Case No: CL-2017-000252

Neutral Citation Number: [2018] EWHC 1797 (Comm)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2018

Before :

MR JUSTICE BUTCHER

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Between :

PAO Tatneft	**Claimant**
- and -	
Ukraine	**Defendant**

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- -

David Foxton QC and **Emily Wood** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**)
for the **Claimant**
Philip Edey QC, **Philippa Webb** and **Anton Dudnikov** (instructed by **Winston & Strawn**)
for the **Defendant**

Hearing dates: 28-29 June 2018

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Judgment

MR JUSTICE BUTCHER

1. This is an application by the Defendant ("Ukraine") to set aside an order made by Teare J *ex parte* on 9 August 2017 under s. 101 Arbitration Act 1996 ("the Arbitration Act"). By that order Teare J granted leave to the Claimant ("Tatneft") to enforce an arbitration award dated 29 July 2014 ("the Merits Award"), and judgment was entered against Ukraine for US$112 million (the total amount awarded against Ukraine by the Merits Award) plus interest.

2. On the present application Ukraine seeks to set aside that order on two grounds:

   (1) That Ukraine has not lost the state immunity to which it is otherwise entitled under s. 1 of the State Immunity Act 1978 ("the SIA") by virtue of s. 9 of the SIA, because it did not agree to submit the disputes (alternatively, all the disputes) in respect of which the Merits Award has been made, to arbitration. On this basis this court has no jurisdiction over Ukraine in this matter (alternatively, no jurisdiction over it in relation to part of the Merits Award).

   (2) That Tatneft failed in its duty of full and frank disclosure both when it made its original application for an order enforcing the Merits Award, and thereafter.

3. Ukraine reserves the right to contend that the Court should refuse to recognise and enforce the Merits Award under s. 103 Arbitration Act, if it is unsuccessful at the present hearing. The parties have agreed that such objections will be considered at a future hearing if necessary. In the meantime Ukraine has not submitted to the jurisdiction.

The Bilateral Investment Treaty

4. Central to the issues which arise on this application are the provisions of a bilateral investment treaty, namely the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the encouragement and mutual protection of investments dated 27 November 1998 (the "BIT"). The BIT contained, amongst others, the provisions which I have set out in the Appendix to this judgment, and to a number of which I will revert below.

Factual Background

<u>The parties and other relevant entities</u>

5. Tatneft is one of Russia's largest oil producing companies. In 1995 Tatneft, along with the Republic of Tatarstan (a constituent republic of the Russian Federation) and Ukraine became the major shareholders in a new Ukrainian company, CJSC

Ukrtatnafta Transnational Financial and Industrial Oil Company ("Ukrtatnafta"). Ukrtatnafta owned and operated the Kremenchug Refinery, which was the largest oil refinery in Ukraine.

6. In 1999 two other entities, Seagroup International Inc. (a US company) ("Seagroup") and AmRuz Trading AG (a Swiss company) ("Amruz") acquired shareholdings, of 9.96% and 8.336% respectively, in Ukrtatnafta in return for promissory notes.

7. From about 2001, the legality and validity of Amruz's and Seagroup's acquisition of shares were the subject of challenge before the courts of Ukraine. Until 2007, these challenges had not prevailed.

8. In May 2007, however, a Ukrainian court made an order that their shares should be held in custody by Naftogaz, Ukraine's state-owned energy company. In September 2007, the Kiev Economic Court declared the share purchase agreements invalid and that decision was upheld by the Kiev Economic Court of Appeals in October 2007. In subsequent litigation this position was confirmed. Amruz's and Seagroup's shares were ultimately returned to Ukrtatnafta, and sold to a third party in June 2009.

9. Meanwhile, on Tatneft's case, on 19 October 2007, the Kremenchug Refinery was seized by force, under the direction of a Ukrainian court bailiff and with the assistance of Ukrainian troops, for the benefit of the Privat Group of companies, said to be controlled by an influential Ukrainian oligarch with close political ties with the Ukrainian government and a notorious "raider" of other businesses.

10. On 11 December 2007 Tatneft issued a Notice of Dispute under Article 9 of the BIT.

11. On 18 December 2007, Tatneft bought just under 50% of the shares in Amruz, and on 24 December 2007 it bought all the shares in Seagroup.

12. In between those purchases of Amruz and Seagroup shares, on 19 December 2007, the Ukrainian General Prosecutor's Office commenced proceedings before the Kiev Economic Court seeking to invalidate the resolutions of the General Meeting of Ukrtatnafta by which Tatneft had been permitted to acquire its shares in Ukrtatnafta for cash, rather than, as originally envisaged, oil fixtures in Tatarstan.

13. Eventually, pursuant to various Ukrainian court decisions and orders in 2008-2009, the share purchase agreements by which Tatneft acquired its shares in Ukrtatnafta were invalidated, and Tatneft's shares were returned to Ukrtatnafta and (in early 2010) sold to a third party.

The Arbitration

14. On 21 May 2008, Tatneft served Ukraine with a Notice of Arbitration under the BIT pursuant to the UNCITRAL Rules.

15. In that arbitration, in outline, Tatneft alleged that through a series of actions in which Ukraine was complicit, it had effectively been deprived of its entire shareholdings in Ukrtatnafta, in particular as a result of the seizure of the Kremenchug Refinery and by the series of what it said were the unlawful orders of the Ukrainian Courts between

2007 and 2009 purporting to invalidate Tatneft's, as well as Amruz and Seagroup's, purchases of shares in Ukrtatnafta and depriving them of their shares. More specifically, Tatneft alleged that Ukraine had violated its obligations under the BIT: (i) to encourage and protect investments (Article 2); (ii) not to expropriate investments (Article 5); and (iii) to treat investors fairly and equitably (an obligation which it contended was incorporated by reason of Article 3, to which I will return below).

16. The Tribunal, comprised of Professor Francisco Orrego Vicuna, The Honourable Charles N. Brower and The Honourable Marc Lalonde, P.C., O.C., Q.C., was constituted on 16 January 2009.

17. Ukraine raised objections to the Tribunal's jurisdiction under the BIT and the admissibility of the claims, which were the subject of written submissions and a jurisdiction hearing in The Hague. On 28 September 2010, the Tribunal issued a partial award ("the Jurisdiction Award") confirming its jurisdiction and rejecting each of Ukraine's objections.

18. The hearing on the merits took place from 18 to 27 March 2013, preceded and followed by written submissions. The Merits Award was issued on 29 July 2014. In it, the Tribunal found that Ukraine had breached the obligation to treat Tatneft fairly and equitably, its actions resulting in a "*total deprivation of [Tatneft's] rights as a shareholder of Ukrtatnafta*". It ordered that Ukraine pay Tatneft US $112 million plus interest as compensation for that breach. Tatneft's other claims were dismissed.

Subsequent Court Proceedings in Other Jurisdictions

19. Following the Merits Award, proceedings have taken place in the courts of France, the United States and Russia as follows.

    1. France: On 27 August 2014, Ukraine applied to the Paris Court of Appeal, as the seat of the arbitration, to annul both the Jurisdiction and Merits awards. The Paris Court of Appeal rejected Ukraine's arguments on 29 November 2016. Although Ukraine filed a cassation appeal challenging the decision on 21 March 2017, the Court of Cassation removed this appeal from the docket on 9 November 2017 following a motion filed by Tatneft under Article 1009-1 of the French Code of Civil Procedure on the ground that Ukraine had not paid the damages due under the Merits Award and the attorney's fees of Eur 200,000 awarded by the Paris Court of Appeal. On this basis, if Ukraine fails to pay these amounts by February 2020 the proceedings will be dismissed with prejudice. Ukraine is currently seeking the abrogation of the decree which introduced Article 1009-1 insofar as it applies to sovereign states which would otherwise have immunity from execution. It has stated that if it is successful, it will pursue its cassation appeal.

    2. USA: On 30 March 2017, Tatneft filed a petition in the United States District Court for the District of Columbia to confirm the Merits Award in the USA. On 12 June 2017, Ukraine filed a motion to stay the proceedings until the conclusion of the French setting aside proceedings. On 26 June 2017, Tatneft filed an

opposition to Ukraine's motion contending *inter alia* that the court should decide whether it had jurisdiction before deciding whether to stay the case. Ukraine then filed a motion to dismiss Tatneft's original petition on 25 July 2017 on the grounds that it was immune from jurisdiction under the US Foreign Sovereign Immunities Act because Tatneft was not a private party and the Merits Award went beyond the scope of the arbitration agreement. On 19 March 2018, the District Court dismissed that application. Ukraine has appealed this decision and the confirmation proceedings are stayed pending decision by the Circuit Court.

3. Russia: On 13 April 2017, Tatneft applied to the Moscow Arbitrazh Court seeking the recognition and enforcement of the Merits Award in Russia. Ukraine opposed this motion. The Moscow Arbitrazh Court ruled in favour of Ukraine but this decision was reversed by the Moscow Cassation Court. The Russian Supreme Court dismissed Ukraine's appeal from this decision on 31 October 2017. I was informed that the Moscow Arbitrazh Court has now dismissed the proceedings in Moscow and transferred them to a court in Stavropol.

These proceedings

20. On 13 April 2017 Tatneft issued an arbitration claim form applying for an *ex parte* order for permission to enforce the Merits Award under s.101(2) of the Arbitration Act 1996 and for judgment to be entered in the amount of the Merits Award. That application was supported by the 1st Witness Statement of Mr Gadhia of Cleary Gottlieb Steen & Hamilton LLP, also dated 13 April 2017 ("Gadhia I").

21. The application was dealt with on paper by Teare J and granted, with judgment being entered against Ukraine for US$112m plus interest (totalling some US$34m at the date of the application). The resulting order ("the Original Order") was dated 16 May 2017. However, it was not sealed until 4 July 2017.

22. The order as originally drawn up was defective. Tatneft therefore applied for and obtained a corrected order dated (and sealed on) 9 August 2017. By a Consent Order dated 17 October 2017 the Original Order was set aside, and Ukraine agreed to accept service of the order dated 9 August 2017, to which I will refer henceforth as "the Enforcement Order", and of the arbitration claim form through its solicitors, Winston & Strawn ("W&S") in London. The Enforcement Order and arbitration claim form were duly served on Ukraine, through W&S on 24 October 2017.

23. Pursuant to an agreed timetable, Ukraine's present application under CPR Part 11 was issued on 16 January 2018, supported by the 1st Witness Statement of Maria Kostytska of W&S.

State Immunity

Overview

24. It is common ground between the parties that Ukraine is entitled to state immunity pursuant to s. 1 of the SIA unless s. 9 of the SIA applies. Section 1 of the SIA is in these terms:

> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

25. Section 9 of the SIA provides as follows:

> Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

26. The arbitration agreement which Tatneft contends is applicable is one stemming from Article 9 of the BIT.

27. Bilateral investment treaties are treaties between two sovereign nations. It has been common ground before me, however, that such treaties, and the BIT in particular, can give rise to an agreement in writing between the state and an investor for the purposes of s. 9 of the SIA. The way in which this is analysed to come about is to regard the consent of the state to arbitrate claims by an investor as a unilateral offer to an investor to arbitrate, which offer is accepted by the investor when it commences the arbitration against the state: see Ecuador v Occidental Exploration and Petroleum Company [2006] QB 432; Gold Reserve Inc. v Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, [17].

28. It has also been common ground that enforcement proceedings, such as the present proceedings commenced by Tatneft, are "proceedings … which relate to the arbitration" for the purposes of s. 9 SIA: Svenska Petroleum Exploration AB v Lithuania (No. 2) [2007] QB 886 at [117].

Ukraine's Position on State Immunity

29. It is helpful, at the outset, to give a broad summary of Ukraine's position on state immunity. It is as follows:

> (1) There are two relevant claims or disputes:

i. The successful claim by Tatneft for breach of the fair and equitable treatment ("FET") standard in relation to its own shares in Ukrtatnafta.

ii. The successful claim by Tatneft for breach of the FET standard in relation to Amruz's and Seagroup's shares in Ukrtatnafta ("the Amruz/Seagroup shares claim").

(2) By the BIT, Ukraine did not agree to submit to arbitration any claim for breach of the FET standard because the BIT does not itself include that standard and it is not incorporated by means of the Most Favoured Nation provision in the BIT. That has been called "the FET point".

(3) Further or alternatively, Ukraine did not agree to submit to arbitration the Amruz/Seagroup shares claim:

i. because it did not relate to an investment by Tatneft in Ukraine ("the No Investment point"); or

ii. because Tatneft only acquired its shares in Amruz and Seagroup after the dispute relating to Amruz's and Seagroup's shareholding in Ukrtatnafta had arisen ("the Timing point"); or at a time when that dispute was reasonably foreseeable (and in fact foreseen) and for the purpose of bringing that dispute within the scope of the BIT ("the Abuse of Rights point").

Are Ukraine's points open to it?

30. In answer to Ukraine's position on state immunity, Tatneft takes a preliminary point. It points out that the applicability of s. 9 SIA depends on whether there was an agreement to arbitrate the relevant dispute, or, in other words, it depends on whether the Tribunal had jurisdiction over the dispute. Accordingly the points which Ukraine now seeks to take went to the jurisdiction of the Tribunal. It further contends that if Ukraine had wished to raise any of these points they should have been taken as jurisdictional objections before the Tribunal but were not: the points as to jurisdiction which were taken before the Tribunal were discrete, and none was now maintained before this Court. Accordingly, Tatneft says, Ukraine should not be able to raise new jurisdictional objections now.

31. Tatneft accepts that there are differences between the various points as to how extensive is the departure of Ukraine from its position before the Tribunal. In relation to the FET point, it had been common ground before the Tribunal that the Most Favoured Nation provision in Article 3 of the BIT ("the MFN") did have the effect of incorporating the fair and equitable treatment provision from another bilateral investment treaty, and the parties had differed as to the standard of fair and equitable

treatment required of Ukraine and whether its actions were in breach of that standard. In relation to the No Investment point, this had not been raised before the Tribunal, and was new. Tatneft accepted the Timing point and the Abuse of Rights point had been taken, albeit, as Tatneft submitted, as going to admissibility rather than to jurisdiction, a distinction to which I will return below. On the basis of its submission that Ukraine should be confined to the same jurisdictional points as it took before the Tribunal, Tatneft contended that none of the four points could be taken by Ukraine now; or at least the No Investment point and, most clearly, the FET point could not be taken.

32. Tatneft's argument in this regard was that the Court should apply an approach similar to that applicable in the context of challenges to awards under s. 67 Arbitration Act, and to give effect to the policy reflected in ss. 31 and 73(1) of that Act and which had been applied in JSC Zestafoni v Ronly Holdings Ltd [2004] 2 Lloyd's Rep 335 at [62]-[64] per Colman J; in Westland Helicopters Ltd v Sheikh Salah Al-Hejailan [2004] 2 Lloyd's Rep 523 at [33]-[43] per Colman J; and in Primetrade AG v Ythan Ltd ("The Ythan") [2006] 1 Lloyd's Rep 457 at [54]-[60] per Aikens J.

33. Tatneft contended, as I understood it, that in cases in which a State failed to take a jurisdictional point in front of the arbitrators, then it had waived that point; and specifically that Ukraine had waived the points on which it now sought to rely.

34. Ukraine contends that no approach similar to that laid down in the Arbitration Act can be adopted when the question before the Court is whether a sovereign state is entitled to immunity. Its current application is not, it points out, a challenge under s. 67 Arbitration Act, but is a challenge to this Court's jurisdiction based on the provisions of the SIA. There is nothing in the SIA which in any way resembles s. 73 Arbitration Act or otherwise suggests a similar philosophy. On the contrary, s. 1(2) SIA requires the Court to give effect to the immunity accorded by s. 1(1) even if the state does not appear. Because of the special position of sovereign states they will not be subject to the type of points which might be taken against a private party and which can prevent such a party from deploying a case which would otherwise have been open to it. In that context reference was made to United Arab Emirates v Abdelghafar [1995] ICR 65, where the time for appealing to the EAT was extended even though the state had no acceptable excuse for not having complied with the time limit, and to Arab Republic of Egypt v Gamal-Eldin [1996] 2 All ER 237, where it was held that the state should be permitted to put in new evidence in order to vindicate its claim for immunity, even if that meant departing from the rules ordinarily applicable to the admission of new evidence on appeal.

35. I consider that Ukraine is correct to say that it is not precluded by what occurred before the Tribunal from raising the points which it has at this hearing. By reason of s. 1(1) SIA it is immune from the jurisdiction of the Court unless an exception provided for in the SIA applies, and indeed the Court is obliged to give effect to that immunity even if the state does not appear. What that entails in the present case is that the Court would have to give effect to the immunity unless it is satisfied that the State has agreed in writing to submit a dispute to arbitration and the proceedings relate to the arbitration. If there is an issue which is either apparent to the Court of its own motion or is raised by the state and which goes to the question of whether there was such an agreement in writing in relation to the relevant dispute, then I consider that the Court is obliged to consider it and can only exercise jurisdiction over the state if satisfied

that the s. 9 exception is nevertheless applicable. There is nothing in the SIA which suggests that there can be a foreclosure of the points which the State may raise as to the applicability of the immunity afforded by the SIA by reason of what may have occurred in front of an arbitral tribunal in a way similar to that provided for by the Arbitration Act. In particular there are no provisions similar to those in s. 73 Arbitration Act, and I do not consider that such constraints can be read into the SIA.

36. Mr Foxton QC for Tatneft argued that, unless states were confined on a challenge to the Court's jurisdiction to enforce an award such as the present to the jurisdictional points which they had taken before the tribunal, they could 'chop and change' their positions, in a way which was unacceptable given that they would already have participated in a sophisticated arbitral process. I do not consider that this point can override what I regard as the effect of the SIA. The extent to which states may seek to alter their positions might, in any event, have been overstated. The extent to which they may seek to change their positions on jurisdictional issues between the arbitration and any hearing to determine state immunity is likely to be influenced by the obvious forensic points which can be made to the national court if a state wishes to pursue arguments inconsistent with those which it advanced in the arbitration. Mr Foxton made effective use of just such forensic arguments in the present case.

37. Insofar as Tatneft made, in addition to its general point that the Court should adopt an approach similar to that applied in the context of challenges under s. 67 Arbitration Act, a distinct contention that Ukraine could be said, by reason of the course it took in the arbitration, to have waived reliance on the points going to the applicability of the s. 9 exception which it now raises, I find that no such waiver was made out. I do not exclude the possibility that a waiver of such points could be made in the course of an arbitration under a bilateral investment treaty, but I consider that what would at least be required would be conduct which clearly indicated that the state was foregoing reliance on a particular point not just for the purposes of the arbitration but for wider purposes including any subsequent issues as to state immunity before a national court. I do not consider that there was any such conduct here.

Construction of the BIT

38. A further introductory matter which it is convenient to deal with here is to record the approach which should be adopted in relation to the construction of the BIT. In this regard, it was common ground that the principles governing the construction of a treaty such as the BIT, including its arbitration provision, were as set out in the decision of Bryan J in GPF GP v Poland [2018] EWHC 409 [46] – [62]. They can be summarised as follows:

    (1) It is for the Court to interpret the BIT in accordance with international law, and the principles of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention"), which codifies customary international law (GPF, [9]).

    (2) Article 31 sets out the primary rule of interpretation:

(1) A treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

39. The rule of interpretation is textual, not teleological (GPF, [49]). That is, "interpretation must be based above all upon the text of the treaty" (per the ICJ in Territorial Dispute Case (Libya v Chad) (1994) ICJ 6 at [41]). Accordingly, the text is presumed to be the authentic expression of the intention of the parties and is not to be substituted for or overridden by the presumed intention of the parties (GPF, [49]).

40. Article 32 of the Vienna Convention provides as follows:

"Supplementary means of interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

41. Accordingly, as Bryan J held in GPF at [61] (original emphasis):

"It is important to note that the supplementary means of interpretation in Article 32 is applicable only to confirm the

> meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Thus if the meaning resulting from the application of Article 31 is clear (i.e. where there is no ambiguity etc., such as where there are two equally possible meanings) the supplementary means of interpretation in Article 32 cannot be used to change or contradict the meaning resulting from the application of Article 31."

Analysis of Issues on State Immunity

The FET point

42. The BIT does not itself contain any express provision requiring that each state party should treat investors fairly and equitably. Nevertheless, Tatneft contended in the arbitration, and the Tribunal accepted, that such a protection was extended to Tatneft by virtue of Article 3(1) of the BIT which contained a MFN provision.

43. As set out in the Appendix, that MFN provision was in the following terms:

> "Each of the Contracting Parties shall, in respect of investments made by investors of the other Contracting Party and of activities relating to such investments, ensure in its territory a regime that is no less favourable than the one provided to its own investors or investors of any third state, and which excludes the application of measures of a discriminatory character that might prevent the management and disposal of investments. "

44. There is a bilateral investment treaty between the UK and Ukraine, whose terms include the following:

> "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."

45. Because of the provisions of the MFN stipulation, and of the UK-Ukraine bilateral investment treaty, the Tribunal found that Ukraine was obliged to ensure that the substantive protections available to Russian investors were no less favourable than those available to UK investors, and that included the protection of FET.

46. Ukraine contends that there was no obligation of FET in the BIT, and that it was not incorporated by means of the MFN provision. More specifically, Ukraine contends:

(1) That this point is one which goes to jurisdiction, and not simply to the merits of Tatneft's claims. Ukraine says that, if Ukraine did not agree to the FET standard, then it did not agree to a claim of that type (ie for breach of that standard) being arbitrated.

(2) That on a proper construction of the BIT there was no FET obligation. The omission of any express FET obligation from the BIT must be considered as deliberate. Ukraine refers to the fact that out of 56 bilateral investment treaties to which Ukraine is a party, only four, including the BIT, do not include a FET provision, and out of 59 bilateral investment treaties to which Russia is a party, only four, including the BIT, do not include a FET provision.

(3) That there was a deliberate decision not to include a FET obligation is borne out by the negotiating history of the BIT. Russia had originally sent a draft of the BIT to Ukraine which included a provision for fair and equitable treatment, but this was not included in the treaty as eventually concluded.

47. Tatneft contends, on the contrary:

(1) That the question of whether there was any FET obligation is not one which goes to the jurisdiction of the Tribunal. The only jurisdictional issue is whether the dispute as to existence or otherwise of an FET obligation fell within the arbitration agreement. Tatneft submitted that it plainly did. It was a "dispute in connection with" the investment in the Ukrtatnafta project. Whether there was an FET obligation and whether it had been breached were questions on the merits.

(2) In any event, even if the issue were one which went to jurisdiction, the construction contended for by Ukraine is wrong. The MFN provision did indeed incorporate the FET obligation.

48. I consider that Tatneft is clearly correct to say that the FET point cannot be characterised as a jurisdictional issue. The question of whether the claim for breach of an FET obligation fell within the scope of the arbitration agreement is a question of construction of Article 9 of the BIT. That provision is drafted in broad terms. It is to be recalled that it provides, in part that

> "In case of <u>any dispute</u> between the Contracting Party and the investor of the other Contracting Party, which may arise <u>in connection with the investments</u> …" [the parties submit to arbitration] [emphasis added]

49. Applying the principles of construction of the BIT, as set out above, an ordinary meaning is to be given to this provision, including the words which I have emphasised. I consider that the question of whether Ukraine owed Tatneft a duty of fair and equitable treatment is a "dispute" "in connection with" the investments in Ukrtatnafta.

50. The basis on which Ukraine argues that the FET point is one which goes to jurisdiction is, as I have already indicated, that if Ukraine did not agree to an FET standard, it did not agree to arbitrate claims alleging a breach of that standard. In my judgement that argument does not give proper effect to the terms of the arbitration agreement. Ukraine agreed to arbitrate "any dispute" in connection with the relevant investments, not particular types of dispute relating thereto. One type of dispute which it agreed to arbitrate was as to what protections were conferred by the BIT.

51. Indeed, the logic of Ukraine's case here would seem to be that any dispute as to the interpretation of the protections afforded by the terms of the BIT were jurisdictional. In any such case it could be said that, as Ukraine had not – on its case – agreed to confer a particular protection, then it had not agreed to arbitrate claims alleging a breach of the obligation to provide that protection. I consider that such a result would be contrary, not only to the terms of Article 9, but to the broad intention behind bilateral investment treaties.

52. For these reasons, I consider that the FET point is not one which goes to the jurisdiction of the Tribunal and thus to whether Ukraine had submitted the dispute to arbitration under s. 9 of the SIA, but is instead a point on the merits which was for the Tribunal to decide.

53. Having reached the conclusion expressed in the last paragraph I consider that it would be inappropriate for me to express a view on the merits of the FET point, and I do not do so.

Arguments in relation to the Amruz and Seagroup shares claim

54. As I have said, Ukraine contends that, even if it is wrong on the FET point, it did not agree to submit the Amruz and Seagroup shares claim to arbitration for any one of three reasons, which have been called respectively "the No Investment point", the "Timing point" and the "Abuse of Rights point". I will consider them in turn.

The No Investment point

55. In relation to Tatneft's claim in respect of what was said to amount to a *de facto* expropriation of Amruz and Seagroup's shares in Ukrtatnafta, Ukraine argues that there was no relevant "investment" for the purposes of Article 9 of the BIT, and any dispute in connexion with those shares was not agreed to be referred to arbitration by that Article.

56. Ukraine's argument is as follows:

(1) Article 9(1) of the BIT provides:

> Any dispute between one Contracting Party and an investor of the other Contracting Party, arising in connection with investments…shall be set out in a written notification accompanied by detailed comments which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall attempt to resolve that dispute where possible by way of negotiation. (emphasis added)

(2) It follows that there is no agreement to submit to arbitration any dispute with an "investor" (i.e. claim by an investor) that does not arise in connection with an "investment".

(3) Article 1(1) and (2) of the BIT define "investment" and "investor" inter alia as follows:

> "Investments" means assets and intellectual property of all kinds that are **invested by an investor of one Contracting Party within the territory of the other Contracting Party** in accordance with the latter's legislation…
>
> …
>
> "Investor of a Contracting Party" means:
> …
> "b) any body corporate created in accordance with the legislation in force within the territory of this Contracting Party, provided that that [sic] the said body corporate has legal capacity under the legislation of its Contracting Party to make investments within the territory of the other Contracting Party. (emphasis added) "

57. There are also references to making investments or investments being "made" in the relevant territory in Articles 2, 4, 5 and 12; and Article 3 refers to "investments made by investors". Ukraine contends that these provisions show that only an investment made in Ukraine (or Russia) is a qualifying investment.

58. Guidance as to the concept of making an investment is provided by the decision of Teare J in Gold Reserve. Ukraine contends that that decision shows that:

(i) making an investment requires the input of resources by the investor into the relevant asset in return for an interest in that asset [35];
(ii) mere passive ownership of an asset is insufficient: what is required is an active relationship between the investor and the investment [37].

59. In the present case:

(i) Tatneft's purchases of almost 50% of the shares of Amruz and 100% of the shares of Seagroup, a Swiss and a US company respectively, were not investments made by it in Ukraine: no contribution of capital or other resources were put into the economy of Ukraine thereby.
(ii) The fact that, as a result of its purchases of Amruz and Seagroup shares, Tatneft became the indirect owner of almost 50% of Amruz's and 100% of Seagroup's shareholdings in Ukrtatnafta is irrelevant: even if Amruz and Seagroup had made investments in Ukraine by acquiring their Ukrtatnafta shares (which Ukraine does not accept for reasons which do not matter for present purposes), that was their investment, not Tatneft's.

(iii) Unlike in Gold Reserve, there is no evidence that subsequent to Tatneft's purchase of the Amruz and Seagroup shares, Tatneft made any investment in Ukraine in connection with Amruz's and Seagroup's shareholding in Ukrtatnafta.

60. Accordingly, Tatneft's Amruz and Seagroup shares claim did not relate to qualifying investments. Ukraine therefore did not agree to submit that claim to arbitration under Article 9 of the BIT. It is therefore entitled to assert (and has not waived) state immunity in relation to it.

61. Tatneft for its part accepted that this argument is one which went to the jurisdiction of the Tribunal, but contended that is wrong as a matter of interpretation of the BIT, by reference to authority, and as a matter of *a priori* analysis.

62. In more detail, Tatneft contended:

(1) That what it acquired by the purchase of the Amruz and Seagroup shares was control of shares in Ukrtatnafta, which, with the shares it already owned, gave it majority control. That was an investment in Ukraine because Ukrtatnafta was a Ukrainian company.

(2) As a matter of the language of the BIT, the acquisition of an indirect shareholding by a Russian purchaser was intended to be protected by the BIT.

(3) The decision in Gold Reserve does not suggest the contrary. That was a case concerned with an internal movement of shares within the same economic undertaking, which is not so in this case. Furthermore, Tatneft was not simply a passive investor. It invested a significant amount of money to acquire the indirect shareholdings which gave it a controlling interest in Ukrtatnafta.

(4) The interpretation of the BIT contended for by Ukraine would not serve the purposes of the investment treaty framework, as states would find that investment treaties were ineffective to promote flows of capital if the protection they afford is limited to the original acquirer and will not extend to subsequent purchasers.

63. As is apparent, Ukraine's case depends on the proper construction of "investments" in Article 9 of the BIT, which itself depends on a construction of the definition in Article 1(1). On analysis there are several strands in its argument on construction.

64. The first strand, which Mr Edey QC for Ukraine said did not ultimately matter, but which Mr Foxton QC said was key to Ukraine's case, is as to whether, in the Article 1(1) definition, the reference to "assets and intellectual property of all kinds that are invested by" an investor is a reference to the assets and other property which are contributed or put in **by** the investor, or are assets and other property **into which** money or other resources go. Mr Edey QC submitted it was the former, and Mr Foxton QC submitted it was the latter.

65. I consider that, though not very well expressed, the meaning of "investments" is intended to be the assets and intellectual property of all kinds that are **invested into** by an investor. This is supported by a consideration of the types of assets enumerated in sub-paragraphs (a) to (d). Thus in (a), the species of "immovable property" to which the protection of the BIT can most naturally be expected to extend is "immovable property" in the territory of the host state. That would not normally be expected to be contributed by the investor from the other state, but to be property which is acquired, or in relation to which an interest is acquired, as a result of the investment. Similarly with (d), the "rights to carry on commercial activities, including rights to prospecting, development and exploitation of natural resources" is describing rights which may be conferred by the host state, and into which an investment may be made, rather than rights which may be contributed by an investor from the other state.

66. This conclusion is also supported by the provision at the end of Article 1(1), which states that "no alteration of the type of investments in which means are invested shall affect their character as investments…". That provision indicates that it is not the "means" (ie funds or other resources) which are the investment, but what they are invested into, and its purpose is to make it clear that an alteration of the character of the investment does not prevent a party from claiming the protection of the BIT.

67. The second and third strands of Ukraine's argument are closely intertwined. The first of the two is, as Mr Edey QC put it, "the investor must actually do something". It can also be put as an argument that there must be an active relationship between the investor and the investment: the investor must actively invest, or put in resources. The second of the two is that the investment must be made, or the resources put in, within the territory of Ukraine. These two aspects flow, as Ukraine submits, from the words "<u>are invested</u> by an investor of one Contracting State <u>within the territory of the other Contracting State</u>" which appear in Article 1(1). Given that what Tatneft did was to acquire the shares of a Swiss and a US company, in each case from a shareholder which was a Seychellois company, there was no investment within the territory of Ukraine.

68. I do not consider that this argument is correct. In my judgment the phrase "are invested by" does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein. The purpose of the words "are invested by" is to permit, within the definition of "investment", a link between the specification of the types of assets which are comprised within the term and the person who owns or is otherwise interested in those assets (who must be an investor of the other Contracting State) and also with the requirement that that investor must have acquired those assets in accordance with the legislation of the home state. They do not mean that even though the asset would ordinarily and naturally be described as an investment of an investor of the other Contracting State, nevertheless they will not qualify as such because the investor has not actually made an active contribution of resources to the host state.

69. The construction contended for by Ukraine would mean that if an investor from one Contracting State acquired what would in ordinary language be described as an investment which is located in the territory of the other Contracting State from someone other than a natural or legal person operating within the host state, then the new investor would have no "investment" in the host state for the purposes of the

BIT. That would undermine the aim of the BIT which, as with other bilateral and multilateral investment treaties, is to create and maintain favourable conditions for mutual investments. If protection were confined to the original acquirer of the asset, and subsequent purchasers had none, this would be unlikely to promote flows of capital. Investors would be less likely to seek to acquire assets in the host nation if their ability to realise that investment was constricted by the fact that a subsequent purchaser was at risk of unfair treatment or expropriation.

70. The construction which I consider to be the correct one gains support from two UNCITRAL arbitration awards to which I was referred. In Saluka Investments BV v The Czech Republic (Award of Sir Arthur Watts KCMG QC, Maitre Yves Fortier CC QC and Prof Peter Behrens dated 17 March 2006), one of the issues was as to whether the claimant's shareholding in a Czech bank was an "investment" for the purposes of the relevant investment treaty. That treaty contained a definition of "investments" as comprising "every kind of asset invested directly or through an investor of a third State". It was argued by the respondent that the claimant had made no true investment in the Czech Republic. The tribunal rejected this argument at paragraph [211] as follows:

> "To a considerable extent, this argument seeks to replace the definition of an "investment" in Article 2 of the Treaty with a definition which looks more to the economic processes involved in the making of investments. However, the Tribunal's jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of 'investment' the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the well-being of the company operating within it. Although the *chapeau* of Article 2 refers to 'every kind of asset *invested*', the use of that term in that place does not require, in addition to the very broad terms in which 'investments' are defined in the Article, the satisfaction of a requirement based on the meaning of 'investing' as an economic process: the *chapeau* needs to contain a verb which is apt for the various specific forms of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb 'invested' without thereby adding further substantive conditions."

71. A similar approach was adopted in the Partial Award on Jurisdiction in Mytilineos Holdings SA v (1) The State Union of Serbia and Montenegro (2) Republic of Serbia (Award of Tribunal consisting of Prof. August Reinisch, Prof. Stelios Koussoulis and Prof Dobroslav Mitrovic dated 8 September 2006). Again there was an issue under the bilateral investment treaty relevant to that case as to whether the definition of "investment" was limited by the requirement that the assets must be "invested". This was addressed by the majority of the tribunal in paragraphs [126]-[135] of the Award.

Of particular significance is the reasoning in paragraphs [126]-[131] which was as follows:

> "[126] Article 1(1) of the BIT defines 'investment' as 'every kind of asset *invested* by an investor' (emphasis added). It has been suggested by Respondents that the broad range of potential assets (listed in a demonstrative fashion) that potentially qualify as investments is limited by the additional requirement that any such asset must be 'invested' in order to constitute an investment covered by the BIT.
>
> …
>
> [128] According to Respondents any assets specifically mentioned in Article 1(1)(a)-(e) of the BIT do not constitute investments in themselves, but must be 'invested' in order to qualify as 'investments'. In their view, the Contracting Parties of the BIT must be considered as having 'intended to protect only claims to money and other claims under contract which are related to or associated with an investment'.
>
> [129] In the view of the Tribunal, Respondents' interpretation would, however, unduly restrict and unpredictably limit the meaning of an otherwise clear and straightforward investment definition. The Tribunal finds that the core of the definition lies in the characterization of 'every kind of asset' as an 'investment'. The examples of assets added in an illustrative fashion to this definition in Article 1(1)(a)-(e) of the BIT and the verb 'invested' do not add to it. Rather, the verb 'invested' appears necessary for the further qualification that the investments must be made 'in accordance with the [host State's] legislation'.
>
> [130] [reference to the Award in Saluka]
>
> [131] The Tribunal finds that in a similar way Article 1(1) of the [treaty relevant in that case] requires the verb 'to invest' in order to add a subject who is making the investment and the territorial requirement of where the investment has to be made ('invested by an investor of one Contracting Party in the territory of the other Contracting Party') in a grammatically satisfactory way. Apart from that, the verb 'invest' does not add to or diminish in any way the definition of 'investment' as 'any kind of asset'."

72. While the wording of the treaties under consideration in those awards was not identical to that of the BIT, it was sufficiently similar and the arguments raised were sufficiently close to those raised here for these awards to be persuasive. I find the reasoning in each compelling and they fortify the construction which I would in any event have placed on Article 1(1) of the BIT, which is that the essence of the definition is that all types of assets within the host state which have been lawfully

acquired by an investor of the other state are "investments". It is not seeking to limit that definition by a stipulation as to the economic nature of the process by which an investor obtains such assets.

73. I also found helpful and persuasive certain of the reasoning in a further award, namely Fedax N.V. v The Republic of Venezuela (ICSID Case No. ARB/96/3) (Award dated 11 July 1997). That case involved Venezuelan promissory notes. At paragraph [40] of the award it was said:

> "[40] In such a situation, although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due. To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the Agreement. While specific issues relating to the promissory notes and their endorsements might be discussed in connection with the merits of the case, the argument made by the Republic of Venezuela that the notes were not purchased on the Venezuelan stock exchanges does not take them out of the category of foreign investment because these instruments were intended for international circulation. Nor can the Tribunal accept the argument that, unlike the case of an investment, there is no risk involved in this transaction: the very existence of a dispute as to the payment of the principal and interest evidences the risk that the holder of the notes has taken."

74. I consider that the tribunal's reasoning, in that case, that the investment itself remains constant, despite the fact that the promissory notes may change hands, is correct. The case also illustrates the point that the protection of investment treaties has been recognised as extending to those who have the risk in relation to the asset even if the interest in that asset is acquired on the secondary market. In the case of a promissory note, the risk is on the holder of the note. In the present case, the risk in relation to the share capital of Ukrtatnafta, and the risk of deprivation of dividends or a distribution in the event of a solvent winding up is on the shareholder from time to time.

75. In arguing for a construction of Article 1(1) which confines "investments" to cases in which the investor has actively invested in the asset in the sense of having acquired an interest in the asset in return for a contribution of resources into the host state (or making such resources available for the host state to use), Mr Edey QC placed considerable reliance on the decision of Teare J in Gold Reserve, and in particular paragraphs [39]-[45] of the judgment in that case.

76. In Gold Reserve, Teare J had to construe a bilateral investment treaty between Venezuela and Canada. The issue which arose before him was as to whether the entity which had claimed in the arbitration, Gold Reserve Inc (or "GRI") was "an investor" within the meaning of that treaty. That was the relevant question for the purposes of ascertaining whether the exception to state immunity in s. 9 of the SIA was applicable because Article XII of the treaty submitted to arbitration "any dispute

between one contracting party and **an investor** of the other contracting party, relating to a claim by **the investor** that a measure taken or not taken by the former contracting party is in breach of this agreement…" (emphasis added) The definition of "investor" was "in the case of Canada: (i) any natural person possessing the citizenship of Canada in accordance with its laws; or (ii) any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who **makes the investment** in the territory of Venezuela and who does not possess the citizenship of Venezuela…" (emphasis added). There was also a definition of "investment" which provided that the term meant "any kind of asset owned or controlled by an investor of one contracting party either directly or indirectly, including through an investor of a third state, in the territory of the other contracting party…"

77. In construing the definition of "investor", Teare J reasoned at paragraph [35] of his judgment that "the ordinary meaning of 'making' an investment includes the exchange of resources, usually capital resources, in return for an interest in an asset". He further said in paragraph [37] that to "make" an investment, "what is required is an active relationship between the investor and the investment", and that for a person to "make an investment" there must be "some action on his part". On that basis he concluded that GRI had not "made an investment" when, under a restructuring in the Gold Reserve group of companies, from being a subsidiary of Gold Reserve Corp, and one which had no direct or indirect ownership of the Brisas concession, GRI had become the parent of Gold Reserve Corp which was the indirect owner of the Brisas concession. On the other hand, Teare J found that GRI had, after the restructuring, expended nearly US$300 million in developing the Brisas Project. That was the making of an investment, and GRI was therefore an "investor" (paragraph [46]). On that basis, Teare J found that the dispute was one over which the arbitrators had had jurisdiction and the order granting leave for enforcement of the award should stand.

78. In my judgment that case involves the construction of provisions which, though dealing with similar concepts, are materially different. Specifically, Gold Reserve was concerned with the meaning of "investor", and not, at least directly, with the meaning given to the term "investment". Further, the definitions of both "investor" and "investment" in that case were different from the definitions in the present case. In particular, the definition of "investment" in that case did not contain the wording "assets … of all types that are invested … within the territory of the other Contracting Party in accordance with the latter's legislation" which appear in the BIT. Further, the definition of "investor" in the BIT does not contain the wording found in Gold Reserve that the investor is one who "makes the investment".

79. Teare J's reasoning in relation to the different language of the treaty relevant in Gold Reserve does not persuade me that Article 1(1) of the BIT must be interpreted as meaning that unless there has been the active "making" of an investment, then the assets in question do not count as "investments" at all. Article 1(1) of the BIT does not contain the phrase "make an investment" which was found by Teare J, in the context of the treaty considered by him to require an active relationship between the investor and the investment. I note that the awards in Saluka and in Mytilineos were not cited to Teare J, doubtless because those awards did not consider the meaning of a definition of "investor" as one who "makes an investment".

80. Even if I am wrong, however, and Article 1(1) of the BIT should be interpreted as requiring that there must be the "making of an investment" and that, as described by

Teare J in paragraph [37] of Gold Reserve, this entails an "active relationship between the investor and the investment", I consider that Tatneft would have satisfied that requirement in the present case. It expended significant sums to acquire the indirect shareholdings which gave it a controlling interest in Ukrtatnafta. Gold Reserve does not suggest that that would not count as "making an investment". Instead it would appear that Teare J would have regarded it as "making an investment", for in paragraph [44] of his judgment the language used indicates that had GRI made any payment or transferred anything of value to Gold Reserve Corp in return for becoming the indirect owner or controller of the shares in CAB or the Brisas Project, the position would have been different. The reason why Teare J did not consider that GRI had "made an investment" at the time of the share swap was because GRI had not at that point done anything at all: what had been done had been done by its shareholders by way of their swapping their shares in GRI for shares in Gold Reserve Corp.

81. If that is correct, and again on the assumption that Article 1(1) of the BIT does require the "making of an investment" in the sense given to that concept by Teare J, the remaining question would be whether Article 1(1) of the BIT means that Tatneft's expenditure of sums to acquire the Amruz and Seagroup shares would not count as an "investment" because the payments were not to a Ukrainian company or national, but were to the Seychellois holder of shares in a Swiss and a US company. I do not consider that it does. In my judgment, and given my view that Article 1(1) is concerned to identify assets into which there may be investment, not which are invested, the reference to "within the territory of the other Contracting State" identify where the assets which are invested into are located, and not to where any resources expended to acquire such assets are directed.

The Timing point

82. Ukraine contends that, in accordance with international investor-state jurisprudence, the relevant state's offer to arbitrate should be construed as limited to disputes in respect of events that arise after the claimant makes a qualifying investment protected by the bilateral investment treaty. Ukraine contends that Tatneft acquired the Amruz and Seagroup shares after the relevant dispute relating to those shares had already arisen.

83. Tatneft contends that there is no basis for saying that the offer to arbitrate in the BIT was limited to matters arising after the claimant acquired a qualifying investment. It submitted that Article 9 does not expressly include any such limitation and, construed in accordance with the principles I have set out, it could not be interpreted as imposing such a restriction. In any event, even if there was a temporal limitation, it was satisfied in the present case.

84. In the Award on Jurisdiction and Admissibility rendered in the case of Philip Morris Asia Limited v The Commonwealth of Australia (PCA Case No. 2012-12) (Award dated 17 December 2015) the Tribunal referred, at paragraph [528] to an earlier award in the case of Gremcitel v Peru. In Gremcitel part of the tribunal's award was as follows:

> "[146] … it is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host [S]tate and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.
>
> [147] This conclusion follows from the principle of non-retroactivity of treaties, which entails that the substantive protections of the BIT apply to the [S]tate conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.
>
> [148] […] [A claimant] must therefore prove that [it] had already acquired [its] investment at the time of the impugned conduct." (emphasis added by Tribunal in Philip Morris).

85. The tribunal in Philip Morris then proceeded, in paragraph [529] of its award to state:

> "The Tribunal agrees with this approach and considers that, whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred. Investor-State jurisprudence is in accord with this approach. [footnote 1039] In this respect, the identification of the critical date is essential for the assessment of the scope of the Tribunal's *ratione temporis* jurisdiction."

86. Footnote 1039 to the award referred to six further awards as supportive of the proposition in the first sentence of paragraph [529], and also to paragraph 303 of Douglas, The International Law of Investment Claims.

87. I accept, in line with this extensive jurisprudence, that the offer to arbitrate contained in Article 9 of the BIT should be construed as one subject to a temporal limitation by reference to the relationship between the date on which a protected investment was acquired and the date of the occurrence of the breaches of the BIT complained of.

More specifically, I accept that the limitation is, as indicated by the tribunal in Philip Morris, as to whether the relevant investment had been acquired before the time at which the alleged breach of the BIT occurred, and that the offer to arbitrate is only in respect of disputes where that was the case.

88. What is the position when a series of actions, or inactions, of the host state are complained of, some of which occur before and some of which occur after the acquisition of the investment? What should be regarded as the time of the breach? The award in Philip Morris is of assistance in this regard. At paragraph [530] there was a further citation from the Gremcitel award, as follows:

> "[149] […] the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier. It is not uncommon that divergences or disagreements develop over a period of time before they finally 'crystallize' in an actual measure affecting the investor's treaty rights."

89. At paragraph [532] and [533] the tribunal in Philip Morris said this:

> "[532] The Tribunal shares this view. [ie the approach in Gremcitel]. …
>
> [533] In conclusion, for purposes of the *ratione temporis* objection the critical date is the date when the State adopts the disputed measure, which in this case is the date of *enactment* of the [Tobacco Plain Packaging Act 2011], as before that moment the Claimant's right could not be affected. …"

90. Applying that approach, I consider that the critical date in the present case, and that on which there can be said to have occurred the equivalent of the "adoption" of the "disputed measures" referred to in Gremcitel and Philip Morris occurred only in 2009 or at earliest in late 2008, and thus after the acquisition by Tatneft of the Amruz and Seagroup shares.

91. In this regard it is of significance that the Award made by the Tribunal in the Merits Award was for the value of Tatneft's direct and indirect shareholdings in Ukrtatnafta. The date for the valuation of these shareholdings was taken as the dates when the shares were actually transferred away from Tatneft and Amruz/Seagroup, which were 27 January 2010 and 12 May 2009 respectively. The Tribunal found that the best evidence of the value of the shareholdings at those dates was what Tatneft had originally paid for its shares in Ukrtatnafta and in Amruz/Seagroup respectively. It is thus clear that the relevant breach which was compensated was the effective expropriation of the shares.

92. The issue of when the relevant breach had occurred and how it was temporally related to Tatneft's acquisition of shareholdings in Amruz and Seagroup was considered by the Tribunal in its Partial Award on Jurisdiction at paragraphs [213]-[217]. Those paragraphs were as follows:

> "[213] The evidence produced by [Tatneft] indicates that it acquired shares in Amruz and Seagroup in December 2007. [Ukraine] does not challenge that Tatneft had control of Amruz and Seagroup after that date. A number of the acts complained of by [Tatneft], especially the court proceedings that were commenced in 2008 and resulted in the sale of Amruz's and Seagroup's shares by auction in June 2009, took place after the acquisition. It is true, however, that [Tatneft], Amruz and Seagroup alleged in 2008 that the interests of Amruz and Seagroup started to be adversely affected in 2007, i.e. prior to Tatneft's acquisition. In its Statement of Claim, Tatneft indicated that the improper transfer of Amruz's and Seagroup's shares to Naftogaz in May 2007 deprived them of their shareholder rights. Similarly, Seagroup stated in broader terms in its Notice of Dispute dated 10 June 2008 that '[d]uring 2007, as a result of a series of actions and omissions of the Ukrainian Government, the Ukrainian courts and enforcement officers, Seagroup has been deprived of its shares in Ukrtatnafta and of its shareholding rights, suffering significant and ongoing damages.' Amruz's Notice of Dispute of 11 June 2008 is identically worded and refers to the same date and events.
>
> [214] … following an application for interim relief by the Ministry of Fuel and Energy of Ukraine, Amruz and Seagroup were indeed ordered to transfer their shares in Ukrtatnafta to Natfogaz on 22 May 2007. On 17 September 2007 and 30 October 2007, the Economic Court and the Economic Court of Appeal of the city of Kiev successively upheld claims from the Prosecutor General of Ukraine seeking the invalidation of the share purchase agreements entered into by Seagroup and Amruz and ordered the transfer of their shares to the State (represented by the Ministry of Fuel and Energy of Ukraine). On 14 December 2007, according to Respondent, the Economic Court of the city of Kiev ordered measures for the enforcement of its decision of 17 September 2007.
>
> [215] In subsequent submissions, however, [Tatneft] has given evidence of a third court action that was initiated in February 2008, after its acquisition of shares in Amruz and Seagroup, and resulted this time in a final and irrevocable decision to transfer these shares to a third party. By contrast, the outcome of the first court proceedings that took place in the first half of 2007 was temporary by nature since the court ordered the transfer of shares by way of interim relief. The second court proceedings were stayed in May 2008 pending the resolution of

> the third court proceedings and eventually discontinued in February 2009. It is only in late 2008, in the third court proceedings, that the issue of the validity of Amruz's and Seagroup's share purchase agreements reached the Supreme Court of Ukraine which then confirmed the annulment by the lower courts of the purchase agreements and the order to return the shares to Ukrtatnafta. The returned shares were then sold at an auction in June 2009 to a company called Korsan, following a court order to that effect.
>
> [216] While [Tatneft] concedes that there is no evidence in the record that Tatneft sought to obtain any specific guarantee with respect to its purchase of shares in December 2007, the Tribunal agrees that when Tatneft acquired its shares in Amruz and Seagroup, the court decisions that affected these shares could still be subject to review by higher courts and thus were not final. [Tatneft] could still seek to obtain a remedy. In addition, in previous proceedings regarding the validity of Amruz's and Seagroup's acquisition of shares in Ukrtatnafta, the Supreme Court of Ukraine had twice handed down decisions in favour of Amruz and Seagroup, in 2002 and as recently as April 2006. The prospect of prevailing in the new proceedings of 2007 and 2008, though uncertain, was not unreasonable or unlikely.
>
> [217] The Tribunal thus further agrees that the cumulation of the three above-described court proceedings, which concerned the same issue and all resulted in the transfer of Amruz's and Seagroup's shares to a third party, along with the alleged raid on Ukrtatnafta, should be considered in aggregate to determine what the alleged breach was and when it occurred. It is only in mid-2009, when the shares were auctioned and acquired by Korsan, or at the earliest in late 2008, when the Supreme Court of Ukraine confirmed the lower court's decision to transfer Amruz's and Seagroup's shares to Ukrtatnafta, that it became clear that Amruz and Seagroup had been fully and finally deprived of their shares….."

93. An essentially similar but rather fuller account of the relevant facts appears, as "Undisputed facts" in paragraphs [276] to [280] of the Merits Award. For the purposes of the present application, albeit not otherwise, Ukraine accepted that the facts were as found by the Tribunal (footnote 4 to Skeleton Argument; Ukraine Chronology).

94. On the basis of the relevant facts as set out in the Tribunal's Awards I agree with and adopt the analysis by the Tribunal in the Jurisdiction Award, and in particular the passage from paragraph [217] thereof which I have quoted, as to when the breach complained of occurred. On that basis I consider that the temporal limitation

recognised in Philip Morris and other awards was complied with here, and the Tribunal did not lack jurisdiction *ratione temporis*.

Abuse of Rights

95. Ukraine contends that even were I to find, as I have, that the investment was acquired before the moment when the breach occurred, nevertheless Tatneft was not able to bring any claim in respect of the Amruz or Seagroup shares in arbitration because it was an abuse of rights to do so. This was on the basis that, at the time of the acquisition of those shares, it was at least reasonably foreseeable that a dispute would arise in relation to Amruz and Seagroup's holdings in Ukrtatnafta, and the acquisition was made in order to gain the protection of the BIT. That an investor was not entitled to bring a claim in such circumstances was shown, Ukraine contended, by the Philip Morris award at paragraphs [538]-[554], which itself refers to a considerable amount of arbitral case law on the issue of abuse of rights. The issue went to the jurisdiction of the tribunal because, so Ukraine submitted, the offer to arbitrate did not extend to abusive claims, and it contended that this analysis was supported by the award in Phoenix Action Ltd v The Czech Republic (ICSID Case No. ARB/06/5), especially at paragraphs [93] and [144]-[145].

96. In relation to the facts of the present case, Ukraine submits that there was plainly an abuse. That a dispute with Ukraine in relation to Amruz and Seagroup's holding of Ukrtatnafta shares was not only foreseeable but was actually foreseen at the time of Tatneft's acquisition of shares in Amruz and Seagroup was not capable of being denied. By that date, the Kiev Economic Court had declared Amruz and Seagroup's share purchases invalid, and the Kiev Economic Court of Appeal had dismissed an appeal from that decision; the forceful takeover of the refinery itself had occurred; on 13 November 2007 Tatneft's Head of Department of Strategic Planning had told the press that Tatneft intended to bring arbitration claims both on its own behalf and "on behalf of foreign minoritaries [minorities] of [Ukrtatnafta] – Amruz Trading and Seagroup International"; and Tatneft had served its notice of dispute for the purposes of Article 9 of the BIT. Further, Ukraine submitted, Tatneft had bought the shareholdings in Amruz and Seagroup in order to bring claims relating to those shares together with its claim relating to its own shares in Ukrtatnafta under the BIT. Ukraine submitted that no other reason had been given for the acquisition, and given the timing it was difficult to see how there could be any other reason.

97. For its part, Tatneft contended that the issue of abuse of rights was not one which went to the jurisdiction of the Tribunal (and thus not to the applicability of s. 9 of the SIA) at all. It was rather a question of admissibility. Issues of jurisdiction go to the existence or otherwise of a tribunal's power to adjudge the merits of a dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it. The distinction was expressed by the ICJ in Case concerning Oil Platforms [Iran v USA][Merits] [2003] ICJ Rep 161 at paragraph [29] as follows:

> "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct,

nonetheless there are reasons why the Court should not proceed to an examination of the merits."

98. Even if that is wrong, Tatneft contends that, on the facts, there was no abuse in this case.

99. I consider that Tatneft is correct to say that the issue of abuse of right is not jurisdictional, but is instead a matter going to admissibility, and is one for the Tribunal to decide.

100. The argument that the issue is jurisdictional depends on being able to read into the offer to arbitrate contained in Article 9 of the BIT a restriction that it does not extend to an "abusive" claim. I do not consider that such a restriction can be read in. On the contrary, especially considering the nature of the test and what is involved in a determination of whether a claim is abusive, to which I revert below, I consider that the offer to arbitrate includes an offer to arbitrate disputes as to whether or not a claim is abusive. This is what both Contracting Parties to the BIT would be expected to desire and is the result which is likely to foster the aims of the treaty, because each host state would be expected to want its investors to benefit from an independent arbitral tribunal deciding questions of whether a claim in relation to a particular investment was abusive.

101. I consider that the nature of a determination as to whether there is an abuse of rights reinforces the conclusion that the issue is not jurisdictional:

(1) In order to determine whether a claim is an abuse of rights, what is required is the application of an imprecise principle of international law to the particular, and it may be strongly contested, facts of the case, including issues as to the characterisation of the purpose of the parties in taking certain steps. One would not expect the result of an exercise of that type to determine jurisdiction.

(2) This is especially so, given that it has been recognised that "the threshold for finding an abusive initiation of an investment claim is high" (Philip Morris award, paragraph [539]). The binary question of whether a tribunal does or does not have jurisdiction would not be expected to depend on whether or not the facts are sufficiently out of the ordinary as to pass a "high threshold".

(3) Various of the awards considering the issue have characterised the issue as one of "abuse of process": see the awards referred to in paragraphs [548], [549] and [552] of the Philip Morris award, and paragraph [550] of that award itself. In paragraph [554] of the same award the issue was described as "an abuse of rights (or an abuse of process, the rights abused being procedural in nature)". The "process" (or the procedural rights) which is being abused must be the arbitration regime established by the relevant investment treaty, and the abuse must be the initiation of a claim in an arbitration thereunder in circumstances where an investor has taken particular steps to gain the protection of the treaty when a specific dispute was foreseeable. The issue of whether there has been such an abuse of process is one which is for the tribunal whose process is alleged to have been abused. It would, in my judgment, be surprising and unsatisfactory if, that tribunal having considered

and determined that its process had not been abused, it was possible for that issue to be reargued in front of an enforcement court.

(4) While the award in Phoenix Action is, in any event, only persuasive, and while paragraph [145] refers to the tribunal there as "lacking jurisdiction", nevertheless I consider that the award as a whole is consistent with the issue of abuse not being truly jurisdictional. In particular in paragraph [144] the tribunal referred to its being its "duty" not to protect an abusive manipulation of the system of international investment protection, and that the tribunal had "to ensure" that the ICSID mechanism did not protect investments which it was not designed to protect. That is not consistent with the issue of abuse going to the tribunal's jurisdiction, in the sense that the tribunal would not be able to decide as to whether there was abuse. It is consistent rather with the tribunal as having a duty to resolve that question.

102. Given that I consider that the issue of whether there was an abuse of rights and if there was what the effect of that might be, were ones which were within the jurisdiction of the Tribunal I do not intend to express any view as to whether there was an abuse of rights as a matter of fact.

Non Disclosure

103. Ukraine contends that, whether or not it is entitled to state immunity, the Enforcement Order should be set aside on the basis that there was a failure to make proper disclosure on the ex parte application. The essential complaint is that the witness statement in support of the application did not state in terms that it was likely that Ukraine would claim state immunity as a basis for challenging the Court's jurisdiction, and that, accordingly, it was or might not be appropriate for the award to be recognised and enforced, and judgment entered against Ukraine, without an inter partes hearing. Equally, the Court was not told that any order should protect Ukraine's ability to challenge the Court's jurisdiction on the basis of state immunity without risking having to submit to the jurisdiction. Ukraine contended that that would be likely to reinforce the impression, which it contended was given, that Ukraine was not likely to claim state immunity. Further, Tatneft had failed to disclose the existence of parallel enforcement proceedings in the US and in Russia. These were of particular materiality in that Ukraine had in fact asserted immunity in those proceedings. While this had not happened at the time of the original application on 13 April 2017, it had before the Original Order was sealed, and well before the Corrected Order was made.

104. Ukraine referred to the decision in Gold Reserve, and in particular to paragraphs [67]-[74]. In particular Mr Edey QC drew attention to paragraph [71] where Teare J said:

> "When a judge is faced with an application for permission to enforce an award against a state as if it were a judgment the judge will have to decide whether it is likely that the state will claim state immunity. If that is likely then he would probably not give permission to enforce the award but would instead

> specify (that being the language of CPR 62.18(2) that the claim form be served on the state and consider whether it was a proper case for granting permission to serve out of the jurisdiction. He would envisage that there would be an inter partes hearing to consider the question of state immunity. For that reason any applicant for permission must draw the court's attention to those matters which would suggest that the state was likely to claim state immunity. Indeed, since the court is required by section 1(2) of the State Immunity Act 1978 to give effect to state immunity even though the state does not appear, it is important that the court be informed of the available arguments with regard to state immunity."

105. Mr Edey QC submitted that it was apparent from the fact that in the present case Teare J gave permission for the Merits Award to be enforced as a judgment, and did not specify that the claim form be served on the state that he was misled as to the likelihood of Ukraine's claiming state immunity. Had that been made apparent to him then he would, as he had said in Gold Reserve, not have given permission to enforce the award.

106. The obligation of an applicant for an *ex parte* order to give proper disclosure is of the first importance, and it is a duty which continues until service of the relevant proceedings on the respondent / defendant. The importance of the duty was recently emphasised by Popplewell J in Banca Turco Romana S.A. v Cortuk [2018] EWHC 662 (Comm), especially at [45] where he said:

> "… Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

107. In the present case, having considered Ukraine's points carefully, I am not persuaded that there was a substantial breach of the duty. I should also say that I consider it clear that to the extent that there was any breach it was not deliberate.

108. Gadhia I did refer to arguments which Ukraine might raise as to the jurisdiction of the Tribunal at paragraphs [33]-[34], [35]-[36] and [37]-[40]; and at paragraphs [41]-[42] to an argument which might be raised as to the "competence or jurisdiction" of the Tribunal. It was made clear that these were arguments which Ukraine had deployed in the French proceedings, and also that these points were still "live" in France as Ukraine had lodged a cassation appeal before the Court of Cassation.

109. It is true to say that the reference to these arguments was in the context of possible challenges to enforcement of the Award which Ukraine might make under s. 103 of the Arbitration Act, and not specifically in the context of the possibility of a claim for state immunity. The position as to state immunity was dealt with by Mr Gadhia in paragraphs [57]-[58] of Gadhia I, where he referred to the decision in Gold Reserve

and the guidance that a judge might order service of a claim form on the state in situations where it is "likely that the state will claim state immunity", and then proceeded to say that "there is a good arguable case here that the Defendant is not entitled to state immunity", on the basis of the applicability of s. 9 SIA. It would undoubtedly have been preferable that there should have been an express statement that the issues which had been mentioned as going to the jurisdiction of the Tribunal would also go to the issue of state immunity, and that the existence of such arguments and the fact that they had been taken in the French proceedings was relevant to whether Ukraine was likely to claim state immunity in the present proceedings. Nevertheless, I consider that, reading the witness statement as a whole, it was apparent that there were matters which Ukraine might raise as to the jurisdiction of the Tribunal, and that they would go to whether the state had immunity. I also consider that, given that it was said that Ukraine had raised these points in the French proceedings, and was pursuing an appeal there against their rejection, and "might" raise them again in the English proceedings, that it was made apparent that there might well be a claim for state immunity.

110. As to Ukraine's complaint that there was no mention, before the original Order was sealed, or the Corrected Order made, of the USA and Russian enforcement proceedings, and of the issues raised by Ukraine in them, I was not persuaded that such disclosure would have added significantly to the position disclosed in Gadhia I. It had revealed that issues as to the jurisdiction of the Tribunal might be taken. As I have found, it was apparent that that might mean that s. 9 of the SIA was inapplicable. Disclosure of the points raised in the USA proceedings would have indicated that similar objections were being taken there. Accordingly this would not have added materially to what had been revealed by Gadhia I. The grounds on which the Russian enforcement proceedings were being contested, by contrast, were different from those which might have been, and have been, raised here, and were peculiar to those proceedings. Again, I do not consider that disclosure of those points would have materially altered the view of the case which had been revealed in Gadhia I.

Conclusion

111. For these reasons, Ukraine's application fails and is dismissed.

Appendix

1. "The Government of the Russian Federation and the Cabinet of Ministers of Ukraine, hereinafter referred to as the Contracting Parties,

Seeking to develop the basic provisions of the Agreement on Cooperation in the Sphere of Investment Activity of 24th December 1993,

In pursuance of their intention to create and maintain favourable conditions for mutual investments,

In the desire to create favourable conditions for the expansion of economic cooperation between the Contracting Parties,

Have agreed as follows:

"Article 1

Definitions

For the purposes of this Agreement:

"Investments" means assets and intellectual property of all types that are invested by an investor of one Contracting Party within the territory of the other Contracting Party in accordance with the latter's legislation, and in particular:

Movable and immovable property and corresponding proprietary rights;

Monetary funds and securities, liabilities, deposits and other forms of participation;

Intellectual property rights, including authorial and related rights, trade marks, brevets d'invention, industrial samples, models, and technological processes and know-how;

Rights to carry on commercial activities, including rights to prospecting, development and exploitation of natural resources.

No alteration of the type of investments in which means are invested shall affect their character as investments, provided that such alteration will not be contrary to the legislation of the Contracting Party within whose territory the investments are made."

"Investor of a Contracting Party" means:

a) Any natural person who is a citizen of a Contracting Party and who has legal capacity under its legislation to make investments within the territory of the other Contracting Party;

b) Any body corporate created in accordance with the legislation in force within the territory of this Contracting Party, provided that the said body corporate

has legal capacity under legislation of its Contracting Party to make investments within the territory of the other Contracting Party.

…

"Article 2

Encouragement and Protection of Investments

Each of the Contracting Parties shall encourage investors of the other Contracting Party to make investments within its territory and shall permit such investments in accordance with its legislation.

Each of the Contracting Parties shall guarantee, in accordance with its legislation, the complete and unconditional legal protection of the investments of investors of the other Contracting Party."

"Article 3

National Regime and Most Favoured Nation Treatment

1. Each of the Contracting Parties shall, in respect of investments made by investors of the other Contracting Party and of activities relating to such investments, ensure in its territory a regime that is no less favourable than the one provided to its own investors or investors of any third state, and which excludes the application of measures of a discriminatory character that might prevent the management and disposal of investments. "

…

The most favoured nation treatment provided in accordance with point 1 of this Article shall not extend to privileges granted or to be granted by a Contracting Party:

a) in connection with involvement in a free-trade zone or in a customs or economic union, a monetary union, or an international agreement providing for similar associations, or in other forms of regional cooperation in which any Contracting Party is or may become a participant;

b) by virtue of an agreement on the avoidance of double taxation or other agreements on matters of taxation.

…

"Article 5

Expropriation

1.Investments made by investors of one Contracting Party within the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to measures that are equal in effect to expropriation…"

…

"Article 9

Resolution of Disputes between a Contracting Party and an Investor of the other Contracting Party

1.Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes regarding the amount, terms of and procedure for payment of compensation provided for in Article 5 of this Agreement, or the procedure for effecting a transfer of payments provided for in Article 7 of his Agreement, shall be set out in a written notification accompanied by detailed comments which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall attempt to resolve that dispute where possible by negotiation."

In the event that the dispute is not resolved within six months of the date of the written notification referred to in point 1 of this Article, the dispute shall be referred to be considered by:

a) a competent court or an arbitration tribunal of the Contracting Party in whose territory the investments were made;

b) the Arbitration Institute of the Stockholm Chamber of Commerce;

c) an ad hoc arbitration tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).