 - iii. The Claimant has satisfied the requirements of Article VII of the BIT and the provisions of the ECT;⁸⁹ and
 - iv. Lotus Enerji can be added to this proceeding as a co-claimant and doing so would not affect the Claimant’s claims as asserted in this arbitration.⁹⁰
132. Finally, it should be noted, at the outset, that the Claimant does not dispute the Respondent’s submissions as to the legal standard of ICSID Arbitration Rule 41(5).⁹¹ The Claimant does, however, disagree with the application of that standard and argues that this is not a case that should be dismissed on the basis of Rule 41(5).⁹²

(1) The Claimant was duly authorized to file this arbitration

133. The Claimant argues that the two board resolutions that it submitted together with the Request, authorizing the firms Butzel Long and Egemenoglu to represent it in this

⁸⁷ Updated Rule 41(5) Application, para. 79.

⁸⁸ Claimant’s Rejoinder, Section II and Section III.

⁸⁹ Claimant’s Rejoinder, Section IV.

⁹⁰ Claimant’s Response to Updated Application, Section III and Section VI.

⁹¹ Transcript, p. 146, l. 12 - l. 16.

⁹² Transcript, p. 146, l. 24 - p. 147, l. 9.

proceeding fulfil the formal requirements for filing an ICSID request for arbitration as they were signed by the Claimant's sole board member, Mr. Erdal Çelik.⁹³

134. The Claimant argues that there is no requirement under the ICSID Arbitration Rules that powers of attorney be notarized.⁹⁴ The Claimant stresses that after the Request was registered, the Respondent “acknowledged Claimant’s counsel as duly-appointed representatives and even issued a visa (and instructed its counsel in obtaining such visa) to Messrs. Alcitepe and Egemenoglu in order to travel to Turkmenistan and discuss issues related to [Claimant’s] claim with representatives of Turkmenistan, including its counsel.”⁹⁵
135. In its Response to the Respondent’s Updated Rule 41(5) Application, the Claimant added that “should the Tribunal so decide that a notarized power of attorney is required [it] will obtain a notarized version of its board resolution authorizing its counsel to initiate this arbitration and represent it in these proceedings.”⁹⁶
136. At the Hearing, the Claimant introduced a notarized Turkish language power of attorney into the record, a copy and English translation of which was transmitted to the Tribunal on 18 September 2019.⁹⁷
137. Following questions from the Tribunal at the Hearing as to whether the document had a retroactive effect, the Claimant sought to submit a further notarized power of attorney into the record by letter dated 2 October 2019. The Claimant argued that this document has “retroactive effect” under Turkish law authorizing counsel to file its ICSID claim against the Respondent.⁹⁸

⁹³ Claimant’s Rejoinder, para. 37.

⁹⁴ Claimant’s Response to Updated Application, para. 36.

⁹⁵ Claimant’s Rejoinder, paras. 42-43.

⁹⁶ Claimant’s Response to Updated Application, para. 37.

⁹⁷ Claimant’s email to the Tribunal dated 18 September 2019.

⁹⁸ Claimant’s letter dated 2 October 2019.

138. The Respondent objected to the admission of this document into the record on 16 October 2019, and on 18 October 2019, the Tribunal decided not to admit it at this time.⁹⁹

(2) The Claimant's claims in this arbitration belong to the Claimant

139. The Claimant's position is that "Lotus Holding suffered, in addition to the loss of its monetary claims held through Lotus Enerji, the complete destruction of the value of its shareholding in Lotus Enerji and is fully authorized under international investment law to bring claims in these regards."¹⁰⁰

140. The Claimant rejects the Respondent's argument that the Claimant's claims should have been asserted by Lotus Enerji because it (not the Claimant) was a party to the contracts at issue in this arbitration. According to the Claimant, the Respondent "ignores the plain language of both the BIT and the ECT, as well as many cases in which a parent company was allowed to bring claims against a respondent in order to recover its own losses."¹⁰¹ The Claimant also argues that Lotus Enerji was one of the Claimant's "investment vehicles."¹⁰²

141. The Claimant's position is that the plain language of both the BIT and the ECT clearly allow it "to claim damages against Respondent for losses arising out of monies not paid by Respondent on the contracts to which its fully-owned subsidiary was a party."¹⁰³ It clarifies that it is not seeking damages for breach of contract but for violations of the ECT and the

⁹⁹ Respondent's letter of 16 October 2019 and the Tribunal's communication of 18 October 2019.

¹⁰⁰ Claimant's Response to Updated Application, para. 22.

¹⁰¹ Claimant's Response, para. 6.

¹⁰² Claimant's Response, paras. 7-8.

¹⁰³ Claimant's Response, para. 12.

BIT.¹⁰⁴ It adds that “[i]t is well-established the same facts can form the basis both for the subsidiary’s breach of contract claim and the parent/investor’s treaty claim.”¹⁰⁵

142. According to the Claimant, the ECT’s definition of investment covers “[...] every kind of asset, owned or controlled directly or indirectly by an Investor and includes [...] (b) [a] company or business enterprise, or shares, stocks or other forms of equity participation in a company or business enterprise [...]” as well as “(c) [c]laims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment.”¹⁰⁶ The Claimant argues that its investments fall under these categories.

143. The Claimant also argues that Article I(2)(i-ii) and (3) of the BIT protect “‘any form of participation,’ not only ownership of shares” and also “explicitly protects the investor’s right to dividends in its definition of ‘returns.’”¹⁰⁷

¹⁰⁴ Claimant’s Rejoinder, para. 11. The Claimant also states: “While the RFA asserts that Respondent’s actions constitute both a breach of its contracts with Lotus Enerji *and* violations of the ECT and BIT, the RFA seeks a remedy only for the treaty violations, not the contract breaches. In particular, Claimant will seek a remedy for the following violations of the BIT and the ECT: a. Depriving Claimant of dividends it would otherwise have received from Lotus Enerji had Respondent not refused to make payments due to Lotus Enerji and not unjustly and improperly terminated contracts with Lotus Enerji; b. Expropriating Claimant’s investment by improperly and unjustly forcing Lotus Enerji into bankruptcy; c. Forcing Claimant to spend millions of dollars – including making payments to Lotus Enerji’s creditors and employees – to keep Lotus Enerji afloat; and d. Depriving Claimant of its right [to] make further investments in Lotus Enerji or other businesses with dividends for (a) or funds it had to spend on (c), above.”

¹⁰⁵ Claimant’s Rejoinder, para. 12.

¹⁰⁶ Claimant’s Response, para. 13; Article 1(6) of the ECT [C-2].

¹⁰⁷ Claimant’s Rejoinder, para. 15.

144. The Claimant cites several cases¹⁰⁸ to demonstrate that “a parent company and/or a shareholder in a company whose contract was breached was allowed to assert its own independent treaty claim.”¹⁰⁹
145. Further, in response to the Respondent’s argument that the Claimant’s claims as articulated in its Request for Arbitration are different from the measure of damages requested in later pleadings, the Claimant argues that, “when filing the Request for Arbitration, [it] expressly ‘reserve[d] the right to substantiate, amend and supplement’ its damages as well as adding ‘interests, costs and amounts associated with the loss of business opportunities and loss of enterprise value.’ Indeed, it is standard practice in international arbitration to provide a full quantification of the damages following the Request for Arbitration.”¹¹⁰ The Claimant further contends that ICSID Arbitration Rule 40 also allows for the amendment of such claims.¹¹¹
146. The Claimant also rejects the Respondent’s argument that the Claimant is seeking “double recovery.”¹¹² The Claimant argues that it is “nothing more than a false dilemma Respondent has raised in an effort to deprive Claimant of its rights under the BIT and ECT,”¹¹³ and it refers to several cases¹¹⁴ to demonstrate that “both this tribunal and the

¹⁰⁸ Claimant’s Response to Updated Application, paras. 23-34; Claimant’s Rejoinder, paras. 12-23; see *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/08, (“*CMS v. Argentina*”), Decision of the Tribunal on Objections to Jurisdiction dated 17 July 2003 [CL-2], paras. 51-52; see *American Manufacturing & Trading Corporation (Zaire) Inc. v. Zaire*, ICSID Case No. ARB/93/I, (“*American Manufacturing v. Zaire*”), Award dated 10 February 1997 [CL-3]; see *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, (“*Lanco v. Argentina*”), Preliminary Decision on Jurisdiction dated 8 December 1998 [CL-4]; see *LG&E Energy Corporation v. Argentine Republic*, ICSID Case No. ARB /02/01, (“*LG&E v. Argentina*”), Decision on Objections to Jurisdiction dated 30 April 2004 [CL-5], para. 60; see *Enron Corp. v. Argentine Republic*, ICSID Case No. ICSID ARB/01/3, (“*Enron v. Argentina*”), Decision on Jurisdiction dated 14 January 2004 [CL-7]; *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction dated 22 February 2006 [CL-8].

¹⁰⁹ Claimant’s Response, para. 22.

¹¹⁰ Claimant’s Response to Updated Application, para. 33; Request for Arbitration, para. 70.

¹¹¹ Claimant’s Response to Updated Application, para. 34; see ICSID Arbitration Rule 40.

¹¹² Rejoinder, para. 24.

¹¹³ Rejoinder, para. 24.

¹¹⁴ Claimant’s Rejoinder, paras. 24-25; see *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, (“*Suez v. Argentina*”), Decision on Jurisdiction dated 3 August 2006 [CL-9], para. 51; see *Enron v. Argentina*, Decision on Jurisdiction (Ancillary Claim) dated 2 August 2004 [CL-10]; see *Sempra Energy*

government of Turkmenistan have sufficient resources to be able to protect against the spectre of ‘double recovery’ or of interfering with creditors’ rights without depriving the foreign investor of its rights.”¹¹⁵

147. Finally, the Claimant also submits that its “claims in this arbitration would not circumvent the creditors of Lotus Enerji because Claimant asserts only those claims that it is legally entitled to bring in its own name.”¹¹⁶ Therefore, it argues, “since these rights belong to Claimant, there is no need to seek the trustee’s permission to pursue them.”¹¹⁷

(3) The Claimant has satisfied the requirements of Article VII of the BIT and of the ECT

a. The Claimant has satisfied the notice requirements of Article VII of the BIT and the ECT

148. The Claimant rejects the Respondent’s objection on the basis that it failed to satisfy the notice requirements of the BIT and the ECT. According to the Claimant, the Respondent “ignores both key pieces of evidence as well as well-established law on the issue.”¹¹⁸ The key pieces of evidence that the Claimant refers to are:

- the letter of notification dated 21 April 2016 where the Claimant mentioned the possibility of taking the dispute to “international third parties;” and
- the email of a draft request for arbitration sent to the Ministry of Energy of Turkmenistan and the Turkmenistan Refinery on 1 February 2017, “outlin[ing] the treaty claims” and “requesting that the matter be resolved amicably.”¹¹⁹

149. The Claimant argues that it satisfied the six-month notice period of the BIT and recalls that:

Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, (“*Sempra v. Argentina*”), Decision on Objections to Jurisdiction dated 11 May 2005 [CL-11], paras. 76-77.

¹¹⁵ Claimant’s Rejoinder, para. 25.

¹¹⁶ Claimant’s Response to the Respondent’s Updated 41(5) Application, para. 26.

¹¹⁷ Claimant’s Rejoinder, para. 29.

¹¹⁸ Claimant’s Response, para. 45.

¹¹⁹ Claimant’s Response, para. 46.

- On 21 April 2016, the Respondent was notified of the dispute related to the Refinery Project;
 - On 1 February 2017, Turkmenistan received a draft request for arbitration identifying all the projects as the subject of a dispute between Lotus Holding and Turkmenistan;
 - On 28 July 2017, the Claimant filed the Request for Arbitration; and
 - The Request for Arbitration was registered on 22 August 2017.¹²⁰
150. The Claimant argues that it filed the Request for Arbitration four days shy of the six-month period starting from the draft request for arbitration, and that the Request was not registered until 22 August 2017, well after the six months had elapsed.¹²¹ Moreover, the Claimant argues that it satisfied the requirement of the ECT, as the “ECT proposes only that the Claimant requested ‘amicable settlement’ of the dispute at least three months prior to the commencement of arbitration.”¹²²
151. Finally, the Claimant argues that even if the six-month period had not elapsed, “Respondent has provided no evidence at all as to what actions it would have taken in those four days to promote settlement of the dispute.”¹²³ Relying on the *Occidental v. Ecuador* case,¹²⁴ the Claimant submits that “[a] number of tribunals have confirmed that where negotiations are bound to be futile, there is no need for the waiting period to have fully lapsed.”¹²⁵

¹²⁰ Claimant’s Response to Updated Application, paras. 39, 41.

¹²¹ Claimant’s Response to Updated Application, paras. 39, 41.

¹²² Claimant’s Response to Updated Application, para. 40.

¹²³ Claimant’s Response to Updated Application, para. 42.

¹²⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, (“*Occidental v. Ecuador*”), Decision on Jurisdiction dated 9 September 2008 [CL-19].

¹²⁵ Claimant’s Response to Updated Application, para. 42; *Occidental v. Ecuador*, Decision on Jurisdiction dated 9 September 2008 [CL-19], fn. 10.

b. The Claimant also satisfied the other requirements of the BIT and the ECT

152. The Claimant submits that Article VII (2) of the BIT is not a jurisdictional bar to its claims.¹²⁶
153. According to the Claimant, tribunals have allowed claimants to pursue their treaty claims under the BIT despite not initially filing to litigate domestically in Turkmen courts.¹²⁷ The Claimant's position in this arbitration is that:

... the Treaty does not require claimants to first file for litigation in Turkmen courts. This view was adopted by the tribunal in its Decision on Jurisdiction dated February 13, 2015 in *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB 12/6). Lotus will provide factual and anecdotal evidence, similar to *Sehil*, regarding the legislative intent of the Turkey-Turkmenistan BIT in support of the position that the one-year resort to litigation requirement is not imposed by the BIT.

Should the tribunal find that the requirement does exist, Lotus will argue that 1) the MFN clause of the BIT allows Lotus to circumvent the requirement; 2) submission of the dispute to Turkmen courts would have been futile and; 3) while not initiated by Lotus, local court proceedings have indeed been conducted in the context of the present dispute. The tribunal in *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, in its Award dated March 8, 2016, found that because Turkmenistan had conducted legal proceedings in Turkmen courts against claimant with respect to the latter's claims, even though these proceedings were not initiated by the claimant, this was sufficient to satisfy the requirements of Article VII (2) of the of BIT.¹²⁸

c. The Claimant's intention to add Lotus Enerji as a "co-claimant"

154. Finally, in the Claimant's Response to the Respondent's Updated Application, the Claimant asserts that the possible addition of Lotus Enerji as a co-claimant would not have

¹²⁶ Claimant's Response, para. 53.

¹²⁷ Claimant's Response, para. 54.

¹²⁸ Claimant's Response, para. 55; *see* Letter dated 16 August 2017 [C-9].

any impact on the Claimant’s claims in this arbitration, as the Claimant has “separate and independent claims, distinct from those of Lotus Enerji.”¹²⁹

155. The Claimant submits that there has been no formal petition to add Lotus Enerji as a co-claimant in this proceeding, and therefore, that the issue is “not yet ripe for briefing.”¹³⁰ However, even if it were ripe for briefing, the Claimant’s position is that “[t]here is nothing in the ICSID Rules that prohibit the addition of a co-claimant.”¹³¹

VI. TRIBUNAL’S ANALYSIS

A. SUMMARY DISMISSAL UNDER RULE 41(5)

156. ICSID Arbitration Rule 41(5) provides a procedure for the summary dismissal of claims at a very early stage. A party “may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.” The timing is significant. It necessarily means that the application must be made before the timetable for the submission of pleadings has been set down, and therefore when the only available statement of the case is that set out in the Request for Arbitration. It is on the basis of the Request that the application under ICSID Arbitration Rule 41(5) is made and the tribunal must decide.
157. The wording of Rule 41(5) is clear. The respondent must show that “a claim” is “manifestly without legal merit.” As Rule 41(6) makes clear, if all claims are to be dismissed, all must be shown to be manifestly without legal merit.¹³²
158. The consequence of a summary dismissal under Rule 41(5) is that the claim set out in the request for arbitration proceeds no further. The tribunal rules, in effect, that there is no

¹²⁹ Claimant’s Response to Updated Application, paras. 22-24; *Bernhard von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, (“*von Pezold v. Zimbabwe*”), Award dated 28 July 2015 [CL-16].

¹³⁰ Claimant’s Response to Updated Application, para. 55.

¹³¹ Claimant’s Response to Updated Application, paras. 56-57.

¹³² See, e.g., *Trans-Global v. Jordan*, Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 [RL-2].

point in proceeding with the claim because it *cannot* succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified. If the claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed: but if the tribunal is satisfied that no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point.

159. The procedure under Rule 41(5) serves the interests of the efficient administration of justice and the interests of both parties in a case. Dismissal of a claim saves the claimant expending time and resources on the pursuit of a claim that cannot succeed, and it saves the respondent expending time and resources in defending a claim that is so manifestly and fundamentally defective that it calls for no further defence before it is dismissed.
160. A tribunal's judgment on a Rule 41(5) application must be practical. While there is perhaps always a theoretical possibility that well-established legal rules and principles could be overturned or not applied in a particular case, a claimant would have to show why it is credible that such a theoretical possibility might operate in the instant case. A tribunal must be able to regard some legal rules and principles as so firmly established that they can serve as premises on the basis of which it can properly conclude that a particular claim will inevitably fail. If that were not the case, Rule 41(5) would be emptied of practical effect.
161. The Claimant argued at one point that the motives of a respondent in making an application under Rule 41(5) are relevant. It said that because the Respondent is a creditor in the bankruptcy process of Lotus Enerji (in fact, "by far the largest creditor, or alleged creditor, of Lotus Enerji")¹³³, there is "an inherent conflict of interest."¹³⁴

¹³³ Transcript, p. 153, ll. 2-3.

¹³⁴ Transcript, p. 152, l. 12 - p. 153, l. 11.

162. In the view of the Tribunal, even if the motive of an applicant is relevant to consideration of an application under Rule 41(5) (which the Tribunal does not decide), it cannot be improper for a party to seek to protect its own interests in the litigation.¹³⁵ The Tribunal finds no evidence of any improper motive on the part of either Party in this case.
163. With these preliminary remarks made, the analysis in this case must begin by identifying “the claims.”

B. THE RELEVANT TIME FOR ASSESSING “THE CLAIMS”

164. As was noted above, it is evident that “a claim” can only be defined by reference to the Request for Arbitration. This accords with legal principle. Questions relating to the jurisdiction of a tribunal are judged as at the moment at which the claim is filed with a tribunal, and the Tribunal considers that the same principle is applicable to the question whether a claim is manifestly without legal merit, arising under Rule 41(5) of the ICSID Arbitration Rules, because dismissal on that ground is in essence a determination that the claim put before the tribunal is, whatever the evidence or arguments that might be adduced in support of it, not one on which the tribunal could possibly rule in favour of the claimant.
165. Subject to what is said below about the amendment of a claim,¹³⁶ it follows from that principle that both the claim and the facts must be appraised as they stood at the relevant time. There might be argument as to whether the relevant date in this case is the date of the communication of the Request for Arbitration to ICSID (here, 28 July 2017), or the date on which ICSID registers the request (22 August 2017), or the date on which the Tribunal is constituted (5 April 2018), or the date on which the Rule 41(5) application is received from the Respondent (4 May 2018). In the present case, however, the Tribunal is satisfied that there is no material change in the position between the first and last of those dates. It

¹³⁵ Claimant itself says, albeit in a slightly different context, “... I commend Respondent's counsel for this, they are representing their client, but the objective is to shield Turkmenistan from liability from any entity at any point at all costs”: Transcript, p. 151, ll. 14-18.

¹³⁶ See paras. 190-194.

therefore refers for convenience to the Request for Arbitration as the definitive statement of the claim.

C. “THE CLAIMS” IN THE PRESENT CASE

166. The Request for Arbitration in this case presents claims by Lotus Holding, and explicitly identifies Lotus Holding as “the Claimant.” It is not disputed that Lotus Holding is the sole Claimant in this case.
167. The claims presented are for damages in respect of injuries said to have been caused to Lotus Holding by the Respondent. The Request for Arbitration identifies “Turkmenistan’s breaches of its obligations under international law.”¹³⁷ In paragraph 60 of the Request for Arbitration, the Claimant says that:

Turkmenistan’s unlawful measures including, but not limited to, withholding of monies due to Lotus Holding, actions to sabotage Lotus Holding’s investment vehicle Lotus Enerji’s performance, unlawful seizure of various projects without full payment and without the consent of Lotus Holding and/or Lotus Enerji, and the unjust termination of Lotus Enerji from the DCU & SDA Agreement, among other things, constituted violations of the guarantee of a minimum standard of treatment.

168. In paragraph 61 of the Request for Arbitration, the Claimant says that:

This very same factual matrix *ipso facto* is a breach of Turkmenistan’s substantive obligations under the BIT. The measures of Turkmenistan including, but not limited to, the unlawful failure to make payments due under the various projects, unlawful withholding of the retention amount under the various Agreements, and illegal seizure of the various project premises without the consent of Lotus Holding and/or Lotus Enerji are unlawful measures attributable to Turkmenistan. By enforcing these unlawful measures, Turkmenistan violated several of its obligations under the BIT. The violations include, but are not limited to the following ...

¹³⁷ That is the title of section 5 of the Request.

169. The Request for Arbitration goes on to list the provisions said to have been violated. They include the duty not to discriminate, the MFN clause, the ‘umbrella clause,’ the national treatment standard, the duty not to discriminate, and the duty not to expropriate, all under the BIT, and the fair and equitable treatment and the duty not to expropriate, under the ECT.
170. The Tribunal considers it to be abundantly clear, from the written and oral submissions made in this case,¹³⁸ that the claims in the present case are for monies owed under the five contracts identified in paragraph 87 above, and for alleged associated losses. The Request for Arbitration refers repeatedly to the Respondent’s alleged failures to make payments due under the contracts,¹³⁹ and there is no claim articulated in the Request for Arbitration that is distinct from those allegations.
171. The nature of a contractual claim cannot be altered merely by describing it in different terms. To suggest that non-payment of sums due under a contract *in itself* constitutes expropriation,¹⁴⁰ or a breach of MFN or national treatment clauses,¹⁴¹ does not alter the fact that the claim remains one for non-payment under a contract. That is not to say that non-payment can never constitute a breach of a treaty standard. In some circumstances, it may do so: but the argument must be properly pleaded out, and it must be explained why, for example, the non-payment is considered to be expropriatory or discriminatory and what facts support that submission. If it is not properly pleaded out, a respondent cannot know what the allegation made against it is, and a tribunal cannot satisfy itself that the matter is within its jurisdiction and is admissible. In the present case, the Request for Arbitration provides no explanation of why the alleged contractual breaches should, or could, be considered to be, in themselves, breaches of the BIT and/or the ECT.

¹³⁸ Including the letters sent by Lotus Enerji to the Cabinet of Ministers in Turkmenistan, on 20 November 2015 and 21 April 2015, and 19 November 2015, annexed to the Request for Arbitration as Annex 1, and the Board of Directors Resolutions of Lotus Holding Anonim Sirketi, dated 15 June 2017, authorizing these proceedings, annexed to the Request for Arbitration as Annex 5.

¹³⁹ See, e.g., Request for Arbitration, paras. 25, 27, 60, 61, 67, 71, 72, 80.

¹⁴⁰ Request for Arbitration, para. 71.

¹⁴¹ Request for Arbitration, para. 67.

D. “THE CLAIMS” RELATE TO RIGHTS OF LOTUS ENERJI, NOT OF THE CLAIMANT

172. The difficulties facing Lotus Holding, as the only Claimant in this case, are that it is not a party to any of the contracts in question here, and that it has not articulated in its Request for Arbitration a claim that the Respondent’s dealings with Lotus Enerji have violated rights held by Lotus Holding under the BIT and/or the ECT. All of the contracts were concluded by Lotus Enerji. The “monies due to Lotus Holding” are, under those contracts, monies due to Lotus Enerji. Lotus Holding had no more than the expectation or hope of receiving some benefits, in its capacity as shareholder of Lotus Enerji, from any monies received under those contracts by Lotus Enerji, *e.g.* in the form of dividends.
173. It is common ground that Lotus Enerji is not a party to the present proceedings, and that (quite apart from the question of the need for the consent of the Respondent in this case)¹⁴² the leave of the Turkish Bankruptcy Directorate would be necessary to make it a party, and that such leave has not been given at this time.¹⁴³ Indeed, no application has been made to the Tribunal to add Lotus Enerji as a party to this case.
174. Parties to arbitral proceedings can only make claims in respect of their own rights. That is axiomatic, and inherent in the very concept of the status of a ‘party’ to proceedings. To find a claim under the BIT or the ECT, the rights and “assets” protected by the treaties, including the “claims to money” referred to in Article 1 of the ECT and Article 1 of the BIT, must be the rights and assets of the Claimant. The rights and claims to money in this case, however, do not belong to the Claimant, but to Lotus Enerji.
175. Lotus Holding is a corporate entity whose legal separateness from Lotus Enerji is undisputed. In the same way that Lotus Holding can point to its legal independence of Lotus Enerji when questions of responsibility for the debts of Lotus Enerji are in question,

¹⁴² A point discussed extensively in the Parties’ respective submissions. The Tribunal does not need to decide on this question.

¹⁴³ Transcript, p. 16, ll. 3-22.

it must accept the consequences of that independence when the enforcement of Lotus Enerji's rights is in question.

176. The Request for Arbitration offers no indication of why the Claimant considers that the alleged breaches of Lotus Enerji's contractual obligations amount to breaches of the Claimant's rights under the BIT and/or the ECT. They are referred to as breaches of the Respondent's international law obligations: but no explanation is offered of why the alleged breaches of contract should be considered to violate the Respondent's obligations towards the Claimant under international law, and the Claimant has not alleged any facts connecting the Respondent's alleged breaches of contract with the alleged breaches of the treaties. For example, there is no indication of any facts that might support an allegation – much less, might support a finding – that the non-payment of sums due under the contracts was discriminatory and in breach of the obligation of national treatment.
177. The Claimant asserts in the Request that it “owns and controls, through Lotus Enerji, the agreement for the constructions projects ... and all claims to monies arising out of those contracts.”¹⁴⁴ The suggestion is that wrongs done to Lotus Enerji are in some way actionable by Lotus Holding. That is, however, incorrect.
178. The Claimant's ‘ownership’ interest in the contracts has at all material times, from the time that the contracts were concluded through to the present day, consisted in no more than the rights that it has as a shareholder in respect of any dividends or residual assets of what is now the bankrupt company, Lotus Enerji. That is a contingent interest, now dependent upon there being assets remaining for distribution once all of Lotus Enerji's creditors have been satisfied. There is no suggestion that the Claimant had or has any legal entitlement to any specific assets of Lotus Enerji. Nor is there any suggestion that the Claimant had or has the right to pursue actions in the name of or on behalf of Lotus Enerji, or that it had or has any proprietary rights, aside from those implicit in the bankruptcy process, in respect

¹⁴⁴ Request for Arbitration, para. 42.

of any assets of Lotus Enerji. Lotus Holding and Lotus Enerji cannot be treated as one and the same company.

179. The ‘control’ that the Claimant was able to exercise over Lotus Enerji when Lotus Enerji was established, does not alter the position. It was not control over the project contracts or the monies due under them. It may be that the Claimant could have used its control so as to institute proceedings in the name of Lotus Enerji; but its control could not transform wrongs done to Lotus Enerji into wrongs done to the Claimant itself. And at the present time, as the Claimant concedes, Lotus Enerji is under the control of the Turkish Bankruptcy Directorate, although the Claimant says that “the ownership is still with Lotus Holding.”¹⁴⁵
180. The Tribunal considers, following the language of the tribunal in *Enkev Beheer BV v. Poland*,¹⁴⁶ that the Claimant, Lotus Holding, cannot stand in the shoes of its subsidiary Lotus Enerji and make claims on its subsidiary’s behalf for harm suffered directly by its subsidiary. Claimant must allege a violation of its own rights under the BIT and/or the ECT. The Tribunal agrees with the Respondent that “even assuming all facts asserted in the application in the Request for Arbitration at face value, an award from this tribunal on liability under the contracts could not be made in favour of and payable to Lotus Holding.”¹⁴⁷

E. LOTUS HOLDING’S “OWN CLAIMS”

181. The Claimant argues that the case law establishes that:

Either the parent companies or shareholders of companies that were aggrieved by the state through a contract or expropriation have the right to bring their own claims in a treaty, in a bilateral investment

¹⁴⁵ Although Claimant says that “the ownership is still with Lotus Holding”: Transcript, p. 140, ll. 19-25. As has been explained, Claimant’s ‘ownership’ interest in Lotus Enerji extends to rights or assets protected under the BIT or the ECT.

¹⁴⁶ *Enkev Beheer BV v Poland*, First partial Award dated 29 April 2014 [RL-29], para. 310; Transcript, p. 55, l. 22 - p. 56, l. 4.

¹⁴⁷ Transcript, p. 56, ll. 18-23.

treaty or multilateral investment treaty, so long as those claims are distinct from that of the aggrieved subsidiary.¹⁴⁸

182. The Claimant refers in passing in the Request for Arbitration to “acts of corruption” against Lotus’ interests in Turkmenistan;¹⁴⁹ but no particulars of any such acts are given. The Claimant also refers in the Request for Arbitration to “unlawful seizure of various projects without full payment and without the consent of Lotus Holding and/or Lotus Enerji, and the unjust termination of Lotus Enerji from the DCU and SDA Agreement.”¹⁵⁰ Again, no particulars are given. In its slide presentation at the Hearing, the Claimant referred to “raids in Lotus’s camps and offices” and seizures of property in February 2017 as an example of “retaliatory action” by the Respondent.¹⁵¹ No details are provided. The Tribunal does not consider that these passing references can be regarded as constituting distinct “claims” in the Request for Arbitration.
183. The Claimant maintained in subsequent submissions that it (Lotus Holding) is indeed bringing its own claims, on the basis that “a shareholder of a company that was aggrieved in the Respondent’s territory was free to bring claims that were related to its own losses.”¹⁵² The Tribunal does not accept that proposition: a company that is aggrieved in the respondent’s territory has no general right to bring claims “related to its own losses”: it may only bring claims related to breaches of its own rights. Moreover, those breaches must be sufficiently identified in the Request for Arbitration; and in this case they are not.
184. In paragraph 11 of its Rejoinder, the Claimant stated that:

Claimant ... is not seeking damages for breach of contract but for violation of the ECT and the BIT between Respondent and Turkey. While the RFA asserts that Respondent’s actions constitute both a breach of its contracts with Lotus Enerji *and* violations of the ECT and BIT, the RFA seeks a remedy only for the treaty violations, not

¹⁴⁸ Transcript, p. 157, ll. 18-23. Cf., p. 150.

¹⁴⁹ Request for Arbitration, para. 59.

¹⁵⁰ Request for Arbitration, para. 60; cf., paras. 61, 67, 72, 74.

¹⁵¹ Claimant’s Slide Presentation, slide 3; Transcript, p. 142, l. 9 - p. 144, l. 17.

¹⁵² Transcript, p. 150, ll. 13-25; Claimant’s Response to Turkmenistan’s Reply Submission, paras. 2-4, 11-23.

the contract breaches. In particular, Claimant will seek a remedy for the following violations of the BIT and the ECT:

a. Depriving Claimant of dividends it would otherwise have received from Lotus Enerji had Respondent not refused to make payments due to Lotus Enerji and not unjustly and improperly terminated contracts with Lotus Enerji;

b. Expropriating Claimant's investment by improperly and unjustly forcing Lotus Enerji into bankruptcy;

c. Forcing Claimant to spend millions of dollars – including making payments to Lotus Enerji's creditors and employees – to keep Lotus Enerji afloat; and

d. Depriving Claimant of its right [to] make further investments in Lotus Enerji or other businesses with dividends for (a) or funds it had to spend on (c), above.

185. The Tribunal does not accept that this re-characterization of the claims that had been set out in the Request for Arbitration changes the fact that the Request itself does not set out claims that the Claimant's own rights have been violated. The claims set out in the four sub-paragraphs (a) – (d) are substantially different from the claims set out in the Request for Arbitration. They are not explications of the claims made in this case; as is apparent on their face, they are different claims. None of the points raised there is the subject of a claim set out in the Request for Arbitration.

186. The Tribunal considers that in order to put forward a cognizable claim, the Claimant must at a minimum present allegations that connect the Respondent's alleged breaches of its contracts with the Claimant's subsidiary, Lotus Enerji, to the Respondent's alleged breaches of the two treaties, and explain how those treaty breaches caused injury to the only Claimant in the case, which is Lotus Holding. Without that 'connective tissue,' the Request for Arbitration cannot be regarded as stating a case alleging a breach of the BIT or the ECT which the Respondent must answer. A State cannot be obliged to defend a case based solely on conclusory assertions that the State has breached specific treaty provisions.

187. It is undoubtedly correct that shareholders and parent companies may in certain circumstances bring claims in respect of their own losses that result from the treatment of a subsidiary. For example, the expropriation of the shares in the subsidiaries themselves, held by a claimant, would clearly violate the claimant's rights, entitling it to bring a claim. But that is not the case here. The Request for Arbitration does not articulate any claims that do not derive exclusively from – and are not wholly overlapping with – contract claims belonging to Lotus Enerji.
188. The Claimant appears to accept, at least in part, that it did not articulate any such claims. During the Hearing, counsel for the Claimant said:

I would also submit that at least with respect to Lotus Holding's claims related to its own losses such as shares, loss of company value, loss of shares, any amounts it spent to keep Lotus Enerji afloat, those types of claims that are not related to the agreements that Lotus Enerji entered into with Turkmen entities, the decision is clear-cut, and just because some of those ideas were not expressly articulated in the Request for Arbitration doesn't mean that the Tribunal can readily dismiss them pursuant to a 41(5) application. And this is because that standard must be read and applied in conjunction with ICSID arbitration Rule 40(2). Rule 40(2) expressly allows for the inclusion of additional claims until the submission of a reply. We are not talking about theory of a claim or the way quantum is calculated in a claim; we are talking about actual additional claims.¹⁵³

189. Rule 40(2) provides that: "An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding." In his treatise on the ICSID Convention, Professor Christoph Schreuer describes "incidental or additional claims" within the meaning of Rule 40(2) as follows: "Incidental or additional claims can be of a varied nature. Recurrent instances of

¹⁵³ Transcript, p. 146, l. 24 - p. 147, l. 16.

incidental or additional claims are third party contracts, interest on the sums claimed and procedural costs.”¹⁵⁴ Elsewhere, he elaborates that, “[a]n incidental claim arises as a consequence of the primary claim, such as interest or compensation for procedural costs. An additional claim is made by way of a later addendum to the original claim.”¹⁵⁵ What is evident from the foregoing is that the Request for Arbitration must first state an “original” or “primary” claim in order to trigger Rule 40(2)’s provision for incidental or additional claims. The Request for Arbitration in this case, however, does not plead any original or primary claims that could provide a basis for the incidental or additional claim. Thus, ICSID Rule 40(2) does not assist the Claimant in this context. We now turn to addressing Claimant’s argument that it may amend the claim stated in its Request for Arbitration on the basis of ICSID Rule 40 and its reservation of right in the Request for Arbitration.

F. THE POSSIBILITY OF AMENDING THE CLAIMS MADE IN THE REQUEST FOR ARBITRATION

190. It is true that a Request for Arbitration is not a completely rigid delimitation of the claim(s) before a tribunal. Moreover, paragraph 85 of the Request for Arbitration in this case contains an express ‘reservation of right to amend’ clause, of a kind common in arbitrations. It reads as follows:

The Claimant reserves its right to amend or supplement this Request for Arbitration and the translations submitted herewith, to advance further arguments and to produce such further evidence as necessary to complete or supplement the presentation of its claims. Claimant also reserves its right to make additional claims, and to request such alternative or additional relief as may be appropriate, including conservatory, injunctive, or interim relief.

191. Nonetheless, the Claimant does not have complete freedom to amend its case. The Claimant in this case specifically “requests the institution of an ICSID arbitration

¹⁵⁴ C. H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press 2010), p. 141, para. 46.35.

¹⁵⁵ C. H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press 2010), p. 732, para. 46.2.

proceeding against Turkmenistan.”¹⁵⁶ The arbitration is accordingly subject to the ICSID Arbitration Rules. ICSID Arbitration Rule 40(1) provides that:

...a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

192. That is, however, only a basis for making *ancillary* claims. If an additional claim is not ancillary to the primary claim(s) set out in the Request for Arbitration, a party has no right under ICSID Arbitration Rule 40 to present it by way of an ‘amendment’ to the primary claim. There is no right under ICSID Arbitration Rule 40 to present “additional claims” that are fundamentally different from the primary dispute, and to abandon the primary claims.
193. The Claimant thus has the right to develop its claim to some extent. It is not obliged to keep its claim strictly within the literal terms of its original Request for Arbitration. But if the Claimant has purported to modify its claim in a manner that is not permitted by the principle set out in ICSID Arbitration Rule 40, and has transformed the original claim into a new claim materially different from that set out in the Request for Arbitration, the Tribunal cannot make its decision under ICSID Arbitration Rule 41(5) by focusing on the new claim. If the original claim which the Tribunal was established to determine, as set out in the Request for Arbitration, was one that should properly have been dismissed because it was manifestly without legal merit, that defect cannot be cured by transforming it into a different claim. Even less can it be cured by an assertion that the Claimant might in future ‘modify’ the original claim, again outside the limits of the initial claim.
194. The Tribunal considers that in the present case the Request for Arbitration sets out a range of claims arising from contractual obligations owed to Lotus Enerji, and does not give any clear indication that any claims are made that are, in the Claimant’s words, “not related to the agreements that Lotus Enerji entered into with Turkmen entities.”¹⁵⁷ Claims “not

¹⁵⁶ Request for Arbitration, para. 1.

¹⁵⁷ Transcript, p. 146, l. 24 - p. 147, l. 16.

related to the agreements that Lotus Enerji entered into with Turkmen entities” cannot be brought within the Request by its amendment within the limits prescribed by ICSID Arbitration Rule 40. They are new claims, beyond the scope of the present proceedings.

G. CONCLUSION ON THE CLAIMANT’S CLAIMS IN THIS CASE

195. Having considered all of the submissions made by the Claimant, both in their overall nature and in detail, paragraph by paragraph, the Tribunal concludes that all of the claims set out in the Request for Arbitration are properly to be characterized as contract claims relating to contracts entered into by Lotus Enerji. This conclusion is reinforced by the Claimant’s references in the Request for Arbitration to the “basis for Lotus Holding to bring contract claims”¹⁵⁸ and for the “basis for the assertion of Lotus Holding’s contract claims.”¹⁵⁹ But, as was noted above, the contract claims are not claims of Lotus Holding: any contract claims belong to Lotus Enerji, which is not a party to these proceedings.
196. The lack of standing of Lotus Holding is also fatal to the Claimant’s argument that ‘umbrella clauses’ in some of Turkmenistan’s BITs are to be regarded as incorporated in the Turkey-Turkmenistan BIT by virtue of the MFN clause in Article II(2) of the BIT. Even if Article II(2) of the BIT has the legal effect for which the Claimant contends (which the Tribunal does not decide), that could benefit only Lotus Enerji, and not Lotus Holding, which has no rights under the contracts.
197. The Tribunal accordingly decides that the claims in the Claimant’s Request for Arbitration dated 28 July 2017 are, within the meaning of ICSID Rule 41(5), manifestly without legal merit as claims under the BIT and the ECT and are therefore to be summarily dismissed.
198. There is another aspect of this case which is relevant, and merits note. The Turkish Bankruptcy Directorate is in control of Lotus Enerji, which remains in and is subject to the bankruptcy process. That process involves the collection of Lotus Enerji’s assets and their disposition in accordance with Turkish law in order to satisfy Lotus Enerji’s liabilities. If

¹⁵⁸ Request for Arbitration, para. 63.

¹⁵⁹ Request for Arbitration, para. 64.

monies are due to Lotus Enerji, whether under the contracts or otherwise (for example, under the BIT or the ECT), those monies would form part of the assets of Lotus Enerji and would fall for distribution under the control of the Turkish bankruptcy process. Lotus Holding is a shareholder in Lotus Enerji; but it has no right to receive any part of those assets outside of the bankruptcy process. This Tribunal would be mindful of the need to consider the proper relationship between the Tribunal and the arbitration proceedings on the one hand, and the Turkish Bankruptcy and the bankruptcy proceedings on the other. In this case, however, it is unnecessary to consider the matter further because the Tribunal has decided that the arbitration claims are to be dismissed. For these reasons the Tribunal considers that the claims made by Lotus Holding against the Republic of Turkmenistan, as set out in its Request for Arbitration, are manifestly without legal merit and are dismissed in accordance with ICSID Arbitration Rule 41(5) and 41(6). This decision is without prejudice to any claims, whether or not contractual, which might be brought by or in the name of Lotus Enerji. Nor does it prejudice any claims, other than those set out in the Request for Arbitration dated 28 July 2017, which Lotus Holding might institute against Turkmenistan.

199. In view of the conclusion in the previous paragraph, it is not necessary for the Tribunal to address the other objections raised by the Respondent. In accordance with the principle of judicial economy, the Tribunal does not decide them.
200. The Tribunal notes for the record that the Parties are agreed that if this Rule 41(5) application is granted, so that this arbitration ceases, there would *ex hypothesi* be no arbitration to which Lotus Enerji could be added as a party.¹⁶⁰

¹⁶⁰ Transcript, p. 20, l. 23 - p. 22, l. 4. Claimant says that in this event Lotus Enerji “would have its own claim initiated at as separate – initiated in the form of a separate case”: Transcript, p. 21, ll. 15-18.

VII. COSTS

A. POSITIONS OF THE PARTIES ON COSTS

201. As agreed at the Hearing, the Parties filed their respective submissions on costs on 4 October 2019.
202. In the Claimant’s Submission on Costs, it requests that the Tribunal award it all of its costs incurred in connection with the Respondent’s 41(5) Application which it enumerated as follows:¹⁶¹

	Fees	Disbursements	Total
Offit Kurman	\$59,815.00	\$1,557.74	\$61,372.74
Butzel Long	\$63,614.00	\$1,054.42	\$64,668.42
Egemenoglu	\$25,575.00	\$6,568.42	\$32,143.42
TOTAL			\$158,184.58

203. In addition to the above, the Claimant paid USD 125,000 to the Centre as an advance payment.
204. In the Respondent’s Submission on Costs, it argues that the Claimant’s “procedural tactics and meritless claims have caused Respondent to incur significant and unnecessary burden and expense.”¹⁶² Therefore, the Respondent seeks recovery of all of the costs relating to this phase of the arbitration incurred by the Respondent to date, which it enumerated as follows:¹⁶³

¹⁶¹ Claimant’s Statement of Costs attached to the Claimant’s letter dated 4 October 2019.

¹⁶² Respondent’s Submission on Costs dated 4 October 2019, p. 4.

¹⁶³ Respondent’s Submission on Costs dated 4 October 2019, p. 1.

CATEGORY	AMOUNT
Legal Fees	\$884,817.66
Costs Disbursements	\$67,638.67
ICSID Advance	\$125,000.00
TOTAL	\$1,077,186.33

B. THE TRIBUNAL’S DECISION ON COSTS

205. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

206. ICSID Arbitration Rule 28(1) provides:

Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

207. The Tribunal considers that the dismissal of this case is the result of defects in the Claimant’s Request for Arbitration, and that the Respondent has not contributed to those deficiencies. Indeed, the Respondent set out its basic submissions regarding the defects in

the Request in its Application dated 4 May 2018, having raised the main points in more general terms in a letter to ICSID dated 11 October 2017.¹⁶⁴

208. The Tribunal further considers that the Respondent has not by its conduct in these proceedings unnecessarily increased the costs, and that its costs, while considerably higher than those of the Claimant, are not out of line with those typically incurred in investment arbitrations.
209. The Tribunal has considered whether, despite the Claimant's repeated delays in paying the advances due under ICSID's Administrative and Financial Regulations, the Respondent could have made the proceedings shorter and less expensive had it promptly fulfilled its own duty to pay the advance, rather than adopting the policy that it would make no payment until the Claimant had paid its own share, and that the Respondent should therefore make some contribution to the costs of the case. The Tribunal considers, however, that it cannot be presumed that the Tribunal would have proceeded any sooner if only one Party had made the payment due, and that in this case no departure from the normal principle that costs follow the event is warranted. It notes, however, that the consequences of non-payment of fees as they fall due is a matter that ICSID itself may wish to address.
210. The Tribunal has also considered whether the Respondent's argument that the Claimant did not satisfy the requirements of Article VII of the BIT was properly raised under Rule 41(5). The Tribunal finds that the question of the proper interpretation of Article VII of the BIT is not one capable of resolution under Rule 41(5).¹⁶⁵ Accordingly, the Tribunal considers it appropriate to reduce the amount of Respondent's legal fees payable by the Claimant by 10 percent.
211. The costs of the proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

¹⁶⁴ Exhibit R-6.

¹⁶⁵ Transcript, p. 62, l. 22 - p. 66, l. 23.

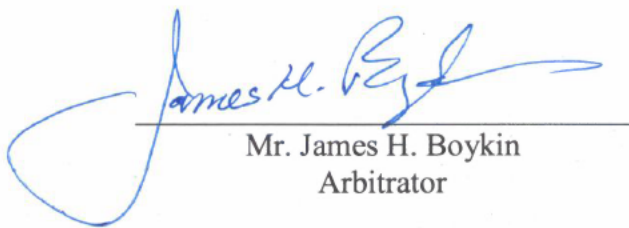
Arbitrators' fees and expenses	
Prof. Vaughan Lowe QC	31,480.00
Mr. James H. Boykin	38,027.68
Prof. Brigitte Stern	40,282.00
ICSID's administrative fees	126,000.00
Direct expenses (estimated)	15,990.88
Total	<u>251,780.56</u>

212. The above costs have been paid out of the advances made by the Parties in equal parts.¹⁶⁶
213. The Tribunal decides that in these circumstances the Claimant should pay ninety percent of the Respondent's legal fees and disbursements (USD 857,210.70) and all of the costs of the proceeding, including the Respondent's share (which amounts to USD 125,890.28) as set out above. The Claimant shall thus pay the Respondent a total amount of USD 983,100.98. Any question concerning the responsibilities of LexShares, the litigation funder, is a matter to be resolved between the Claimant and LexShares.


VIII. AWARD

214. For the reasons above, the Tribunal hereby decides:
- a. that the claims made by Lotus Holding against the Republic of Turkmenistan, as set out in its Request for Arbitration, are manifestly without legal merit and are dismissed in accordance with ICSID Arbitration Rule 41(5) and 41(6);
 - b. that the Claimant Lotus Holding shall pay the Respondent its share of the costs of the proceeding and ninety percent of the Respondent's legal fees and disbursements in the sum of USD 983,100.98.


¹⁶⁶ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.


Mr. James H. Boykin
Arbitrator

Date: 1 April 2020


Professor Brigitte Stern
Arbitrator

Date: 1 April 2020


Professor Vaughan Lowe QC
President of the Tribunal

Date: 31 March 2020