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Case No: 2004 Folio 272

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2005

Before :

MRS JUSTICE GLOSTER, DBE

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Between :

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- -

M Bools Esq (instructed by **Messrs Norton Rose**) for the **Claimant**
S Shackleton Esq & **D Holloway Esq** (instructed by **Messrs Eversheds**) for the **Defendant**

Hearing dates: 4th-6th July 2005; 11th & 12 July 2005
Further submissions and materials received: 27 July; during August; and 26th September 2005.

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Judgment

Mrs Justice Gloster, DBE:

Introduction

1. On 28 April 1993, the Claimant, Svenska Petroleum Exploration AB ('Svenska'), the First Defendant, the Government of the Republic of Lithuania ("Lithuania" or "the State"), and the Second Defendant, AB Geonafta ("Geonafta") (collectively "the Defendants"), signed a Joint Venture Agreement (the "JVA") in relation to the planned exploitation of various oil fields in Lithuania.

2. Svenska, as its name suggests, is a Swedish company employed in the business of oil exploration and extraction. Geonafta, previously known as Gargzdai State Petroleum Geology Enterprise and sometimes referred to in the relevant documents as "EPG", was formerly a Lithuanian State enterprise. It was privatised on 16 June 2000 and has since then been privately owned.

3. In June 2000, a dispute arose between the parties as to who was entitled to exploit certain specific oil fields. Svenska brought a claim against both Geonafta and the State before an ICC arbitral panel sitting in Denmark ("the Tribunal"). The State took the preliminary objection that it was not a party to the arbitration agreement contained in Article 9 of the JVA. On 16 and 17 October 2001 there was a two day hearing before the three-member Tribunal in Copenhagen at which all parties were fully represented in relation to the issues of jurisdiction and arbitrability. In a 69 page interim award ("the Interim Award"), issued on 21 December 2001, the Tribunal, (having considered all the various arguments which have been deployed before me on this hearing) unanimously held that the State was a party to the arbitration agreement. The State made no challenge to that finding in the Danish courts, although it was common ground that it was open to it to have done so. It is relevant to quote the following passage from the Interim Award at page 68:

> "It is undisputed that no provisions of any Lithuanian law prevented GOVERNMENT from signing an arbitration agreement at the time when the JVC was signed in 1993. The issue of arbitrability only arises due to subsequent Lithuanian laws, i.e. article 29 of the underground law from 1995 and article 11 in the Law of Commercial Arbitration from 1996.
>
> The JVC is a commercial contract regarding the exploration and exploitation of oil fields within Lithuania. The dispute between SVENSKA and GOVERNMENT is a dispute which relates to an alleged breach of contract by GOVERNMENT. Such a dispute is clearly arbitrable. The claims of SVENSKA, i.e. the relief sought from this Tribunal are divided into three different claims, a request for a declaratory award sentence, a request for damages and a request for a specific performance award ordering GOVERNMENT to abrogate an existing licence and to issue a new licence. The alleged non-arbitrability can in the opinion of the Arbitral Tribunal at most

> be applicable to that part of SVENSKA's claim, which relates to the revocation and issuance of licences. It follows that GOVERNMENT is obliged to answer to the remainder of the claims in any event.
>
> Under these circumstances, the Arbitral Tribunal has not found it appropriate – at this stage of the case – to make a final decision whether the claim for revocation and issuance of licences is arbitrable, or whether the relief sought would be an appropriate relief in this matter.
>
> Accordingly, the parties are invited to elaborate further on this issue in the course of the dealing with the merits of the case."

4. Following a substantial hearing, in which the State fully participated, the Tribunal issued a final Award on 30 October 2003 ("the Final Award"). By that Award (which ran to 280 pages), the Tribunal held that the State and Geonafta were jointly and severally liable to pay the Claimant the sum of US$12,579,000 by way of damages plus costs. That Award also determined the question of arbitrability, in relation to which the Tribunal (by a majority) held as follows:

> "Arbitrability
>
> "In his dissenting opinion, Mr Gytis Kaminskas has addressed the issue of arbitrability, and has concluded that the dispute related to the Principal Claim is not arbitrable under Lithuanian law by virtue of Article 29 of the Underground Law and Articles 2 and 11 of the Law on Commercial Arbitration of 1995.
>
> We do not agree with Mr Kaminska's position, and we believe that this issue was already decided upon in our Interim Award, dated 21 December 2001, in which Award the unanimous finding of the Arbitral Tribunal was stated as follows … [Here the Tribunal set out the passage that I have already quoted above].
>
> …
>
> The Claimant has after the Interim Award withdrawn its claim for a specific performance award ordering First Respondent to abrogate an existing license and issue a new license. Claimant's requested remedy is now limited to a claim for damages. This claim is in the view of the majority clearly arbitrable under Lithuanian law. The parties have not previously nor after the Interim Award argued that the claim for damages is not arbitrable or that the Arbitral Tribunal otherwise lacks jurisdiction with respect to this claim.
>
> Article 29 of the Underground Law and Article 11 of the Law on Commercial Arbitration governs the administrative legal

> relations, which disputes are decided by the Administrative Court of Lithuania. These provisions are not applicable to disputes originating from a commercial contract, where relief sought is a claim for damages.
>
> The claim for damages is a claim for breach of contract and does not depend on or relate to the validity of any administrative or Governmental act, including the grant or revocation of any rights in relation to the underground either to the Claimant, the Second Respondent or the JV-Company."

5. The State made no challenge to that Final Award in the Danish courts. On the contrary, by resolution dated 11 February 2004 it resolved that:

> "1 … It is not expedient to apply to a court for annulment of the award of the Arbitration Tribunal of the International Chamber of Commerce in the case considered in Copenhagen on 30 October 2003.
>
> 2. … to commission the state enterprise State Property Fund to notify [Svenska] or its representatives of the position of the [State] or its representatives of the position of the [State] on the award referred to in Clause 1."

Neither Geonafta nor the State has honoured the Final Award.

6. On 2 April 2004, Svenska issued an arbitration claim form seeking permission to enforce the Final Award in England pursuant to section 101 of the Arbitration Act 1996. On 7 April 2004 Morison J gave Svenska permission to enforce the Final Award in England. Since the application had, in the usual way, been made without notice, the Defendants were given a period of time in which to apply to set aside the order. Geonafta's challenge to the recognition and enforcement of the Final Award was dismissed by Cooke J. on 24 August 2004. The State acknowledged service of the claim form on 31 August 2004, indicating in that acknowledgement that it intended to contest the Court's jurisdiction. On the same day, the State issued an Application Notice pursuant to Part 11 of the CPR disputing the jurisdiction of the English Court, and applied for an order that the claim form, the order of Morison J and the service of the enforcement proceedings on it be set aside on the grounds that, as an independent sovereign state, the State is immune from the jurisdiction of the English court, by virtue of section 1 of the State Immunity Act 1978 ("the Act"). This provides:

> "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

Summary of the parties' contentions

7. Shortly stated, the State's argument is that none of the various exceptions contained in Part I of the Act apply. In particular, the State contends that it has not submitted to

the jurisdiction of the English Court (section 2); that the proceedings do not relate to a commercial agreement (section 3); and that the State has not agreed in writing to submit a dispute which has arisen to arbitration (section 9).

8. On the other hand, Svenska contends that:

   i) the State has expressly waived any entitlement to rely on State Immunity and has agreed to submit to the Court's jurisdiction; accordingly it falls within the exception contained in section 2 of the Act;

   ii) it was party to a commercial transaction and the present proceedings relate to that transaction; accordingly it falls within the exception contained in section 3 of the Act;

   iii) it was a party to the arbitration agreement contained in Article 9 of the JVA, alternatively is estopped from denying that fact by virtue of the Interim Award; accordingly it falls within the exception contained in section 9 of the Act.

Factual Background

9. It is necessary to set out the factual background to the JVA and the arbitration proceedings in some greater detail than the brief summary which I have already given.

10. In 1989, Swedish and Lithuanian parties commenced discussions concerning the exploitation of certain of Lithuania's oil reserves. Discussions were initially conducted between Svenska, on the one hand, and the Soviet Corporation of Geological Works ("LG") on the other. On 31 January 1991, Svenska and LG signed a Letter of Intent, outlining a framework for the development and exploration of Lithuanian oilfields. The parties to the letter of intent were defined as Svenska and LG only. In March of 1990 the Republic of Lithuania declared its independence. After independence, LG had to be liquidated. The liquidation of Soviet style companies was a common occurrence in all newly independent States following the collapse of the Soviet Union and the gradual replacement of Socialist law with legal systems more consistent with market economies. Geonafta succeeded to LG as the State Enterprise having a right to explore and develop oilfields in Lithuania. All rights and obligations under the Letter of Intent were transferred to Geonafta. This was confirmed by agreement between Svenska and Geonafta dated 13 June 1991. The parties to this agreement were Svenska and Geonafta only. Negotiations continued as I describe in greater detail below in relation to the concluding of an agreement for the development and exploration of the oilfields. Geonafta held the legal licence to exploit the oil reserves which were the subject matter of negotiations. The project would require State approval. In addition, petroleum exploration and exploitation were a priority in view of the trade embargo imposed by the Soviet Union in response to Lithuania's declaration of independence. Lithuania had been the very first of the Soviet States to restore its independence. Accordingly, the State Geological Survey ("SGS") participated in discussions and reported to the State on progress. Various drafts of the JVA were prepared by Svenska between 1991 and 1993. Some early versions of the arbitration agreements mentioned the State and it was proposed that the State should agree to an ICSID arbitration clause. As I shall describe below in greater detail, the final version of the JVA did not include such a provision.

11. It was eventually decided to create a joint venture company as the vehicle for cooperation between Svenska and Geonafta. This was reflected in the text of the draft JVA dated March 1992. This draft also introduces the concept of the "Founders" of the joint venture company. The term, "Founder," has a legal meaning under Lithuanian law corresponding to that of an incorporating shareholder. All drafts of the JVA subsequent to March 1992 define Svenska and Geonafta as the "*Founders.*" They also provide that Svenska and Geonafta are to be the incorporating shareholders of the joint venture company, each holding 50% of the shares.

12. References to both the State and ICSID arbitration were removed from subsequent drafts of the arbitration clause which on its face refers only to arbitration between the two "Founders" of the JVA, Svenska and Geonafta, pursuant to ICC Rules.

13. By Government Resolution dated 27 March 1993, the State approved the terms of the JVA and the issuing of licences in relation to the Gencai oilfield. This resolution also specifically authorised Dr Gediminas Motuza, Head of SGS, to approve the JVA. On 28 April 1993, Svenska and Geonafta signed the JVA. The JVA provided for signature by each founder. The State also signed the last page of the JVA, but separately from the signatures of the Founders and under the following rubric in the English version:

> "The Government of the Republic of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement."

The Lithuanian text of the expression accompanying Lithuania's signature is slightly different. It states:

> "the Government of the Republic of Lithuania approves this agreement and undertakes the obligations as a signatory thereto."

As the JVA was executed in both Lithuanian and English, Article 37 of the JVA accords equal weight to both versions of the text. However I do not attach any significance to the slightly different wording for the purpose of the issues which I have to determine.

14. Pursuant to the terms of the JVA, a joint venture company was established by Svenska and Geonafta, called UAB Genciu Nafta ("the JV Company"). In the preamble to the JVA, Svenska and Geonafta were defined as "Founders." Svenska and Geonafta, as "Founders," each held 50% of the share capital of the JV Company. The State was not defined as a "Founder" under the JVA and did not hold any shares in the JV Company.

15. Article 41 of the JVA provided that the parties would develop either or both of the Kretinga and Nausodis oilfields by a separate agreement. Disputes arose principally in respect of the development and exploration of the Kretinga and Nausodis oilfields. Article 41 of the JVA provided:

> "Fields within the Agreement Area

> As soon as practical after the Effective Date, Svenska shall carry out a technical economic feasibility study in respect of the Kretinga and Nausodis fields within the Agreement Area and the Parties shall, where the study, in the opinion of the Parties proves this to be economically feasible, develop either or both fields by a separate agreement"

16. Svenska and Geonafta failed to agree terms for the development of the Kretinga and Nausodis oilfields as envisaged at Article 41 of the JVA. Geonafta, which held the licence to develop these oilfields prior to the JVA, continued to develop them independently of Svenska. Svenska claimed that the JVA entitled Svenska to exclusive rights to develop the Kretinga and Nausodis oilfields. As a result, Svenska filed a Request for Arbitration with the ICC Secretariat on 12 June 2000. On 19 and 29 August 2000, the State wrote to Svenska and the ICC Secretariat stating an objection to jurisdiction on the alleged grounds that the State had not consented to arbitrate differences with Svenska. A three-member tribunal was appointed comprising Messrs Mogens Skipper-Pedersen, Edward Greeno and Gytis Kaminskas. Terms of Reference were agreed with the arbitral tribunal on 8 August 2001. These were signed with an express reservation in respect of jurisdiction on the State's part, in the following terms:

> "[The State] declares that its signature of these Terms of Reference does not constitute an acceptance of the jurisdiction of the ICC Court of Arbitration and/or the Arbitral Tribunal.".

17. On 16 and 17 October 2001, a hearing took place in Copenhagen on the issue of the arbitrators' jurisdiction over the State. As I have already stated, the Tribunal issued the Interim Award on jurisdiction on 21 December 2001 in which it held that it had jurisdiction over the State. The Tribunal held that the State was a party to the JVA. It relied, in part, on the words of the JVA which express the State's consent to be contractually bound by the JVA. At page 63 of the Interim Award the Arbitrators held:

> "The Arbitral Tribunal holds that by signing the [JVA] and by acknowledging itself to be legally and contractually bound "as if the Government were a signatory to the agreement," GOVERNMENT became a party to the Joint Venture Agreement with SVENSKA and [Geonafta] … By this signature, the agreement became effective in accordance with article 11.1 of the [JVA]. This interpretation is supported by Government Resolution No 205 of 27 March 1993, in which the Government authorises the Minster of Energy and Mr Motuza to approve the founding agreement of the Genciu Nafta enterprise "on behalf of the Government." The Arbitral Tribunal cannot accept Government's allegation that this signature is merely an approval by GOVERNMENT in its administrative capacity. As pointed out by Svenska, the [JVA] vests a number of rights and obligations on the part of GOVERNMENT, and it needs a strong support, which is not available in this case, to consider that GOVERNMENT's signature is of no significance to such rights and obligations…"

In the absence of any indication in the wording of the JVA or any other indication of intentions in relation to the arbitration agreement, the Tribunal also relied on a presumption of Lithuania's intent. At pages 63 and 65 the arbitrators said:

> "The Arbitral Tribunal also holds that by signing the [JVA], GOVERNMENT is bound by the arbitration clause in article 9. Although GOVERNMENT signed the [JVA] in a different capacity than a "Founder," we have found that GOVERNMENT is as a party to the [JVA] signed "as if it was a "signatory" and therefore became bound by the provisions of the [JVA], as if GOVERNMENT had been a "Founder." GOVERNMENT is therefore also bound by the arbitration provision in article 9 unless there is support for an allegation that GOVERNMENT intended a different dispute resolution mechanism. […] Such support does not exist." …
>
> "The [JVA] was an agreement between three parties, each having its rights and obligations …In such a contract there is an implicit assumption that the parties have agreed to the same dispute resolution mechanism."

18. The State complains that, in coming to their conclusion, the arbitrators did not take into account international law and practice, nor did they consider accepted practice in the international petroleum industry except to the extent that arbitration was an accepted form of dispute resolution in that industry. The State also complains that the arbitrators did not take into account the separability of the arbitration agreement, but instead assumed that the use of the word "Founder" was an imprecision owing to late changes to the draft JVA; that the arbitrators did not base their decision on positive evidence that Lithuania had, in fact, consented to arbitrate disputes with Svenska; and that, instead, the arbitrators' reasoning appears to have been based on three grounds:

    i) the absence of any evidence that Lithuania's signature did *not* amount to an implied agreement to arbitrate disputes with Svenska;

    ii) the absence of any evidence that Lithuania intended a different dispute resolution mechanism to apply from that provided for under Article 9 of the JVA; and

    iii) an assumption that Lithuania agreed to the arbitration agreement at Article 9 of the JVA.

19. As I have already stated, following a two-week hearing on the merits, in which the State fully participated, the Tribunal issued the Final Award on 30 October 2003. Both the State and Geonafta were ordered to pay damages of USD $12,579,000 plus interest and costs on a joint and several basis. Although the State's written submissions to the Tribunal formally maintained "all arguments and allegations put forward in the course of the arbitral proceedings previously", and raised arguments about the arbitrability of certain issues, there was no further point taken in argument about the jurisdiction of the Tribunal, based on the State's allegation that it was not party to Article 9 of the JVA.

20. As I have likewise already said, on 2 April 2004 Svenska issued *ex parte* proceedings, seeking leave to enforce the Final Award and for service out of the jurisdiction. In addition to the subsequent procedural history which I have already set out in paragraph 7 above, I should mention that on 29 September 2004, Svenska applied to have the State's Part 11 Application struck out or alternatively dismissed, on the grounds that pursuant to CPR Part 24 the State had no real prospect of successfully defending the claim. In short, Svenska contended that:

    i) the State having participated in a hearing before the Tribunal on jurisdiction;

    ii) the Tribunal having found in the Interim Award that Lithuania was bound by the arbitration clause set out in Article 9 of the JVA;

    iii) the State having not appealed the Interim Award, but rather having participated in the hearing before the Tribunal on the merits; and

    iv) the State having not appealed the Final Award, but rather having chosen to defend the matter on enforcement;

    the State was now estopped from arguing that it was not a party to the arbitration agreement.

21. Svenska's application was dismissed by Mr Nigel Teare QC, sitting as a Deputy High Court judge of this Court, on 10 January 2005. The judgment is reported as *Svenska Petroleum Exploration AB v. Republic of Lithuania* [2005] 1 Lloyd's Rep. 515. In summary, Mr Teare QC held that, under s.101(1), Arbitration Act 1996, the Court must recognize the arbitrators' Interim Award unless the State brings itself within one of the grounds for inviting the court to decline recognition in s.103(2). If the State brought itself within one of the grounds within s.103(2) for refusing recognition of the Interim Award, the Court would have a discretion to refuse recognition. One of the grounds giving rise to a discretion was that the State was not a party to the arbitration agreement pursuant to which the Arbitrators purported to act. He then went on to hold that, even if it were to be accepted that the State could establish that it was not a party to the arbitration agreement, the Court would, for the purposes of the application, nevertheless exercise its discretion to recognize the arbitrators' Interim Award. He said at paragraph 27:

> "27. In my judgment the present case is an appropriate case in which to exercise the discretion conferred upon the Court by section 103(2) of the Act to recognise an arbitration award by permitting the Claimants to rely upon it in defence of the Government's claim to set aside the proceedings notwithstanding that, leaving aside the effect of that award, the Government could, it is assumed, prove that it was not a party to the arbitration agreement. Firstly, having objected to the tribunal's jurisdiction on the grounds that it was not party to the arbitration agreement the Government participated in a two day hearing on that very issue in Denmark in October 2001 when both factual and expert evidence on the law of Lithuania was adduced.

> Secondly, the tribunal decided that issue against the Government in an interim award published in December 2001 of some 69 pages which set out extensively the facts and evidence relied upon, the expert evidence of Lithuanian law, the arguments of the parties and the reasoning and conclusions of the tribunal. Thirdly, having lost on that issue, the Government did not take the opportunity to seek a review of the interim award in the Danish Courts. No reason was suggested as to why this step could not have been taken. Fourthly, the Government participated in a 13 day hearing on the merits which resulted in a final award against the Government published in October 2003. Fifthly, having decided not to challenge the final award in the Danish Court in February 2004 and to notify the Claimants of the Government's position, the Government then, after the Claimants took steps to enforce the final award in April 2004, claimed immunity from the jurisdiction of this Court, a contention which could only made good if the State was not party to the arbitration agreement, contrary to the decision of the arbitral tribunal in its interim award which the Government had not challenged."

22. Accordingly he decided to recognise the Interim Award. However, having recognized the Interim Award, he accepted that he then had to decide, for the purposes of the application before him, whether the Interim Award gave rise to an issue estoppel on the question whether the State was a party to the arbitration agreement. He held that it was clear that the arbitrators' decision that the State was a party to the arbitration agreement in Article 9 of the JVA was a decision which followed a hearing on the merits. However, in order to establish the issue estoppel, it was also necessary for the Claimant to prove that the decision of the Tribunal was "final and conclusive". This, the Deputy Judge held, Svenska could not do. He decided that, because it had not been established for the purposes of the application before him that the right to challenge the Interim Award under Danish law had been lost once and for all, the Interim Award was not, in the relevant sense, "final and conclusive". The Deputy Judge therefore held that he could not, on a Part 24 application, say that the State was estopped from arguing that it was not a party to the arbitration clause in Article 9. In paragraph 36 and 37 of his judgment he stated:

> "36. … Having considered the evidence on Danish law it seems to me that it cannot be said that the decision of the arbitral tribunal in Denmark finally and conclusively determined that the Government was party to the arbitration agreement…..
>
> 37. There was discussion in the evidence of Danish law as to the circumstances in which, by reason of delay or waiver, the right to review the interim award might be

> lost but this did not feature in the Claimants' argument. It was not said, for example, that although the interim award did not, as at the date of the award, finally and conclusively determine the question whether the Government was party to the arbitration agreement, yet it now did because of delay in exercising, or waiver, of the right of review."

Does the State fall within the exception contained in section 2 of the Act?

23. The first issue for my determination is whether the State falls within the exception contained in section 2 of the Act. Section 2 provides (so far as is material) as follows:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that is governed by the law of the United Kingdom is not to be regarded as a submission.
>
> (3) A State is deemed to have submitted -
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of –
>
> (a) claiming immunity; or
>
> (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it."

24. One of the terms of the JVA was Article 35, which provided as follows:

> "GOVERNING LAW AND SOVEREIGN IMMUNITY
>
> 35.1 GOVERNMENT and EPG hereby irrevocably waives [sic] all rights to sovereign immunity.
>
> 35.2 This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in

> the petroleum industry if they do not contradict the laws of the Republic of Lithuania."

25. However, the State contends that, on its true construction (as allegedly demonstrated by evidence as to the purpose of Article 35, given by a Professor Katuoka and corroborated by a Mr Zukovskis), Article 35 amounted to a waiver of Sovereign Immunity in respect of Geonafta *only* (Geonafta being at the time of entry into the JVA a state enterprise), and that all that the State was doing under the terms of the clause was to give its consent to Geonafta's own waiver.

26. The JVA contains no express submission to the jurisdiction of the English Court. Article 9 of the JVA does contain an arbitration agreement referring disputes between the two "*Founders*" (which is the collective definition set out in the preamble to the JVA of Geonafta and Svenska) to *inter alia* ICC arbitration and is in the following terms:

> "9.1 Disputes between the Founders concerning the performance or interpretation of this Agreement are settled through negotiations between the Founders.
>
> 9.2 In the event that disputes cannot be settled within 90 days of the receipt of the written notice by either Founder about the existence of such disagreement, the disputable matter shall be submitted upon agreement of the Founders for consideration to:
>
> (a) the Court of the Republic of Lithuania; or
>
> (b) independent arbitration in Denmark, Copenhagen, to be conducted in accordance with International Chamber of Commerce Rules of Arbitration in the English language. In case the Founders do not reach agreement on the institution where the dispute is to be settled, the disputable matter shall be submitted for consideration to an independent arbitration provided in sub-paragraph (b) of this paragraph."

27. The State contends – and it is a critical plank of its case - that, because it is not a "*Founder*", it is not a party to the agreement to arbitrate. This is an issue to which I will have to turn later in this judgment in the context of the submissions on section 9 of the Act. It submits, that even if, contrary to its primary contention, the State itself agreed to waive its own, as opposed to Geonafta's, sovereign immunity under Article 35, that waiver under Article 35 did not *per se* amount to a submission to the English Court's jurisdiction for the purposes of section 2; accordingly, Article 35 cannot assist Svenska unless the State is also found to have agreed that it would be a party to arbitration proceedings under Article 9 of the JVA.

28. Therefore the questions which, as I see it, I have to decide under this head are as follows:

i) on the true construction of Article 35, did the State waive its own sovereign immunity thereunder, or did Article 35 amount to a waiver of Sovereign Immunity in respect of Geonafta *only*;

ii) if the former, did the waiver of the State's immunity in clause 35.1 amount to a submission to the jurisdiction of the English court, irrespective of whether the State was a party to the arbitration agreement contained in Article 9 of the JVA.

If the answer to sub-issue ii) is that the waiver of the State's immunity contained in clause 35.1 amounts to a submission to the jurisdiction of the English court *only* if the State was in fact a party to the arbitration agreement under Article 9 of the JVA, because only in that event would the Court have jurisdiction to enforce the Award, then there is no separate or free-standing issue under section 2 of the Act, since in reality the issue falls to be decided under section 9.

29. Subject to the points referred to below, it was common ground that the JVA had to be construed in accordance with its governing law, namely Lithuanian law, and that the relevant principles of construction were contained in Articles 6.193-5 of the Lithuanian Civil Code as elaborated in a commentary by a Professor Mikelenas ("the Commentary"). However, the parties were not in agreement as to the relevance and importance of the principal text of the contract or whether Article 6.193 represents a complete statement. In addition, the State relied on "international law and practice", which Mr Shackleton identified as "the interpretations of similar situations by other arbitral tribunals and by the courts of the United States, France and Switzerland where these issues have arisen". It was also common ground that, although the expert as to foreign law has to provide the English Court with the relevant foreign principles and rules of construction, in relation to a contract it was for the English Court, in the light of those principles and rules to determine the meaning of the document; see Dicey and Morris, *The Conflict of Laws* (2000) (13th Edition) at paras. 19-019 and 32-188-9; the Fourth Supplement thereto (2004) at p.26 and authorities there cited; and *Rouyer Guillet & Cie v Rouyer Guillet & Co Ltd.* [1949] 1 All ER 244 (CA). Accordingly, both parties correctly accepted that the views, given by their respective experts as to the true interpretation of the contract, were not admissible evidence. Likewise, the subjective views of Mr Zukovskis as to the interpretation of Article 35 were not legitimate aids to my determination.

30. Articles 6.193-5 of the Lithuanian Civil Code and the relevant commentary (excluding footnotes) are as follows:

"**Article 6.193: Rules on Interpretation of Contracts**

1. A contract must be interpreted in accordance with good faith. In interpreting a contract, it is necessary primarily to determine the parties' good intentions and not rely only on a literal interpretation of the text of the contract. In the event the real intentions of the parties cannot be established, the contract must be interpreted in accordance with the meaning that reasonable persons analogous to the parties would have attributed to it in the same circumstances.

2. All terms and conditions of the contract must be interpreted taking into account their interrelation, the essence of the contract as well as its purpose and the circumstances of its conclusion. When interpreting a contract, it is necessary to have due regard to usual terms and conditions, although they are not provided for in the contract.

3. In the event of doubt concerning terms which may have several meanings, the meaning, which is most suitable according to the nature, essence and subject-matter of the contract, shall be attributed to these terms.

4. In the event of doubt concerning contractual conditions, these shall be interpreted against the contracting party that proposed such conditions, and in favour of the party that accepted them. In all cases, the conditions of a contract must be interpreted in favour of consumers or a party who concludes a contract by way of adherence.

5. When interpreting the contract, pre-contractual negotiations, an established course of conduct between the parties, post-contractual conduct and existing usages shall be taken into consideration as well.

Article 6.194: Language Discrepancies

Where a contract is drawn up in two or more languages and all texts of the contract have equal legal force, in the case of discrepancy between the versions, preference shall be given to the text which was drawn up first.

Article 6.195: Filling in Gaps of a Contract

Where parties leave certain matters unagreed, which are necessary for the performance of the contract, the court, at the request of a party, may fill in such gaps in the contract by establishing appropriate conditions, taking into account non-mandatory legal norms, the intentions of the parties, the purpose and essence of the contract, standards of good faith, reasonableness and justice.

…

The Commentary:

1. The Article commented on repeats Articles 4.1 – 4.6 of the UNIDROIT Principles. The contract has to be interpreted when a dispute arises between the parties

concerning its validity, type, nature, amendment, termination, true meaning of one or another condition, etc.

In accordance with Article 45 of the Law on Approval, Entry into Force, and Implementation of the Civil Code of the Republic of Lithuania, Article 6.193-6.195 of the Civil Code are applied to the interpretation of contracts irrespective of the time of their conclusion. This rule is set out because the rules on the interpretation of contracts provided in the Article commented on are not new – they were known and recognised by both legal doctrine and judicial practice before the entry into force of the Civil Code.

Paragraph 1 of the Article establishes two significant principles of interpretation of contracts. First, contracts must be interpreted in good faith. This principles requires that consideration be given to the intentions of both parties, analysis of the contract as a whole, and not certain part[s] of it, and in case of doubt as to the validity of a contract, to give priority to an interpretation that confirms the validity of the contract, etc. In addition to good faith, the principles of justice and reasonableness must be applied when interpreting contracts. For instance, both good faith and justice require that a contract be interpreted in favour of a party which is economically weaker, e.g. for the benefit of the consumer or an employee or a party which concluded the contract by way of adherence.

Second, the Article commented on embodies the principle of subjective interpretation of contracts which requires the determination of the true intentions of the parties and not only the written text of the contract. This principle means that in case of any discrepancy between the textual meaning of provisions of the contract and the true intentions of the parties, priority must be given to the parties' true intentions which they had in mind when concluding the contract. However, this principle should not be overestimated. In case the parties' true intentions vary, attention should be focused on the textual analysis of the contract, since it might be helpful in determining which party's intentions correspond to the textual meaning of the contract. Therefore, the Article commented on also establishes that when the parties' true intentions cannot be determined, the contract must be interpreted in the way a reasonable person, being a

party under identical circumstances, e.g. having the same profession, experience or qualification, would understand its text.

2. Paragraph 2 of the Article being commented on sets out several other principles of contractual interpretation. First, this Article establishes the principle of systemic interpretation of the contract which requires any contractual condition to be interpreted with regard to the entire context of the contract. Furthermore, no part of the contract, annex or any other constituent part should be left without consideration or evaluation (e.g. it is necessary to have regard to the preamble of the contract, its annexes, subsequent amendments, etc). In this case, the presumption that each word or phrase has a certain meaning and significance is valid, as usually parties do not use them without a reason. Therefore, it is necessary to determine the meaning of each word or phrase, and not on the contrary, to state that one or another word or phrase is meaningless or insignificant. Also, it is necessary to bear in mind that terms and conditions of a contract are of two types: explicitly expressed and implicit (Article 6.196 of the Civil Code). Therefore, when interpreting a contract, due regard must be paid not only to explicitly expressed terms and conditions, but also to implicit terms and conditions, for instance, those which are usually found in contracts of a similar nature. When interpreting contracts, it is necessary to take into account traditions of the trade, mutual relations between the parties, the circumstances of the conclusion of the contract, etc.

   Another principle of contractual interpretation is the determination of its objectives. The purposes of a contract may help to reveal the parties' true intentions, the meaning of one or another condition, etc. The purposes of the contract may help to determine the type, nature of the contract and the extent of mutual rights and duties of the parties.

3. Paragraph 3 of the Article commented on sets out the rule of interpretation when polysemic words and definitions are encountered. Frequently, the same words may have several meanings. Sometimes parties indicate in the contract interpretations of definitions used in the contract. Definitions must be interpreted in the way they were defined in the contract by the parties. Words or definitions the meaning of which is not set out in the contract must be assigned the

meaning which is most acceptable in terms of the type, nature, essence, subject-matter, parties of the contract and other important circumstances.

4. Paragraph 4 of the Article being commented on embodies the so-called contra preferentem rule. This means that terms and conditions that are unclear and ambiguous in the contract are to be interpreted against the benefit of the party which proposed or drafted them. For instance, unclear and ambiguous terms and conditions of a contract are to be interpreted against the benefit of the party which drafted them and in favour of the party who concluded the contract by way of adherence. As most consumer contracts are contracts of adherence, the Article being commented on sets a general rule that in case of doubt, it is necessary to interpret contracts for the benefits of users and the party which has concluded the contract by way of adherence, i.e., the party who is economically weaker.

5. Paragraph 5 of the Article being commented on sets out the general rule that not only the text of the contract, but also the actual circumstances surrounding the conclusion and fulfilment of the contract as well as other action of the parties are important for the interpretation of the contract. Therefore, when interpreting a contract, it is necessary to take into account the parties' pre-contractual negotiations, signed documents of negotiations, verbal and written statements by the parties, exchanges of correspondence, established relations between the parties, traditions of the trade and other customs, actual acts of the parties when concluding, fulfilling or making any amendments, etc to the contract. Actual acts of the parties must also be interpreted in order to determine the true intentions of the parties (paragraph 1 of the Article being commented on).

   Frequently, after lengthy negotiations parties include in the contract a special condition indicating that this is to be the sole agreement and the whole previous correspondence of the parties or the signed documents become invalid (the reservation of integration or consolidation). However, such a contractual condition does not have any impact on the interpretation of the contract – the whole pre-contractual documentation between the parties may be used for the interpretation of the contract and for the determination of the common intentions of the parties."

31. In my judgment, and applying the rules and principles set out in Article 6, as amplified by the Commentary, on the true interpretation of Article 35 of the JVA, the State clearly waived its own sovereign immunity thereunder, and it is impossible sensibly to construe Article 35 as amounting to a waiver of Sovereign Immunity in respect of Geonafta *only*. Every draft of the JVA, except the first draft, and the final version of the JVA, contained a clause by which both Geonafta and the State waived state immunity and submitted to arbitration under the auspices of ICSID (International Centre for the Settlement of Investment Disputes). At no point did either party ever suggest that the waiver of immunity was restricted to Geonafta and that was all to which the State was agreeing. Accordingly on this issue I construe the JVA against the State's contentions.

32. I now turn to consider the question whether the waiver of the State's immunity in clause 35.1 amounts to a submission to the jurisdiction of the English court, for the purposes of section 2 of the Act, irrespective of whether the State was a party to the arbitration agreement contained in Article 9 of the JVA. For the purposes of deciding this issue as a free standing one, I assume that the State did not agree to arbitrate issues between itself and Svenska under Article 9.

33. The issue whether such a waiver of immunity amounts to a submission to the jurisdiction of the court is discussed by *Dickinson, et al, State Immunity, Selected Materials and* The *Commentary* at pages pp.349-50:

> "Some difficulty may arise ... in the event that an agreement contains, not a provision submitting disputes to the English courts (or other courts in the United Kingdom), but a provision merely setting out the State's agreement to waive any immunity that it may possess in any jurisdiction in which the counterparty should choose to bring proceedings. Such an agreement does not sit comfortably within the framework of s.2. The English courts may have jurisdiction in respect of the subject-matter of proceedings brought against a State in these circumstances, but that would not be because the State had submitted to the jurisdiction in the normal sense. To fall within s2(1), the waiver of immunity provision would have to be characterized as a submission by the State to the jurisdiction of the English courts to the extent that such courts may have jurisdiction under their own rules in the absence of consent. It is submitted, that such characterization, whilst not free from artifice, would accord with the spirit of the section"

34. Mr. Bools submitted that Article 35.1 of the JVA should be characterized in the way suggested: he contended that Svenska was understandably wary about entering into a commercial contract with the nascent Republic of Lithuania and only agreed to do so because the State agreed to contract on the same basis as a private party; he submitted that an agreement irrevocably to waive all rights to immunity only makes sense if interpreted as an agreement to be treated as a private party. He submitted that, by agreeing to be treated as a private party the State, as Dickinson suggests, agreed to submit to the Courts of foreign states to the extent that they would have jurisdiction over private parties (i.e. to the extent that they would have jurisdiction absent consent); and that, as is demonstrated by the English Court's jurisdiction over

Geonafta in the present case, the Court would have jurisdiction over the State under its ordinary jurisdictional rules for private parties. In support of his submission that Article 35.1 should be interpreted as an agreement by the State to be treated as if it were a private party, Mr Bools relied upon the judgment of Saville J., as he then was, in *A Company Ltd* v. *Republic of X* [1990] 2 Lloyd's Rep. 520. In that case clause 6 of the relevant agreement provided that

> "The Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)."

Saville J. held that

> "It seems to me that, read in the context of what was undoubtedly a commercial bargain between the parties, the intent and purpose of the clause is quite clear, namely, to put the State on the same footing as a private individual so that neither in respect of the State not its property would any question of sovereign immunity arise in connection with the State's obligations to the plaintiffs under the agreement. [at p. 523, col 1.]"

Mr. Bools submitted that, in the present case, the purpose of Article 35 is similarly clear.

35. I do not accept Mr. Bools' submissions. I cannot sensibly construe clause 35, which is purely a waiver of the State's immunity, as a written submission to the jurisdiction of the English Court within sections 2(1) and (2) of the Act. My reasons may be summarised as follows.

36. In my judgment, *A Company Ltd* (supra) is clearly distinguishable on its facts. In that case, as well as the express waiver of immunity "for itself and for its property" in clause 6 of the relevant agreement, there was an express choice of law clause (which on its own did not engage section 2 - see section 2(2)) and an express submission to the jurisdiction of the English Court and to arbitration in England. That was at clause 7, which was in the following terms:

> "7. Governing Law and Arbitration
>
> (a) This agreement shall be governed by… the laws of England…and the [State] hereby submit *(sic)* to the jurisdiction of the English courts.
>
> (b) Any dispute relating to….shall be resolved in London … under the auspices of, and accordance with the rules and regulation of the Coffee Trade Federation."

The State had expressly accepted that it had, by clauses 6 and 7 submitted to the jurisdiction of the English court in respect of claims under the agreement. The relevant issue in *A Company Ltd* was whether the State was entitled to invoke immunity from a *Mareva* injunction under subsections 13(2) and (3) of the Act.

Those subsections expressly provide that there should be no injunction or other relief against a State unless it gives written consent, and that a provision merely submitting to the jurisdiction of the courts does not amount to such consent for the purposes of the subsection. Thus the question in the case was whether the immunity given in clause 6 amounted to a written consent to injunction relief and other enforcement measures, not whether such a clause amounted to a submission to the jurisdiction, which is the issue here. Not surprisingly, Saville J concluded that, in the context of the commercial agreement which he had to consider (which contained, in another clause, not only an express submission to the jurisdiction of the English Court but also an agreement to arbitrate here), the waiver of immunity at clause 6, in particular by its reference to property, clearly amounted to a consent to enforcement measures, or, in other words, a waiver of State immunities in relation to enforcement.

37. In this case, on the other hand, the question is whether, on the stated hypothesis (i.e. no agreement on the part of the State to submit to arbitration under Article 9), the waiver of immunity amounts to a submission to the jurisdiction of the English Court. That seems to me to be a very different question. In the absence of any such submission in the JVA, it is, in my judgment, not only wholly artificial, but also wrong, to say that a waiver of immunity such as contained in clause 6 can be treated as a consensual submission to the jurisdiction of the English Court for the purposes of section 2 of the Act, simply on the basis that the State has under Article 35 agreed to waive all immunity points. Moreover, in the absence of an agreement on the part of the State under Article 9 to submit to arbitration (and, on this hypothesis, there was no such agreement), the characterisation of the waiver of immunity provision "as a submission by the State to the jurisdiction of the English courts *to the extent that such courts may have jurisdiction under their own rules in the absence of consent"* leads nowhere, as the English courts would not have jurisdiction to enforce an arbitration award against a non-party to the arbitration. Moreover, there is either a submission to the jurisdiction or there is not. There is an inherent difficulty in characterising a clause such as clause 35 as a submission to the jurisdiction of the English Court, for immunity purposes, but not for other purposes. But to interpret the waiver as a submission to the jurisdiction of the English Court for all purposes would clearly be impermissible, as it would be imposing obligations upon the State, to which it never agreed.

38. I accept Mr Shackleton's submission that the Act lays down a presumption of immunity, which applies subject to the exceptions set out in the Act. There is no authority to support a freestanding concept of waiver, outside the scope of the Act. If there were such authority, I was not referred to it. A State will enjoy immunity pursuant to Section 1 of the Act, unless one of the exceptions can be proven. Thus any waiver alleged must conform with the requirements of the sections of the Act which provide exceptions to immunity, for example an express submission to the English Courts or an express submission to arbitration. Accordingly I reject Svenska's submissions on section 2.

Section 3 of the Act - Is the State a party to a commercial transaction and do the present proceedings relate to that transaction?

39. The second issue which arises is whether the State falls within the exemption afforded by section 3 of the Act. Section 3 provides that:

> "(1) A State is not immune as respects proceedings relating to –
>
> (a) a commercial transaction entered into by the State….
>
> …
>
> (3) In this section 'commercial transaction' means –
>
> (a) any contract for the supply of goods or services
>
> …
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which State enters or in which it engages otherwise than in the exercise of sovereign authority."

Is the State a party to a commercial transaction?

40. The first question under this head is whether the JVA was a commercial transaction entered into by the State or whether it was a signatory to the JVA merely in an administrative capacity or in the exercise of its sovereign authority.

41. Mr Shackleton, on behalf of the State, submitted that, as a matter of fact, the JVA is not a commercial transaction as far as it concerns the State; that the State was never a commercial party to the JVA, nor indeed defined as a "party" to the JVA at all; that there was evidence from Dr Gediminas Motuza, (who was involved in the negotiations for the JVA in his capacity as Director of the Geological Survey, which supervised and regulated Geonafta) and Professor Katuoka (the expert in Lithuanian law on behalf of the State), that Lithuania's role in this project was not commercial but public, relating as it did to the regulation and licensing of the country's natural resources; and that the provisions relied on by Svenska as examples of commercial obligations of the State are not commercial matters, but areas generally relating to the public interest and the administrative and regulatory spheres; and that there was no evidence that the State was getting into the oil business itself.

42. Although the JVA is arguably somewhat of a hybrid agreement, on this point I prefer the submissions of Mr Bools, as to the correct characterisation of the JVA. I did not find the evidence of either Dr Motuza or Professor Katuoka of any assistance on this point. I conclude that the JVA is a commercial transaction as defined in subsections 3(3)(a) and (c). This can be seen from certain of the relevant terms of the JVA. I refer to the following by way of example, although there are others that support the conclusion. Although not in terms an option, Article 18 effectively provides the State with the right to purchase all of the oil produced under the agreement at market price. Article 18D defines the ratios of profit sharing between EPG and Svenska. Article 18E provides:

> "1. It is presumed that Government will purchase and take all oil produced hereunder at Market Price as defined in Article 19.2. If Government does not pay (30 days after invoice or on other mutually agreeable terms) for the crude oil take in hard currency, then each Party shall be allowed to take its shares hereunder in kind.
>
> 2. If Svenska and/or EPG shall elect to take its/their shares hereunder in kind, Government shall give whatever licence or permission may be required to allow export of oil from [Lithuania]."

In effect the JVA granted the State the right to buy all oil produced under the JVA at market price. Only if the State did not elect to do so, could Geonafta and Svenska export the oil produced for sale elsewhere.

43. Under Article 21, moreover, the State gave the joint venture the right to use certain assets and infrastructures, with the right to the State and Geonafta to remove and use assets purchased by Svenska or Geonafta, which had become the property of the joint venture, but had become surplus to its requirements. There was also a warranty given by the State to Svenska that the Joint Venture would have the right to use the areas required for operations, as though it were the legal owner, and a release given by the State to Svenska in respect of any liability for environmental damage together with a contractual indemnity in favour of Svenska in the event that it did incur any liability in respect of such damage. Importantly, under Article 33 the State was given wide contractual rights of cancellation of the entire JVA as against Svenska, with a corresponding obligation upon the State to pay the fair market value of Svenska's share of the field facilities left behind in Lithuania. Furthermore, under Article 40.1 the State agreed that Svenska would be granted an option to develop additional oil fields within Lithuania in a specified area. Svenska was to propose a work programme; if the State deemed it unsatisfactory and solicited alternative proposals from others, Svenska was given the opportunity to match those proposals. In the event that it did so, the parties agreed that Geonafta and Svenska would form a further joint venture to "carry out the exploration work proposed and develop any discoveries which are deemed commercial". In substance this clause gave Svenska a valuable commercial option over these additional fields. Further Article 40.2 provided Svenska with the entitlement to "opportunities to participate in bidding for exploration development and production of petroleum" in Lithuania outside the specified areas. Finally, Article 41 provided for the parties to develop the Kretinga and Nausodis fields:

> "As soon as practical after the Effective Date, Svenska shall carry out a technical-economic feasibility study in respect of the Kretinga and Nausodis fields within the Agreement Area and the Parties shall, where the study, in the opinion of the Parties proves this to be economically feasible, develop either or both fields by separate agreement."

44. As the Tribunal stated at page 66 of the Interim Award, the dispute between Svenska and the State was one which related to an alleged breach by the State of its express or implied contractual obligations under, in particular Articles 40 and 41 of the JVA.

Moreover, as the Tribunal stated at page 68 of that Award, which I have quoted above, the JVA "is a commercial contract regarding the exploration and exploitation of oil fields within Lithuania". Whilst I am not in any way bound by the views of the Tribunal, I share its views as to the correct characterisation of the contract.

45. As to the question whether the State was a party to a commercial transaction, not only did the State expressly assume a raft of obligations under the final JVA, but it also signed it and agreed that it was "legally and contractually" bound by it. In addition to the articles to which I have already referred above, the following articles of the JVA make it clear that the State was a party to, and assumed obligations under, the JVA:

i) Article 11 provided that the Agreement was only effective when all parties, including the State, signed it. Article 11.2 provided that the Agreement could only be changed with the State's consent.

ii) Article 15.1 granted the joint venture company the right to the oil extracted under the Agreement, a right which only the State could grant.

iii) Under Article 24 the State granted an exemption from customs duties.

iv) Article 26 granted the State a right of access to records and reports and in return the State gave an undertaking of confidentiality.

v) Similarly, Article 29 granted the State a right of access to the Agreement Area and in return the State gave the joint venture an indemnity in respect of loss or damage.

vi) Article 31 gave the State a right of requisition and in Article 31.4 the State gave an indemnity in return.

vii) Article 34 defined the State's position in the event of a *force majeure* event.

46. Accordingly, whatever may be the position in relation to the agreement to arbitrate, (which is an issue that I consider below), it is clear in my judgment that, by signing its acknowledgement that it was "legally and contractually bound" and by accepting obligations and rights under various of the clauses of the JVA, the State was clearly a party thereto. In my judgment, therefore, the JVA was a "commercial transaction, entered into by the State".

Do the present proceedings relate to that transaction?

47. The second question, which arises under this head, is whether, for the purposes of section 3 of the Act, Svenska's enforcement proceedings under section 101 of the 1996 Act are proceedings "which relate to a commercial transaction".

48. For the State, Mr Shackleton submitted that, even if the JVA was a commercial transaction as far as the State is concerned, these proceedings do not relate to the underlying commercial transactions of the JVA, but rather to the Final Award and its enforcement. He argued that, in this respect, a clear distinction is drawn between adjudicative and enforcement proceedings and that these proceedings clearly fall into the latter category. He submitted that the distinction is laid down in the provisions of the Act itself and relied upon the decision of Stanley Burnton J in *AIC Ltd* v. *The*

Federal Government of Nigeria [2003] EWHC 1357, where it was held that proceedings for the registration of a foreign judgment under the Administration of Justice Act, 1920 were not proceedings relating to a commercial transaction. In that case, Nigeria asserted immunity. The judgment creditor, which was owed unpaid commission on sales, argued that the underlying transaction was commercial and invoked the Section 3 exception to State immunity. The same argument as that now put forward by Svenska was rejected by Stanley Burnton J, who stated at paragraph 24:

> "(b) **Do the proceedings relate to a commercial transaction entered into by a State?**
>
> 24. In my judgment, the proceedings resulting from an application to register a judgment under the 1920 Act relate not to the transaction or transactions underlying the original judgment, but to that judgment. The issues in such proceedings are concerned essentially with the question whether the original judgment was regular or not: see section 9(2)(a) to (f). The correctness of the original judgment on questions of law or fact is irrelevant. Section 9(2)(d), the fraud exception, is exceptional: in effect, a judgment obtained by fraud is treated as irregular, on the basis that "fraud unravels all". The registering court is entitled to examine the nature of the cause of action underlying the original judgment only under section 9(2)(f), which is a narrow and seldom-applied exception concerned with illegality and the like.
>
> 25. This conclusion is supported by reference to section 9 of the State Immunity Act, which applies where a state has entered into a written arbitration agreement, and excludes immunity "as respects proceedings in the courts of the United Kingdom which relate to the arbitration". Most, if not all, arbitration agreements entered into by a state relate to commercial transactions entered into by that state. If, for the purposes of the Act, proceedings relating to the arbitration also relate to the underlying commercial transaction, it is difficult to see why section 9 was required.
>
> 26. Furthermore, if Parliament had intended the State Immunity Act to include an exception from immunity relating to the registration of foreign judgments, it would have been illogical to limit it to commercial transactions entered into by the state (which is the consequence of AIC's contentions), with no provision for the registration foreign judgments where the exception to immunity before the original court was

the equivalent of one of the other exceptions to immunity in that Act.

27. In *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, Lord Millett, at 1587F to H, opined that the words 'proceedings relating to' in section 3(1)(a) should be given a narrow construction. This is consistent with my above conclusion.

28. It follows that, even if the underlying transaction between AIC and the Defendants were commercial, section 3(1)(a) of the State Immunity Act is inapplicable. There is in this case no other relevant exception to the immunity of a state from the jurisdiction of this court. It follows that the Nigerian judgment should not have been registered under the 1920 Act.

29. This conclusion means it is unnecessary to consider whether any issue estoppel arising from the foreign judgment applies to the question whether the state defendant entered into a commercial transaction. Both parties in the present case assumed that this court must determine that question itself. My provisional view is that this is correct. However, in a case in which the claimant has obtained judgment from a foreign court on an alleged contract with the state defendant, but the defendant denies that it entered into the contract, this implies that this court might arrive at a conclusion inconsistent with the judgment of the foreign court on the merits. That would be an anomalous situation. It is an added reason for preferring the narrow interpretation of section 3(1)(a) of the State Immunity Act.

30. The conclusion that the Defendants are immune from the proceedings for the registration of the judgment in this country is unsurprising. Leaving aside Admiralty proceedings and the like, the underlying principle of the State Immunity Act is that a state is not immune from the jurisdiction of the courts of the United Kingdom if it enters into commercial transactions or undertakes certain activities having some connection with this jurisdiction. Purely domestic activities of a foreign state are not the subject of any exception to immunity. Sections 3(1)(b), 4, 5, 6, 7, 8 and 11 all contain territorial qualifications to the exceptions to immunity to which they relate. Section 3(1)(a) does not include any such qualification, but even there the claimant wishing to bring proceedings must establish a basis for jurisdiction under CPR Part 6.20, normally

> under paragraphs (5) or (6), relating to contractual claims. Paragraph (5) requires that the contract be one which was made within the jurisdiction, or made by or through an agent trading or residing within the jurisdiction, or (in the case of a foreign state defendant) be one which the state has agreed should be governed by English Law or subject to the English courts having jurisdiction. Paragraph (6) is limited to breaches of contract committed within the jurisdiction. The Nigerian judgment in this case relates to a purely domestic matter, and I do not think that it was ever intended that the State Immunity Act should exclude immunity in such cases."

49. Mr Bools, on the other hand, submits that I should not follow the decision of Stanley Burnton J in *AIC Ltd v. The Federal Government of Nigeria*, because the decision is not binding upon me and, it is said, the judge's reasoning was unsatisfactory. In support of this submission, Mr Bools argued as follows:

i) The question of the meaning of the words "relating to" is one of statutory construction aimed at ascertaining the intention of Parliament. The words "proceedings relating to" as a matter of ordinary language are wide enough to cover the present situation: the present proceedings "relate to" the JVA. Notably, the words Parliament chose to use were "relate to" and not, for example, "arising directly out of". Some looser connection between the transaction and the proceedings must therefore have been intended.

ii) If that is right, the question becomes whether there is any reason to believe that Parliament intended to depart from the ordinary meaning of the words it used. There is none.

iii) The underlying principle behind section 3 is clear enough: states should have immunity in relation to Sovereign activities, but if a state descends into the commercial arena, it should be dealt with as if it were a private party. It would be illogical to limit that treatment to adjudication to the exclusion of enforcement proceedings.

iv) Treating states in this way would not result in the courts interfering in domestic transactions of other states unconnected with the United Kingdom, because the court's ordinary jurisdictional rules will still have to be satisfied.

v) The suggested reading of section 3 is not incompatible with section 9 expressly dealing with arbitral proceedings: the fact that a state might lose immunity under two provisions of the Act is not surprising. Therefore it is no answer to say that most commercial transactions contain arbitration clauses and would fall within Article 9 in any event. Some would not and would therefore only be covered by section 3.

vi) Finally, there is no force in the argument that it would be illogical to limit enforcement of judgments/awards to those arising out of commercial transactions while not applying it to other transactions covered by other

> sections of the Act: each section of the Act has to be considered according to its own terms: so, for example, section 4 deals with "proceedings relating to a contract of employment between the State and an individual…" It may well be that enforcement proceedings in relation to an employment award equally "relate to a contract of employment" in the same way that the present proceeding relate to a commercial transaction.

50. In my judgment, I should follow the decision of Stanley Burnton J in *AIC Ltd* v. *The Federal Government of Nigeria* largely for the reasons which he gives. Although the view expressed by Lord Millett in the House of Lords in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, at 1588, that:

> "In my opinion the words "proceedings relating to" a transaction refer to claims arising out of the transaction, usually contractual claims, and not tortious claims arising independently of the transaction but in the course of its performance."

was strictly *obiter*, it shows that the phrase "*proceedings relating to the transaction"*, in the context of Section 3 of the 1978 Act, should indeed be given a narrow construction; that is to say, they should be limited to claims that arise out of the contract or transaction itself, and not extended to those arising out of some subsequent act, albeit that that act itself might loosely "relate to*"* the contract or transaction. A claim to enforce an arbitration award necessarily "arises out of" the award. As Mr Bools realistically accepted, there is a clear analogy between proceedings to register judgments and proceedings to enforce arbitration awards. The decision in *AIC Ltd v. The Federal Government of Nigeria* has been cited with some approval by Dame Hazel Fox QC in the introduction to her work *The Law of State Immunity*, Oxford University Press (2002) at page xxvii, although she questioned the judge's reasoning by reference to the utility of section 9 of the Act, stating *ibid.* that his reading "may neglect the prime purpose of section 9 which was to construe consent to arbitration as submission to the English Court's jurisdiction". Be that as it may, and even accepting, as Mr. Bools submits, that there well may be situations where there is no overlap between a section 3 case and a section 9 case, I conclude that these enforcement proceedings under section 101 of the 1996 Act do not relate to the underlying commercial transactions of the JVA, but rather to the arbitration and the Final Award.

51. Accordingly Svenska's case under section 3 of the Act fails.

Issue Estoppel

52. The issue that arises under this head is whether, given that the arbitrators decided in the Interim Award that the State was a party to the arbitration agreement in Article 9 of the JVA, the State is estopped from contending that it was not so bound. As I have already said, in his judgment of 11 January 2005 on Svenska' Part 24 application, Mr. Teare Q.C held that Svenska had established all the necessary elements of an issue estoppel, save for establishing that the Interim Award was, as a matter of Danish law, final and conclusive. He held that, for these purposes, an arbitrators' award on jurisdiction was only final and conclusive if it could no longer be challenged under the law of the courts with supervisory jurisdiction over the arbitration.

53. The State's threshold submission on this point is that Mr. Teare QC has already decided the issue of issue estoppel relating to the Interim Award adversely to Svenska on the Part 24 application and it is therefore not open to Svenska to re-argue the point before me. The State contends that the issue has been determined on the merits by Mr. Teare in a final and conclusive judgment, Svenska having sought permission to appeal the decision of Nigel Teare QC, (which was granted) but then electing not to appeal. In other words, Mr. Shackleton submitted that Svenska itself was estopped from raising the point again and that it would be an abuse to do so. Mr Shackleton further submitted that, even if it were technically open to Svenska to do so, the decision was a fully reasoned finding on the merits and Mr. Teare's judgment should be regarded as finally determinative of the matter.

54. I reject Mr. Shackleton's threshold submission. I accept Mr. Bools' submission that Mr. Teare's decision was only given in the context of the CPR Part 24 application. Although the Deputy Judge did not expressly say so, it is clear that all he was deciding was whether the State's claim to immunity should be struck out or dismissed pursuant to Part 24 as being hopeless on the grounds of issue estoppel; he was not determining the actual issue himself. This is clear from the terms of the order made by him on 11 January 2005 which merely dismissed the Claimant's Part 24 application. A course that would have been open to him, had he thought it appropriate to have done so, would have been to have given a final judgment on the issue in the State's favour; see CPR Part 24.2 and the notes at 24.6.2. He did not do so.

55. Moreover, it is clear from paragraph 37 of his judgment, that he was not, on the application before him, considering the argument presented before me by Mr. Bools (but not before the Deputy Judge) that, although the Interim Award did not, as at the date of the Interim Award, finally and conclusively determine the question whether the State was party to the arbitration agreement, yet it now did because of the State's delay in exercising, or waiver of, the right of review. Mr Bools told me that the reason why such an argument was not advanced at the stage of the Part 24 application was that it could not be said that the contrary argument – that the right of challenge had not been lost – was unarguable, such that it had no real (as opposed to fanciful) prospect of success for the purposes of the Part 24 application. In contrast, such an argument was run before me.

56. Accordingly, this court is not precluded from adjudicating on the issue, as it is well-established that an interim, or interlocutory, decision of this type does not give rise to *res judicata* or issue estoppel.

57. I therefore have to decide whether, on the evidence before me, as at the present date, and on the balance of probabilities, the Interim Award was final and conclusive, so as to give rise to an issue estoppel. In practice this means that I have to decide whether it is more likely than not that the First Defendant has, as a matter of Danish law, now lost the right to challenge the arbitrators' Interim Award, it being common ground that, if it could no longer be challenged under the law of the courts with supervisory jurisdiction over the arbitration (i.e. the Danish Courts), the decision would indeed be final and conclusive.

58. At the hearing before Mr Teare Q.C. both parties filed expert evidence of Danish arbitration law: these reports were also relied upon in evidence before me. Svenska

relied on the Report of Messrs. Joren Gronborg and Peter Fogh and the State relied on the Report of Messrs. Kim Hakonsson and Kim Frost. Both experts' reports agreed that not only could the Final and Interim Awards theoretically be the subject of challenge or appeal in the Danish courts on any of the grounds set out in sections 7(1) and 7(3) of the Danish Arbitration Act (Act no. 81 of 24 May 1982), but also that the same defences could be relied upon in any enforcement proceedings brought in the Danish Courts by the successful party under section 9 of the Danish Arbitration Act.

59. Both reports expressly addressed the question of whether the right to challenge the Interim Award had been lost and both agreed as to the applicable test as a matter of Danish law. Messrs. Gronborg and Fogh stated that if a party had left "an unreasonably long time to pass" before challenging an award, that fact (taking into account all of the circumstances of the case) will be interpreted as an expression that the party has, in reality, accepted the award. [Gronborg and Fogh Report, §2.8.] Messrs Hakonsson and Frost put the test in much the same way:

> "… if a party does not appeal an award within a reasonable time, the courts may find that the party due to unreasonable delay in asserting a right has forfeited his right to appeal the award" (Hakonsson and Frost Report, p.6).

60. Has the State's delay in challenging the Interim Award become "unreasonable" such as to preclude it from challenging it? On that Svenska's experts expressed the following views:

> "If an extended period of time has lapsed after the arbitration award was executed, the courts may, however, find that the lack of action has constituted an implied acceptance of the arbitration award and consequently a waiver of the right to challenge. …
>
> It is in our opinion not possible to state when an 'unreasonably long time' has passed. When exercising a 'test of reasonableness' Danish courts will take all circumstances into consideration and the circumstances will rarely be the same from case to case. It is, however, our opinion that a party, who are dissatisfied with an Arbitration Award, but does not commence legal proceedings or raises a challenge as a defence until almost three years later will be seen by the Danish courts as having waived the right to challenge. [Gronborg and Fogh Report, §2.8]"

Messrs Hakonsson and Frost, the State's experts, were more equivocal:

> "However, if a party does not appeal an award within a reasonable time, the courts may find that the party due to unreasonable delay in asserting a right has forfeited his right to appeal the award ….
>
> [W]hat constitutes 'reasonable time' is not clear. If the Lithuanian government decides to appeal the interim award

> before the Danish courts, the relevant court would review the matter and make a decision on the question. In our opinion the fact that more than three years has passed since the final award was announced implies a right that a Danish court would not consider an appeal at this point of time as an action within 'reasonable time'. It is, however, difficult to estimate that risk. [p.6]"

61. Mr Shackleton contended:

i) that the State's expert report equates the provisions relating to challenging awards and those relating to defending enforcement procedures;

ii) that both sides' experts' reports showed that the Final Award could be subject to challenge by the Danish courts on any of the grounds set out in sections 7(1) and 7(3) of the Danish Arbitration Act (Act no. 81 of 24 May 1982); that there would therefore be no issue preclusion in respect of the argument that the State had not agreed to arbitrate; and thus if Svenska were to seek to enforce the final award in Denmark today, the State would "certainly" be able to raise a defence to enforcement proceedings based on the lack of consent to arbitrate;

iii) the question of whether the State is party to the arbitration agreement at Article 9 of the JVA is clearly reviewable by the Danish courts, either in a challenge to the Award itself (Interim or Final), or as a defence to any enforcement proceedings which may be brought by Svenska in Denmark;

iv) Svenska's latest submission invites this court to speculate as to how much weight a Danish court would give to the State's decision not to challenge the award, but to challenge its enforcement, and this is not a legitimate exercise for this Court;

v) the experts clearly agree that the court would have to weigh up all the circumstances in reviewing whether a challenge to the award, or a defence of enforcement proceedings, would succeed; but the courts nonetheless would have jurisdiction to consider the question of whether the State was a party to the arbitration agreement and that its decision on this question would depend upon the context in which the question was raised; and that this clearly argues against any issue estoppel arising as a matter of law;

vi) if there is a question to be decided under Danish law on the merits, it is unsatisfactory that the court has not had the benefit of hearing oral evidence from the experts on the point raised (again) by Svenska;

vii) that the Danish law evidence cannot be regarded as such as "to prove an issue estoppel"; moreover, the expert evidence has not been fully argued and tested in cross examination and the State has not been given the opportunity to reply to Svenska's fresh allegations;

viii) Accordingly Lithuania's final submission on this issue is that this Court cannot be satisfied on the balance of probabilities that the question of consent to arbitration has been decided finally and conclusively under Danish law.

62. I reject these submissions by the State. It is clear from reading the expert reports submitted by both sides, that, although whether the State was a party to the arbitration agreement at Article 9 of the JVA might have been an issue that was *prima facie* reviewable by the Danish courts, either in a challenge to the Award itself (Interim or Final) brought by the State by way of appeal, or as a defence under section 9 of the Danish Arbitration Act to any Danish enforcement proceedings brought by Svenska, the question could nonetheless arise in either such proceedings whether the State was precluded from raising such an argument as a result of the passage of time, its failure to challenge the Interim or the Final Awards, waiver or any other relevant circumstance. In other words, the possibility exists under Danish law that the Interim Award had indeed become final and conclusive, gave rise to an issue estoppel and therefore precluded the State either from challenging the Interim Award by way of appeal, or by way of a defence to any Danish enforcement proceedings brought by Svenska. I do not find such a position surprising, since it equates to the position in relation to English arbitration proceedings under sections 31 and 73 of the English Arbitration Act 1996. Second, with the assistance of the Danish expert evidence as to the relevant principles which a Danish supervisory Court would apply to determine the matter, this Court is in as good a position as a Danish court to consider whether the State's delay in seeking to challenge the Interim Award is reasonable, such that the supervisory court would permit the State now to challenge that Award. Moreover the fact that it may not be possible as a matter of law to state with certainty or definitively when an 'unreasonably long time' has passed, does not mean that a Danish Court could not, or would not, decide whether, in all the circumstances, a party has indeed lost the right to challenge an arbitral award, nor does it preclude me from doing so. Moreover, the function of the Danish law evidence is not "to prove an issue estoppel" or to disprove it either. Its function, in the circumstances, where Danish law does not identify a specific date when, or event upon the happening of which, the State would be precluded from challenging the Interim Award, is to articulate the relevant legal principles by which the Danish Court would be guided in determining if such a time had arrived.

63. The views of the respective Danish law experts were clearly set out in their reports and, in the event, did not differ greatly. There was no need for that evidence to "be fully argued and tested in cross examination" as Mr. Shackleton submitted. Moreover no application was made by the State either to cross-examine Svenksa's experts or for an adjournment of the application. The State had every opportunity to deal with Svenska's case on this point, which cannot be regarded as involving the raising of fresh allegations.

64. In my judgment, on the balance of probabilities, were the Danish Court now to address itself to the issue whether the Interim Award was binding, or whether the State was still free to challenge that Award before the Danish Court, as the supervisory court of the arbitration proceedings, the Danish Court would conclude that it was no longer open to the State to do so. The Interim Award was rendered on 21 December 2001, now nearly four years ago. The State had every opportunity to challenge the Interim Award, had it chosen to do so. But it deliberately did not take advantage of that opportunity; instead it chose fully to participate in the arbitral hearing on the merits, which led to the Final Award. Moreover, as the passage at page 238 of the Final Award, which I have cited above, shows, after the Interim Award had been given, the State did not "argue .. that [Svenska's] .. claim for

damages is not arbitrable or that the Arbitral Tribunal otherwise lacks jurisdiction with respect to this claim". No doubt the State fully participated in the substantive hearing hoping for success before the Tribunal. Had it been successful, it would then have been entitled to have relied upon the Award, for example in resisting any proceedings which might have been brought by Svenska against it in Lithuania. It passed the Governmental Resolution on 11 February 2004, referred to above, deciding effectively not to challenge the Final Award, and further resolving that the resolution be specifically communicated to Svenska. No doubt Svenska relied upon that decision in informing its strategy as to what further steps it would take to enforce the Final Award. In all those circumstances it seems to me unlikely in the extreme that a Danish supervisory court would now permit the State to challenge the Interim Award in the Danish Courts. I consider that, on the balance of probabilities, a Danish Court would decide that any appeal at this point of time to the Danish Courts to challenge the Interim Award would not be an action within 'reasonable time' and that they would regard the State, for the purposes of those proceedings and any enforcement proceedings, as effectively having waived its right to do so. I therefore agree with Mr. Bools' submission that, in all the circumstances, the Interim Award gives rise to an issue estoppel and debars the State from arguing before the English court that it was not a party to the arbitration agreement in Article 9 of the JVA. Accordingly, in my judgment, because of the issue estoppel, the State is not entitled to rely on the fact that it alleges that it was not a party to the arbitration agreement in the context of its claim to state immunity.

Scope of section 9 of the Act

65. The next issue that arises is whether section 9 applies to proceedings which are for the enforcement of an award delivered in foreign arbitration proceedings and therefore whether Svenska can rely on the exception. Section 9 of the Act provides as follows:

> "(1) 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.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."

66. Svenska contends that proceedings for the recognition and enforcement of an Award are proceedings "which relate to the arbitration" within section 9 and that the meaning of those words is plain. Accordingly, on the basis that the State is indeed estopped from denying that it was a party to the arbitration agreement in Article 9 of the JVA, it contends that the exception in section 9 applies and therefore the State cannot claim immunity.

67. The State, on the other hand, submits that section 9 does not apply, first, to enforcement proceedings and, secondly, to proceedings which relate to the enforcement of a foreign arbitral award. It contends for a limited interpretation of the scope of Section 9. It contends that these enforcement proceedings do not "relate to an arbitration", for the purposes of section 9 of the Act, but rather solely to the

arbitration award. The proceedings, it is said, are not supportive of the arbitral process, but relate to the enforcing jurisdiction's treatment of the arbitration award.

68. Mr. Shackleton's submissions on this point may be summarised as follows:

i) There is no connecting factor between the arbitration clause or the dispute and the United Kingdom or the courts of the United Kingdom. Support for the view that in such circumstances section 9 is not engaged is to be found in Dicey & Morris (2000) *The Conflict of Laws* 13th edition, London, Sweet & Maxwell at page 251:

> "This exception applies to proceedings relating to the arbitration, including proceedings to enforce the arbitration agreement or for review of an award. The Bill which resulted in the 1978 Act expressly provided that this Exception did not apply to proceedings for the enforcement of the award. Although the question is not free from doubt, it is suggested that the exception does not apply to enforcement of an award."

ii) Further support is to be found in Dame Hazel Fox's article (1988) "States and the Undertaking to Arbitrate," 37 *International and Comparative Law Quarterly*, page 1 at page 13, and also in *The Law of State Immunity*, Oxford, Oxford University Press at 166 to 167. At the former passage Dame Hazel Fox explains some of the reasons why enforcement proceedings do not come with the scope of the Section 9 exception:

> "First the section contains no express limitation to proceedings relating to arbitration of commercial matters. Had section 9 followed Article 12 of the [ECSI]…and one of its purposes was to ratify that Convention- it would have restricted the proceedings to "commercial or civil matters." By omitting to do so, it theoretically covers all arbitration, domestic and international, relating to non commercial matters. For States the distinction has great importance; many disputes with private parties arise by reason of the exercise of governmental power, or involve mixed issues of commercial law or public law. It is in this sensitive area that a State may consent to settlement by arbitration where it would adamantly oppose reference to a local court. To impute automatically submission to the local court by reason of the consent to the agreement to arbitrate is to endanger States' willingness to consent to any third party process of settlement. The 1958 New York Convention on Reciprocal Enforcement of Arbitral Awards recognises the significance of the distinction between commercial and non-commercial matters by allowing States to limit the obligation of their courts to give effect to foreign awards…'which are considered as commercial under the national law of the State making the declaration."

iii) These considerations, submits Mr Shackleton, are particularly relevant in the circumstances of this arbitration given the non-arbitrable (and non-commercial) nature of many of the disputes that arise under Lithuanian law.

iv) Mr Shackleton also relies upon Dame Hazel Fox's rationale for a limited interpretation of the scope of Section 9 (*ibid.* at page 14):

> "The second omission appears to be any limitation of the section to English arbitration. Is an undertaking by a State to refer a future dispute to arbitration outside the United Kingdom, and for which the proper law is foreign law, within the section so as to constitute consent to proceedings in the English court? […] Although as far as I know, the point has not appeared in any English reported case, this disregards the additional requirement that the English court will require a jurisdictional connection between itself and the arbitration agreement, such as England being the place of arbitration, which would rule out such extreme situations. Certainly in the United States […] the case law after some hesitation has emphasised the need for territorial links with the US courts and refused to construe a waiver of immunity in respect of one jurisdiction as waiver to all jurisdictions. On this analogy consent to arbitration in England may constitute consent to proceedings in English courts, but consent to arbitration elsewhere will not […] Had section 9 once again followed the wording of Article 12 of the European Convention there would have been no ambiguity. Article 12 expressly limits the local court proceedings to those relating to the validity or interpretation of the arbitration agreement, arbitration procedure and setting aside the award…Such a limitation would seem to have been in conformity with the general approach which was to separate off enforcement measures and to require a separate express consent by the State to their application."

v) Further he submits that section 9 does not apply in relation to disputes of a public nature relating to a state's licensing of the natural resources on its own territory, particularly when the resources presented a valuable energy source in a time of political and economic transition.

vi) Further he submits that the wide construction considered by Svenska conflicts with the approach of the European Convention on State Immunity 1972. One of the purposes of the State Immunity Act 1978 was to ratify the Convention. Article 12 of the Convention provides:

> "Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has

taken or will take place in respect of any proceedings relating to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides."

vii) He then submits that this is not a case where it is legitimate to place any reliance upon Hansard. The words of section 9 of the Act are not ambiguous or obscure as required under the first limb of the test in *Pepper v Hart* as outlined by Lord Browne–Wilkinson at [1993] AC 634. Nor can it fairly be said that either suggested construction leads to an "absurdity" as is required by that case, whatever the merits of either construction.

viii) Even if regard is to be paid to the passages in Hansard relied upon by Svenska, these short statements cannot be regarded as determinative of the issue of the proper construction of section 9. In particular, no evidence has been put forward that section 9 was intended to apply to disputes arising out of a foreign State's regulation of its underground natural resources.

ix) Mr Shackleton also placed reliance upon certain United States authorities. He submitted that, despite the broad language of the American Foreign Sovereign Immunity Act, in the United States, a number of decided cases have declined to infer waiver from the existence of an arbitration agreement in a contract, particularly where there was no link with the United States. It appears that some form of territorial connection, or a willingness to submit to the jurisdiction of any State, will be required before American courts will allow a waiver of sovereign immunity. Thus:

a) In *Verlinden B.V. v. Central Bank of Nigeria* 488 F. Supp. 1284 (S.D.N.Y 1980) the parties entered into a contract regarding the sale of cement. The contract contained a provision providing for ICC arbitration and the application of Netherlands law. The plaintiff, however, sued on a letter of credit, not the cement contract. The letter of credit contained neither provision. If Nigeria waived immunity, it did so only for disputes under the contract. Even if this was not the case, the Southern District of New York held that when a foreign state agrees to submit its disputes with another, non-American private party, to the laws of a third country, it does not implicitly waive its immunity as to the jurisdiction of the courts of the United States.

b) In *Obntrup v. Firearms Center, Inc.* (1981) 516 F. Supp. 1281 D.C.C an action in tort was brought against the seller of a gun which malfunctioned and caused damage. The seller joined the manufacturer of the gun, a public corporation in Turkey. The corporation claimed immunity. The plaintiff relied on an arbitration clause in the agreement

between the seller and the manufacturer whereby disputes were to be submitted for settlement by the International Chamber of Commerce in Paris; and argued that the arbitration clause amounted to a waiver. Pollak J. rejected the argument and held that

> "a waiver of immunity by a State as to one jurisdiction cannot be interpreted to be a waiver as to all jurisdictions."

c) In *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407 (S.D. Tex.) 1985 the court stated:

> "[M]ost courts have refused to find an implicit waiver of immunity to sue in American courts from a contract clause providing for arbitration in a country other than the United States."

d) Other authority supports the position. Hans Smit has stated in H. Smit, (1981) *International Contracts*, New York, Mathew Bender, at page 259 that:

> "[I]t may well not be an effective waiver for the purposes of subject matter and in personam competence when suit is brought on the award in a place other than that of the arbitration. After all a person who agreed to an arbitration clause does not contemplate proceedings in a place other than that in which the arbitration is to take place and perhaps the place in which he resides. Construing a waiver of immunity clause as waiving objection to suit in a place with which the defendant has no reasonable connection would appear not only unfair but may also be unconstitutional."

69. I do not accept these submissions. In my judgment, there is no linguistic or other basis for construing the language used in section 9 of the Act (particularly when viewed in the context of the execution provisions of section 13) as excluding enforcement proceedings, or as excluding proceedings which relate to the enforcement of a foreign arbitral award. Nor is there any justification for excluding arbitrations which "may relate to disputes of a public nature relating to a state's licensing of the natural resources on its own territory". If, however, there is any doubt, or any ambiguity in the language, such that it is legitimate to place reliance upon Hansard, then the Parliamentary proceedings leading to the enactment of the Act resolve that ambiguity. As Dame Hazel Fox has observed – see *State Immunity* ibid. at page 167 -

> "During the passage of the bill through Parliament a clause excluding a provision for the enforcement of an arbitral award was deleted from this section. This and the reference in section 13(4)(b) to an arbitral award would seem to indicate that proceedings may be brought for registration to turn an award into an order of the court, provided leave to serve proceedings

> abroad can be obtained under CPR 6.20-12 … Section 13, relating to measures of enforcement, would govern how any such court order could be executed."

70. The debate in the House of Lords to which Dame Hazel Fox referred is reported in Hansard, 16 March 1978, Cols 1516-17.

> "The Lord Chancellor moved Amendment No.15 …
>
> Page 5, line 13, leave out subsection (2).
>
> …. This Amendment is intended to remove the immunity currently enjoyed by States from proceedings to enforce arbitration awards against them. Clause 10(1) [as s.9 then was] removes immunity from proceedings relating to arbitration where the State had submitted to the arbitration in the United Kingdom, or according to United Kingdom law, but by subsection (2) enforcement proceedings are excepted; that exception is now to be removed. If the Government Amendments to Clause 14 are accepted, the property of a State which is for the time being in use or intended for commercial purposes will become amenable to execution to satisfy and award. However, it would not be possible to proceed to such execution without first bringing enforcement proceedings to turn the award into an order of the court on which the execution could be levied, and unless the State had waived its immunity to enforcement, Clause 10(2) would prevent the necessary steps being taken. This Amendment will delete the subsection."

The Amendment was agreed. It is clear therefore that section 9, as enacted, was indeed intended to apply to proceedings for the recognition and enforcement of awards.

71. As I have set out above, the State also argues that there is a requirement of link with the United Kingdom and that, accordingly, section 9 only applies when there is a "connecting factor between the arbitration clause or the dispute and the United Kingdom". I accept Mr. Bools' submission that the passage from Dame Hazel Fox's "*States and the Undertaking to Arbitrate*" 37 ICLQ 1 relied upon by Mr. Shackleton does not support the submission that section 9 requires a connecting factor between the arbitration and the United Kingdom; that passage merely notes the apparent omission of "any limitation of the section to English arbitration". Moreover, the Parliamentary proceedings as reported in Hansard for 28 June 1978, Col 316 make it clear that the omission was deliberate:

> "The Lord Chancellor: My Lords, I beg to move that the House doth agree with the Commons in Amendment No 2. Clause 9 of the Bill provides that where a State has agreed in writing to submit a dispute to arbitration in, or according to, the law of the United Kingdom, the State is not immune as respects proceedings which relate to the arbitration. The Amendment removes the links with the United Kingdom, and by deleting

> the reference to the United Kingdom or its law, it will ensure that a State has no immunity in respect of enforcement proceedings for any foreign arbitral award."

The Amendment was passed.

72. Mr. Bools also referred me to Dickinson et al, *State Immunity: Selected Materials and Commentary*, §4.068, which summarizes the position in the following way:

> "Two important amendments were made to the text of clause 10 of the Bill [which became s.9] in its passage through Parliament. First, Clause 10(2) excluding the operation of the exception in "proceedings for the enforcement of an award" was omitted. Secondly, words limiting the operation of the exception to arbitrations "in or according to the laws of the United Kingdom" were excluded, thereby permitting proceedings relating to foreign arbitrations (including proceedings to register a foreign award for enforcement)."

73. In my judgment, it is therefore clear that section 9 was intended to apply to "any foreign arbitral award" and there is no justification to be found in the language used in section 9 (in particular when contrasted with that used in section 3) for limiting the exception to awards relating to purely commercial disputes. Nor do I gain any assistance from Mr. Shackleton's citation of the European Convention on State Immunity 1972 or the U.S authorities to which he referred. The relevant section which I have to construe is section 9 of the Act, which is in very different terms. Accordingly, I hold that the present proceedings for the enforcement of a foreign arbitration award are indeed within the scope of section 9. It follows that, in my judgment, on the basis that the State is indeed estopped by the Interim Award of the Tribunal that it was a party to the arbitration agreement, the State cannot rely on sovereign immunity for the purposes of these proceedings.

Was the State party to the arbitration agreement contained in Article 9 of the JVA?

74. It is only if I were to be wrong in my finding that the State is estopped by the Interim Award of the Tribunal that the issue as to whether the State was indeed a party to the arbitration clause at Article 9 of the JVA arises for my determination. However, in case this matter goes further, and since I have heard a substantial amount of evidence and argument on the matter, it is right that I should express my conclusion on this issue. The point may also be relevant to enforcement proceedings in Lithuania and Germany. As Mr. Shackleton submitted, it is clear that, in doing so, I have to come to an independent conclusion on the matter, rather than merely reviewing the decision of the Tribunal for the purpose of seeing whether the Arbitrators were entitled to reach the decision which they did.

75. Two further points should be stated at the outset, since Mr. Shackleton devoted a considerable time in submission to addressing them. First, I accept that the issue is whether the State agreed, whether expressly or impliedly, to arbitrate its disputes with Svenska by the procedure laid down in Article 9; in other words, it is not sufficient that Svenska establishes merely that the State was party to the JVA; it must also establish that the arbitration clause was intended to cover disputes between the State

and Svenska and the State agreed to be bound thereby. The separability of an arbitration clause, a concept well-known to English law, is also well-established under Lithuanian law, as the experts agreed. That proposition is well-established by the authorities to which Mr. Shackleton referred in paragraphs 222 – 239 of his helpful opening submissions. Second, I accept that, for the purposes of deciding this issue, the State cannot be equated with Geonafta, which at all material times was a separate corporate entity, albeit that at the time of the conclusion of the JVA, it was a state enterprise, only being privatised in June 2000. I thus accept that the mere fact that a state enterprise agrees to arbitrate does not itself imply consent by a state itself to arbitrate. There must be a manifestation of the State's own intention so to do. That proposition is well-established by the authorities to which Mr. Shackleton referred in paragraphs 176 – 221 of his opening submissions.

Applicable law

76. In order to answer the question what law governs the question whether or not a state has agreed in writing to submit a dispute to arbitration, the English court must apply English conflicts rules. Rule 57(1) of Dicey and Morris, *The Conflict of Laws* (2000) (13th Edition) provides that the validity, effect and interpretation of an arbitration agreement are governed by its applicable law. In the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which it forms a part; see *ibid*. §16-012.

77. I have already set out above the relevant express choice of law clause contained in Article 35.2 of the JVA. From that clause it is clear that the applicable law of the arbitration agreement contained within the JVA is therefore Lithuanian law, supplemented, where required, by "rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania".

78. The question for the Court is therefore whether, as a matter of Lithuanian law, the State and Svenska agreed that disputes between them should be submitted to arbitration. I accept Mr. Bools' submission that there is no basis, in answering that question, for having recourse to any other law than Lithuanian. Neither of the parties' experts suggested that Lithuanian law did not provide the rules necessary to answer the question. In particular, Prof. Katuoka (the State's expert) did not suggest that recourse should be had to anything other than Lithuanian law. Dr Foigt (Svenska's expert) said that some members of the judiciary in Lithuania might have regard to the decisions of foreign courts, but not all. The fact that the Lithuanian courts might look to other jurisdictions for comparative decisions in particular cases does not suggest that Lithuanian law on the question of the validity of an arbitration agreement is in any way inadequate or requires supplementing. Both experts clearly set out the applicable principles of Lithuanian law in their reports.

79. Nor does Article 35.2 justify any invocation of principles of "international law" as Mr. Shackleton suggested. The clause gives primacy to Lithuanian law and only permits other laws to be referred to where they are "required" to supplement Lithuanian law, which they are not in the present case. Moreover, even if it were necessary to so, recourse may only be to the "rules of international business activities generally accepted in the petroleum industry". There is no basis for simply asserting that these rules are the same as the rules of international arbitration. Furthermore,

recourse is to be had to such rules only insofar as they do not contradict the laws of Lithuania. Lithuanian law provides rules for determining whether the arbitration clause is a valid agreement to arbitrate. Insofar as the rules of international arbitration are the same as Lithuanian law they add nothing; insofar as they differ, they are inapplicable because they contradict Lithuanian law. They can, therefore, be disregarded in any event. The State did not, in any event, adduce any evidence of what were the "rules of international business activities generally accepted in the petroleum industry".

The applicable principles of Lithuanian Law

80. I heard lengthy expert evidence, both written and oral, relating to Lithuanian law. However there was, in the main, agreement between the parties on the essential requirements under Lithuanian law for a valid arbitration agreement. The principal features may be summarised as follows:

i) At the time that the JVA was concluded there was no requirement that an arbitration agreement had to be in any particular form; see Professor Katuoka's Report, §62-64.

ii) At the time that the JVA was concluded there was no legal impediment to the State's agreeing to arbitrate disputes that might arise under that contract; see the First Report of Dr Foigt, page 7; and Professor Katuoka's Report, §64.

iii) The principle of the separability of arbitration agreements is well-recognized under Lithuanian law; i.e. arbitration agreements/ clauses are separable from the contracts in which they might be contained; see Professor Katuoka's Report, §§83 – 89 and Second Report of Dr Foigt, §§27-28.

iv) A valid arbitration agreement required the parties to express their common will to submit disputes between themselves to arbitration in writing; see Professor Katuoka's Report §71-73.

v) Although the JVA was concluded in 1993, when construing it and, in particular, Article 9, the Civil Code 2000 (which entered into force on 1 July 2001) must be applied; Article 45 of the Law on Approval, Coming into Force and Enforcement of the Civil Code of the Republic of Lithuania, dated 18 July 2000; see Professor Katuoka's Report, §§76-77 pp.16-17 and Second Report of Dr Foigt, §16.

81. Article 6.193 of the Civil Code, "Rules of the Interpretation of Contracts", and the Commentary thereon, (which I have already set out in full above) make it clear that the process of interpretation of a contract under Lithuanian law is significantly different from the approach that is applied under English law. In particular, under Lithuanian law it is legitimate to have regard to a far wider range of factual material, than would be permissible under English law.

82. I accept Mr. Bools' submissions that the following important principles of Lithuanian law relating to the interpretation of contracts can be derived from the expert evidence and the materials which they produced:

i) The overriding principle is that a contract should be interpreted in good faith.

ii) Thereafter, the Court's search is for "the real intentions of the parties without being limited by the literal meaning of the words". In other words, unlike under English law, the primary objective is to ascertain what the parties subjectively actually intended, regardless of the words they used. In the present case, therefore, the enquiry becomes one into whether Lithuania and Svenska intended that disputes between them would be resolved by arbitration, regardless of the literal meaning of the words they used.

iii) In seeking to ascertain the parties' actual intention, regard must be had to "the preliminary negotiations between the parties, practices which the parties have established between themselves, the conduct of the parties subsequent to the conclusion of the contract, and the existing usages". Consequently, and again contrary to the position in English law, the court must look at the negotiations which led to the conclusion of the contract, take into account earlier drafts of the contract and consider each party's subjective intention.

iv) If, despite these sources, what the parties really intended cannot be ascertained *then* the court will apply an objective interpretation and give the contract "the meaning that could be attributed in the same circumstances by reasonable persons in the corresponding position as the parties".

83. The issue before the Court in reality is whether the pre-contractual dealings between the parties demonstrate that they intended disputes between Lithuania and Svenska to be submitted to ICC arbitration. I should say that both experts gave their opinions as to whether or not, applying Lithuanian law to the facts, the State was a party to the arbitration agreement in Article 9 of the JVA. Professor Katuoka concluded that it was not; Dr. Foigt concluded that it was. However, as I have already said above, both parties agreed that, although the expert as to foreign law has to provide the English Court with the relevant foreign principles and rules of construction, it was for the English Court, in the light of those principles and rules, and any relevant factual material, to determine the meaning of the JVA. Accordingly it is not necessary for me to analyse, accept or reject the respective opinions of the experts as to the true construction of the JVA.

The State's principal arguments

84. The onus is on Svenska to establish that the State was indeed party to an agreement to arbitrate. However it is convenient to set out the five principal arguments upon which Mr. Shackleton relied to support the State's contentions that it was not a party to the arbitration agreement.

(1) State not a party to the JVA

85. The first contention was that the State was not a party to the JVA at all. I have already rejected this argument, in the context of my decision on section 3 of the Act. In this context I merely add that it is clear from the evidence before me that the State was involved with the negotiations with Svenska from the outset.

(2) Article 9 is limited to disputes between Founders

86. Secondly the State argues that it is not a party to the arbitration agreement in Article 9. It relies in particular on the actual wording of Article 9 of the JVA and its drafting history. It submits that these are the most important elements in the construction of Article 9, and that the importance of the text itself and contractually agreed definitions is clearly set out in the Lithuanian law on the interpretation of contracts. Mr. Shackleton submitted that there is no room for reasonable doubt as to the meaning of Article 9: it is expressed in plain terms (with clearly defined legal meaning) and expressed so as not to include the State. He also submitted that support is also to be derived from Lithuania's role in the JVA, which was, on any reading, profoundly different in character from that of Svenska or Geonafta.

87. Mr. Shackleton submits that the only parties to the arbitration agreement are the two Founders which are clearly defined in the JVA as Svenska and Geonafta; that not only is the meaning of the defined term, "Founder", clear in the JVA itself, but the word has an established legal meaning in Lithuanian law, as defined in the Law on Joint Stock Companies and the Law on Foreign Investments, both of which are referred to in the preamble to the JVA; that that meaning corresponds to an incorporating shareholder; that the incorporating shareholders of the JV Company were Svenska and Geonafta; that the State is defined separately from the parties to the agreement, at Article 13.12 of the JVA, as the State or effectively any other Department "having the right to control the activity of the joint venture within the limits of its competence;" and that the language of the arbitration provision which refers to "disputes between the Founders," "negotiations between the Founders" and notice by "either Founder," is clearly inconsistent with Svenska's position that tripartite arbitration was agreed, but is consistent with an arbitration agreement between two parties only. Accordingly, he submits, clause 9 is limited to disputes between Founders and, as the State was not a founder of the JV Company, the clause cannot cover its disputes with Svenska. The JVA contains a clear definition of the "Founders." The preamble of the JVA indicates that Gargzdai State Oil Geology Company (later reorganised into Geonafta) is a "Lithuanian Founder" and Svenska is a "Swedish Founder." Both are referred to collectively as the "Founders."

88. Many of these points (but not the conclusion which Mr. Shackleton seeks to draw) are accepted by Mr. Bools on behalf of Svenska. Thus Svenska does not contend that EPG/Geonafta and the State were a single entity, nor that under Lithuanian law, the corporate veil between EPG/Geonafta and the State would be lifted or pierced. It is not Svenska's case that the State was a founder (i.e. incorporator or promoter) of the JV Company. Nor is it Svenska's case that all references in the JVA to "Founders" automatically include the State. What Svenska submits is that it was not the parties' intention that the use of the word "Founder" in Article 9 was intended to exclude the State from the scope of the arbitration agreement. It is irrelevant to that issue whether the State was, or could have been, a founder of the JV Company and it is irrelevant whether it was included in the preamble as one of the "Founders". Mr. Bools submits that the simple point is that it was Svenska's and the State's common intention that, irrespective of the language used, they be covered by the agreement in Article 9 to submit disputes between themselves to ICC arbitration.

89. If I had been approaching the interpretation of the JVA in accordance with English law principles of construction (and in the absence of a claim for rectification), I would

reject Mr. Bools' submissions, as the language of Article 9, when construed in the context of the entire JVA and against what would be the permissible factual matrix under English law, does not support the conclusion that the State has agreed to arbitrate its disputes. However, the approach which is required under Lithuanian law means that, in order to establish the parties' subjective intentions, I have to consider the evidence relating to the parties' pre-contractual negotiations, and the various drafts of the JVA, as an aid to the interpretation of the words used, and therefore I do not accept Mr. Shackleton's submissions that I should approach the matter merely by reference to the language used in the JVA and in isolation from the factual evidence relating to the pre-contractual negotiations. Obviously, when I come to consider the question whether the evidence relating to the parties' pre-contractual negotiations shows that the parties' intentions were that the State should be party to the arbitration clause, I must, under the relevant Lithuanian principles of construction, give appropriate weight to the actual words used in Articles 9 and 35.

(3) The Bilateral Investment Treaty

90. Third, the State argues that, as a bilateral investment treaty between Sweden and Lithuania had been concluded on 17 March 1992 ("the BIT"), the parties' intention must have been that disputes between them would be settled under the procedure laid down in Article 7 of that Treaty and that it was for that reason that the reference to the State submitting to arbitration was removed from the JVA. Further Mr Shackleton submits that support for the clear language of the text of Article 9 is found in the removal of any mention of Lithuania and the subsequent removal of ICSID clauses from drafts of the JVA and the simultaneous coming into force of a BIT between Lithuania and Sweden.

91. I address this argument below, in my analysis of the pre-contractual negotiations.

(4) Arbitrability

92. In his oral evidence, but not in his Report, Professor Katuoka sought to argue that provisions of the 1996 Lithuanian Law on Commercial Arbitration and the 1995 Lithuanian Law on Sub Soil Exploitation were both retroactive and made the disputes between Svenska and the State non-arbitral. This was relied upon by the State generally in its arguments, and also to support its contention that in such circumstances it was unlikely that the State would have agreed to have become party to the arbitration clause in Article 9 of the JVA.

93. I do not accept Professor Katuoka's views in this respect. Although referring to both pieces of legislation in his Report, Professor Katuoka did not there assert that they were retroactive. When asked direct in cross-examination

> "…why in paragraph 131 you do not say that these two Acts have retroactive effect?"

Professor Katuoka simply replied:

> "I do not have anything more to say."

94. On this issue, I prefer Dr Foigt's evidence, namely that neither of the acts had retroactive effect, which may be why Professor Katuoka did not assert the contrary in his written Report and instead went on to consider the law as it applied in 1993. In this regard Professor Katuoka relied upon Article 28 of the Civil Code of 1964. I accept Mr. Bools' submissions that his reliance was, however, misplaced. First, Article 28 of the 1964 Code, as the Professor read it, was permissive and not prohibitory: it permitted disputes arising out of civil legal relationships to be referred to arbitration, maritime arbitration or foreign trade arbitration; it did not go further and prohibit arbitration of other disputes. Secondly, the *Provisional Rules of Oil Prospecting, Exploration, and Production in the Republic of Lithuania* 16 March 1992, made clear (in Article 61) that disputes involving "Oil works" might be arbitrated. The dispute in the present case fell within the definition of "Oil works" within Articles 6-10 of the Rules and was therefore arbitrable.

95. It follows that, as Dr Foigt stated, there was no prohibition in Lithuanian law on the underlying dispute being submitted to arbitration.

(5) The evidence relating to pre-contractual negotiations (and post-contractual conduct) does not establish that Article 9 should be construed as extending the arbitration agreement to the State

96. In summary, the State's principal argument was that the evidence relating to pre-contractual negotiations, and indeed how Svenska, Geonafta and the State conducted themselves after the JVA was concluded, supports its position that the State did not consent to become a party to Article 9 of the JVA. Mr Shackleton submitted that the mere fact that the State may have been a party to the JVA does not imply its consent to arbitration, where actual consent was lacking. One cannot assume consent to arbitration simply because one party (*a fortiori* a State) does not object or because there is no evidence of intent to consent to any alternate dispute resolution mechanism. To proceed on an assumption that a State must arbitrate unless otherwise agreed is especially inappropriate in a context where the arbitration clause clearly excluded the State by its terms.

97. Mr. Shackleton further submitted that the State's position was supported by the evidence of Dr Motuza, who confirmed that one of the purposes of the language of the JVA referring only to Svenska and Geonafta, was clearly to dissociate Lithuania from the JVA itself and from the arbitration clause.

98. Mr. Shackleton further submitted that the fact that Sweden and Lithuania signed a bilateral investment treaty must be taken into account when seeking to ascertain the parties' common intention and that that intention was that disputes between them would be settled under the procedure laid down in Article 7 of that Treaty.

Consideration of the evidence relating to pre-contractual negotiations

99. I turn now to consider the evidence relating to pre-contractual negotiations and whether or not it supports Svenska's argument that, from the time of the earliest drafts of the JVA, the parties intended their disputes (including those involving the State) to be settled by arbitration and that it was the common intention of Svenska and the State that the dispute resolution provisions of Article 9 of the Final JVA should apply

to disputes between the two of them. For this purpose, it is necessary to set out the negotiations in some detail.

100. The parties' relationship started when representatives of Svenska met representative of the Lithuanian Amalgamation of Geological Works in Vilnius on 11 September 1989 The purpose of the meeting was discuss a possible joint venture. The minutes of the meeting record that the parties' intentions had been approved by "Lithuanian Soviet Ministers". The Swedish delegation was received by Mr Prunskiene, the Vice President of the Lithuanian Council of Ministers. The initial contacts were therefore established between the State and Svenska.

101. On 11 March 1990, Lithuania declared independence from the Soviet Union.

102. Further meetings were held in Stockholm on the 4 and 6 September 1990. Lithuania was represented by, amongst others, Dr Leonas Ashmantas, the Minister of Energy. Following these meetings copies of a Feasibility Report were sent to the State. Thereafter on 31 January 1991 a Letter of Intent ("LOI") was signed. The parties were the "Lithuanian Corporation of Geological Works" ("LG") and Svenska. The LOI recorded that:

> "LG has been assigned by the Lithuanian Government to negotiate a joint venture with SPE regarding exploration for and development of petroleum."

The law and arbitration clause stated:

> "Swedish law to govern and arbitration proceedings in cases of dispute to be carried out in Stockholm."

Furthermore, the letter of intent itself was subject to a similar provision:

> "This Letter of Intent shall be governed by Swedish law. Any disputes arising hereunder shall be settled by arbitration in Stockholm under the auspices of the Arbitration Tribunal of the Stockholm Chamber of Commerce."

103. As Dr Motuza accepted, from the start the Swedish side had insisted that all disputes be settled other than in the Lithuanian courts, by international arbitration. This was reflected in the 31 January 1991 LOI. I accept Mr. Bools' submission that both under the LOI and under the proposed JVA three things were clearly intended by all parties at this stage, namely: disputes would be arbitrated, the arbitration would be outside Lithuania and the governing law would be Swedish. Moreover, at this stage, the negotiations were clearly being conducted by LG on the instructions of the State.

104. The Letter of Intent was signed on 31 January 1991. On 11 March 1991, the Lithuanian Corporation of Geological Works (LG) was 'liquidated'. On 13 June 1999 it was agreed that all rights and obligations of LG under the LOI should "as of 31 January 1991 [be] vested in/assumed by EPG as if EPG were [the] original party" to the Letter of Intent. The signatories to this further agreement were Svenska, EPG, the Ministry of Energy and the State Geological Service of Lithuania. Once again,

therefore, the State was directly involved in the parties' negotiations through the Ministry of Energy.

105. In October or November 1991, Dr Motuza and others reviewed the Letter of Intent. It was one of his first acts after being appointed as the head of the State Geology Service. Thereafter Dr Motuza became the principal intermediary between Svenska and the Lithuanian side. He organised meetings and attended most of them. They were predominantly held in his office in Vilnius. He was one of the few people who spoke English (none of those from EPG did) and so he would often transmit both Geonafta's views and those of the State. He was however a geologist and not a lawyer.

106. As he stated in evidence, in reviewing the LOI Dr Motuza had particular regard to the position of the State under the terms of the LOI. He was aware that a number of the terms of the LOI referred to Lithuania and, as head of a State agency, he had an obligation to consider whether those terms were unfavourable to Lithuania. Dr Motuza was assisted in his review by Mr Miknevicius, an external consultant from Belgium. Mr Miknevicius's primary recommendation was that the "LOI should be discarded or completely renegotiated…" The report went on to make further, specific recommendations including the following two:

> "Republic of Lithuania is a sovereign state with its own legislation; any contract or document related to activities carried out in the territory of the Republic and referring to the laws of a foreign country is considered as illegal and void"
>
> Any possible disputes shall be settled by the Court of Arbitration of Den Hague, the Netherlands".

107. When he had received Mr Miknevicius's report, Dr Motuza discussed its contents and recommendations with Dr Ashmantas, the Minister of Energy. Neither Dr Motuza nor Dr Ashmantas objected to Mr Miknevicius's suggestion that "Any possible disputes" should be settled by arbitration in the Hague. I accept Mr. Bools' submission that at this stage it was clear that the State was actively involved in the negotiations with Svenska; and that the original LOI had provided for arbitration in Stockholm but the State's adviser had suggested that the Hague was to be preferred as a venue for arbitration. Neither Dr Motuza nor Dr Ashmantas dissented from that suggestion or suggested that arbitration was an inappropriate forum.

108. Following the State's review of the LOI, a renegotiation of it took place at a meeting on 5-7 November 1991. The State Geology Service's minutes of the meeting record that the original negotiations were conducted "With the assignment of the Government of the Republic of Lithuania". They also record that:

> "All provisions of the Letter of Intent unfavourable *to Lithuania* were reviewed, amended or annulled in this sitting."

Dr Motuza signed the minutes of the meeting and agreed in evidence that it accurately recorded what he understood to be the position at that stage. The negotiating team (and in particular Dr Motuza) informed the Minster of Energy about progress in the negotiations. Thereafter Dr Motuza and Dr Ashmantas reported back to the Prime

Minister because, as Dr Motuza said, "The Prime Minister was concerned regarding the development of investments in the oil industry". A memorandum by which Dr Motuza and Dr Ashmantas reported to the State makes clear who had been negotiating with Svenska:

> "Executing Resolution No.109 of the Government of the Republic of Lithuania of 29 March 1991 and Order No.4-16333 of the Government of the Republic of Lithuania, the Ministry of Energy of the Republic of Lithuania and the State Geological Survey have performed the following preparatory works on exploitation of oil fields and use of oil.
>
> 1. They have held negotiations with the Swedish company Svenska Petroleum Company…"

Moreover it is clear from a copy of the document drawn up at the meeting in November 1991 that there had been negotiations about both the governing law and the seat of any arbitration. The following, apparent compromise, was reached:

> "Article 2.2. page 5, [of the LOI] Governing law and arbitration, text to be deleted and replaced by:
>
> 'The law governing the contractual relations between the Parties shall be law of a country to be agreed with an established tradition of contracts of this nature among private enterprises and which shall contain generally accepted principles of international business. Arbitration proceedings in cases of dispute to be carried out in Stockholm under internationally accepted arbitration rules.'
>
> The aforesaid shall not prejudice normal rights for the Republic of Lithuania as a sovereign state to issue and enforce new legislation of a public nature."

That document was signed with "the consent and approval" of the Ministry of Energy and the State Geological Service.

109. I accept Mr. Bools' submission that by this stage, therefore, Svenska and the State had actively negotiated the governing law and arbitration clause. It is also clear that the arbitration clause was intended to cover disputes with the State: first, given that the negotiations had directly involved the State, it would have been very odd if it did not; and, secondly, the reservation in the second paragraph set out above would have been otiose if the first paragraph had not been intended to relate to the State. Moreover Dr Motuza explained why they had agreed to arbitration in Stockholm:

> "We agreed that provision because we understood the concern of Svenska in relation to the security and protection of the investment and there was no real legal system in Lithuania, so we left it in here. We thought our court system would develop and we would change it later."

110. The position appears therefore to have been that the Government of Lithuania, as the holder of the right to exploit the country's oil reserves had authorised a state entity (originally LG and latterly EPG) to negotiate with Svenska for the formation of a joint venture. Negotiations were conducted by LG and EPG under the supervision of the State through the Ministry of Energy and the State Geological Service. The State was kept apprised of the progress of the negotiations, reviewed the contractual documents produced and authorised their signing. At this stage the evidence shows that it was not yet settled which state entity would be the contracting party under the JVA, but it was clear that the State was keen not to fetter its right to legislate. It follows that the State must at this stage have envisaged that it would, in some way, be a party to and / or bound by the terms of the JVA: if the State was in no way bound by the JVA, there was no need for it to spell out that the choice of law and arbitration clause in the LOI was in no way intended to fetter its right to "issue and enforce new legislation".

111. As envisaged at the meeting in early November 1991, a first draft of the JVA was produced on or around 21 November 1991. Many of its clauses make clear that the State was intended to be a party to it. In particular, Article XXVII (3) provided that

> "This Agreement after signature by the Parties and by Government shall have the status of law in Lithuania."

In addition, it was also intended that all disputes under the contract would be arbitrated: Article XXIII provided that:

> "1. Periodically EPG and Svenska and, as necessary, Government shall meet to discuss the conduct of activities under this Agreement and will make every effort to settle amicably any problem arising therefrom.
>
> 2. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof which cannot be settled amicably, shall be settled by arbitration under the auspices of ICSID (International Center for Settlement of Investment Dispute).
>
> The arbitration proceedings shall be conducted in the English language.
>
> 3. This Agreement shall be governed by the laws of ".

112. Again, I accept Mr. Bools' submission that the fact that the State was intended to bound by this clause is borne out by the reference to "Any dispute" arising out of the agreement and the fact that any arbitration was to be under the auspices of ICSID – which could only apply to disputes involving a State. (Notably this clause was included at a time well before Sweden and Lithuania concluded their bilateral investment treaty.)

113. A Mr. Ivanauskas (of EPG) responded to the November 1991 draft JVA in a detailed letter of 2 January 1992. The first substantive issue which he raised was the need to

comply with Article 14 of the Law on Foreign Investments which required all joint venture agreements to include various details. One of the requirements was that the agreement specify a dispute resolution procedure. Mr Ivanauskas suggested that, in the first instance, all disputes should be settled by arbitration in Lithuania, in Lithuanian and "if Svenska is not satisfied with the decision" that it might appeal to an ICSID arbitration to be conducted in English.

114. On 17 March 1992, Sweden and Lithuania entered into the BIT.

115. The next draft of the JVA was dated 25 March 1992. EPG had made a number of suggested amendments and many of these were incorporated into the new draft. EPG and Svenska were named as the founders and parties to the joint venture. Once again, however, it was clear from the draft that the parties intended the State to have rights and obligations under the Agreement. Although the detail of the dispute resolution clause changed, it remained the case that it applied to "Any dispute, controversy or claim arising out of or in relation to this Agreement….". Thus Article XXIII provided for arbitration in the first instance in Lithuania, a right of 'appeal' by Svenska to an ICSID arbitration tribunal within 1 month of the Lithuanian award (or to another intentionally recognized body if ICSID arbitration was no longer available), and a waiver by EPG and the State of State immunity. It was in the following form:

> "1. Periodically EPG and Svenska and, as necessary, Government shall meet to discuss the conduct of activities under this Agreement and will make every effort to settle amicably any problem arising therefrom.
>
> 2. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination, or invalidity thereof which cannot be settled amicably, shall be settled by arbitration in Lithuania in accordance with applicable Lithuania legislation.
>
> 3. Following receipt of the Lithuanian arbitration award Svenska shall have the right, during one (1) month to challenge the award by initiating arbitration proceedings under the auspices of ICSID (International Center for Settlement of Investment Disputes) or, if ICSID is no longer available, another internationally recognized and accepted institution. Such arbitration shall, unless otherwise agreed, be conducted in Oslo, Norway, under the English language.
>
> Government and EPG hereby waives [sic] all rights to sovereign immunity and submit to the full and final jurisdiction of ICSID (or another institution as aforesaid).
>
> 4. This agreement shall be governed by the laws of Lithuania provided that the rules of international

> business activities generally accepted in the petroleum industry shall apply in cases of conflict."

116. Although the bilateral investment treaty had been signed by this stage, it was not yet in force. It is clear from the March draft that the parties were moving towards a compromise where each secured what was most important to it: as Dr Motuza said in evidence, the State's primary concern was to have Lithuanian law as the governing law and Svenska's primary concern was that disputes should be finally settled other than in Lithuania. Again I accept Mr. Bools' submission that if there was any doubt that the reference to ICSID arbitration was intended to encompass the State it was dispelled by the State's waiver of sovereign immunity and its express submission to the jurisdiction of ICSID.

117. On or before 27 April 1992 the draft contract was submitted to the Oil Works Licence Committee and was considered in detail by, amongst others, the Ministry of the Economy, the Environmental Protection Department and the Ministry of Trade and Material Resources. Each made detailed comments to the Oil Works Licensing Committee on the terms of the Agreement and these were relayed to Svenska. The only issue raised by the Committee relating to the dispute resolution clause was as to the choice of applicable law. There was no suggestion that the State should not be a party to both the Agreement and the arbitration clause.

118. The next draft was prepared in early August 1992. The governing law clause was slightly amended but the remainder of Article XXIII remained unchanged: all disputes were to be submitted to arbitration in Lithuania, with a right of appeal to ICSID arbitration in Oslo. The State and EPG waived Sovereign immunity and submitted to the jurisdiction of an ICSID tribunal.

119. At this stage, on about 13 August 1992, the form of the Agreement changed. In particular, the information which was required by Article 14 of the Law on Foreign Investments had previously been included in a summary form on the first page of the contract. It was now expanded and divided into a number of separate articles. Importantly, Article 14.10 required "The procedure for arbitrating disputes to be included". This became Article 9. In earlier drafts Article XXIII had dealt with dispute resolution, governing law and waiver of Sovereign immunity. These were now split between Articles 9 and 35 of the Agreement and the wording of the clauses was changed. In particular the wording of the arbitration clause was altered to make it clearer that it complied with the requirement of Article 14.10 of the Law on Foreign Investments. The relevant clauses were as follows:

> "9.1 Disputes between the founders concerning the carrying out of this Contract are settled in accordance with the Statute of the Company or through negotiations between the founders.
>
> 9.2 In the event that disputes cannot be settled through negotiations, they shall be settled in the Courts of Law of the Republic of Lithuania.
>
> "9.3. The judgement given by a Lithuania Court of Law may be challenged by SVENSKA during one (1) month

> after receipt thereof by initiating arbitration proceedings under the auspices of ICSID or, if ICSID is no longer available, another internationally recognized and accepted institution. Such arbitration shall unless otherwise agreed be conducted in the English language in Copenhagen, Denmark or such other place as the Parties may agree."
>
> "35.1 GOVERNMENT and [Geonafta] hereby irrevocably waives [sic] all rights to sovereign immunity and submit to the full and final jurisdiction of ICSID (or another institution as stated in Articles 9.2 and 9.3 above.)
>
> 35.2 This contract shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry."

120. I accept Mr. Bools' submission that there is no evidence that, by separating the arbitration clause from the governing law and Sovereign immunity clause, the parties intended fundamentally to alter the scope of the arbitration clause. Likewise I accept his submission that there is evidence to suggest that they did not: viz.

i) There is, in the contemporaneous documents, nothing (either internal to the parties or by way of communication between them) to suggest that the intention of recasting the contract was to exclude the State from the scope of the arbitration clause.

ii) Every previous draft of the JVA had provided that *all* disputes were to be arbitrated and there is nothing to suggest that the parties suddenly changed their intention between the March and August 1992 drafts.

iii) All but the very first draft of the JVA contained an agreement by the State to waive Sovereign immunity and to submit to the jurisdiction of an arbitral tribunal. There is nothing in the evidence to suggest that its intention in this regard had fundamentally changed.

iv) Despite Article XXIII, and particularly the applicable law, having been discussed by the parties (and having been discussed internally by the parties), no one had ever suggested either internally in State circles or to Svenska that it was unacceptable for the State to be a party to the arbitration clause.

121. I also accept the importance of the point that, even after Article XXIII had been split in two, Article 35 continued to contain the State's agreement to waive sovereign immunity and to submit to the jurisdiction of "ICSID (or another institution as stated in Articles 9.2 and 9.3)". Those other institutions were the Lithuanian courts whose judgment was challengeable before an ICSID tribunal or "If ICSID is no longer available another internationally recognized and accepted institution". Therefore the State was intended to continue to be a party to the arbitration clause despite the splitting of the clause into two and despite the reference in Article 9 to "founders".

Neither the division nor the introduction of the word "founder" was intended fundamentally to change the nature of the parties' agreement. It would appear therefore that all that the redrafting had been intended to do was to make clear that the draft complied with Article 14 of the Law on Foreign Investments.

122. The next draft was produced in early November 1992. In it Article 9 was modified to provide for the decision of a Lithuanian court to be challenged by an ICC arbitration in Denmark. Article 35 remained unamended – it still referred to the State and EPG submitting to the full and final jurisdiction of ICSID or other institution referred to in Articles 9.2 and 9.3 above. Mr Karl Thalin, General Counsel to Svenska from 1980 - 1995, who was responsible for the negotiations with the State and Geonafta throughout the period 1990-1993 leading up to the conclusion of the JVA, stated in evidence that the change from ICSID to ICC was requested by the State and was communicated to him by Dr. Motuza, although Dr. Motuza gave no explanation for the change. Dr. Motuza denied that he suggested this change. Although both Mr Thalin and Dr. Motuza were honest witnesses, I prefer the evidence of Mr. Thalin in this respect, and indeed generally, as his recollection was clearer. He had no continuing connection with Svenska and had for some time been employed by another institution. From 2002 to March 2004 Dr. Motuza had been head of the geology division at Geonafta and his evidence gave the impression on occasions of being somewhat partisan.

123. The November 1992 draft was reviewed by a number of Government Ministries, including the Ministry of Justice. The evidence of Mr. Vladimiras Zukovskis, who worked in the legal department of the Lithuanian Ministry of Justice and was responsible for reviewing some of the drafts, was that this draft was the first that he reviewed and that he had not previously been involved in the parties' negotiations. On 9 December 1992, Mr Zukovskis wrote to the State with his comments on the November draft. He made several comments about various aspects of the draft which needed clarification, but none about either the dispute resolution clause or the governing law and sovereign immunity clauses. At around the same time, however, on 8 December 1992, the Ministry of Economic Relations transmitted its comments to the State. The Ministry noticed the mismatch between Article 9 and Article 35: the former had been changed to refer to ICC arbitration in Denmark but the latter still referred to the State and EPG submitting to the jurisdiction of the ICSID tribunal. The Ministry wrote:

> "As regards 35.1 – here the ICSID (International Centre for Settlement of Investment Disputes) is mentioned. If this is the final instance of dispute settlement, this should be discussed in Article 9."

124. In other words, what the Ministry was suggesting was that Articles 9 and 35 should be brought into line: *if* an ICSID tribunal was to be the final arbiter (as Article 35 presently said), then Article 9 needed to reflect that fact. That was not, however, what had been intended: the parties had at that stage agreed to substitute ICC arbitration in Denmark for ICSID arbitration: it was Article 35 which no longer reflected their intention, not Article 9; Article 35 should have referred to ICC, not ICSID, arbitration. There was no suggestion in the Ministry's communication, or indeed elsewhere, that the State was not prepared to agree to arbitration. If Article 9 had not been thought to and intended to apply to disputes with the State, it would not have

been inconsistent for Article 35 to provide that the State submitted to ICSID arbitration. Furthermore it would not have been necessary for the State to waive Sovereign immunity.

125. Thus it came about that reference to ICSID and indeed all arbitration was deleted from Article 35 in the next draft of 4 February 1993. So far as relevant, that provided as follows:

> "9.1 Disputes between the founders concerning the carrying out of this Agreement are settled in accordance with the Bylaws of the Company or through negotiations between the founders.
>
> 9.2 In the event that disputes cannot be settled through negotiations, they shall be settled in the Court of the Republic of Lithuania.
>
> 9.3 The judgement given by a Lithuanian Court may be challenged by Svenska during One (1) month after receipt thereof by initiating arbitration proceedings. Such arbitration shall be conducted in Copenhagen, Denmark or such other place as the parties may agree upon in the English language in accordance with the International Chamber of Commerce Rules of Arbitration."
>
> "35. GOVERNMENT and EPG hereby irrevocably waives all rights to sovereign immunity.
>
> This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania"

126. That draft was prepared taking into account the comments of the various Government Ministries. Reporting back to the State on 17 February 1993, Dr. Motuza wrote

> "The Remarks provided by the Ministries of Justice and Economy are attached. Taking into account these and other remarks made while authorisation, the following paragraphs of the text of Agreement are corrected or otherwise changed: according to remarks of the Ministry of Justice – p.p. 1.5; 8.1; 9; 15.2; 16.2; 26.8; 35.1; Ministry of Economics – p.p. 3.3; 3.4; 4.1; 5.2; 20.4; 32.2 … *etc*.

127. However, Article 9 of the 4 February 1993 draft still referred to the judgment of the Lithuanian courts being appealable to an ICC arbitration. That was not surprisingly unacceptable to the Ministry of Justice who wrote on 10 February 1993:

> "Point 9.3 is completely unacceptable since a decision of the Court of the Republic of Lithuania may be appealed only in the procedure prescribed by the Civil Procedure Code…"

128. Thereafter the parties appear to have negotiated the solution which was ultimately incorporated in Article 9: namely disputes to be submitted either to the Lithuanian courts or to ICC arbitration in Denmark on agreement of the parties and, if the parties did not agree, then the dispute would go to ICC arbitration. This gave the Lithuanian courts a potential role, but also gave Svenska the protection of knowing that they could choose ultimately to arbitrate their disputes outside Lithuania. The wording which ultimately became Article 9 was proposed by the Ministry of Justice. It was incorporated in manuscript in a draft of 4 February 1993.

129. So far as the evidence was concerned, it was common ground between Mr. Thalin and Dr. Motuza (and, so far as they were able to shed any light on the matter, the other witnesses) that Svenska had proposed ICSID arbitration in an early draft of the JVA and that, although there was some discussion about various aspects of the arbitration clause (for example, venue and the change to ICC arbitration), there was never any discussion, or negotiation, about the State not being prepared to agree to be bound by, and a party to, an arbitration dispute resolution method. As Mr. Thalin said in evidence, and I accept, at all times throughout the negotiations, critical features for Svenska were: that the State should be an immediate party to the JVA; and that there should be recourse to international arbitration to settle disputes arising under the JVA. What is clear, however is that in the earlier drafts the State had appeared to be content to be a party to ICSID arbitration in respect of all disputes arising under the JVA. Moreover, I accept Mr. Thalin's evidence, that if Dr. Motuza, or anyone on the State's part, had suggested at the time that reference to ICSID, and indeed all arbitration, was deleted from Article 35 in the draft of 4 February 1993, or, indeed, at any other stage in the negotiations, that the State was not prepared to be a party to the arbitration dispute resolution procedure at all, the likelihood is that Svenska would have walked away from the negotiations.

130. So far as Dr. Motuza's evidence was concerned, I reject Mr. Shackleton's submission that the State's position was supported by the evidence of Dr Motuza, that "one of the purposes of the language of the JVA referring only to Svenska and Geonafta, was clearly to dissociate Lithuania from the JVA itself and from the arbitration clause". Dr. Motuza'a evidence (particularly that contained in his written witness statements) was in some respects internally inconsistent. Thus on the one hand it was clear from what he said both orally and in writing, and from the State's contemporaneous internal communications produced in evidence, that neither he, nor anyone instructing him in the course of negotiations on behalf of the State, ever positively discussed or addressed the issue that the State might refuse to agree to be a party to an arbitration clause, having originally appeared quite content to be bound by the ICSID arbitration clause. This evidence I accept. On the other hand he also gave evidence to the effect that the fact that the State signed the JVA in a separate capacity "reflected the fact that the State had never intended to be a commercial party to the JVA or a party to the dispute resolution clause." This evidence, and evidence to similar effect from the State's two other witnesses (Messrs Kumpa and Zukovskis), I reject. It was, in the main, mere assertion and self-serving. The fact is that there is no evidence that the State ever had, or formed, the intention *not* to be a party to the arbitration clause, and

an arbitral dispute resolution procedure, having clearly indicated earlier in negotiations that it was prepared to do so. I should also say that I do not accept the assertions in the State's evidence that Dr. Motuza would not have been authorised to have negotiated any such arbitration clause; that he was so authorised is borne out by the submission of the drafts referring to ICSID arbitration.

131. In my judgment, the correct analysis of the evidence which I have set out extensively above, is that there was, as Mr. Thalin said in evidence, a drafting error at the time that reference to ICSID and indeed all arbitration was deleted from Article 35 in the draft of 4 February 1993. I hold that this did not reflect any change in the State's actual intention, which remained that it was prepared to be bound by the arbitration procedure in clause 9.

132. I should deal at this stage with the State's argument that the reason why the reference to arbitration was removed from Article 35 was because the parties intended that any disputes which Svenska had with the State could be arbitrated under the auspices of the BIT. I reject this argument largely for the reasons given by Mr. Bools in submission. They may be summarised as follows:

i) Save for a passing reference in a Svenska Board Minute to there being an investment treaty between the two countries, the State has provided no evidence to support its submission that it was the parties' common intention that the investment treaty would govern their disputes. The State's own factual witnesses' evidence does not support the case now being advanced, nor do the internal State communications. In other words there is no evidence whatsoever to support the notion that this was the reason driving the amendments to the draft JVA.

ii) The State's argument in this respect on the interpretation of the various draft JVAs is as follows:

a) When Article XXIII was split, it was intended that the dispute resolution provision in Article 9 apply as between Geonafta and Svenska and that, as provided for in Article 35, the State submit to ICSID jurisdiction in relation to its disputes with Svenska.

b) Thereafter it was realised that it was unnecessary to have a reference to ICSID arbitration in Article 35 because *all disputes which might arise* would be covered by the treaty and its dispute resolution procedure, Article 7. Therefore the unnecessary reference to ICSID in Article 35 was deleted.

iii) This argument is unsound for the following reasons:

a) First, although this is clearly not determinative, as I have ruled against the State on this point in any event, it is wholly inconsistent with the State's case that it was never intended to be a party to the JVA. If it was never intended to be a party, submits Mr. Bools, why was a clause providing for the resolution of disputes between it and Svenska included in the first place?

b) The State's agreement to submit to ICSID jurisdiction was included in the very first draft of the JVA (21 November 1991) which pre-dates the bilateral investment treaty, which was concluded on 17 March 1992, by several months. It was not the case, therefore, that the reference to ICSID was included simply to reflect what would have been the position under the treaty in any event.

c) The suggestion that the submission to ICSID arbitration was deleted because it was thought to be otiose in light of the treaty is unsupported by any evidence and inconsistent with the evidence of why the amendments to Article 35.1 were actually made – namely because it was thought to be inconsistent with Article 9.

d) Finally, the argument is fallacious because it equates a contractual agreement to submit disputes arising under the JVA with a treaty commitment to submit disputes under the treaty to arbitration. The treaty did not provide the same scope of protection that the express submission in clause 35 would have done: it cannot therefore have been the case that the parties deleted it because they regarded it as otiose: it was not, as it extended ICSID jurisdiction far beyond that which existed under the treaty.

133. In relation to the last point, I refer to Chapter 11 of Redfern and Hunter, *Law and Practice of International Commercial Arbitration.* There the authors discuss bilateral investment treaties and the rights of arbitration under them. They point out that for a claim to be entitled to arbitrate under a bilateral investment treaty to succeed, the claimant must first establish that it is a protected investor within the terms of the treaty and that the dispute relates to a protected investment. Thereafter

> "If the jurisdictional hurdles are overcome, the question arises whether the host state has breached its substantive obligations. [§11-23]"

134. Thus a claim will only lie under the treaty for breaches by the state of the obligations it has assumed under the treaty. As to the content of those obligations Redfern and Hunter say: "There is a surprising degree of uniformity between substantive protections in the treaties, aided by model treaties established as negotiating models by the main capital-exporting nations". They go on to cite examples of common protections: "Fair and equitable treatment"; "full protection and security"; "no arbitrary or discriminatory measures impairing the investment"; "no expropriation without prompt, adequate and effective compensation"; "national and 'most favoured nation' treatment"; and "free transfer of funds related to investment".

135. These are precisely the sort of protections which appear in the treaty between Sweden and Lithuania. In short, each state, by the treaty, assumes obligations towards investors. It is for breach of those treaty obligations which an investor might have recourse to ICSID arbitration under clause 7 of the BIT:

> "(1) Any dispute between one of the Contracting Parties an investor of the other Contracting Party *concerning the*

> *interpretation or application of this Agreement* shall, if possible, be settled amicably.
>
> (2) If the dispute cannot be thus settled within six months … it shall at the request of either party be submitted to arbitration for a definitive settlement…."

Clause (3) goes on to provide that if both States are parties to the Washington Convention then the dispute may be submitted to ICSID. It follows that the procedure laid down in Article 7 is a procedure for resolving claims by an investor that a Contracting State has breached one of its obligations under the Treaty. It does not provide for claims for breach of contract – which do not also amount to breaches of treaty obligations – to be resolved under the treaty disputes resolution provisions.

136. I accept Mr. Bools' submissions that it is for this reason that there is a real difference between Svenska and the State being parties to a contractual agreement to resolve their disputes under the JVA by ICSID arbitration and Lithuania and Sweden being parties to a treaty which contains an agreement to resolve their disputes with investors under the treaty by ICSID arbitration. It is unsustainable to suggest that the parties regarded the two as equivalents such that deleting the State's agreement to submit to ICSID arbitration in Article 35 made no difference: its effect (if the State had not been covered by Article 9) would have been to have taken the vast majority of contractual disputes outside the scope of arbitration and that was never the parties' intention.

137. Accordingly I reject the State's arguments in relation to the BIT.

Geonafta's and Svenska's post-contractual dealings

138. In reaching my conclusion, I have also considered the evidence relating to Geonafta's and Svenska's post-contractual dealings, but that has not assisted me in reaching my conclusion as to the true interpretation of Article 9.

Conclusion

139. In my judgment, the evidence of the parties' pre-contractual negotiations demonstrates the common intention of the State, Geonafta and Svenska that their disputes (including those involving the State) should be settled by arbitration and that the dispute resolution provisions of Article 9 of the Final JVA should apply to disputes between the State and Svenska, notwithstanding the inappropriate use of the words "Founders" and other words in that clause. In reaching this conclusion I have given due weight to the wording in clause 9. However, despite the fact that it does not *prima facie* reflect the actual intentions of the parties as I have held them to be, the relevant principles of Article 6.193 of the Lithuanian Civil code require the Court to search for the parties' real common intention notwithstanding the literal meaning of the words used. Accordingly, it follows that, in my judgment, the State was indeed a party to the arbitration agreement in Article 9 of the JVA and therefore it is not entitled to State immunity in the present proceedings by virtue of section 9 of the Act.

140. Finally, I should say how grateful I am to both Mr. Shackleton and Mr. Bools for their very helpful written and oral submissions, and also to Mr. Shackleton for the

provision of various further documentary submissions and materials following the hearing.