

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Krederi Ltd.

v.

Ukraine

ICSID Case No. ARB/14/17

AWARD

Members of the Tribunal

Prof. Dr. August Reinisch, President

Dr. Markus Wirth, Arbitrator

Dr. Gavan Griffith QC, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

Date of dispatch to the Parties: 2 July 2018

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TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral Investment Treaty
CE-	Claimant's Exhibits
CCU	Commercial Code of Ukraine
CLA-	Claimant's Legal Authorities
Claimant or Krederi	Krederi Limited
Claimant Defence to Preliminary Objections and Reply on the Merits	Claimant's Defence to Preliminary Objections and Reply on the Merits dated 16 December 2016
Claimant Memorial	Claimant's Memorial on the Merits dated 20 July 2015
Claimant Post-Hearing Brief	Claimant's Post-Hearing Brief dated 29 September 2017
Claimant Rejoinder to Preliminary Objections	Claimant's Rejoinder to Preliminary Objections dated 17 July 2017
Claimant Submission on Costs	Claimant's Submission on Costs dated 25 September 2017
COB	Close of Business
ECHR	European Convention on Human Rights and Fundamental Freedoms dated 4 November 1950

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ECtHR	European Court of Human Rights
[...]	
FET	Fair and equitable treatment
FCN	Friendship, Commerce and Navigation (Treaty)
[...]	
ICC	International Chamber of Commerce
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
IIA	International Investment Agreement
KCC	Kiev City Council
Krederi	Krederi Limited
MFN	Most Favored Nation
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PCA	Permanent Court of Arbitration
[...]	

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R-	Respondent's Exhibits
RLA-	Respondent's Legal Authorities
Request	Request for Arbitration
Respondent	Ukraine
Respondent Counter-Memorial	Respondent's Preliminary Objections and Counter-Memorial on the Merits dated 26 February 2016
Respondent Post-Hearing Brief	Respondent's Post-Hearing Brief dated 29 September 2017
Respondent Rejoinder on the Merits	Respondent's Rejoinder on the Merits dated 17 July 2017
Respondent Reply to Preliminary Objections	Respondent's Reply to Preliminary Objections dated 25 May 2017
Respondent Submission on Costs	Respondent's Submission on Costs dated 24 September 2017
SCC	Stockholm Chamber of Commerce
Hearing transcript, [hearing day:page:line]	Transcript of the hearing on jurisdiction and the merits
Treaty or UK-Ukraine BIT	Bilateral Investment Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, dated 10 February 1993
UAH	Ukrainian Hryvnia

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UBO	Ultimate Beneficial Owner
UCC	Ukrainian Civil Code
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
USD	United States Dollars
VCLT	Vienna Convention on the Law of the Treaties, concluded in Vienna on 23 May 1969
¶(¶)	Paragraph(s)

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I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of (i) the Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine, which came into force on 10 February 1993 (“Treaty” or “UK-Ukraine BIT”);¹ and (ii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (“ICSID Convention”).²
2. The dispute relates to Claimant’s real estate investments in Ukraine, including the acquisition of three land plots in central Kiev ([...]) (Plots 1 and 3) and on [...] (Plot 2) on which Claimant had plans to develop a multi-functional complex including a luxury hotel, shopping area, multi-level parking, residential, office, and retail spaces. In Claimant’s view, the land plots were lost as a result of various measures by Ukraine, most importantly four court proceedings allegedly conducted in an irregular fashion falling short of due process.

II. THE PARTIES AND RELEVANT ENTITIES

A. THE PARTIES

3. Claimant is Krederi Limited (“Krederi” or “Claimant”). Krederi is incorporated under the laws of England and Wales with company No. 6210742. It has its registered address at 20-22 Bedford Row, London WC1R 4JS.³
4. Respondent is Ukraine (“Ukraine” or “Respondent”).

¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments (London, 10 February 1993), entered into force 10 February 1993, CE-1.

² Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention), (Washington D.C., 18 March 1965).

³ Articles of Association of Krederi Ltd. and Companies House Certification, CE-2.

5. Claimant and Respondent are collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed on page (ix) above. Although they are not parties to the dispute, the corporate entities described below are relevant to the facts of the case.

B. [COMPANY A]

[...]

C. [COMPANY B]

[...]

D. [COMPANY C]

[...]

E. [COMPANY D]

[...]

III. PROCEDURAL HISTORY

10. Claimant submitted its Request for Arbitration (“Request”) to the Centre on 1 July 2014, together with exhibits CE-1 through CE-62.
11. The Secretary-General of ICSID registered the Request on 21 July 2014, pursuant to Article 36(3) of the ICSID Convention. In the Notice of Registration, the Secretary-General of ICSID invited the Parties to proceed to constitute an arbitral tribunal in accordance with Articles 37 to 40 of the ICSID Convention.
12. The Parties agreed that the Tribunal would be constituted in accordance with Article 37(2)(a) of the ICSID Convention and would consist of three arbitrators, one appointed by

each Party (“co-arbitrators”), and the third arbitrator, the President of the Tribunal, to be appointed by a list ranking procedure.⁴

13. The agreed method of constitution was as follows:

- (i) By 5 September 2014, Claimant would appoint an arbitrator;
- (ii) By 30 September 2014, Respondent would appoint an arbitrator;
- (iii) The two party-appointed arbitrators in consultation with the Parties would provide a list of no more than six names to both Parties by 20 October 2014;
- (iv) By 27 October 2014, each party would strike out up to two of those names and rank the remaining names in order of preference;
- (v) By 31 October 2014, the two appointed arbitrators, without further consultation with the parties, would appoint the President of the Tribunal from the ranked lists; and
- (vi) If either Party failed to make an appointment or the two party-appointed arbitrators were unable to reach an agreement on the identity of the President of the Arbitral Tribunal within the specified time limits, then the Chairman of the ICSID Administrative Council would make the appointment of arbitrators or President not yet appointed among the Parties’ ranked arbitrators list.⁵

14. On 5 September 2014, Claimant appointed Dr. Markus Wirth, as arbitrator, and Dr. Wirth accepted the appointment by letter of 22 September 2014. Together with his acceptance, Dr. Wirth provided the Parties with a declaration of his independence and impartiality.

15. Respondent attempted to appoint an arbitrator by letters of 29 September 2014, 7 October 2014, and 9 October 2014. However, each of the potential appointees could not accept their appointments.

16. By letter of 14 October 2014, the Centre wrote to the Parties “notfing] that the Respondent ha[d] appointed an arbitrator pursuant to the parties’ agreed method, but the appointees

⁴ Claimant’s communications of 6 August 2014, 21 August 2014, and 5 September 2014; Respondent’s letters of 11 August 2014 and 4 September 2014.

⁵ Letters from ICSID to the Parties of 5 September 2014 and 15 October 2014.

- ha[d] declined their appointments. The parties' agreement on the method of constitution of the Tribunal [did] not foresee such circumstance." The Centre accordingly invited the Parties to clarify the method and/or to consult in view of amending such method, including the remaining time limits.
17. By letter of 15 October 2014, Claimant proposed an amended method of constitution of the Tribunal. By letter of the same date, Respondent appointed an arbitrator. The Secretariat of the Centre acknowledged receipt of the Parties' letters and (i) invited Respondent to indicate whether it accepted Claimant's proposed amendment to the method of constitution of the Tribunal in this case and (ii) indicated that it would seek the acceptance of the arbitrator appointed by Respondent.
 18. By letter of 16 October 2014, Respondent disagreed with Claimant's proposed amendment to the method of constitution of the Tribunal.
 19. By letter of 22 October 2014, given that the Parties were unable to agree on an amended method for constituting the Tribunal, the Centre informed the Parties that "unless the parties agree otherwise, if any arbitrators are missing on the Tribunal on October 31, 2014, the Chairman of the Administrative Council shall make the appointment(s)."
 20. By letter of 31 October 2014, ICSID informed the Parties that the arbitrator that Respondent had appointed was unable to accept his appointment. The Centre invited the Parties to inform it whether they would like to revise the method of constitution of the Tribunal by 3 November 2014. It also advised the Parties that failing an agreement on a revised method of constitution, and given that Respondent had been unable to appoint an arbitrator within the agreed period of time, the Chairman of the Administrative Council (the "Chairman") would make this appointment from the ICSID Panel of Arbitrators without consultation with the Parties.
 21. Additionally, with respect to the appointment of the President of the Tribunal, ICSID invited the Parties to also confirm, by 3 November 2014, whether they wished to maintain the list procedure, as agreed by the Parties and set forth in the Centre's letter of 15 October 2014, with revised deadlines. ICSID informed the Parties that failing an agreement by the

- Parties, the Chairman would make the appointment directly from the ICSID Panel of Arbitrators in consultation with the Parties, as per ICSID practice.
22. By letter of 3 November 2014, Respondent requested an extension to Monday 10 November 2014, COB, for the Parties to seek to reach an agreement on a revised method of constitution.
 23. By letter of the same date, Claimant rejected Respondent's request for an extension and requested that the Chairman appoint an arbitrator on behalf of Respondent.
 24. In a further letter of 3 November 2014, Respondent advised Claimant and the Centre that it was in the process of contacting three candidates to confirm if they would be prepared to accept an appointment, and stated that Claimant's request for the Chairman to appoint an arbitrator on behalf of Respondent was premature.
 25. Also on 3 November 2014, ICSID wrote to the Parties stating that, unless and until the Parties communicated that they had reached an alternative agreement as to the method of the constitution of the Tribunal, the Centre would continue the process of appointment by the Chairman starting with the appointment of the co-arbitrator.
 26. By letter of 4 November 2014, Respondent appointed Dr. Gavan Griffith QC as arbitrator. On 6 November 2014, ICSID informed the Parties of Dr. Griffith's acceptance of his appointment.
 27. On 10 November 2014, the Centre confirmed the further agreement of the Parties concerning the appointment of the President of the Tribunal. The Parties agreed as follows:
 - (i) by 25 November 2014, the two party-appointed arbitrators would provide an agreed list of 6 names to the parties;
 - (ii) by 2 December 2014, the Parties would strike out up to two of those names, and would rank the remaining names in order of preference;
 - (iii) by 16 December 2014, the two party-appointed arbitrators would appoint the President of the Tribunal, and if by that date the two party-appointed arbitrators are unable to reach agreement on the identity of the President of the Tribunal, the Chairman of the Administrative Council shall proceed to appoint the President of the Tribunal.

28. On 2 December 2014, after receiving the respective list rankings, ICSID confirmed that the Parties had agreed to appoint Professor Albert Jan van den Berg as President of the Tribunal.
29. On 4 December 2014, the Acting Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was constituted. The Tribunal was composed of Professor Albert Jan van den Berg, a national of the Netherlands, President, appointed by agreement of the Parties; Dr. Markus Wirth, a national of Switzerland, appointed by Claimant, and Dr. Gavan Griffith QC, a national of Australia, appointed by Respondent. Moreover, Mr. James Claxton, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
30. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 20 February 2015, at the World Bank’s offices in Paris, France.
31. Following the first session, on 5 March 2015, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural language is English, and that the place of the proceedings is to be Paris, France. Procedural Order No. 1 sets out the agreed schedule for the jurisdictional and merits phases of the proceedings.
32. In accordance with Procedural Order No. 1, it was agreed that:
 - (i) by 22 June 2015, Claimant would file its Memorial on the Merits;
 - (ii) by 21 December 2015, Respondent would file its Preliminary Objections and Counter-Memorial on the Merits;
 - (iii) by 17 October 2016, Claimant would file its Defence to Preliminary Objections and Reply on the Merits;
 - (iv) by 19 December 2016, the Respondent would file its Reply to Preliminary Objections and Rejoinder on the Merits; and
 - (v) by 3 February 2017, the Claimant would file its Rejoinder to Preliminary Objections.

33. On 30 April 2015, the Secretary-General informed the Parties that Ms. Mairee Uran-Bidegain was appointed as the Secretary of the Tribunal in this case, replacing Mr. James Claxton.
34. On 22 June 2015, the Tribunal acknowledged the Parties' agreement to extend the deadline for the submission of Claimant's Memorial to 20 July 2015, and their proposal to amend the procedural calendar for this proceeding.
35. On 20 July 2015, Claimant submitted its Memorial ("Claimant Memorial"), together with exhibits CE-1 to CE-68, legal authorities CLA-1 to CLA-36 as well as six witness statements, and three expert reports: [...].
36. Following exchanges between the Parties, it was agreed to extend the deadline for the submission of Respondent's Preliminary Objections to Jurisdiction and Counter-Memorial on the Merits to 16 February 2016.⁶
37. On 26 February 2016, Respondent submitted its Counter-Memorial on the Merits ("Respondent Counter-Memorial"), together with exhibits R-1 through R-107, legal authorities RLA-1 through RLA-79, and the expert report of [...]. On 1 March 2016, Respondent sent a correction of its supporting documentation.
38. By letter of 7 March 2016, the Centre requested that Respondent provide an English translation of its exhibits submitted in Ukrainian, as required by Procedural Order No. 1.
39. On 9 September 2016, the Acting Secretary-General of ICSID informed the Parties that Ms. Ella Rosenberg had been appointed to serve as the Secretary of the Tribunal, replacing Ms. Mairee Uran-Bidegain.
40. Also on 9 September 2016, the Parties submitted a joint request to the Tribunal regarding a) the proposed timetable for the document production phase, and b) the possibility of revising the hearing dates.

⁶ Communication from ICSID of 22 July 2015; Letter from King & Wood Mallesons of 13 January 2016; Communication from ICSID of 15 January 2016.

41. By email of 12 September 2016, the Tribunal decided not to amend the hearing dates but approved the Parties' proposed changes to the timetable for the document production phase provided that the Parties agreed on a schedule until the hearing that would maintain the previously agreed hearing dates, i.e., 4 to 7 April 2017.
42. On 16 September 2016, as requested by the Tribunal, the Parties submitted a joint proposal for a revised timetable.
43. Also on 16 September 2016, Claimant provided the Tribunal with its Redfem schedule and asked the Tribunal to decide on an outstanding document request. Claimant advised the Tribunal that all the other requests made by the Parties had been agreed and all documents would be produced accordingly.
44. On 19 September 2016, the Tribunal approved the Parties' joint proposal for the procedural calendar. The timetable established was as follows:
 - 14 October 2016: Document production (as ordered of non-objected documents);
 - 14 December 2016: Claimant to file its Defence to Preliminary Objections and Reply on Merits;
 - 24 February 2017: Respondent to file Reply to Preliminary Objections and Rejoinder on Merits;
 - 17 March 2017: Claimant to file Rejoinder to Preliminary Objections;
 - 28 February 2017: Parties' notification of witnesses and experts;
 - 21 March 2017: Pre-hearing organizational teleconference;
 - 3 to 7 April 2017: Hearing on jurisdiction and the merits;
 - 28 April 2017: Parties to file post-hearing memorials;
 - 19 May 2017: Parties to file reply post-hearing memorials;
 - 2 June 2017: Parties to file their respective submissions on costs.

45. Also on 19 September 2016, the Tribunal issued a decision on Claimant's outstanding document request.
46. On 26 September 2016, Respondent wrote to the Tribunal requesting alternate hearing dates. Respondent cited insufficient time in the current timetable for the Parties to adequately prepare for the hearing as no documents had been exchanged and further material submissions and evidence had yet to be advanced.
47. On 4 October 2016, the Tribunal noted that Respondent's power of attorney on file had expired and invited Respondent to provide either a current power of attorney or another document executed by Respondent confirming that its counsel was duly authorized to represent Ukraine in these proceedings. Subsequently, on 2 November 2016, Respondent provided a power of attorney covering the period up to 31 December 2016.
48. Following exchanges between the Parties and the Tribunal, on 13 October 2016, the Tribunal confirmed that the hearing dates would be moved to 4-8 September 2017, and requested the Parties to provide a joint proposal for the remainder of the procedural calendar.
49. On 1 November 2016, the procedural calendar was amended as follows:
 - 16 December 2016: Claimant to file its Defence to Preliminary Objections and Reply on Merits;
 - 24 April 2017: Respondent to file its Reply to Preliminary Objections and Rejoinder on Merits;
 - 5 June 2017: Claimant to file its Rejoinder to Preliminary Objections;
 - 7 July 2017: Parties' notification of witnesses and experts;
 - 14 August 2017: Pre-hearing organizational teleconference;
 - 4-8 September 2017: Hearing on jurisdiction and the merits;
 - 29 September 2017: Both Parties to file post-hearing memorials;
 - 20 October 2017: Both Parties to file reply post-hearing memorials;
 - 17 November 2017: Both Parties to file their respective costs submission.

50. On 16 December 2016, Claimant submitted its Defence to Preliminary Objections and Reply on the Merits (“Claimant Defence to Preliminary Objections and Reply on the Merits”) together with exhibits CE-72 to CE-81 and legal authorities CLA-37 to CLA-61.
51. On 27 December 2016, the Tribunal noted that Respondent’s power of attorney on file was set to expire on 31 December 2016, and invited Respondent to provide either a current power of attorney or other document executed by Respondent confirming that its counsel was duly authorized to represent Ukraine in these proceedings. As no answer had been received, on 6 February 2017, the Secretariat requested an update from Respondent on the status of its power of attorney.
52. By letter of 27 March 2017, the Centre informed the Parties that Professor Albert Jan van den Berg had submitted his resignation in accordance with ICSID Arbitration Rule 8(2). Pursuant to ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy resulting from the resignation of Professor van den Berg could be filled. As contemplated by ICSID Arbitration Rule 11(1), the vacancy was to be filled using the same method by which his appointment was made. Following exchanges between the Parties, an agreed protocol and timetable for the replacement process was established.
53. On 20 April 2017, after receiving the respective list rankings, ICSID confirmed that the Parties had agreed to appoint Professor August Reinisch, a national of Austria, as President of the Tribunal and that the Tribunal was reconstituted. Its members are: Prof. August Reinisch (Austrian), President, appointed by his co-arbitrators in accordance with ICSID Arbitration Rule 11(1); Dr. Markus Wirth (Swiss), appointed by Claimant; and Gavan Griffith QC (Australian), appointed by Respondent. The proceeding was resumed pursuant to ICSID Arbitration Rule 12.
54. By letter of 9 May 2017, the Tribunal established the following procedural calendar:
 - 22 May 2017: Respondent to file its Reply to Preliminary Objections and Rejoinder on the Merits;
 - 5 July 2017: Claimant to file its Rejoinder to Preliminary Objections;
 - 28 July 2017: Parties’ notification of witnesses and experts;

- The pre-hearing meeting was to take place, as planned, on 14 August 2017 and all of the remaining dates as regards the hearing and post-hearing matters were to remain unaffected.
55. Following exchanges between the Parties, on 12 May 2017, the Tribunal granted Respondent’s request for an extension to file its Reply to Preliminary Objections. As a result, a new procedural calendar was established as follows:
- 25 May 2017: Respondent to file its Reply to Preliminary Objections and Rejoinder on Merits;
 - 8 July 2017: Claimant to file Rejoinder to Preliminary Objections;
 - 8 July 2017: Respondent to file Rejoinder on the Merits;
 - 28 July 2017: Parties’ notification of witnesses and experts;
 - All remaining dates remain unchanged.
56. On 25 May 2017, Respondent submitted its Reply to Preliminary Objections (“Respondent Reply to Preliminary Objections”), with legal authorities RLA-80 to RLA-93 and the expert report of [...]. In addition, Respondent stated with regards to its power of attorney the following:
- [...]
57. Subsequently, on 29 August 2017, Respondent provided an updated power of attorney covering the period up to 31 December 2017.
58. On 13 July 2017, the Tribunal approved the Parties’ agreement to extend the deadline for the submission of Claimant’s Rejoinder to Preliminary Objections and Respondent’s Rejoinder on the Merits to 17 July 2017.
59. Accordingly, on 17 July 2017, Claimant filed its Rejoinder to Preliminary Objections (“Claimant Rejoinder to Preliminary Objections”), together with legal authorities CLA-62 through CLA-71.
60. Also on 17 July 2017, Respondent filed its Rejoinder on the Merits (“Respondent Rejoinder on the Merits”), together with the Second Expert Report of [...], the First Expert Opinion

of [...], the First Expert Opinion of [...] as well as exhibits R-108 through R-123 and legal authorities RLA-94 through RLA-122.

61. A pre-hearing procedural teleconference was held on 14 August 2017, regarding the organization of the hearing to be held from 4 to 8 September 2017, at the World Bank in Paris, France.
62. On 15 August 2017, Respondent requested that the witness statement of [...] be stricken from the record since Claimant's counsel had informed that [...] would not be attending the hearing.
63. On 17 August 2017, Claimant submitted observations on Respondent's request for the exclusion of [...]’s evidence, and filed a request to submit a new legal authority, *OAO Tatneft v. Ukraine*, (PCA Case No. 118005), Award on the Merits, dated 29 July 2014. By letter of the same date, Respondent objected to Claimant's request of 17 August 2017.
64. On 19 August 2017, the Tribunal issued Procedural Order No. 2 concerning the organization of the hearing to be held from 4 to 8 September 2017 at the World Bank in Paris, France. In particular, Procedural Order No. 2 established the agreed allocation of time between the Parties, the manner of time keeping, the sequence of the hearing, the list of witnesses and experts, as well as the scope and manner of witness and expert examination.
65. In addition, in Procedural Order No. 2, the Tribunal settled the two outstanding applications of the Parties. The Tribunal decided not to allow [...]’s evidence to be kept on record, however allowed Claimant to introduce the contents of the witness statement as part of its submission. It also granted Claimant's request to add a new legal authority, *OAO Tatneft v. Ukraine*, (PCA Case No. 118005), Award on the Merits, dated 29 July 2014.
66. Pursuant to Section 45 of Procedural Order No. 2, by letter of 21 August 2017, the Tribunal invited the Parties to address, *inter alia*, the following matters at the upcoming hearing:
 - i. The jurisdictional issue of consent to ICSID arbitration under the BIT as well as the question of consent “importation” via the Treaty's MFN clause;

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- ii. the lawfulness of the investment (financing, registration);
- iii. the standard of review of domestic court proceedings appropriate under BIT protection standards;
- iv. the application of BIT protection standards regarding the conduct of the four cases; expropriation by denial of justice; and
- v. valuation issues.

67. A hearing on jurisdiction and the merits was held in Paris from 4 to 8 September 2017 (the “Hearing”). The following persons were present at the Hearing:

Tribunal:

Professor Dr. August Reinisch	President
Dr. Markus Wirth	Arbitrator
Dr. Gavan Griffith, QC	Arbitrator

ICSID Secretariat:

Ms. Ella Rosenberg	Secretary of the Tribunal
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For Claimant:

Professor Loukas Mistelis	Mistelis & Haddadin
Dr. Harris Bor	20 Essex Street
Dr. Roberto Castro de Figueiredo	Tauil & Chequer Advogados in Association with Mayer Brown LLP

Ms. Oksana Malenko	Mistelis & Haddadin
Mr. Armenak Ohanesian	Mistelis & Haddadin

For Respondent:

Dr. Andrei Yakovlev	KWM Europe LLP
Ms. Dorothy Murray	KWM Europe LLP
Mr. Alexis Namdar	KWM Europe LLP
Mr. Edmund Northcott	KWM Europe LLP
Mr. Andrei Kolupaev	Lexwell & Partners
Mr. Tatiana Kolga	Lexwell & Partners
Mr. Igor Nagai	Lexwell & Partners
Mr. Michael Siroyezhko	Ukrainian Ministry of Justice
Mr. Artem Zubko	Ukrainian Ministry of Justice

Court Reporter:

Ms. Diana Burden
Ms. Laurie Carlisle

Interpreters:

Ms. Ludmila Davis
Mr. Boris Kovaltchouk
Mr. Oleks Nesnov

68. During the Hearing, the following persons were examined:

On behalf of Claimant:

[...]

On behalf of Respondent:

[...]

69. The Parties filed simultaneous post-hearing briefs on 29 September 2017 (“Claimant Post-Hearing Brief” and “Respondent Post-Hearing Brief”). By letter of 5 October 2017, Claimant filed objections to certain points raised by Respondent in its post-hearing brief. On 10 October 2017, Respondent filed a response to Claimant’s observations of 5 October 2017.

70. Respondent filed its submission on costs on 24 November 2017 (“Respondent Submission on Costs”), and Claimant filed its submission on costs on 25 November 2017 (“Claimant Submission on Costs”).

71. The proceeding was closed on 26 June 2018.

IV. FACTUAL BACKGROUND

[...]

A. CASE 1: [...]

B. CASE 2: [...]

C. CASE 3: [...]

D. CASE 4: [...]

V. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

[...]

VI. JURISDICTION

A. THE PARTIES' POSITIONS

(1) Respondent's Position

[...]

a. Respondent has not consented to ICSID arbitration

[...]

(i) There is no express consent to ICSID arbitration in the UK-Ukraine BIT

[...]

(ii) Consent to ICSID arbitration cannot be imported by operation of the MFN clause at Article 3 of the UK-Ukraine BIT

[...]

b. Claimant's bad faith and/or illegality in making the investment preclude it from protection under the UK-Ukraine BIT

[...]

(i) Claimant's investment was made in violation of Ukrainian law

[...]

(ii) Claimant's investment was not made in good faith or was unlawful

[...]

c. Claimant does not qualify for protection under the UK-Ukraine BIT because Respondent was not aware that Claimant was a foreign investor

[...]

d. Claimant is not entitled to protections under the UK-Ukraine BIT because it invested through two Ukrainian intermediaries

[...]

(2) Claimant's Position

[...]

a. There is in principle consent to ICSID arbitration in Article 8(2) BIT

[...]

b. The MFN Clause in the UK-Ukraine BIT can be interpreted as importing a dispute resolution provision from another dispute resolution provision

[...]

c. Claimant's investment was made in conformity with the laws in force in Ukraine

[...]

d. Claimant's investment was made in good faith

[...]

B. TRIBUNAL’S ANALYSIS

(1) Introduction

232. This Tribunal must first decide whether it has jurisdiction which requires that the conditions of Article 25 ICSID Convention are fulfilled including, most importantly, that the Parties have consented to the jurisdiction of the Centre and thus of this Tribunal.⁷
233. In fact, the Parties’ difference of views has centred on the *ratione voluntatis* issue of whether Respondent has effectively consented to ICSID jurisdiction. While the Parties have not focused on the *ratione materiae* and *ratione personae* requirements under Article 25 of the ICSID Convention, it is clear that the Tribunal has to satisfy itself that such requirements are also fulfilled.
234. Further, it will address the specific jurisdictional/admissibility challenges raised by Respondent which has argued that the investment was neither made in accordance with host State law nor in good faith and would thus not merit protection under the Treaty.

(2) The *ratione materiae* and *ratione personae* jurisdictional requirements under Article 25 ICSID Convention

235. Claimant has asserted⁸ that the *ratione materiae* and *ratione personae* jurisdictional requirements pursuant to Article 25 ICSID Convention are fulfilled. Still, it is the duty of a tribunal constituted pursuant to the ICSID Convention to satisfy itself of the fulfilment of these jurisdictional prerequisites.
236. Article 25 ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing

⁷ When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia* – or better, *iura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.

⁸ Claimant Memorial, ¶ 183.

to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

237. The Tribunal will assess the question of whether Claimant’s activities qualify as an investment in the sense of Article 25 ICSID Convention pursuant to a “*Salini* light-test” which has emerged as the prevailing approach by ICSID tribunals over the last years and which developed the original *Salini*-test,⁹ holding that in fact only “the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.”¹⁰
238. In the present case, it is undisputed that a substantial amount of money was used by Krederi to acquire the three land plots in central Kiev through its subsidiaries. These acquisitions were intended to be developed over the subsequent years into profit-making real estate projects. It is evident that such long-term activities carried a number of commercial and other risks. It thus appears obvious that Claimant’s activities can be regarded as an “investment” pursuant to Article 25 ICSID Convention and it is noteworthy that such a qualification was not challenged by Respondent during the proceedings.
239. In regard to the *ratione personae* jurisdictional requirement for legal persons, the ICSID Convention defines “national of another Contracting State” as “any juridical person which had the nationality of a Contracting State other than the State party to the dispute [...] and any juridical person which had the nationality of the Contracting State party to the dispute

⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, CLA-38, ¶ 52 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition”). Investment tribunals have focused on: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State’s development as typical characteristics of an investment. See also C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* (2nd edn., 2009) 128 *et seq.*, RLA-85.

¹⁰ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, CLA-16, ¶ 5.43. See also *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 295; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, RLA-47, ¶ 151; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶ 110 (“[...] that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention.”).

[...] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”¹¹

240. In the present case, it is unquestioned that Claimant, Krederi Ltd., is a company established under the law of the UK which has been a Contracting Party of the ICSID Convention since 1967. Claimant thus qualifies as a “national of another Contracting State” pursuant to Article 25 ICSID Convention.

241. It is also undisputed that Ukraine has been a Contracting Party of the ICSID Convention since 2000. Thus, the second *ratione personae* jurisdictional requirement pursuant to Article 25 ICSID Convention, that Respondent be a Contracting Party, is also fulfilled.

242. The Tribunal will now turn to the controversial issue of whether the Parties to the dispute have effectively consented to the jurisdiction of the Centre.¹²

(3) The jurisdictional requirements under the BIT

243. It is well-established that in addition to fulfilling the jurisdictional requirements of Article 25 ICSID Convention, an investment tribunal must assure itself that an investment meets the jurisdictional requirements of the applicable BIT or IIA, pursuant to what has been referred to as the so-called double-barrelled test¹³ in ICSID cases. In the past, most tribunals have applied such a double-barrelled test in regard to the jurisdictional requirement of an

¹¹ Article 25(2)(b) ICSID Convention.

¹² See below ¶¶ 262 *et seq.*

¹³ *Ceskoslovenska obchodni banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ¶ 68 (“A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.”); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Partial Award on Jurisdiction, 8 September 2006, ¶ 112 (“It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an “investment” under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfil the *ratione materiae* prerequisite of Article 25 of the Convention.”); *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 28 May 2007, ¶ 55 (“Under the double-barrelled test, a finding that the Contract satisfied the definition of “investment” under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the criterion of an “investment” within the meaning of Article 25.”).

- “investment”. However, this equally applies to the other jurisdictional requirements that may be expressed in both the ICSID Convention and in the applicable investment treaty.¹⁴
244. Article 1(a)(i)-(v) of the Treaty contains a wide asset-based definition of “investment” including movable and immovable property, shares, claims to money, intellectual property rights and business concessions. It does not remove indirect ownership of any of these assets from the investment definition, e.g. by requiring direct shareholding.
245. Thus, Krederi’s investments in the Kiev real property market through its majority-owned and fully controlled Ukrainian subsidiaries, [Company C] and [Company D], qualify as investments under the Treaty. Respondent’s argument that Claimant is not entitled to protection under the Treaty because it invested through two intermediaries is thus rejected.
246. Claimant, Krederi Ltd., is a “company established and operating under the laws of England and Wales”¹⁵ and thus qualifies as a corporation “incorporated or constituted under the law in force in any part of the United Kingdom” pursuant to Article 1(c)(1)(bb) of the Treaty, defining the notion of “investor”.
247. Ukraine is a Contracting Party of the Treaty.
248. There is no indication in the Treaty that in addition to the objective definitions of investment and investor, the host State must have specific knowledge of the foreign character of an investment and/or investor at the time of the alleged breach as submitted by Respondent.¹⁶
249. In fact, it is one of the characteristics of investment treaties that they automatically cover an unidentified range of foreign investors and investments that fulfil the requirements laid down in the abstract definitions of such treaties. There is no need for a host State to be aware of specific investments made by investors of the other contracting party.

¹⁴ See *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 14 April 2009, RLA-37, ¶ 74 (“It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the fulfilment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT. [...]”).

¹⁵ Claimant Memorial, ¶ 3.

¹⁶ Respondent Counter-Memorial, ¶¶ 34.2, 49.

250. Where, however, contracting parties make treaty protection explicitly dependent upon an authorization or approval requirement for individual investments, they thereby have a tool to actually receive specific knowledge of the foreign character of an investment. In the case of treaty provisions of this kind such knowledge (as the precondition for approval) can be regarded as a requirement for treaty protection.
251. Since the UK-Ukraine BIT does not contain any indication of a “specific knowledge” or an approval requirement the question whether Ukraine was actually aware of the fact that Claimant was foreign is irrelevant and does not remove Claimant for the protection of the Treaty.
252. Since the “legality of the investment”, an issue that relates to the investment definition under the Treaty, was specifically challenged by Respondent, it will be separately addressed below.¹⁷

(4) Consent to ICSID jurisdiction

253. Respondent objects to the jurisdiction of the Centre and this Tribunal because it considers that it has not offered such “consent” through Article 8 of the Treaty or otherwise.
254. Claimant bases its jurisdictional case in regard to consent mainly on two arguments: first, that Article 8 of the Treaty contains Respondent’s offer of consent and, second, that the Treaty’s MFN clause expressly includes dispute settlement and thus permits Claimant to accept Respondent’s offer of consent to ICSID arbitration found in its BITs with third States.
255. Respondent rejects this claim and argues that consent cannot be “imported” through an MFN clause.
256. The Tribunal further notes that Claimant withdrew its additional claim that jurisdiction of the Centre may be based on Respondent’s implied or tacit acceptance in the course of the present proceedings. Therefore, this argument will be addressed only in passing.

¹⁷ See below ¶¶ 344 *et seq.*

a. Implied acceptance of ICSID jurisdiction

257. According to Claimant, it gave notice of dispute in early 2013 and, on 15 January 2014, informed Respondent that it would file a request for arbitration with ICSID.
258. In Claimant’s view, “Respondent ha[d] been asked to object within a certain period of time should it not wish to refer the matter to ICSID.”¹⁸ Since there was no formal objection before its Counter-Memorial, this would satisfy the requirement for “consent” by Respondent.
259. Respondent opposes this view and asserts that “there can be no ‘implied or tacit’ consent to investor – state international arbitration”¹⁹ and that “Claimant’s unilaterally imposed deadline for Respondent to object to jurisdiction did not, and could not, create any legal rights or obligations for it or Respondent, nor does the fact that Respondent offered to negotiate the dispute.”²⁰
260. In the course of the Hearing, Claimant dropped the implicit acceptance claim.²¹ Thus, the Tribunal does not have to address the issue whether consent to ICSID arbitration may be implicitly agreed upon by not objecting to it.
261. In the Tribunal’s view, a failure to object to correspondence cannot amount to consent required both under the ICSID Convention and under Article 8 of the Treaty.

b. Consent to ICSID jurisdiction in Article 8 of the Treaty

262. In particular at the Hearing, Claimant insisted that, instead of relying on an implied or tacit acceptance of consent to ICSID arbitration, Respondent’s consent to such arbitration is already expressed in Article 8 of the Treaty.
263. The Parties agree that the Treaty’s dispute settlement clause provides for investor-State arbitration as a matter of principle (“... be submitted to international arbitration if the

¹⁸ Request, ¶ 67.

¹⁹ Respondent Counter-Memorial, ¶ 89.

²⁰ *Ibid.*

²¹ Hearing Transcript, D5:P1033:L19-20. See also Claimant Post-Hearing Brief, ¶ 65.

investor concerned so wishes.”). However, it is disputed whether Article 8 contains the Contracting Parties’ offer of consent to ICSID arbitration in the sense of Article 25 ICSID Convention.

264. For the purpose of analyzing this issue it seems helpful to recall the text of Article 8 of the Treaty. It provides as follows:

Settlement of Disputes between an Investor and a Host State

(1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled, shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then

in force. The parties to the dispute may agree in writing to modify these Rules.

265. According to Claimant, a correct reading of Article 8(1) provides it, as a “Contracting Party investor”, with the right to refer a dispute to either ICSID, ICC, or UNCITRAL arbitration.
266. While Claimant acknowledges that Article 8 may be worded in a “rather infelicitous” manner,²² it emphasizes that there is a relevant divergence in the two authentic language versions of Article 8(2) which should be construed in favor of the Ukrainian text.
267. The Ukrainian version of Article 8(2) of the Treaty indeed differs from the above-rendered English version. Instead of reading “Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute **may agree** to refer the dispute either to [...]”, a literal translation of the Ukrainian text – as rendered by Respondent in its Opening Statement as well as Post-Hearing Brief – reads as follows: “Where the dispute has been referred to international arbitration, the Contracting Party investor and the concerned in the dispute **may agree** to refer the dispute either to [...]”.²³
268. According to Claimant, the Ukrainian version should take precedence because it was the version which was accepted by the Ukrainian legislator and had become Ukrainian law,²⁴ and because the only reasonable construction would be the one that would give the investor a choice of three different investor-State arbitration procedures to which the contracting State party had already consented in principle.
269. To this Tribunal, such an interpretation cannot be maintained.
270. To start with, it is clear that both language versions are equally authentic as expressly provided for in the Treaty’s final clauses.²⁵ Thus, any inconsistency between these versions

²² Claimant Post-Hearing Brief, ¶ 50 (“While the BIT language in Article 8 is rather infelicitous, Claimant submitted that an effective, meaningful and good faith interpretation exists.”).

²³ Respondent Post-Hearing Brief, ¶ 13. See also UK-Ukraine BIT, CE-1.

²⁴ Claimant Post-Hearing Brief, ¶ 51.

²⁵ UK-Ukraine BIT, CE-1 (“Done in duplicate at London this 10th day of February 1993 in the English and Ukrainian languages, both texts being equally authoritative.”).

has to be solved by the customary rules of treaty interpretation as enshrined in the VCLT.²⁶ It should be noted though that in respect of the Treaty the rules of the VCLT do not only apply as customary international law since the VCLT was ratified by the UK in 1972 and adhered to by Ukraine in 1986, well before the conclusion of the Treaty in 1993.

271. Pursuant to Article 33(4) VCLT, “[...] when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”
272. Thus, treaty interpreters are enjoined to first resort to the traditional interpretation rule contained in Article 31, as well as to the supplementary means of interpretation in order to remove any inconsistency, and then attempt to reconcile different meanings “having regard to the object and purpose of the treaty”.
273. In the Tribunal’s view, a comparison of the Ukrainian language version with the English version of Article 8(2) of the Treaty reveals a number of logical inconsistencies of the former version which would render part of the dispute settlement provision meaningless. This would clearly contradict an interpretation guided by Article 31 VCLT as well as the principle *ut res magis valeat quam pereat (effet utile)* according to which each treaty provision should be given a meaningful interpretation rather than one which would deprive it of meaning.²⁷
274. Article 8 of the Treaty has a fairly clear structure: its paragraph 1 provides, in regard to “disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under [the BIT]” for a three-month period during which an attempt at amicable settlement must be made. It further provides that, after such

²⁶ Vienna Convention on the Law of Treaties, CLA-39.

²⁷ *Korea – Definite Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, ¶ 80 (“We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties (*ut res magis valeat quam pereat*) which requires that a treaty interpreter: ‘... must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.’” (emphasis added, footnotes omitted); *Eureka B.V. v. Republic of Poland*, Partial Award, 19 August 2005, RLA-20, ¶ 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless.”).

attempt, the dispute shall “be submitted to international arbitration if the investor concerned so wishes.”

275. In spite of the use of obligatory language (“shall”) Article 8(1) does not provide for a choice between different types of investment arbitration to investors. Rather, Article 8(2) makes it clear that there are three options of investment arbitration (ICSID, ICC, and UNCITRAL arbitration) on which the disputing parties “may agree” (“[...] the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to [...]”).
276. Further, Article 8(2) last sentence of the Treaty provides for a fall-back option in case the parties cannot agree upon any of the investment arbitration options: the investor then has the right to submit the dispute to UNCITRAL arbitration (“[...] the dispute shall at the request in writing of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law.”).
277. To provide for such a fall-back in favour of UNCITRAL arbitration would be meaningless, if Article 8 provided for an immediate right of an investor to choose any of the three options already in its paragraph 1. Article 8(2) last sentence of the Treaty is very explicit in stating that the fall-back option of UNCITRAL comes into play where the parties cannot agree on any of the above-mentioned three alternative procedures (“If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, [...]”).
278. This wording also clearly contradicts Claimant’s suggestion that the “default consent” to UNCITRAL resulted from the fact that ICSID became available only after the conclusion of the Treaty, which entered into force in 1994, since Ukraine became a Contracting Party to the ICSID Convention only in 2000.²⁸ Claimant thereby alludes to differently worded dispute settlement clauses found in other BITs which indeed provide for UNCITRAL or other arbitration procedures as a fall-back where either ICSID and/or ICSID Additional Facility are not available. In the present case, however, the Treaty’s wording is very clear

²⁸ Claimant Post-Hearing Brief, ¶ 53 (“This historical fact, the non-availability of ICSID arbitration at the time of signing the BIT, is arguably the reason for the inclusion of the default consent.”).

in that it provides for UNCITRAL arbitration in case “there is no agreement to one of the above alternative procedures.”

279. This rather clear and logical structure contrasts with an inconsistent meaning derived from the literal reading of the Ukrainian version of Article 8 if understood as giving the investor a right to choose any of the three investment arbitration procedures. It would ignore that the wording “agree” presupposes an agreement with another party and it would render Article 8(2) last sentence meaningless.
280. Thus, the Tribunal finds that the above interpretation based on the English text reflects the correct interpretation of Article 8. Therefore, Ukraine cannot be regarded as having consented to ICSID arbitration via Article 8 of the Treaty alone.
281. This finding is without prejudice to Claimant’s alternative argument that it can accept the consent given by Ukraine to ICSID arbitration in other third country investment treaties as a result of the Treaty’s MFN clause.
282. It is this argument to which the Tribunal will turn next.

c. The UK-Ukraine BIT’s MFN clause as basis for consent

283. In the alternative, Claimant argues that this Tribunal has jurisdiction over the dispute as a result of the UK-Ukraine BIT’s MFN clause.
284. In Claimant’s view, Article 3 also clearly extends to dispute settlement, by expressly stating that the MFN treatment applies “to the provisions of Articles 1 to 11 of this Agreement.” Thus, one could rely on the MFN clause in order to import consent given by Ukraine to ICSID arbitration in BITs with third countries. The availability of ICSID arbitration and the choice between ICSID arbitration and other forms of investment arbitration as provided for in third party BITs constituted more favourable treatment which Ukraine was bound to extend to UK investors according to Article 3 of the Treaty.

285. Claimant specifically relies on *Garanti Koza v. Turkmenistan*²⁹ and *RosInvestCo v. Russia*³⁰ for the proposition that consent to investment arbitration may be imported via an MFN clause.
286. Claimant further emphasizes that in light of the inconsistent jurisprudence of investment tribunals on this particular issue, special attention should be given to the fact that numerous tribunals, including those that rejected the importation of more favorable procedural provisions from third party BITs through MFN clauses, have acknowledged that MFN clauses expressly stating that they apply to all provisions of the basic treaty, like the one in Article 3(3) of this BIT, could be read to include consent to ICSID arbitration.³¹
287. Respondent, while agreeing that the Treaty's MFN clause applies to Article 8,³² rejects the idea that it might be used to import consent to ICSID arbitration. In its view, consent is a fundamental matter that cannot be imported from a third-party treaty. Rather, MFN clauses can only serve to overcome procedural hurdles such as waiting periods or requirements to exhaust domestic remedies; they cannot found consent where no consent is given in the BIT.
288. In Respondent's view, neither *Garanti Koza v. Turkmenistan* nor *RosInvest v. Russia* can be relied upon for the proposition that consent to investment arbitration can be imported via an MFN clause. According to Respondent, the tribunal in *Garanti Koza v. Turkmenistan* already found consent in Article 8(1) of the Turkmenistan-UK BIT and imported only the right to choose between different arbitration procedures. Similarly, the tribunal in *RosInvest v. Russia* only extended the scope of existing consent to arbitration.

²⁹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, CLA-63.

³⁰ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction, October 2007, CLA-68.

³¹ Claimant Post-Hearing Brief, ¶¶ 57-61, relying on *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000, ¶ 52; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, RLA-27, ¶ 85; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, RLA-34, ¶ 167; and *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-19, ¶ 204.

³² Respondent Post-Hearing Brief, ¶ 18.

289. The Tribunal shares the view of the tribunal in *Tza Yap Shum v. Republic of Peru*³³ that the precise reach of MFN clauses remains “one of the *quaestiones vexatae* (or maybe the *quaestio vexata*) in investment arbitration.”³⁴ The Tribunal further agrees that it is preferable to look at the precise MFN clause in order to determine its effect than to rely on general concepts of what the invocation of such clauses may achieve or may not achieve.
290. It thus starts with the express wording of the applicable MFN clause in Article 3 of the Treaty. This article provides as follows:

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

291. The scope of Article 3 seems well-defined as a result of paragraph 3; it is clearly meant to apply to all articles of the Treaty, including Article 8 on investor-State arbitration. But the question remains whether this extension is also meant to relate to establishing jurisdiction or only to procedural issues.

³³ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

³⁴ *Ibid.*, ¶ 193.

292. As Respondent put it very succinctly in its Closing Statement, it is agreed that Article 3 applies to Article 8; the issue is how.³⁵
293. Taken literally, Article 3 seems to be very broad which suggests that better dispute settlement provisions which already contain consent to jurisdiction can be imported.
294. It has been cautioned, and particularly emphasized by Respondent, that in spite of the broad reference to all Treaty provisions in Article 3(3) not all provisions, such as investor definitions, temporal application, are covered by an MFN clause.³⁶
295. Indeed, it is generally accepted that an MFN clause cannot be relied upon to import more favorable, broader definitions of “investments” and or “investors”.³⁷ Similarly, tribunals have rejected the use of MFN provisions to extend the temporal scope of application of a BIT.³⁸ Further, it appears obvious that an MFN clause will not entitle an investor to invoke the inter-State dispute settlement provision in Article 9 of the Treaty.
296. The real question in this case is thus not whether the MFN clause applies to dispute settlement, which is undoubtedly provided for by the reference in Article 3(3), but rather in what sense MFN treatment as contained in Article 3(1) and (2) applies to Article 8. In particular, whether the application of the Treaty’s MFN clause to Article 8 is limited to procedural and admissibility issues, such as domestic litigation or exhaustion of local remedies requirements or waiting periods, as Respondent suggests, or whether it extends

³⁵ Hearing Transcript D5;P1036:L24-25. See also Respondent Post-Hearing Brief, ¶ 18 (“The Parties agree that Art.3 of the BIT (MFN treatment to both investors and investments) applies to Art.8. [...] The relevant question is *how* Art. 3(2) applies to Art. 8 [...]”).

³⁶ Respondent Post-Hearing Brief, ¶ 23.

³⁷ *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, ¶ 149; *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, RLA-64, ¶ 145; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, RLA-63, ¶ 397; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 133; *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections, 19 September 2008, ¶¶ 40-41.

³⁸ *Technicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 69.

to jurisdictional questions, such as the right to accept a host State's consent to jurisdiction given in a more favourable third party BIT, as suggested by Claimant.

297. The Parties' arguments are clearly inspired by the post *Maffezini v. Spain* debate. This debate goes back to the 2000 decision on jurisdiction in *Maffezini v. Spain*.³⁹ Back then, an ICSID tribunal permitted an Argentine investor to "avoid" an 18-month waiting period, requiring claimants to litigate in domestic courts before being permitted to access ICSID arbitration, by relying on the applicable BIT's MFN clause.
298. Since then, investment tribunals have come out at opposite ends not only whether MFN clauses are limited to substantive treatment or can be invoked to import "procedural" benefits under other IIAs, but also, in particular, whether "procedural" benefits are restricted to admissibility issues or could extend to questions of jurisdiction.
299. While it is clear that these decisions of other investment tribunals, whether established pursuant to the ICSID Convention or under other arbitration rules, do not have any binding authority for this Tribunal, they may provide helpful guidance and even persuasive authority on the strength of their reasoning.⁴⁰ Since the Parties have also relied on these decisions in their submissions and oral arguments, the Tribunal will inquire as to what extent they are helpful to solve the issues presented to it.
300. In fact, the seeming inconsistency of many post-*Maffezini v. Spain* cases, with numerous decisions allowing and others rejecting reliance on MFN clauses may have been more apparent than real considering that most tribunals permitted reliance on MFN clauses to

³⁹ *Emilio Agustín Maffezini v. Kingdom of Spain, Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000.

⁴⁰ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51, ¶ 293 ("It is true that arbitral awards do not constitute binding precedent. [...] However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.").

import procedural advantages, such as shorter or no waiting periods,⁴¹ but not to import jurisdiction where no jurisdiction was provided for in the basic treaty.⁴²

301. As formulated by the tribunal in *Plama v. Bulgaria*:⁴³

[i]t is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.⁴⁴

302. Still, even this fragile attempt to construe order in a field of inconsistent practice proved difficult to maintain. On the one hand, tribunals in cases like *Wintershall v. Argentina*,⁴⁵ *ICS v. Argentina*,⁴⁶ *Daimler v. Argentina*⁴⁷ and *Kılıç v. Turkmenistan*⁴⁸ basically treated

⁴¹ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000, ¶¶ 54-64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, CLA-8, ¶¶ 100-104; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, RLA-87, ¶¶ 102-105; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, CLA-41, ¶¶ 29-31; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, RLA-27, ¶¶ 79-94; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, CLA-41A, ¶¶ 52-68; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶¶ 79-108, RLA-103; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, RLA-49, ¶¶ 59-75; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, RLA-56, ¶¶ 59-186.

⁴² *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶¶ 103-119; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-19, ¶¶ 183-227; *Vladimir Berschader and Moise Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶¶ 159-206; *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, CLA-29, ¶¶ 90-101; *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, ¶¶ 199-216; *Austrian Airlines AG v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, ¶¶ 92-140.

⁴³ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-19.

⁴⁴ *Ibid.*, ¶ 209.

⁴⁵ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, RLA-34.

⁴⁶ *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶¶ 274-313.

⁴⁷ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, RLA-54, ¶¶ 205-278.

⁴⁸ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013.

all procedural issues as jurisdictional with the consequence that MFN was limited to “*substantive*” treatment.

303. On the other hand, some tribunals like the one in *RosInvestCo v. Russia*⁴⁹ held that the right to submit an investment claim also formed part of the “treatment” covered by the BIT with the consequence that investors could rely on an MFN clause in order to accept the consent given to dispute settlement in third party BITs.⁵⁰ This conclusion was corroborated by the fact that the BIT’s exceptions to MFN treatment related explicitly to preferential trade agreements and to tax matters only.⁵¹ Thus, the *RosInvestCo v. Russia* tribunal found that “the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.”⁵²

304. It is important to note though that the majority of these cases were decided on the basis of MFN clauses that were much less explicit than the one in the present case, and that, in a number of cases, the tribunals expressly qualified their findings, to the effect that they acknowledged that through express wording, States may extend or limit the reach of MFN clauses.

⁴⁹ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007, CLA-68.

⁵⁰ *Ibid.*, ¶ 130 (“[...] difficult to doubt that an expropriation interferes with the investor’s use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment’, procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.”).

⁵¹ Article 7 UK-USSR BIT (“The provisions of Articles 3 and 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from (a) any existing or future customs union, organisation for mutual economic assistance or similar international agreement, whether multilateral or bilateral, to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly taxation.”).

⁵² *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007, CLA-68, ¶ 135 (“[...] it can certainly not be presumed that the Parties ‘forgot’ arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN clauses should also not apply to arbitration, it would indeed have been easy to add a subsection (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.”).

305. In fact, treaty-makers have reacted to the *Maffezini v. Spain* jurisprudence and thus specifically rejected its approach in some treaties and in others specifically endorsed it.
306. Some treaty-makers have stated that the MFN clause does not encompass mechanisms for the settlement of investment disputes provided for in third party BITs.⁵³ In other cases, parties to a BIT have used interpretative declarations stating their view that MFN clauses do not extend to dispute resolution “and that this has always been their intention.”⁵⁴
307. On the contrary, a number of States have expressly endorsed the *Maffezini v. Spain* approach and formulated MFN clauses in a way to remove any doubt that dispute settlement was intended to be covered by them.⁵⁵ The clarification added to the MFN clause of the UK model investment treaty, to which the formulation of the present Treaty corresponds, is another example.⁵⁶ It provides:

For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this agreement.⁵⁷

⁵³ Colombia-Switzerland Agreement, 17 May 2006, annex (“For greater certainty, it is further understood that the most favourable nation treatment [...] does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned.”), cited in Ziegler, ‘The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)’, *European Yearbook of International Economic Law* 77, at 95 (2010); similar clauses can be found in the Canada-Peru FIPA 2006, Annex B.4; Article 5(4) ASEAN-China Investment Agreement (2009); Article IV (2) Colombian Model BIT (2009).

⁵⁴ *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, RLA-27, ¶ 85 (“[...] the Argentine Republic and Panama exchanged diplomatic notes with an “interpretative declaration” of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”).

⁵⁵ Article 3(3) Austrian Model BIT 2008 (“Each Contracting Party shall accord to investors of the other Contracting Party and to their investments or returns treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments or returns with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favourable to the investor.”).

⁵⁶ Chester Brown and Audley Sheppard, ‘United Kingdom’, in Ch. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 697, 728 (“Where Article 3(3) is included, it therefore provides an answer to the controversial question whether the MFN provision also applies to procedural issues such as investor-State dispute settlement.”).

⁵⁷ Article 3(3) UK Model BIT 1991, RLA-83, RLA-84.

308. In investment jurisprudence, the introductory language (“For the avoidance of doubt [...]”) has usually been regarded as confirming that this broad understanding of the MFN clause has always been the UK approach. For instance, in *National Grid v. Argentina*,⁵⁸ an ICSID tribunal found that this wording indicated that it has been the understanding of the UK that also dispute settlement was within the reach of MFN clauses in previously concluded BITs “all along”.⁵⁹ In a similar way, the tribunal in the *AWG v. Argentina* case⁶⁰ inferred from this language the UK’s pre-existing intention to include dispute settlement.⁶¹
309. Even tribunals rejecting the *Maffezini v. Spain* approach generally acknowledge that the contracting parties to a BIT are, in principle, free to provide for such an approach.
310. Importantly, they are also clear that this may not only relate to applying the MFN clause to procedural and admissibility issues, but also to the scope of jurisdiction.
311. For instance, the ICSID tribunal in *Salini v. Jordan*⁶² held that the applicable MFN clause in the Jordan-Italy BIT was not broad enough to form the basis for ICSID jurisdiction over contractual disputes, as provided for in other BITs of the host State. The tribunal stressed that the applicable MFN clause, as opposed to others, neither directly referred to dispute settlement nor broadly covered ‘all matters’ of the basic BIT as in *Maffezini v. Spain*,⁶³ and

⁵⁸ *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, RLA-27.

⁵⁹ *Ibid.*, ¶ 85 (“Since 1991, the MFN clause in the UK model investment treaty has included a third paragraph stating that: ‘For the avoidance of doubt’, the MFN clause extends to Articles 1 to 11 of the treaty and, hence, to dispute resolution matters. The implication in the wording of this additional paragraph is that, all along, this was the UK’s understanding of the meaning of the MFN clause in previously concluded investment treaties.”).

⁶⁰ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, CLA-41A.

⁶¹ *Ibid.*, ¶ 58 (“The inference to be drawn from this language is that this new paragraph, by its terms, is intended to clarify what had been the United Kingdom’s preexisting intention in negotiating its BITs: that the most-favored-nation clause is to cover all the articles (i.e. Articles 1 to 11) of the treaty.”).

⁶² *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004.

⁶³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000.

that it could not identify any intention of the parties to have dispute settlement included in the reach of MFN treatment.⁶⁴

312. Similarly, the tribunal in *Plama v. Bulgaria*,⁶⁵ which rejected the argument that its jurisdiction could be based on dispute settlement clauses in third party BITs through the MFN clause of the applicable BIT, acknowledged that the parties might have done so by using other language. The *Plama v. Bulgaria* tribunal famously stated that:

[...] an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.⁶⁶

313. The *Plama v. Bulgaria* tribunal emphasized the crucial importance of consent to arbitration as a basis for jurisdiction which must be “clear and unambiguous”.⁶⁷ However, it acknowledged that such consent may be given by reference, i.e., through an MFN clause, as long as the reference is such “that the parties’ intention to import the arbitration provision of the other agreement is clear and unambiguous.”⁶⁸ The reason that the *Plama*

⁶⁴ *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, ¶ 118 (“The Tribunal observes that the circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement”. Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims.”).

⁶⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-19.

⁶⁶ *Ibid.*, ¶ 223.

⁶⁷ *Ibid.*, ¶ 198 (“Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous.”).

⁶⁸ *Ibid.*, ¶ 200 (“[...] a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract (*i.e.*, in this case, the Bulgaria-Cyprus BIT). This is another way of saying that the reference must be such that the parties’ intention to import the arbitration provision of the other agreement is clear and unambiguous.”).

v. *Bulgaria* tribunal rejected the possibility to “import” consent to jurisdiction was that it found that the applicable MFN clause was not “clear and unambiguous” in this regard.⁶⁹

314. The tribunal in *Telenor v. Hungary*⁷⁰ also found that an MFN clause could not be relied upon in order to expand the scope of ICSID jurisdiction to claims that the BIT parties had excluded from the Hungary-Norway BIT. Under the BIT such jurisdiction was limited to issues concerning the amount and payment of compensation in case of expropriation. Nevertheless, the *Telenor v. Hungary* tribunal accepted that the parties may have done so by using different language permitting even the importation of jurisdiction via an MFN clause. The tribunal said that:

[i]n the absence of language or context to suggest the contrary, the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.⁷¹

315. Even the majority of the SCC tribunal in *Berschader v. Russia*⁷² which found that the expression “all matters covered by the present Treaty” did not really mean that the MFN provision extended to all matters covered by the Treaty and thus rejected the idea “that the parties intended the MFN provision to extend to the dispute resolution clause,”⁷³

⁶⁹ *Ibid.*, (“A clause reading ‘a treatment which is not less favourable than that accorded to investments by investors of third states’ as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.”).

⁷⁰ *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, CLA-29.

⁷¹ *Ibid.*, ¶ 92 (emphasis in original).

⁷² *Vladimir Berschader and Moise Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006.

⁷³ *Ibid.*, ¶ 194.

acknowledged that an MFN clause could “incorporate by reference an arbitration clause from another BIT” if that could be unambiguously deduced from the Contracting Parties’ intent.⁷⁴

316. In a similar way, the SCC tribunal in *Renta 4 v. Russia*,⁷⁵ which rejected the claimant’s attempt to rely on the specific limited MFN clause of the Spain-Russia BIT in order to avoid a narrow dispute settlement clause,⁷⁶ acknowledged that there was no authority for the proposition that MFN treatment was generally limited to “primary” or substantive obligations and that “access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs.”⁷⁷ The tribunal’s statement that there was “no textual basis or legal rule to say that ‘treatment’ does not encompass the host state’s acceptance of international arbitration”⁷⁸ clearly indicates that the treatment referred to in MFN clauses may include consent to arbitration.
317. As a result, it appears clear and generally accepted that, as a matter of principle, parties to BITs are free to offer consent to ICSID jurisdiction via an MFN clause. Even all the cases that have rejected that this was the effect of the applicable MFN clauses do not dispute that, in general, negotiating parties have the possibility to formulate MFN clauses in a way that they also “import” consent to ICSID arbitration.

⁷⁴ *Ibid.*, ¶ 181 (“[...] the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”).

⁷⁵ *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009.

⁷⁶ Article 10 Spain-Russia BIT (“1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6 of this Agreement, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavour to settle the dispute amicably. 2. If the dispute cannot be settled thus within six months of the date of the written notification referred to by [sic] either of the following, the choice being left to the investor: [Stockholm Chamber of Commerce arbitration or UNCITRAL arbitration].”).

⁷⁷ *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, ¶ 100.

⁷⁸ *Ibid.*, ¶ 101.

318. The question thus is whether this was done by the MFN clause in Article 3 of the UK-Ukraine BIT.
319. Indeed, the question for this Tribunal is what the contracting parties of the Treaty really intended, and more precisely whether they expressed their intention with sufficient clarity for a tribunal tasked with interpreting and applying the treaty.
320. In this regard, the view expressed by the *Plama v. Bulgaria* tribunal,⁷⁹ on which both Parties have relied, seems to be most explicit and clear.
321. As already mentioned above, the *Plama v. Bulgaria* tribunal rejected the possibility to “import” consent to jurisdiction because it found that the applicable MFN clause was not “clear and unambiguous” in this regard.⁸⁰ Thus, it held that “the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration and that the claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.”⁸¹
322. What seems remarkable though is that the same tribunal characterized Article 3(3) of the UK Model BIT, which is identical to Article 3(3) of the BIT applicable in the present case, as an example of a “clear and unambiguous” expression of the intention of the Contracting Parties to permit the “importation” of consent to jurisdiction from third party BITs. It stated that:

[...] the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. This is, for example, the case with the UK Model BIT, which provides in its Article 3(3):

⁷⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-19.

⁸⁰ *Ibid.*, ¶ 200 (“A clause reading ‘a treatment which is not less favourable than that accorded to investments by investors of third states’ as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.”).

⁸¹ *Ibid.*, ¶ 227.

For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

Articles 8 and 9 of the UK Model BIT provide for dispute settlement. The drafters of the UK Model BIT rightly noted that there could be doubt and expressly neutralized that doubt.⁸²

323. Even arbitrators who have very categorically stated why, in their view, “in principle, an MFN clause cannot import, in part or *in toto*, a dispute settlement mechanism from a third party BIT into the BIT which is the basic treaty applicable to the dispute”⁸³ have made an “important caveat.”⁸⁴ They have accepted that an “interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute settlement mechanism is not expressly stated or clearly ascertained.”⁸⁵
324. The example referred to by Professor Stern in her Dissenting Opinion in *Impregilio v. Argentina* for such an express and clear intention to permit the “importation” of a dispute settlement mechanism from a third-party BIT into the BIT is Article 3(3) of the UK Model BIT which corresponds to Article 3(3) of the BIT applicable in the present case:

There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the UK Model BIT, who have provided in Article 3(3) that ‘for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision’.⁸⁶

325. These considerations indeed strongly suggest that the MFN clause of the BIT which refers to investors’ treatment “as regards their management, maintenance, use, enjoyment or

⁸² *Ibid.*, ¶ 204 (emphasis in original).

⁸³ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, ¶ 16 (emphasis in original). See also Zachary Douglas, *The International Law of Investment Claims*, Cambridge 2009, CLA-40, ¶ 679 (“An MFN clause in the basic treaty can only be relied upon to incorporate jurisdictional provisions in a third treaty where the MFN clause clearly envisages that possibility. The most notable example is the UK Model BIT, Article 3(3) of which provides: For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”).

⁸⁴ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, ¶ 17.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, ¶ 18.

disposal of their investments” in Article 3(2) and confirms in Article 3(3) that such treatment “shall apply to the provisions of Articles 1 to 11 of this Agreement” which include the “Settlement of Disputes between an Investor and a Host State” contained in Article 8, can be invoked by a UK investor in order to “import” a dispute settlement mechanism from a third party BIT.

326. But the Tribunal does not need to finally decide this issue.
327. Even if it may remain questionable whether the specific MFN clause applicable in this case can serve to import jurisdiction given elsewhere, the ICSID tribunal in *Garanti Koza v. Turkmenistan*⁸⁷ has provided a reasonable and convincing interpretation of both an MFN and a dispute settlement clause which correspond to the ones applicable in the present case.
328. In that case, the UK construction company, Garanti Koza, was allowed to rely on the MFN clause of the Turkmenistan-UK BIT,⁸⁸ which also clarified that it applied to the BIT’s dispute settlement provisions,⁸⁹ in order to directly access ICSID arbitration, instead of the fall-back option of UNCITRAL arbitration.
329. As in the UK-Ukraine BIT, the investor-State dispute settlement provision contained in Article 8(2) of the Turkmenistan-UK BIT permitted unilateral access to UNCITRAL arbitration only, while ICSID and ICC arbitration had to be agreed upon by the disputing parties.⁹⁰

⁸⁷ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, CLA-63.

⁸⁸ Article 3(2) Turkmenistan-UK BIT (“Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.”).

⁸⁹ Article 3(3) Turkmenistan-UK BIT (“For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”).

⁹⁰ Article 8 Turkmenistan-UK BIT (“(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes. (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to: [(a) ICSID; (b) ICC; (c) UNCITRAL arbitration]. If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute

330. In the view of the *Garanti Koza v. Turkmenistan* tribunal, the mandatory language of Article 8(1) of the Turkmenistan-UK BIT already contained the State Parties' consent to submit disputes to international arbitration. Thus, Article 8(1) "establish(es) unequivocally Turkmenistan's consent to submit disputes with U.K. investors to international arbitration. That consent satisfies the fundamental condition that the State must have consented to participate in arbitration before it may be required to do so."⁹¹
331. Thus, the tribunal held that as a first step, a provision according to which a dispute "shall be submitted" to international arbitration after a four-month notification period, constituted a valid offer of consent. It recognized though that this did not solve the issue what kind of arbitration a contracting party had consented to.⁹²
332. The *Garanti Koza v. Turkmenistan* tribunal then turned to Article 8(2) of the Turkmenistan-UK BIT, which it interpreted in the same manner as this Tribunal did in the Section above.⁹³ That tribunal said "that Turkmenistan expressed in the BIT its willingness to consider three possible kinds of arbitration whenever it was notified by a U.K. investor of a claim under the BIT -- ICSID Arbitration, ICC Arbitration, and UNCITRAL Arbitration. Article 8(2) is equally clear that the fall-back option, failing a case-specific agreement to use one of the first two kinds of arbitration, is UNCITRAL Arbitration."⁹⁴
333. It then continued to inquire whether the lacking consent to ICSID could be imported via more favorable dispute settlement provisions.⁹⁵
334. The *Garanti Koza v. Turkmenistan* tribunal found that the BIT's MFN clause (particularly as a result of its clarifying language) was broad enough to allow the claimant to rely on

shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.").

⁹¹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, CLA-63, ¶ 29.

⁹² *Ibid.*, ¶ 30.

⁹³ See above ¶ 262 *et seq.*

⁹⁴ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, CLA-63, ¶ 36.

⁹⁵ *Ibid.*, ¶ 39.

other BITs which clearly expressed Turkmenistan’s consent to be sued before an ICSID tribunal.⁹⁶ In other words, the MFN clause gave investors a choice between ICSID, ICC, and UNCITRAL arbitration since the contracting States had already agreed to investment arbitration in principle. Thus, the MFN clause did not serve to import consent, but merely the choice between different arbitration systems. It thus concluded that:

[...] where Turkmenistan: (a) has expressly consented in the basic U.K.-Turkmenistan BIT to submit investment disputes with U.K. investors to international arbitration, (b) has provided in the same BIT that U.K. investors and their investments will not be subjected to treatment less favorable than that accorded to investors of other States or their investments, (c) has expressly provided that the MFN treatment so accorded ‘shall apply’ to the dispute resolution provision of the BIT, and (d) has provided investors of third States, specifically Switzerland, with an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration, there is no reason why Turkmenistan’s consent to ICSID Arbitration in its BIT with Switzerland may not be relied upon by a U.K. investor, *if* the provision for ICSID Arbitration or an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration provides treatment more favorable to the investor than the treatment provided by the base treaty.⁹⁷

335. In regard to the last issue, while “[a]cknowledging the difficulty of establishing that ICSID Arbitration is objectively more favorable to an investor than UNCITRAL Arbitration for all purposes,” the *Garanti Koza v. Turkmenistan* tribunal accepted “the Claimant’s principal argument [...] that it is more favorable to have a choice between the two than not to have a choice.”⁹⁸

336. Indeed, this Tribunal also considers that it need not embark on the difficult assessment whether any of the three arbitration mechanisms available in investment arbitration and mentioned in Article 8 of the Treaty is more favorable than any other. It concurs with the

⁹⁶ *Ibid.*, ¶ 42 (“In the BIT before us, we find the answer to whether the MFN clause (Article 3) should be applied to the investor-state arbitration article (Article 8) in the specific language of Article 3(3) of the U.K.-Turkmenistan BIT.”).

⁹⁷ *Ibid.*, ¶ 79 (emphasis added).

⁹⁸ *Ibid.*, ¶ 90.

view that the availability of a choice between different forms of arbitration is a more favorable treatment of investors than limiting them to only one form.

337. The Tribunal considers that the choices provided for in third party BITs, such as those between ICSID and UNCITRAL arbitration given to investors from Austria in the 1996 Austria/Ukraine BIT or between ICSID, ICSID Additional Facility and UNCITRAL arbitration given to investors from Canada in the 1994 Canada-Ukraine BIT, constitute more favorable treatment than the offer of consent to UNCITRAL arbitration only in Article 8 of the Treaty.
338. The dissenter in the *Garanti Koza v. Turkmenistan* case⁹⁹ found that Turkmenistan's consent to arbitration was not contained in Article 8(1), but only in Article 8(2) of the Turkmenistan-UK BIT, which in effect meant that it was limited to UNCITRAL arbitration.
339. She also disagreed with the majority's interpretation of the BIT's MFN clause which she found applicable to dispute settlement only when the parties had already agreed on dispute settlement. In her view:

[t]o give effect to the MFN clause contained in Article 3(3), the foreign investor must first be in a *dispute settlement relationship* with the host state. A problem of *treatment* can only arise when the foreign investor is treated in a certain way while entertaining a specific relationship with the host state. If there is no relationship between the host state and the foreign investor, the question of more or less favourable treatment is not at stake and thus, the MFN principle does not apply. The so-called 'choice' that supposedly derives from an MFN provision and which has been extensively used by the majority to justify its approach *in casu*, does not come into play if a problem of treatment cannot be identified under the U.K.-Turkmenistan BIT.¹⁰⁰

340. Thus, in effect, she denied the capability of an MFN clause to import jurisdiction at all however explicitly treaty-makers may have expressed their intentions. In fact, her view

⁹⁹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, Dissenting Opinion by Laurence Boisson de Chazournes, 3 July 2013.

¹⁰⁰ *Ibid.*, ¶ 40 (emphasis in original).

implied that an MFN clause could never “import” dispute settlement from third party treaties. Since this Tribunal has held that the scope and effect of an MFN clause depends upon its formulation, such a sweeping rejection appears unjustified, in particular, in the light of views of tribunals like *Salini v. Jordan*, *Plama v. Bulgaria*, *Telenor v. Hungary*, and others, discussed above.¹⁰¹

341. Rather, the Tribunal concurs with the majority of the *Garanti Koza v. Turkmenistan* case. The MFN clause of the UK-Ukraine BIT, which expressly extends to dispute settlement, can be relied upon to import the more favorable choice of different forms of investment arbitration given to third party investors than only UNCITRAL arbitration as provided for in Article 8(2) of the Treaty. This potential is reinforced by the fact that Ukraine has already effectively consented to international arbitration in Article 8(1) of the Treaty.

342. The Tribunal thus concludes that the *ratione voluntatis* requirement of consent to ICSID jurisdiction is fulfilled.

343. A minority of the Tribunal disagrees with the above conclusion for the following reasons:

(i) Article 8(1) does not provide the requisite consent under the BIT to refer claims by investors to “international arbitration”. Absent express consent given within three months, the requisite Contracting Party’s consent solely arises under Article 8(2) where Ukraine’s consent to international arbitration is confined to UNCITRAL Rules; and

(ii) the MFN provision in Article 3 does not abrogate the limitations to jurisdiction arising under the last paragraph of Article 8(2) to enable ICSID arbitration as an alternative. Hence, according to the minority, Article 8 excludes the possibility of jurisdiction being found to arise under the MFN clause, Article 3.

(5) Investment made in violation of host State law

344. According to Respondent, the investment was not made in accordance with Ukrainian law and should thus be considered to be outside the protection of the Treaty. In its written

¹⁰¹ See above ¶¶ 310 *et seq.*

submissions Respondent raised two arguments why it considered that the investment was not made in accordance with Ukrainian law: first, Respondent argued that Krederi had failed to register its investment as required by Ukrainian law.¹⁰² Second, it maintained that Krederi had made its investment with “borrowed funds” in violation of Ukrainian law.¹⁰³ While the first defence was expressly withdrawn during the Hearing,¹⁰⁴ the second was maintained and emphasized in Respondent’s Post-Hearing Brief.¹⁰⁵

345. The applicable BIT contains a so-called in accordance with host State law-clause. Pursuant to Article 1(a) of the Treaty investment “means every kind of investment made in conformity with the law in force in the territory of each of the Contracting Parties [...]”
346. The Tribunal notes that there has been a certain degree of uncertainty whether such “in accordance with host State law”-clauses stipulate jurisdictional requirements, issues of admissibility or relate to the merits of a case.¹⁰⁶
347. The Tribunal further notes that in the present case, the clause does not qualify the obligations of a host State to admit a foreign investment. Rather, it clearly defines the notion of investment covered by the Treaty and thus excludes investments not made “in accordance with host State law” from the coverage of the Treaty.
348. Still, the Tribunal shares the concern of numerous investment tribunals that such a requirement should not unduly restrict the protective scope of a BIT. It thus affirms the existing jurisprudence on “in accordance with host State law”-clauses to the effect that the

¹⁰² Respondent Counter-Memorial, ¶¶ 47 *et seq.*

¹⁰³ *Ibid.*, ¶¶ 42 *et seq.*

¹⁰⁴ Hearing Transcript, D5:P990:L17-18.

¹⁰⁵ Respondent Post-Hearing Brief, ¶ 27.

¹⁰⁶ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, RLA-28, ¶ 190; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 401; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶ 182.

violations of host State law must have been sufficiently serious and that minor errors and infractions of host State law do not lead to an exclusion of investment treaty protection.¹⁰⁷

(6) Violation of registration requirement

349. In its Counter-Memorial, Respondent alleges that Krederi is not protected under the Treaty because it failed to register its investment as required by Ukrainian law.¹⁰⁸ Respondent particularly relies on Article 395 of the Commercial Code of Ukraine.
350. The Parties and their experts diverged sharply on whether such a registration requirement was indeed mandatory at the time the investment was made or not and what a failure to comply with such a duty entailed.
351. However, the Tribunal does not need to decide the issue because the argument that there was a violation of a registration requirement on the part of the investor was withdrawn by Respondent during the Hearing.¹⁰⁹
352. Nevertheless, the Tribunal considers that to the extent that an “in accordance with host State law”-clause may be regarded to stipulate a jurisdictional requirement, it is necessary

¹⁰⁷ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶ 86 (“to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.”); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 106 (“As far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide. [...]”); *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (Resubmitted), ¶ 308 (“[...] La condition de ne pas commettre de violation grave de l’ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu’un État offre le bénéfice de la protection par un arbitrage d’investissement si l’investisseur, pour obtenir cette protection, agit (sic) à l’encontre du droit.”/ “[...] The requirement of not having committed a serious violation of the legal regime is a tacit condition, inherent in every BIT, because it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to obtain that protection, has committed an unlawful action.”); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶ 199 (“investments that are [...] dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State’s regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.”).

¹⁰⁸ Respondent Counter-Memorial, ¶¶ 47 *et seq.*

¹⁰⁹ Hearing Transcript, D5:P990:L17-18.

to address the question whether a potential violation of a registration requirement could deprive it of its jurisdiction on its own motion.

353. In this regard, the Tribunal notes that even the Parties' experts appeared to agree that a failure to comply with such a duty did not lead to administrative or other sanctions, but merely entailed a loss of rights and privileges under the Ukrainian foreign investment law as well other rights and privileges for foreign investors under the Commercial Code.¹¹⁰
354. Thus, it appears questionable whether also a loss of BIT protection would follow. This may be the case if one considers treaties part of the law of the land. But as discussed above, the law itself provides only for the forfeiture of rights and privileges of foreign investors under the foreign investment law and the Commercial Code.
355. Even if that were the case, e.g. if one took the BIT's "in accordance with host State law" provision literally, the question remains whether a mere non-registration would be a sufficiently grave violation of host State law to deprive an investor of its BIT rights.
356. This Tribunal endorses the existing investment arbitration jurisprudence on "in accordance with host State law" clauses to the effect that violations of host State must have been sufficiently serious and that minor errors and infractions of host State law do not lead to an exclusion of investment treaty protection.¹¹¹
357. The Tribunal "agrees with the view that not every trivial, minor contravention of the law should lead to a refusal of jurisdiction."¹¹²
358. In particular, the Tribunal notes that the allegedly violated Ukrainian registration obligation did not serve the purpose of permitting the host State a screening of the type of investment intended to be made so as to make a deliberate choice whether or not to approve it. Rather,

¹¹⁰ Hearing Transcript, D3:P604:L9-18, D3:P631:L9-18, D3:P638:L23-P639:L5.

¹¹¹ See above note 107.

¹¹² *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 483.

it formed a routine requirement apparently intended to ensure that foreign exchange rules could be monitored more easily.

359. In the case at hand, if Krederi failed to comply with its duty to register, such a minor infraction cannot have the consequence of depriving it of protection under the Treaty or depriving this Tribunal of its jurisdiction over the dispute.

(7) Credit financing

360. It is in its Counter-Memorial the Respondent alleges that Krederi should not be protected under the Treaty because it had made its investment into [Company C] with “borrowed funds” in violation of Ukrainian law.¹¹³ This illegality argument is maintained in its Post-Hearing Brief.¹¹⁴
361. Claimant rejects this argument by stating that the two pieces of legislation arguably prohibiting the setting up of companies by loan financing were not applicable at the relevant time,¹¹⁵ and that the prohibition never applied to inter-company loans but only to loans obtained from financial institutions.¹¹⁶ Claimant further disputes that a genuine loan agreement lay behind the inter-company loans and argues that it was financing within a group which did not have to be repaid and thus does not constitute money “borrowed.”¹¹⁷
362. It is not disputed between the Parties that Krederi’s investment in [Company C] through which it ultimately acquired the land plots via [Company D] was made through loans obtained by [...], a related company; what is disputed is the question of whether the Ukrainian laws invoked by Respondent in fact made inter-company financing unlawful and, if so, whether such a contravention of Ukrainian law amounts to a violation of the “in

¹¹³ Respondent Counter-Memorial, ¶¶ 42 *et seq.*

¹¹⁴ Respondent Post-Hearing Brief, ¶¶ 27 *et seq.*

¹¹⁵ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 52.

¹¹⁶ *Ibid.*, ¶ 53.

¹¹⁷ Hearing Transcript, D5:P990:L22-25-P991:L1, Claimant Closing (Prof. Mistelis: “[...] we have clearly stated that in this case it's money flowing within a corporation, there's no requirement of repayment, there's no loan agreement, there's no security provided and no reliance on such standards could be used.”).

accordance with host State law” provision of the Treaty to the effect that the investor is not protected by it.

363. Article 13(3) of the Ukrainian Law on Commercial Enterprises¹¹⁸ in force at the time of the State registration of [Company C] on 11 November 2008 and Article 86(3) of the Commercial Code of Ukraine¹¹⁹ arguably prohibit the use of borrowed funds as statutory share capital.

364. Article 13(3) of the Ukrainian Law on Commercial Enterprises provided at the time:

It is prohibited to use public budget funds, loaned or pledged funds to form the registered (pooled) capital, excluding the cases envisaged by LoU on Priority Measures to Prevent Financial Crisis Negative Consequences and on Amendment of Certain Legislative Acts of Ukraine during the period of its validity.¹²⁰

365. Article 86(3) of the Commercial Code of Ukraine contained an almost identical prohibition plus a number of provisions aimed at securing the financial conditions of the corporate founders.¹²¹

366. The Parties have widely diverging views on the meaning of these provisions.

367. It seemed to be common understanding that a temporary prohibition of credit financing of companies by public institutions may have been a rational measure in the aftermath of the financial crisis 2008. It remained unclear, however, also during the Hearing, to what extent

¹¹⁸ Commercial Enterprises Law, R-36.

¹¹⁹ Commercial Code of the Ukraine in force as at 11 November 2008, R-37.

¹²⁰ Commercial Enterprises Law, R-36t.

¹²¹ Commercial Code of the Ukraine in force as at 11 November 2008, R-37t (“It is prohibited to use public budget funds, loaned or pledged funds to form the registered capital, excluding the cases envisaged by LoU on Priority Measures to Prevent Financial Crisis Negative Consequences and on Amendment of Certain Legislative Acts of Ukraine during the period of its validity. The financial condition of the corporate founders of the open joint stock companies as to their capacity to make the relevant contributions to the registered capital shall be audited by an individual or corporate auditor. The financial condition of the corporate founders of the open joint stock companies as to their capacity to make the relevant contributions to the registered capital in the cases envisaged by law shall be audited by *an individual* or corporate auditor in accordance with the established procedure, while the welfare of individual founders shall be confirmed by their income and property declaration attested by the relevant tax authority.” [emphasis added]).

such a prohibition would have been intended to apply to the use of money borrowed from related companies.

368. Such a broad prohibition of credit financing of share capital of companies would exclude most foreign investment which is often structured via intra-group financing.
369. In the absence of clear Ukrainian jurisprudence on the provisions in issue to the effect that they are also regarded as prohibiting intra-group financing, the Tribunal is disinclined to read it in such a broad way.
370. Furthermore, it appears to the Tribunal that a provision which is so unclear in its scope that it leaves serious doubts as to whether it actually prohibits intra-group financing cannot be viewed as sufficiently fundamental so that a breach of it can be regarded to constitute a violation of host State law sufficiently serious to deprive this Tribunal of its jurisdiction.

(8) Investment not made in good faith/corruption allegations

371. Finally, Respondent has made a somewhat amorphous bad faith argument. According to Respondent, the investment was not made in good faith and should thus not be considered protected by the Treaty.
372. Already in its Counter-Memorial, Respondent maintained that in case of “investor wrongdoing” claims must be rejected “on the basis of a lack of jurisdiction or admissibility, or as a defence on the merits.”¹²²
373. Invoking among others cases like *Phoenix v. Czech Republic*,¹²³ *Hamester v. Ghana*,¹²⁴ and *Yukos v. Russia*,¹²⁵ Respondent argues that serious and intentional wrongdoing such

¹²² Respondent Counter-Memorial, ¶ 491.

¹²³ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 14 April 2009, RLA-37.

¹²⁴ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, RLA-42.

¹²⁵ *Hulley Enterprises Limited v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Award, 18 July 2014, RLA-72.

as corruption, fraud or illegality, bad faith or misrepresentation should lead to the dismissal of investment claims.¹²⁶

374. It further suggests that the Tribunal should use its wide discretion to infer from a number of red flags¹²⁷ that the investment was originally procured by corruption and thus in contravention of Ukrainian law.
375. Respondent submits that “[s]erious allegations of bad faith against Claimant (and those associated with it) pervade these proceedings.”¹²⁸ According to Respondent, the circumstances surrounding the acquisition of the three land plots present unanswered questions and red flags which could have serious implications regarding the legality of Claimant’s investment.¹²⁹ Respondent also argues that if the Tribunal finds that Claimant was negligent and/or reckless in its acquisition of the properties, it has contributed to its own loss and Respondent should not be liable for such loss.¹³⁰
376. According to Respondent, in circumstances where wrongful conduct and illegality are alleged, the Tribunal has the power to shift the burden of proof. It argues that in the instant case, the Tribunal would be entirely justified in relying on *prima facie* evidence of illegality and corruption to shift the burden of proof and draw presumptions from the red flags.¹³¹
377. Respondent submits the following facts are red flags of Claimant’s wrongful and bad faith conduct in acquiring the three land plots: (i) “the purchase price, speed and other features of the Property transactions”¹³² (ii) “the individuals involved in the transactions, and

¹²⁶ Respondent Counter-Memorial, ¶ 498.

¹²⁷ Respondent Counter-Memorial, ¶¶ 520-523.

¹²⁸ Respondent Rejoinder on the Merits, ¶ 154. See also Respondent Counter-Memorial, ¶ 493.

¹²⁹ Respondent Rejoinder on the Merits, ¶¶ 154-201.

¹³⁰ *Ibid.*, ¶ 154.

¹³¹ *Ibid.*, ¶ 158.

¹³² *Ibid.*, ¶¶ 157, 159-172.

connections between them”,¹³³ and (iii) “the failure of Claimant to conduct adequate due diligence.”¹³⁴

378. Respondent concludes that in such circumstances, Claimant does not seek the protections of the Treaty with clean hands and should not be able to avail itself of them.¹³⁵

379. Claimant rejects these allegations as “wholly unsubstantiated,”¹³⁶ maintains that the transactions leading to the acquisition of the land plots were lawful and regular and made in good faith.

380. Claimant argues that Respondent has not been able to establish bad faith or corruption on the part of Claimant and that its bad faith argument is “a red herring.”¹³⁷ Claimant submits that “[t]here is nothing suspicious or extraordinary about the purchase price, terms of the sale or speed of the transactions”¹³⁸ and rejects the contents of [...]’s report as “information rather than evidence” most of which was gathered in the public domain.¹³⁹

381. According to Claimant, “[t]he Respondent has no findings of civil or criminal wrongdoing against the Claimant or against [Company C] or [Company D] or, indeed, any other party in the contractual chain, despite having the full powers of the Prosecutor's Office.”¹⁴⁰ Instead, Claimant argues that several facts point to its good faith. [...]

[...]

¹³³ *Ibid.*, ¶¶ 157, 173-196.

¹³⁴ *Ibid.*, ¶¶ 157, 197-201.

¹³⁵ Respondent Post Hearing Brief, ¶ 34.

¹³⁶ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 156.

¹³⁷ Hearing Transcript D5:P1018L20.

¹³⁸ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 157.

¹³⁹ Hearing D5:P1018:L21-25.

¹⁴⁰ Hearing D5:P1017:L13-20.

384. This Tribunal takes the allegations of investor misconduct on the level of corruption or related offences very seriously.
385. It clearly is of the view that the “in accordance with host State law” provision of the Treaty implies that if corruption can be established remedies under the Treaty would become unavailable because the Tribunal would be deprived of its jurisdiction.¹⁴¹ But also in the absence of an express “in accordance with host State law”-clause, such kind of illegality must be regarded as contrary to the international or transnational *ordre public*. Violating core values protected by international law would clearly be not in good faith and lead to the loss of investment protection under the Treaty.¹⁴²
386. Corruption is certainly a prominent example of an illegality contrary to international principles which, if proven, leads to the loss of investment protection under a BIT. In this

¹⁴¹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, RLA-28, ¶ 257 (“[...] because **Inceysa’s** investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of **El Salvador** in the **BIT** and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre.”); *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, RLA-64, ¶ 373 (“Uzbekistan’s consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes ‘concerning an investment.’ Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan’s consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (Fraport II)*, ICSID Case No. ARB/11/12, Award, 10 December 2014, RLA-74, ¶ 467 (“Based on the foregoing analysis and after due and thorough consideration of the Parties’ arguments and the evidence on the record, the Tribunal finds that Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State’s offer of arbitration under the treaty. [...] Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.” [footnote omitted]).

¹⁴² *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (Resubmitted), ¶ 308 (“[...] La condition de ne pas commettre de violation grave de l’ordre juridique est une condition tacite, propre à tout APRI ...”/ “[...] the requirement of not having committed a serious violation of the legal regime is a tacit condition, inherent in every *BIT* [...]” [emphasis added]); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, RLA-74, ¶ 332 (“[...] even absent the sort of explicit legality requirement that exists here, it would still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.”); *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 177 (“[an investment may] be denied protection under that BIT because, for example, the investor acted in bad faith by resorting to fraud or corruption in order to make the investment.”).

regard, the Tribunal is in full agreement with the ICSID tribunals in *Hamester v. Ghana*,¹⁴³ *World Duty Free v. Kenya*,¹⁴⁴ *Metal-Tech v. Uzbekistan*,¹⁴⁵ and *EDF v. Romania*.¹⁴⁶

387. The problem in this case simply is one of lack of sufficient evidence of corruption or what appears to the Tribunal even an almost deliberate withholding of evidence from the Tribunal by both Parties. Claimant failed to demonstrate the true ownership structure behind the Krederi group of companies and Respondent failed to come forward with any substantiation of irregular payments that may indicate corruption. Instead, it repeatedly insinuated that the making of the real estate investments was accompanied by corruption.
388. However, Respondent not only failed to establish corruption,¹⁴⁷ it also failed to produce any relevant evidence for the usual red flags surrounding corruption cases, such as the use of consultants to which substantial payments have been made in exchange of unexplained services, any indication of transaction values below market prices, of bid-rigging, etc. In fact, the red flags expressly mentioned by Respondent, such as “the purchase price, speed and other features of the Property transactions”,¹⁴⁸ “the individuals involved in the transactions, and connections between them”¹⁴⁹ and “the failure of Claimant to conduct adequate due diligence”¹⁵⁰ remain vague and unsubstantiated.

[...]

¹⁴³ *Gustav F W Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, RLA-42, ¶ 123 (“[a]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; [...].”).

¹⁴⁴ *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, RLA-29, ¶ 157 (“[...] bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.”).

¹⁴⁵ *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, RLA-64, ¶ 290 (“[...] condemnation of corruption under Uzbek law is in conformity with international law and the laws of the vast majority of States.”).

¹⁴⁶ *EDF (Services) Limited. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221 (“The Tribunal shares the Claimant’s view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, [...].”).

¹⁴⁷ Respondent Post-Hearing Brief, ¶ 30 (“R[espondent] accepts it has been unable definitively to establish corruption.”).

¹⁴⁸ Respondent Rejoinder on the Merits, ¶¶ 157, 159-172.

¹⁴⁹ *Ibid.*, ¶¶ 157, 173-196.

¹⁵⁰ *Ibid.*, ¶¶ 157, 197-201.

391. Also, Respondent’s related submissions that because Claimant acted in bad faith the Tribunal lacks jurisdiction over its claims and/or they are inadmissible¹⁵¹ are not substantiated.

[...]

393. Therefore, Respondent’s suggestions that Claimant’s claims should be declared inadmissible on the basis of a “clean hands” doctrine-inspired principle,¹⁵² is not convincing on factual grounds alone.

394. Thus, the Tribunal does not consider that Respondent’s objection that the investment had not been made in good faith and the linked allegations of corruption is sufficiently substantiated.

VII. LIABILITY

[...]

A. FAIR AND EQUITABLE TREATMENT

(1) The Parties’ Positions

a. Claimant’s Position

[...]

b. Respondent’s Position

[...]

(2) Tribunal’s Analysis

432. Claimant’s core submission on the merits is that its investment suffered a violation of fair and equitable treatment, and customary international law guarantees, as a result of denials

¹⁵¹ Respondent Rejoinder on the Merits, ¶ 154.

¹⁵² *Ibid.* (“Claimant should not be allowed [...] any benefit from their own wrongful conduct.”); Respondent Post-Hearing Brief, ¶ 34 (“In such circumstances, [Claimant] does not seek the treaty protections with clean hands and should not be allowed to avail itself of them.”).

of justice by the Ukrainian courts in the course of the four cases leading to the loss of ownership over Plots 1, 2 and 3.

433. Claimant alleges a series of “procedural and substantive failings which, [it] submits, are serious enough to constitute a breach of Ukraine’s treaty obligations.”¹⁵³
434. These failings are outlined and detailed in Claimant’s pleadings and refuted in Respondent’s pleadings. The Tribunal will refer to the actual allegations as well as the legal arguments of the Parties and assess them below.¹⁵⁴
435. Before addressing the individual court cases and the alleged fair and equitable treatment violations committed by Respondent in the course of these domestic court proceedings the Tribunal will set out the legal standard of a potential breach of fair and equitable treatment as a result of a denial of justice.
436. In this regard, it appears uncontroversial between the Parties that investment jurisprudence has identified the obligation to accord “due process” and/or conversely the prohibition to “deny justice” to foreign investors as one of the core obligations contained in the broader standard of fair and equitable treatment.
437. Numerous tribunals have reaffirmed the conceptualization of the fair and equitable treatment standard as a protection standard that comprises various typical “elements” or “principles”, stating that “transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard, and so does compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment.”¹⁵⁵

¹⁵³ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 71.

¹⁵⁴ See below ¶ 491.

¹⁵⁵ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, ¶ 519 (footnotes omitted).

438. Suffice it to rely on two ICSID awards involving Ukraine in which tribunals have aptly summarized the main principles “embraced”¹⁵⁶ by the fair and equitable treatment standard.

439. In *Bosh v. Ukraine*,¹⁵⁷ an ICSID tribunal relied on previously established criteria to determine breaches of fair and equitable treatment. The tribunal expressly endorsed the elements identified in the *Lemire v. Ukraine* case,¹⁵⁸ referring to the following relevant factors:

[...] ‘whether the State made specific representations to the investor’; ‘whether due process has been denied to the investor’; ‘whether there is an absence of transparency in the legal procedure or in the actions of the State’; ‘whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State’; and ‘whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.’¹⁵⁹

440. In fact, the tribunal in *Lemire v. Ukraine* had stated that:

[t]he threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following:

- whether the State has failed to offer a stable and predictable legal framework;
- whether the State made specific representations to the investor;
- whether due process has been denied to the investor;
- whether there is an absence of transparency in the legal procedure or in the actions of the State;
- whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;
- whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.¹⁶⁰

¹⁵⁶ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012) 133.

¹⁵⁷ *Bosh International, Inc. and B&P, Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, CLA-14.

¹⁵⁸ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284.

¹⁵⁹ *Bosh International, Inc. and B&P, Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, CLA-14, ¶ 212.

¹⁶⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284.

441. In any of the jurisprudential summaries of the requirements of fair and equitable treatment the absence of a “denial of justice” or of “due process” figures prominently and it can be regarded as well accepted that treaty parties which have specifically undertaken to accord fair and equitable treatment to investors from other treaty parties breach such obligation if they commit a denial of justice.

a. Denial of Justice

442. While it is thus generally accepted that, as a matter of principle, a denial of justice may amount to a violation of the fair and equitable treatment standard, it is equally accepted that only a serious deficiency and failure to accord due process will reach the threshold of such a fair and equitable treatment violation, as exemplified by the NAFTA tribunal in *Waste Management v. Mexico* which required national court decisions to be “[...] either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic”¹⁶¹ in order to amount to a violation of the fair and equitable treatment standard.

443. Investment tribunals have characterized this shared understanding in different ways and have largely endorsed the customary international law principles concerning denial of justice.¹⁶²

444. A helpful restatement of the concept of denial of justice can be found in *Iberdrola v. Guatemala*,¹⁶³ where an ICSID tribunal stated that under international law a denial of justice could constitute:

- (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this

¹⁶¹ *Waste Management, Inc. v. United Mexican States*, Case No. ARB(AF)/00/3, Award, 30 April 2004, CLA-4, ¶ 130.

¹⁶² Article 9 Harvard Research Draft on the Law of State Responsibility (“[...] gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”), cited in: E. M. Borchard, ‘The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners’, AJIL Spec. Suppl. 23 (1929), 131, at 173.

¹⁶³ *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012.

matter, the Tribunal shares the position of the Claimant in that ‘... denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.’¹⁶⁴

445. These traditional aspects are echoed by the tribunal in *Azinian v. Mexico* which held that:

[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.¹⁶⁵

446. To these elements the *Azinian v. Mexico* tribunal added:

[...] a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of ‘pretence of form’ to mask a violation of international law. [...].¹⁶⁶

447. In the recent *Philip Morris v. Uruguay* award,¹⁶⁷ an ICSID tribunal made clear that for a breach of the fair and equitable treatment standard a high threshold was required. In the tribunal’s view,

[f]or a denial of justice to exist under international law there must be ‘clear evidence of [...] an outrageous failure of the judicial system’ or a demonstration of ‘systemic injustice’ or that ‘the impugned decision was clearly improper and discreditable.’¹⁶⁸

448. This high threshold is also reflected in the *Philip Morris v. Uruguay* tribunal’s finding that although “[...] there were a number of procedural improprieties and a failure of form” before the domestic courts,¹⁶⁹ these did not amount to a denial of justice under international law.

¹⁶⁴ *Ibid.*, unofficial English translation, ¶ 432.

¹⁶⁵ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 102.

¹⁶⁶ *Ibid.*, ¶ 103.

¹⁶⁷ *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, CLA-47.

¹⁶⁸ *Ibid.*, ¶ 500.

¹⁶⁹ *Ibid.*, ¶ 578.

449. In this Tribunal's understanding a number of elements have to be taken into account in order to assess whether a violation of the fair and equitable treatment standard has occurred through a denial of justice:

- i) It can arise from a denial of access to courts in the domestic legal arena, the classical concept of a denial of "access to justice".
- ii) It may also stem from overly long proceedings, pursuant to the old adage of "justice delayed, justice denied".
- iii) Most frequently a denial of justice may result from a serious defect in the adjudicative process, such as a violation of equal treatment of the parties or of various other core rights of litigants, such as the right to be heard and to present evidence, etc.
- iv) Rather exceptionally, a totally irrational or abusive outcome going beyond mere misapplication of the law may constitute a denial of justice.
- v) Further, it must be kept in mind that in most situations the internal legal system may remedy some of the above-mentioned irregularities and that this requires some form of exhaustion of local remedies.
- vi) Finally, since investment tribunals are not sitting as appeal courts over domestic adjudicators they only apply a limited review.

450. These elements should be understood more precisely as set out below.

(i) Denial of access to the courts

451. The right of access to the courts or other adjudicatory bodies is a basic aspect of due process. Refusing such access constitutes the classical case of denial of justice.

452. This is also widely recognized by investment tribunals. The tribunal in *Azinian v. Mexico* held that “[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit [...]”¹⁷⁰ Similarly, the tribunal in *Iberdrola v. Guatemala*,¹⁷¹ stated that:

[...] under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice [...].¹⁷²

453. The tribunal in *AMTO v. Ukraine*¹⁷³ held that:

[d]enial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).¹⁷⁴

454. The “legislative failures” referred to in the *AMTO v. Ukraine* award possibly stemmed from domestic procedural law which did not provide for means to effectively pursue one’s rights. In that specific case, such a claim was rejected by the tribunal because:

[...] the Claimant has failed to demonstrate that the Bankruptcy Law is not effective for the enforcement of rights within the meaning of Article 10(12) of the ECT, or that its provisions otherwise constitute a denial of justice.¹⁷⁵

(ii) Undue delay

455. It is generally accepted that overly long court proceedings, i.e. undue delay which does not result from the litigants’ actions or inaction, may amount to a denial of justice.

456. This was clearly stressed by the tribunal in *Azinian v. Mexico* which held that “[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it

¹⁷⁰ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 102.

¹⁷¹ *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012.

¹⁷² *Ibid.*, ¶ 432 (unofficial English translation).

¹⁷³ *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008.

¹⁷⁴ *Ibid.*, ¶ 75.

¹⁷⁵ *Ibid.*, ¶ 89.

Krederi Ltd. v. Ukraine
Excerpts of the Award

to undue delay, [...].¹⁷⁶ Similarly the ICSID tribunal in *Roussalis v. Romania*¹⁷⁷ acknowledged that “undue delay to rule on a dispute may amount to a denial of justice.”¹⁷⁸

457. At the same time, investment tribunals should be very reluctant to impose their own views on swift and efficient judicial proceedings on domestic courts. Rather, they ought to be willing to concede that various factors may contribute to delays which are not thus to be considered unreasonable.

458. For instance, the tribunal in *Oostergetel v. Slovakia*,¹⁷⁹ while holding that undue delay may constitute a denial of justice as a matter of principle, stated that “the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to consider in the analysis” whether a delay was indeed undue.¹⁸⁰

459. Similarly, the ICSID tribunal in *Toto Costruzioni v. Lebanon*¹⁸¹ held that:

“[...] whether justice is rendered within a reasonable delay depends on the circumstances and the context of the case. Each lawsuit must be analyzed individually with regard to:

- the complexity of the matter;
- the need for celerity of decision;
- the diligence of claimant in prosecuting its case.”¹⁸²

¹⁷⁶ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 102.

¹⁷⁷ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.

¹⁷⁸ *Ibid.*, ¶ 602.

¹⁷⁹ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, RLA-51 also submitted as RLA-122.

¹⁸⁰ *Ibid.*, ¶ 290 (“The Tribunal agrees with the view [...] that the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to consider in the analysis of a claim of undue delay constituting a denial of justice. Having reviewed the expert evidence and particularly the timeline of the proceedings submitted by the Parties, the Tribunal is satisfied with the Respondent’s explanations. No excessive procedural delays resulting in a denial of justice or a violation of Article 3 of the BIT have been demonstrated.”).

¹⁸¹ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, RLA-99.

¹⁸² *Ibid.*, ¶ 163 (footnotes omitted).

460. It also cautioned, however, that “[although overcharged dockets may explain the fact that a decision in a civil matter was not rendered within a reasonable time, it does not excuse the delay.”¹⁸³

(iii) Serious defects in the adjudicative process

461. The core element of due process certainly is that the adjudicator conducts the adjudicatory process in a proper fashion. Thus, serious defects in the adjudicative process, such as violations of equal treatment of the parties, the right to be heard or other core rights of litigants may amount to violations of due process.¹⁸⁴

462. Conversely, denial of justice is encapsulated as the arbitrary disregard of due process. Often reference is made to the famous ICJ dictum in *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)* that arbitrary judicial conduct is “a wilful disregard of due process of law, [...] which shocks, or at least surprises, a sense of judicial propriety.”¹⁸⁵

463. Many investment tribunals have espoused this notion and clarified that it is indeed a demanding standard which implies that there must be a serious deficiency in the adjudicatory process to amount to a denial of justice.

464. For instance, in *Genin v. Estonia*,¹⁸⁶ an ICSID tribunal held that in order to constitute an “arbitrary act that violates the Tribunal’s ‘sense of juridical propriety’”¹⁸⁷ “[...] any

¹⁸³ *Ibid.*, ¶ 162.

¹⁸⁴ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 420 (“[...] conduct that does not offend judicial propriety, that complies with due process and the right to be heard.”).

¹⁸⁵ *Elettronica Sicula S.p.A. (ELSI), (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989, ¶ 128 (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”).

¹⁸⁶ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, RLA-14.

¹⁸⁷ *Ibid.*, ¶ 371 (footnotes omitted),

procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.^{>188}

465. Similarly, the tribunal in *Oostergetel v. Slovakia*,¹⁸⁹ noted:

[...] that a claim for denial of justice under international law is a demanding one. To meet the applicable test, it will not be enough to claim [...] that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.¹⁹⁰

466. The tribunal in *Arifx. Moldovam* emphasised that a denial of justice or lack of due process results from “fundamentally unfair and biased proceedings” or when the outcome is not just wrong or debatable, but so “egregiously wrong” that “no honest, competent court” could have reached such a result:

The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.¹⁹²

467. Similarly, the tribunal in *Rompetrol v. Romania* insisted that:

[...] it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events.¹⁹³

¹⁸⁸ *Ibid.*

¹⁸⁹ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, RLA-51 also submitted as RLA-122.

¹⁹⁰ *Ibid.*, ¶ 273.

¹⁹¹ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-59.

¹⁹² *Ibid.*, ¶ 442.

¹⁹³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, RLA-61, ¶ 279.

(iv) No mere misapplication of the law

468. When a domestic judgment or administrative decision is egregiously wrong and not merely erroneous it may amount to a violation of due process.
469. This view was adopted by the tribunal in *Arif v. Moldova*¹⁹⁴ which held that “outrageously wrong, final and binding decisions” may constitute a breach of fair and equitable treatment by the judiciary.¹⁹⁵ It cautioned though that it must have “misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.”¹⁹⁶
470. But tribunals have emphasized that such “manifestly wrong or unjust judgments” are to be distinguished from merely erroneous outcomes.
471. The investment tribunal in *AMTO v. Ukraine*¹⁹⁷ clearly espoused the view that a denial of justice cannot arise from a mere misapplication of the law. It said:

[...] [i]n the absence of any demonstrated procedural irregularity or interference, the Claimant’s objection to these decisions is simply that they are wrong in law. This Tribunal is not a court of appeal for the decisions of the Ukrainian courts and, in any event, the Tribunal does not accept that these decisions are wrong in law.¹⁹⁸

472. Similarly, the tribunal in *Oostergetel v. Slovakia*,¹⁹⁹ held that a claim for denial of justice under international law is a demanding one and that “to meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national

¹⁹⁴ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-59.

¹⁹⁵ *Ibid.*, ¶ 445 (“[...] the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions.”).

¹⁹⁶ *Ibid.*, ¶ 442.

¹⁹⁷ *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008.

¹⁹⁸ *Ibid.*, ¶ 80.

¹⁹⁹ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, RLA-51 also submitted as RLA-122.

court is erroneous, [...]”²⁰⁰ Rather, a “denial of justice implies the failure of a national system as a whole to satisfy minimum standards.”²⁰¹

(v) Exhaustion of local remedies

473. The ICSID Convention does not require parties to exhaust local remedies before instituting ICSID proceedings.²⁰² However, this only relates to the consent to ICSID arbitration and thus the issue of bringing an ICSID claim.
474. It is another question whether in the case of alleged due process violations committed by the courts of host States, local remedies must be exhausted in order to assess whether States have in fact violated such due process obligations. This relates to the issue of at what point in time such wrongs were committed and to the possibility of remedying judicial wrongs. In effect, it may amount to an implicit requirement for denial of justice claims that is similar to an exhaustion of local remedies.
475. On this basis, a number of tribunals have suggested that the exhaustion of local remedies is a required substantive element of a claim for denial of justice or breach of fair and equitable treatment and is thus different from the traditional rule of exhaustion of local remedies as a procedural prerequisite for the exercise of diplomatic protection or the institution of investment claims.
476. For instance, in *Chevron v. Ecuador*,²⁰³ a UNCITRAL tribunal noted that the parties made “a distinction between the traditional exhaustion of local remedies rule under international law and the objection to be considered here [...] that a ‘Claimant must first exhaust the

²⁰⁰ *Ibid.*, ¶ 273.

²⁰¹ *Ibid.*

²⁰² Article 26 second sentence ICSID Convention makes it clear that a Contracting Party has to make the exhaustion of local remedies an express condition of consent to ICSID arbitration. (“A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”).

²⁰³ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008.

remedies available to it within the [local] court system before a State can be held liable for denial of justice' [...].²⁰⁴

477. The *Chevron v. Ecuador* tribunal explicitly agreed with Jan Paulsson “that exhaustion of local remedies is a required substantive element of a claim for denial of justice.”²⁰⁵ It stated that:

[t]his exhaustion requirement can be viewed as a necessary element both for a denial of justice under customary international law and for the breach of a substantive BIT obligation such as ‘fair and equitable treatment.’ However, in both cases, the question concerns the substance of the claims put before the Tribunal. Despite couching its objection in the language of ripeness and admissibility, what the Respondent raises is an issue affecting liability. Exhaustion of local remedies in this context is therefore an issue of the merits, not jurisdiction.²⁰⁶

478. A number of tribunals have held that denial of justice claims implicitly contain an exhaustion of local remedies requirement.

479. For instance, the tribunal in *Frontier Petroleum v. Czech Republic*²⁰⁷ stated that:

[t]he fair and equitable treatment standard has been found on several occasions to encompass the notion of a denial of justice which, in turn, implies the requirement to exhaust local remedies.²⁰⁸

480. Similarly, the tribunal in *Toto Costruzioni v. Lebanon*²⁰⁹ insisted on an exhaustion of local remedies as a precondition to raise a denial of justice claim, saying that “[...] a state can

²⁰⁴ *Ibid.*, ¶ 232.

²⁰⁵ Jan Paulsson, *Denial of Justice in International Law* (2007) 111, 125; cited in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 235.

²⁰⁶ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 233.

²⁰⁷ *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA, Final Award, IIC 465 (2010), 12 November 2010, RLA-45.

²⁰⁸ *Ibid.*, ¶ 293.

²⁰⁹ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, RLA-99.

only be held liable for denial of justice when it has not remedied this denial domestically.^{»210}

481. Most recently, the tribunal in *Corona v. Dominican Republic*²¹¹ clarified that a denial of justice usually requires an exhaustion of local remedies by holding that “[...] an administrative act, in and of itself, particularly at the level of a first instance decision-maker, can [not] constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.”^{»212}
482. It follows from the above that claimants have to actively pursue their claims in the domestic legal system and cannot simply abandon their claims when they intend to claim a denial of justice. This requirement was clearly addressed in two investment awards involving Ukraine.
483. In *Generation Ukraine v. Ukraine*²¹³ an ICSID tribunal clarified that an investor’s abandonment of its investment “without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation^{»214} is likely to fail on the merits. The tribunal said:

[...] In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.²¹⁵

²¹⁰ *Ibid.*, ¶ 164.

²¹¹ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016.

²¹² *Ibid.*, ¶ 248.

²¹³ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.

²¹⁴ *Ibid.*, ¶¶ 20.30.

²¹⁵ *Ibid.* (emphasis in original).

484. This reasoning was invoked by the respondent in *Lemire v. Ukraine*.²¹⁶ It argued that “Claimant should have taken advantage of the available local remedies that would have been capable of correcting the alleged administrative wrong.”²¹⁷
485. While the tribunal in *Lemire v. Ukraine* found that the applicable BIT did not contain an exhaustion of local remedies requirement²¹⁸ and that thus, “the possibility to file a claim against a specific measure, [was] not burdened by any requirement to previously appeal to the national courts,”²¹⁹ it also cautioned that this “[...] does not mean that an investor can come before an ICSID tribunal with any complaint, no matter how trivial, about any decision, no matter how routine, taken by any civil servant, no matter how modest his hierarchical place.”²²⁰

(vi) Limited standard of review

486. Finally, it is generally accepted that the standard of review of domestic court decisions is very limited. Investment tribunals are neither intended, nor empowered to sit as appellate instances to rule on the correctness of domestic court decisions. Rather, it is their task to assess whether such court decisions amount to a denial of justice. This was clearly acknowledged by Claimant, correctly stating that the Tribunal cannot be expected “to review or to provide the judgment as to whether the Ukrainian courts have decided the matter substantively correctly, but whether [Company D] has been afforded a fair process in Ukraine.”²²¹

²¹⁶ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

²¹⁷ *Ibid.*, ¶ 274.

²¹⁸ *Ibid.*, ¶ 276 (“The starting point of the Tribunal’s analysis must be the text of the BIT. The BIT – unlike other Treaties – does not include any clause requiring the initiation or exhaustion of local remedies before the filing of an investment arbitration. Quite the contrary: Article II.3 deviates from the standard US Model BIT in only one point, the insertion of the following phrase: ‘[...] For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.’”).

²¹⁹ *Ibid.*, ¶ 277.

²²⁰ *Ibid.*, ¶ 278.

²²¹ Claimant Post-Hearing Brief, ¶ 83.

487. This limited function of an investment tribunal has clearly become the dominant view. It was recognized by the tribunal in *Azinian v. Mexico* which held that:

[t]he possibility of holding a State internationally liable for judicial decisions does not, however, entitle a Claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. [...] What must be shown is that the court decision itself constitutes a violation of the treaty. [...] Claimants must [also] show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”²²²

488. The tribunal in *Arif v. Moldova*²²³ also reaffirmed this limited review function of investment tribunals. Specifically in regard to assessing denial of justice claims, the tribunal held that:

[...] international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if ‘[a] simple difference of opinion on the part of the international tribunal is enough’ to allow a finding that a national court has violated international law.²²⁴

489. Also, the tribunal in *Lemire v. Ukraine*²²⁵ confirmed this view and expressly stated that it:

[...] is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal’s sole duty is to consider whether there has been a treaty violation.²²⁶

²²² *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 82.

²²³ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-59.

²²⁴ *Ibid.*, ¶ 441, citing J. Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2005, 72 (footnotes omitted).

²²⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

²²⁶ *Ibid.*, ¶ 283.

490. It is on the basis of such an understanding that the Tribunal will not review the Ukrainian court proceedings on the merits, but rather assess whether they amount to a breach of due process and thus of Article 2 of the Treaty.²²⁷

b. The Four Cases before the Ukrainian Courts

491. At the core of the present dispute is the question of whether the treatment before the Ukrainian courts as a result of which Claimant's investment was ultimately lost, constituted a violation of due process.

492. In this regard, it is clear that the acts of the judiciary are attributable to Ukraine and that, if they fall short of an international standard as enshrined in fair and equitable treatment, Ukraine can be held liable under the Treaty.

493. In the present case, however, what is problematic is the question of whether Claimant, Krederi, was deprived of the opportunity to make its case before the Ukrainian courts or whether it was rather third parties that may have suffered from judicial treatment possibly falling short of fair and equitable treatment.

494. If there was a denial of justice by the Ukrainian courts, as claimed by Claimant, the question is to whom was it done: to [Company A], to [Company B], to [Company D], to [Company C], to Krederi, or to others? Was a potential denial of justice committed vis-à-vis [Company A] in the Ukrainian court cases a fair and equitable treatment violation of Krederi's rights under the BIT?

495. Express allegations of wrongdoing by the Ukrainian courts vis-à-vis the foreign investor protected by the Treaty, Krederi, are limited, such as the alleged violation of the courts' duty to notify [Company D] of the court proceedings concerning the annulment of the sale in Case 2.²²⁸ According to Claimant, "[Company D] was not properly notified of the date, time and place of the court hearing. The writ of summons was delivered to the Prosecutor's

²²⁷ See also the express request by Claimant in Claimant Post-Hearing Brief, ¶ 85 ("The Claimant does not wish the Tribunal to review the domestic court cases as such. It simply wishes the Tribunal to assess the due process and see in the judgments whether the due process is a trigger of protection, and particularly a trigger of Article 2 of the BIT, and also of the minimum standards of protection under customary international law.").

²²⁸ See below ¶¶ 559 *et seq.*

Office to be further delivered to [Company D]. However, there is no evidence of delivery of summons. This would amount to breach of Articles 33, 35 of the Code of Administrative Proceedings (CAP) of Ukraine, the principle of contradiction and the principle of due process.”²²⁹ Also with regard to Case 4, the allegation of substantive due process violations relate to [Company D] as a direct party to the court proceedings.²³⁰

496. As outlined above, Claimant’s main argument is that it suffered from a denial of justice on the part of Ukraine and that this resulted, among others, from “the Prosecutor’s referral of the claim to the courts and the courts’ consideration of the claims despite the lapse of limitation period and inadequate substantiation of the claims by the Prosecutor, the courts’ denial of due process and justice of Claimant and the subsequent attempt by KCC to resell the properties.”²³¹ In this regard, it is relevant that Claimant refers to a “domino effect” arguing that the procedural irregularities of the court cases that did not directly involve [Company D], still affected it in their outcomes.²³²
497. This Tribunal will thus dissect the often very general assertions and analyse the four court cases in detail in order to determine whether specific acts and/or omissions on the part of Respondent amounted to a breach of due process constituting a violation of fair and equitable treatment.

(i) Case 1: [...]

498. Case 1 was started on [...], when the Deputy Prosecutor of Kiev filed a claim to invalidate the KCC’s approvals of the lease/sale of Plot 1 to [Company A]. The proceedings were formally opened on [...], led to a hearing on [...], and resulted in a first instance judgment of [...], in which the Kiev City District Administrative Court declared the KCC’s approvals for the lease/sale of Plot 1 to [Company A] invalid.²³³

²²⁹ Claimant Memorial, ¶ 82 (b).

²³⁰ See below ¶¶ 602 *et seq.*

²³¹ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 76.

²³² Hearing Transcript D5:P1012:L3-9

²³³ Decision of the District Administrative Court, [...], CE-42.

499. On [...], [Company A] appealed this decision to the second instance court, the Kiev Regional Administrative Appellate Court, which dismissed the appeal on [...].²³⁴
500. A further appeal was brought by [Company A] to the Supreme Administrative Court on [...], which rejected the appeal on [...].²³⁵
501. On [...], [Company D] applied for leave to the Supreme Administrative Court to appeal its decision to the Supreme Court. On [...], the Supreme Court of Ukraine denied [Company D]’s appeal.²³⁶
502. In regard to Case 1, the following alleged violations of due process have been raised and will be scrutinized by the Tribunal: 1) that the case was wrongly litigated in the administrative, instead of the commercial courts; 2) that the case proceeded although the statute of limitations had expired; 3) that there was no fair opportunity for the parties to the proceedings to litigate in the Ukrainian courts; and 4) that [Company D] was deprived of the opportunity to be heard.

1. Jurisdiction of administrative or commercial/economic courts

503. Specifically, Claimant alleges that Case 1 was unlawfully heard by an administrative court and should have been heard in the commercial/economic courts.²³⁷ Relying on the expert opinion by [...],²³⁸ Claimant argues that “the dispute on the recognition of the real estate sale transaction as illicit and the cancellation of the Kyiv city council decision [...] should be subject to the jurisdiction of the economic courts, and therefore the decision of the administrative courts in the case number [...] is a decision of a court lacking jurisdiction.”²³⁹ In his expert opinion, [...] stated that in 2010, the Ukrainian Supreme Court had held that if a State body’s “resolution on disposal of land plots” is challenged and has

²³⁴ Decision of the Kyiv Appeal Administrative Court, [...], CE-43.

²³⁵ Decision of the Supreme Administrative Court of Ukraine, [...], CE-44.

²³⁶ Decree of the Supreme Administrative Court of Ukraine, Kyiv [...], R-90.

²³⁷ Claimant Memorial, ¶ 82.

²³⁸ Expert Opinion of [...]

²³⁹ Claimant Memorial, ¶ 82(a).

implications for the subsequent acquisition of private parties it shall be subject to the ‘civil (Economic) jurisdiction’, since there is a dispute on civil right.»²⁴⁰

504. Respondent relies on the report by [...] according to whom there was no uniform practice on this jurisdictional issue.²⁴¹ Respondent further argues that Claimant had failed to object to the administrative court’s exercise of jurisdiction.²⁴²
505. To this Tribunal, it appears that the exact delimitation of jurisdiction between administrative and commercial courts for the type of cases at issue in the present proceeding obviously was a matter of contention under Ukrainian law. There was apparently no uniform practice at the crucial time²⁴³ and it was thus hard to argue that the selection of one forum was clearly wrong.
506. Furthermore, even if one would accept that the administrative court had been the wrong venue, such an error does not appear to be sufficiently grave to be qualified as abusive and contrary to the requirements of due process thus constituting a denial of justice.
507. In addition, the lack of objections on the part of the legal representatives of [Company A] as well as Claimant and its affiliated companies indicates that Claimant was not really aggrieved by the fact that the invalidation proceedings were brought in the administrative as opposed to the commercial/economic courts, as suggested by Claimant.
508. The Tribunal thus finds that the fact that the case was possibly instituted before the “wrong” domestic forum of the Ukrainian administrative courts does not amount to a breach of due process on the international level.

2. Challenge after expiry of statute of limitations

509. Claimant specifically alleges that the proceedings in Case 1 were time-barred and thus unlawfully conducted to the detriment of [Company A] and consequently, Krederi. In fact,

²⁴⁰ Expert Opinion of [...]

²⁴¹ Second Expert Report of [...]

²⁴² Respondent Post-Hearing Brief, ¶ 70.

²⁴³ This was obviously not only the position of the Respondent, but also acknowledged by Claimant. [...]

- the alleged disregard of the three-year limitation period forms one of the core complaints of Claimant’s denial of justice claim. It repeatedly refers to Respondent’s “bad faith and arbitrary and inconsistent treatment of [its] investment as exemplified by the way the courts dealt with the limitation period [...]”.²⁴⁴
510. According to Claimant, the challenged decisions of the KCC “were adopted respectively [in 2007] while the claim was filed by the Prosecution only on [...]. It is undisputed that the Prosecutor of Kyiv City was informed about these decisions of Kyiv City Council in 2007; the court did not consider the issue that the action was time barred.”²⁴⁵
511. [...], the lawyer of [Company A], complained that the Court did not properly consider the Prosecutor’s application to extend the limitation period.²⁴⁶ The Prosecutor asked for an extension because it allegedly only learned of the illegal resolution of the KCC in early 2011. According to Claimant, however, the “Prosecutor knew or ought to have known of the decision of the Kiev City Council when the decision was made, or shortly thereafter,”²⁴⁷ and the institution of proceedings was in fact the result of a request by the President of the Ukraine in [...] to investigate the property sale.²⁴⁸
512. According to Claimant “there was a limitation period of three years for any action to be taken. The court extended without any reasoning the three year period.”²⁴⁹
513. Respondent argues that the Prosecutor filed a timely request for an extension of the limitation period which was considered by the court as evidenced by the hearing minutes. Further, since the Prosecutor only learned about the illegality in [...], and started the proceedings shortly thereafter, it was well within the limitation period.²⁵⁰

²⁴⁴ Claimant Post-Hearing Brief, ¶ 87; Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 76. See also Claimant Memorial, ¶ 98.

²⁴⁵ Claimant Memorial, ¶ 60.

²⁴⁶ *Ibid.*

²⁴⁷ Claimant Post-Hearing Brief, ¶ 89.

²⁴⁸ *Ibid.*, ¶ 19.

²⁴⁹ Claimant Memorial, ¶ 60.

²⁵⁰ Respondent Counter-Memorial, ¶ 286.

514. It appears undisputed between the Parties that the applicable three-year limitation period starts to run from the point in time when the Prosecutor knows or should have known about the illegality. The Parties disagree as to when the Prosecutor actually knew or should have known these facts.
515. According to Respondent, the Prosecutor had no knowledge “in 2008 or 2009 of the irregularities in relation to Plot 1.”²⁵¹ In its view, the Prosecutor only learned of the irregularities in [...]. Respondent further maintains that there was no evidence provided by Claimant that the Prosecutor already had such knowledge before 2011.²⁵²
516. This appears to be an impermissible reversal of the burden of proof: if a party wants to avail itself of a remedy at a point in time that lies beyond an applicable limitation period by arguing that it had not or could not have known earlier, it is that party’s obligation to show this. Thus, it was not [Company A’s] duty to prove that the Prosecutor had actually known of the illegality before [...]. Rather, it was the Prosecutor’s obligation to demonstrate that it had not and could not have known about the illegality.
517. In fact, the [...] criminal investigations of [Company A] and its winning the tender for Plot 1 indicate that the Prosecutor’s office had some knowledge of irregularities or at least that it could have gained additional knowledge if acting diligently.²⁵³
518. Furthermore, the fact that the Prosecutor’s office was regularly invited to attend the KCC meetings and received its minutes most likely had put the Prosecutor on notice of the irregularities. At the very least, the Prosecutor should have known after reviewing the files.

²⁵¹ Respondent Counter-Memorial, ¶ 287.

²⁵² Respondent Post-Hearing Brief, ¶ 73 (“No documents about the Properties were seized from [Company C/D] in the search [Furman T: 361, 11-12]. As explained at ¶¶ 21-24 of the Rejoinder on the Merits, the criminal cases which were commenced (but not pursued) against [Company A] and concerned charges of ‘false entrepreneurship and misdemeanours’ [...] T: 509, 12-18; [...] 763,19 – 764,3]. No evidence was provided, at the hearing or otherwise by C, that the criminal investigations (or any search related to those investigations) concerned matters of fact which overlapped with facts underlying the civil Proceedings brought in 2011.”).

²⁵³ Expert Opinion of [...]

519. All of these circumstances make it difficult to comprehend how the court had granted the extension.
520. Furthermore, the way the extension was granted by the local court was highly questionable. The hearing minutes indicate that an extension request had been made and was granted,²⁵⁴ but the decision itself did not give any reasons why the extension had been granted.²⁵⁵ Even Respondent's expert, [...], confirmed that the "ideal position" would have been for the court to give reasons.²⁵⁶
521. While the appellate administrative court in this case did not address the issue, the appellate economic court in Case 2, [...] involving the claim to invalidate the contracts for the lease/sale of Plot 1 from KCC to [Company A], and relying on Case 1, addressed the question of the limitation period. Referring to Article 267(5) of the Civil Code of Ukraine it found that "the infringed right is protected in the event of a finding of good reason of missed limitation period by the court."²⁵⁷ In order to overcome the statute of limitations, the Kiev Economic Court of Appeal considered that the gravity of the breach justified an extension. According to the Kiev Economic Court of Appeal, the "given circumstances indicate the gravity of causes of skipping of the statute of limitations and the need to consider the dispute on the merits."²⁵⁸ Thus, it considered that the district administrative court had been correct in extending or "skipping" the limitation period.
522. However, the Kiev Economic Court of Appeal was also not very clear as to the "good reason" why the limitation period was missed. It merely asserted that the Prosecutor's office became aware of the irregularities "only in early 2011."²⁵⁹
523. For this Tribunal, the question is not whether there was an extension of the statute of limitations or an assessment of the compliance with the required limitation period that was compliant or contrary to Ukrainian law. Rather, the issue – from an international due

²⁵⁴ Minutes of the hearing before the Kiev Administrative Court on [...], R-58.

²⁵⁵ Decision of the District Administrative Court, [...], CE-42.

²⁵⁶ Hearing Transcript D4:P759:L11-15 [...]

²⁵⁷ Decision of the Kyiv Economic Court of Appeal, [...], CE-46, p. 30.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

process perspective – is whether the decisions of the Ukrainian courts permitting the Prosecutor to bring his claims were made on the basis of manifestly abusive reasoning and whether this would constitute a sufficiently grave error that can be qualified as a denial of justice.

524. In fact, there are a number of questionable elements surrounding the non- or hardly reasoned decisions of the Ukrainian courts to allow the Prosecutor to bring the invalidation proceedings after more than three years: it was not denied by Respondent that the minutes of the KCC meetings were available to the Prosecutor’s office and that the procedural irregularity which led to the invalidation, the absence of a formal discussion in the KCC, could have been detected by studying the minutes. Further, it seems accepted also by the Ukrainian courts that the Prosecutor’s investigation was triggered by a request of the President of the Ukraine in March 2011.²⁶⁰
525. On the other hand, it may not be unreasonable to consider that the Prosecutor’s Office would not be able to detect all problematic aspects of all KCC decisions, including a lease/sale transaction approved by the KCC. Thus, an investigation may seem a reasonable trigger for such detection.
526. Also, the fact that it was carried out following a request by the President of Ukraine,²⁶¹ though hinting towards a political motivation, cannot be viewed as absolutely improper. Many legal systems place the powers of public prosecutors under the political control of ministers or other high-ranking State officials. Thus, regardless whether under Ukrainian law it was proper for the President to give instructions to investigate, as argued by Respondent’s expert [...],²⁶² it appears that such powers, their exercise and the ensuing investigation cannot be regarded as intrinsically improper and unacceptable.

²⁶⁰ Order of the President of Ukraine to carry out the audit of acquisition of the Properties, copied from the court file, [...], R-53. See also Decision of the Kyiv Economic Court of Appeal, [...], p. 30, CE-46 (“Thus, the Kyiv Prosecutor’s Office became aware about the violation of the law by the Kyiv City Council and the Chairman of the Kyiv City State Administration in decision making about the lease and alienation of the land plot at [...] in favor of [...] only in early 2011, during verification of the legality of the aforesaid land alienation on behalf of the President of Ukraine.”).

²⁶¹ Order of the President of Ukraine to carry out the audit of acquisition of the Properties, copied from the court file, 15 March 2011, R-53.

²⁶² Hearing Transcript D4:P864:L13-25 [...]

527. Furthermore, the limitation period had not expired a long time before the institution of the Prosecutor’s invalidation proceedings and there was obviously some judicial practice in Ukraine to grant extensions on a routine basis.
528. As a result, the Tribunal finds that the permission granted to the Prosecutor to institute the proceedings, by either extending the limitation period or considering that the Prosecutor acted within the prescribed time-frame, in and of itself constitutes no violation of due process.

3. *No fair opportunity to make its case*

529. Claimant’s core case of a denial of justice involving a lack of due process is that the proceedings were “[...] unfair and that it ha[d] no real and effective opportunity to present its case and that justice was administered in a seriously inadequate fashion.”²⁶³
530. Specifically, Claimant argues that it did not have enough time to make its case. As summarized in its post-hearing brief, Claimant was of the view that “one day’s notice, or 15 minutes to prepare a petition, a week to deal with a file, ignoring any application from the non-state party are not typical of a fair hearing or due process and breach both local and international standards of due process.”²⁶⁴
531. Claimant further argues that the court decision was suspiciously quickly decided²⁶⁵ and that the parties did not have sufficient time to prepare their case. In addition, Claimant argues that the “Court did not fully examine all circumstances of the case”.²⁶⁶
532. Respondent replied that according to Ukrainian procedural rules, an administrative case should be considered and decided upon within a reasonable time, but no longer than within one month from the date of the opening of the proceedings in the case and that since the “proceedings in Case 1 were formally opened on [...], [Company A] received notice of the

²⁶³ Claimant Post-Hearing Brief, ¶ 90.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*, ¶ 21 [...]

²⁶⁶ Claimant Memorial, ¶ 60.

proceedings at the address which [Company A] admits was its then current address on [...], the merits hearing was held on [...] and the judgment was issued on [...]. This period of time was therefore slightly longer than normal and as set out by Ukrainian law.”²⁶⁷ Respondent also disputes that [Company A] or [Company D] were deprived of a chance to make their case.²⁶⁸

533. In regard to the claim that [Company A] did not have enough time to present its claim, it is hard to follow this line of argumentation. The proceeding in Case 1, seeking the annulment of KCC’s approvals for lease/sale of Plot 1 to [Company A], formally started on [...]. [Company A] had to prepare for the hearing of [...] on relatively short notice, but the evidence shows that [Company A] was probably familiar with the substance of the dispute by the end of [...] or at least by [...].²⁶⁹
534. The fact that the decision was rendered two days after the hearing (which took place on [...] and the decision is dated [...]) also does not give rise to due process concerns. Article 122.1 of the Ukrainian Administrative Procedure Code requires decisions to be rendered within one month after the start of the proceedings.²⁷⁰ It took slightly longer in the present case. Still, the proceedings came to a relatively quick end.
535. Usually, denial of justice complaints concerning the length of judicial proceedings concern overly long proceedings; swift court action as such does not amount to a violation of due process although it may indicate a lack of deliberations and due scrutiny of the parties’ arguments by a court. However, that has to be established separately and cannot merely be deduced from the fact that a decision was rendered quickly.
536. Claimant’s further allegations of violations of equality of treatment before the Ukrainian courts do not appear to be sufficiently substantiated.

²⁶⁷ Respondent Counter-Memorial, ¶ 289.

²⁶⁸ *Ibid.*

²⁶⁹ [...] Hearing Transcript D3:P480:L18-23.

²⁷⁰ [...], Hearing Transcript D3:P703:L23-P704:L17.

537. The suggestion that the administrative court's annulment of the KCC's approvals for lease/sale of Plot 1 to [Company A] was not sufficiently reasoned is hard to follow. Since it was apparently primarily based on the technical ground that there was a lack of debate in the KCC before the actual decision²⁷¹ and did not turn on complicated substantive issues. The Tribunal finds it hard to see why a court could not arrive at such a decision within a short time-frame. In fact, the court concluded from the transcript of the KCC meeting that the issue of the sale was directly put to a vote without any debate.²⁷² Also, the other reasons for the invalidation of the KCC decision stated by the Kiev City District Administrative Court and upheld on the appellate stages seem to be plausibly reasoned. According to the Kiev City District Administrative Court, crucial additional approvals such as that by [...] were missing.²⁷³
538. It is the alternative reasoning based on these additional grounds for the invalidation of the KCC decisions to lease and subsequently to sell Plot 1 to [Company A] which seems to insulate the proceedings from another potential denial of justice problem.
539. If it had been merely the lack of a discussion or debate in the KCC preceding the vote in the Council's plenary session, the issue would arise whether this could be legitimately viewed a serious enough issue to invalidate the KCC's decision to sell Plot 1. As a pure formality, it could be regarded as a pretext to review the procedure and rescind the decision in order to reclaim the land plot.
540. Although Respondent's expert, [...] carefully avoided characterizing the requirement of having a debate in the KCC as a mere technicality,²⁷⁴ he admitted that a breach of a mere technicality would not merit the invalidation of an administrative decision.²⁷⁵
541. As the administrative court decisions demonstrate though, it was not only the formality of the lack of a debate in the KCC before taking a vote that led to the invalidation of the two

²⁷¹ [...] Hearing Transcript D4:P790:L4-6 [...]

²⁷² Decision of the District Administrative Court, [...], CE-42, p. 8.

²⁷³ *Ibid.*, p. 9.

²⁷⁴ Hearing Transcript D4:P796:L1- [...]

²⁷⁵ Hearing Transcript D4:P796:L4-6 [...]

KCC decisions. Rather, this ground was one among others that in combination led the courts to invalidate the KCC decisions.

542. As a result, the Tribunal fails to share Claimant's view that the proceedings before the administrative courts in Case 1 amounted to a procedural denial of justice.

4. Failure to provide third parties an opportunity to be heard

543. Finally, Claimant alleges that at the hearing before the administrative court "[...] objected to the case being heard in absence of some defendants (representatives of the parties) and the third parties."²⁷⁶ This complaint apparently refers to an alleged inability of [Company D] to take part in the proceedings of Case 1.

544. Respondent counters that since [Company D] never raised any complaint in this regard at any relevant stage of the proceedings, despite being on notice, there were no grounds for any complaint.²⁷⁷

545. As the record shows, [Company D] was in fact aware of the proceedings in Case 1 since late [...], and obviously made a strategic choice not to participate in the proceedings of Case 1. Thus, any allegation that the Ukrainian courts deprived [Company D] of its right or chance to participate in the proceedings seems factually incorrect.

546. The Tribunal thus fails to see any basis for the alleged denial of justice.

547. As a consequence, the Tribunal finds that no denial of justice was established in regard to Case 1.

**(ii) Case 2: [...]; Claim in the economic/commercial courts to
invalidate the contracts for the lease/sale of Plot 1 from KCC to
[Company A]**

548. This case was also initiated by the Deputy Prosecutor of the City of Kiev who applied on [...] to the Economic Court of Kiev to declare the contracts between KCC and [Company

²⁷⁶ Claimant Memorial, ¶ 60.

²⁷⁷ Respondent Counter-Memorial, ¶ 292.

- A] for lease and sale of Plot 1 invalid. The proceedings were stayed between [...] and [...] pending the outcome of Case 1. In [...], the Prosecutor asked for the expansion of the claim to also invalidate the subsequent transfers of Plot 1. [...], the Economic Court of Kiev granted the original request, but refused to permit the expanded claim.²⁷⁸
549. Both [Company A] and the Prosecutor appealed. On [...], the second instance court, the Kiev Economic Court of Appeal, denied [Company A's] as well as the Prosecutor's appeals.²⁷⁹
550. A further appeal by [Company A] to the Supreme Economic Court of Ukraine on [...] was also denied by the latter court on [...].²⁸⁰
551. In regard to Case 2, the following alleged violations of due process have been raised and will be scrutinized by the Tribunal: 1) that the case proceeded although the statute of limitations had expired; and 2) that the Ukrainian courts failed to provide "equality of rights of all participants".

1. Challenge after expiry of statute of limitations

552. As in Case 1, Claimant alleges that the proceedings in Case 2 were time-barred since they were instituted three years after the conclusion of the Lease Agreement of [...] between the KCC and [Company A] and the Sale and Purchase Agreement dated [...] between Kiev City Council and [Company A].
553. According to Claimant, "the Court admitted the case despite having been in breach of the time limitation provided for by law and without any reasoning for such extension of time limitation."²⁸¹
554. Respondent argues that the Prosecutor "presented a reasoned application to the court, explaining that the Prosecutor's office has conducted the audit of the legitimacy of the

²⁷⁸ Decision of the Economic Court of Kyiv, [...], CE-45.

²⁷⁹ Decision of the Kyiv Economic Court of Appeal, [...], CE-46.

²⁸⁰ Decision of the Supreme Economic Court of Ukraine, [...], CE-47.

²⁸¹ Claimant Memorial, ¶ 65(a).

acquisition of Plot 1, which revealed the violations on which the claim was based, was requested and commenced only in [...].”²⁸²

555. As already mentioned in the discussion of the limitation period in Case 1,²⁸³ the appellate court in the proceedings of Case 2 did address the question directly, requiring “a finding of good reason of missed limitation period by the court.”²⁸⁴

556. As stated above, this Tribunal has some doubts about the court’s logic in granting an extension under Ukrainian law. As acknowledged by Respondent, “[...] according to Article 261 of the Ukrainian Civil Code, a limitation period starts when the claimant became aware, or should have become aware, of the violation which gives rise to the claim and a court may give protection to a right where the court finds there were good reasons why the limitation period was missed.”²⁸⁵

557. However, while the Kiev Economic Court of Appeal seemed to rely on this ground for an extension, it was not very clear as to the “good reason” that the limitation period was missed. It merely asserted that the Prosecutor’s office only became aware of the irregularities “[...]”²⁸⁶

558. As explained above, though, this Tribunal finds that as a matter of international law, the permission granted to the Prosecutor to institute the proceedings, either by extending the limitation period or by considering that the Prosecutor acted within the prescribed time-frame, in and of itself does not constitute a violation of due process.

2. Failure to provide “equality of rights of all participants”

559. Further, Claimant rather equivocally asserts that “the courts did not provide equality of rights of all participants in resolving this matter and hence did not comply with due process

²⁸² Respondent Counter-Memorial, ¶ 318.

²⁸³ See above ¶¶ 521 *et seq.*

²⁸⁴ Decision of the Kiev Economic Court of Appeal, [...], CE-46, p. 30.

²⁸⁵ Respondent Counter-Memorial, ¶ 317.

²⁸⁶ *Ibid.* See also Respondent’s Counter-Memorial, ¶ 278.

- requirements.”²⁸⁷ More specifically, Claimant contends that [Company D] was not properly notified of the court hearings in Case 2 and thus not given an opportunity to present its arguments (in relation to other cases).²⁸⁸
560. Respondent replies that Claimant made this complaint “without any supporting evidence to demonstrate any prejudice caused to [Company A] or any party during the conduct of Case 2, for example identifying determinative materials or arguments that a party wished to submit but was not permitted or able to. A review of the court files shows that [Company A] took an active part in the proceedings in Case 2, submitting arguments both in writing and orally. However, those were found by the court to be largely without merit and Case 2 was decided against [Company A].”²⁸⁹
561. In regard to the failure to include [Company D] as a party to Case 2, Respondent notes that “[Company A] strenuously objected the inclusion of review of validity of subsequent transfers into the ambit of Case 2, and the court sided with [Company A] on this point. In view of this, as a matter of procedural technicality, the subsequent transferees could not be joined as third parties in the case. A further action (Case 3) had to be commenced with a view to dealing with the subsequent contracts for the transfer of Plot 1. It is entirely unclear to Respondent how Claimant can allege due process breaches by a court system which found in *favour* of [...] on such procedural applications.”²⁹⁰
562. To this Tribunal, it is indeed hard to understand from Claimant’s very general assertions what exactly it complains about when arguing that “the courts did not provide equality of rights of all participants in resolving this matter and hence did not comply with due process requirements.”²⁹¹ In its post-hearing submissions, Claimant suggests that any due process breaches of Case 1 would “infect” the decisions in Case 2.²⁹²

²⁸⁷ Claimant Memorial, ¶ 65(c).

²⁸⁸ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 86.

²⁸⁹ Respondent Counter-Memorial, ¶ 323.

²⁹⁰ *Ibid.*, ¶ 324 (emphasis in original).

²⁹¹ Claimant Memorial, ¶ 65(c).

²⁹² Claimant Post-Hearing Brief, ¶ 24

563. The record does not demonstrate procedural improprieties in the course of Case 2. The rights of the parties to litigate their cases do not appear to have been violated. Since the Tribunal also did not find any due process violations in regard to Case 1, the argument of a potential “contagious” effect on Case 2 appears moot.
564. As regards the alleged deprivation of [Company D]’s right to participate in Case 2, two considerations appear crucial to the Tribunal:
565. Firstly, whether Ukrainian law had to provide a right to an affected third party in proceedings aimed at the annulment of a contract in order to avoid a due process violation, and secondly, whether [Company D] actually wanted to be joined to the proceedings in Case 2.
566. It clearly follows from the rule of law demands on domestic law that a national legal system must offer individuals and legal persons an opportunity to challenge measures that affect their rights or to obtain redress that is capable of remedying the negative implications of national measures. Such a right to challenge does not necessarily have to be a right to be joined as a party to pending proceedings. Any legal remedy would suffice, in particular, if an entity like [Company D] had the opportunity to seek redress for the loss of its property by either directly challenging the court decision invalidating the sales transaction or by being able to seek damages from those that were responsible for its loss.
567. As discussed below, it appears that under Ukrainian law a number of legal remedies were available in principle to Claimant to recover its loss either from the KCC, [Company A] or [Company B].²⁹³ To what extent these were realistic options is difficult to assess since Claimant did not pursue any of the potentially available remedies.²⁹⁴
568. In the present case, it also seems that [Company D] was not actually seeking to be joined to Case 2. The fact that [...], the lawyer who also represented [Company D], appeared as counsel for [Company A], the party to the proceedings in Case 2, and opposed the inclusion

²⁹³ See below ¶ 623.

²⁹⁴ See below ¶ 624.

of other parties to Case 2,²⁹⁵ indicates that [Company D] must have been aware of the proceedings. It is unclear why it did not actively seek to join the proceedings.

569. Thus, the Tribunal sees no basis for finding that Claimant's right to participate in the proceedings in Case 2 had been violated.

570. As a consequence, the Tribunal finds that no denial of justice was established in regard to Case 2.

(iii) Case 3: [...]; Claim in the economic/commercial courts to return Plot 1 from [Company D] to KCC

571. This case was again initiated by the Deputy Prosecutor of the City of Kiev as a follow-up to the previous two cases, requesting the return of Plot 1 from [Company D] on the basis of Article 388 Ukrainian Civil Code ("UCC"). It was instituted on [...], and on [...] the first instance court, the Kiev Economic Court, decided that [Company D] had no right of ownership to Plot 1 and that it should be returned to the City of Kiev.²⁹⁶

572. In [...], [Company A], which was named a third party together with [Company B], appealed to the Kiev Appellate Economic Court and, on [...], [Company A]'s appeal was denied.²⁹⁷

573. On [...], [Company D] which had not appealed the first instance decision appealed both the first instance and the appellate decisions to the Supreme Economic Court. Leave for this appeal was granted, but on [...], the Supreme Economic Court rejected [Company D]'s appeal on the merits and upheld the lower courts' decisions.²⁹⁸

574. The substance of the proceedings was a claim for the restitution of Plot 1 from [Company D] to the City of Kiev on the basis of Article 388 UCC. Article 388 UCC gives the original owner of property a *rei vindicatio* claim, it permits the original owner to seek restitution of

²⁹⁵ Decision of the Economic Court of Kyiv, [...], CE-45; Hearing Transcript D5:P1053:L4-10; Respondent Closing Slides, Slide 28.

²⁹⁶ Decision of Kyiv Economic Court of Appeal, [...], CE-48.

²⁹⁷ Decision of Kyiv Economic Court of Appeal, [...], CE-49.

²⁹⁸ Decision of Supreme Commercial Court of Ukraine, [...], CE-50.

property that was lost, stolen or “departed under a lack of will” even from *bona fide* purchasers.

575. In regard to Case 3, the following alleged violations of due process have been raised and will be scrutinized by the Tribunal: 1) that the Prosecutor lacked standing to bring this case; 2) that there was a substantive due process violation in the outcome of this case; and 3) that there were procedural due process violations in the course of the proceedings.

1. Lack of standing of the Prosecutor

576. Claimant alleges that the Deputy Prosecutor did not have standing to bring the proceedings in this case.²⁹⁹ It alleges that the Prosecutor only had the power to protect State interests, but not municipal interests, and added that it “appears that municipal property is not automatically classified as state property.”³⁰⁰

577. Respondent replies that the land was in fact State owned and was only managed by the municipality.³⁰¹ It concedes that since 2004, it is possible to designate land as either municipal or State land, but absent any evidence of a transfer to municipal ownership, the land plot in issue must be considered State property.

578. In fact, the record of this case does not clearly indicate any designation of Plot 1 as municipal land. However, even if that had been established it is hard to see how an alleged wrong qualification of the land at issue may deprive a State prosecutor of legal remedies according to domestic law leading to a denial of justice on the international level where such remedy was erroneously granted.

579. It is hardly conceivable that the institution of legal proceedings aiming at the annulment of a decision of a municipal entity on the ground of illegality by a State prosecutor entrusted with defending the public interest, could amount to a gross violation of due process.

²⁹⁹ Claimant Memorial, ¶ 70.

³⁰⁰ *Ibid.*

³⁰¹ Respondent Counter-Memorial, ¶ 351.

580. The Tribunal thus rejects the assertion that the alleged lack of standing of the Deputy Prosecutor amounts to a violation of fair and equitable treatment.

2. Fundamentally wrong outcome, substantive due process violation

581. In regard to Case 3, as a result of which [Company D] was ordered to hand back Plot 1 to the KCC, Claimant alleges that this outcome violated [Company D]’s rights as a *bona fide* purchaser.³⁰² According to Claimant, the conditions for reclaiming property from a *bona fide* purchaser were not fulfilled in the present case.³⁰³ The outcome was further reached in violation of basic standards of the administration of justice. According to Claimant, the case was similar to the situation in *Stretch v. f/A*³⁰⁴ in which the European Court of Human Rights (“ECtHR”) had held that deprivation of property as a result of a technical breach of the public body’s internal decision-making process was contrary to Article 1 of the ECHR’s first additional protocol.³⁰⁵

582. Respondent considers that case inapplicable and relies on a basic principle of Ukrainian law as affirmed by its Supreme Court³⁰⁶ that a local self-governing authority must comply with its internal law in order to form an effective will in order to part with property. It maintains that Article 388 UCC was correctly applied by the Ukrainian courts since its third paragraph “says that property may be taken from the possession of a bona fide purchaser and returned to the original owner, if the property was transferred from that original owner’s ownership without his will (that is, capacity).”³⁰⁷ According to Respondent, the invalidated decisions of the KCC evidenced that the City of Kiev had parted with the property without its will.³⁰⁸

³⁰² Claimant Memorial, ¶¶ 70(d), 79(i).

³⁰³ Claimant Memorial, ¶ 70(d) [...]

³⁰⁴ *Stretch v. The United Kingdom*, ECtHR 320, 2003, 24 June 2003, R-7.

³⁰⁵ Claimant Memorial, ¶ 85(f).

³⁰⁶ Resolution of the Supreme Economic Court of Ukraine in case No. 916/2129/15, YK-16; Resolution of the Supreme Court of Ukraine in case No. 916/2129/15, YK-17; Resolution of the Supreme Court of Ukraine in case No. 916/2144/15, YK-18.

³⁰⁷ Respondent Counter-Memorial, ¶ 353.

³⁰⁸ Respondent Counter-Memorial, ¶ 354 [...]

583. Claimant appears to be alleging a misapplication of Ukrainian law, specifically of the conditions under which the original owner of property may reclaim it from a *bona fide* purchaser. It hardly alleges, however, any breach of international law which might arise only from “outrageously wrong, final and binding decisions”³⁰⁹ of domestic courts as opposed to from a mere misapplication of domestic law. As discussed above, this Tribunal will not sit on appeal of decisions of the Ukrainian courts and it will not substitute its interpretation of Ukrainian law for that of the Ukrainian judiciary.³¹⁰
584. Only where the interpretation of Ukrainian law appears patently unjust and adopted merely to the detriment of a party, are suspicions of substantive due process violations raised.
585. The Tribunal thus has to turn to Article 388 UCC in order to assess whether the interpretation given by the Ukrainian courts was a plausible one or was egregiously wrong to the detriment of Claimant.
586. Article 388 UCC, entitled “Right of the Owner to Claim the Property from Bona Fide Beneficiary”, states:

1. If the property is purchased on the basis of the paid contract from a person who had no right to alienate it, and the buyer (a bona fide beneficiary) did not and could not know about it, the owner shall have the right to claim this property from the beneficiary only in case if the property:

- 1) was lost by the owner or by the person to whom the owner transferred the property into possession;
- 2) was stolen from the owner or the person to whom the owner transferred the property into possession;
- 3) in some other way retired from the possession of the owner or of the person to whom the owner had transferred the property into possession, without their will.

2. Property cannot be claimed from a bona fide beneficiary if it was sold per the procedure established for the fulfilment of the court decisions.

³⁰⁹ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-59, ¶ 445.

³¹⁰ See above ¶¶ 486 *et seq.*

3. If the property was obtained free from a person that did not have the right to alienate it, the owner shall have the right to claim it from a bona fide beneficiary in all cases.³¹¹

587. Article 388(1)(3) UCC clearly provides for a restitution claim even against a *bona fide* purchaser if the property in question “in some other way retired from the possession of the owner or of the person to whom the owner had transferred the property into possession, without their will.”
588. While Respondent explains that the “lack of will” should be understood to include formal errors in the decision-making process of public entities like the KCC, Claimant does not offer a detailed explanation as to why this should not be the case.
589. The question for this Tribunal is not whether Article 388 UCC was correctly applied or whether a lack of will/intent was correctly identified as a result of the invalidity of the KCC decision, or whether there should have been a separate assessment of a lack of substantive will (*vice de volonte*). Rather, this Tribunal is merely tasked with assessing whether the decisions of the Ukrainian courts, concluding that the invalidation of the KCC decisions to sell Plot 1 implied that there was a lack of will providing the KCC with a right to restitution under Article 388, was one that no reasonable adjudicator could have reached and that amounted to a “clear and malicious misapplication of the law.”³¹²
590. To this Tribunal, it appears plausible to assert that the internal decision-making procedures of State organs are important. They serve the important policy function of leading to a correct formation of an entity’s will, in the present case of its consent to dispose of property into public hands.
591. Thus, the courts’ conclusion that because there was no debate/discussion in the KCC preceding its approvals for the lease/sale of Plot 1 the approvals were annulable – though clearly insisting on a formality – was not unjustifiable. As held by the court in Case 1, the

³¹¹ Civil Code of Ukraine, Article 388, R-68.

³¹² *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-17, ¶ 103.

absence of additional crucial approvals also justified the annulment.³¹³ Thus, it is hard to consider that there were no valid reasons that justified the annulment and consequently the restitution decision.

3. Procedural due process violations in the course of the proceedings

592. Finally, Claimant alleges a number of procedural due process violations in regard to Case 3, in particular that a requested postponement of the December 2012 hearing (because [Company D] had not been duly notified of the proceedings at its correct address) was rejected³¹⁴ and that the lawyer representing [Company A] received only 15 minutes to draft an application for the recusal of a judge and that the proceedings were continued without his presence.³¹⁵
593. Respondent replies that [Company D] had been notified of the [...] hearing at its “registered address” and that the court was thus correct in continuing the proceedings.³¹⁶ It further points out that [Company D] also failed to appear at the appellate stage, in [...], and that this shows that “failure to notify was evidently not the operative cause of [Company D]’s non-appearance.”³¹⁷
594. In regard to the alleged violation of procedural rights stemming from the short time limit to formulate an application for the recusal of a judge, Respondent refers to the procedural rules according to which a reasoned written request for recusal must be made “prior to commencement of consideration of the case”³¹⁸ and points out that no reasons were given as to why the lawyer appearing on behalf of [Company A] had no knowledge of the grounds for recusal before the hearing. It further argues that the court still permitted [...] a recess to put forward a written application for recusal, but that “upon resumption of the proceedings, he simply failed to reappear.”³¹⁹

³¹³ Decision of the District Administrative Court, [...], CE-42, p. 9.

³¹⁴ Claimant Memorial, ¶ 70(a).

³¹⁵ *Ibid.*, ¶ 70(b).

³¹⁶ Respondent Counter-Memorial, ¶¶ 343-344.

³¹⁷ *Ibid.*, ¶ 345.

³¹⁸ *Ibid.*, ¶ 347.

³¹⁹ *Ibid.*, ¶ 348.

595. Equality of the parties and the right to be heard are core elements of a fair trial and must be respected by the domestic courts of host States. In order to rise to the level of a breach of due process, however, a party alleging a breach of due process rights must avail itself of the domestic legal system in order to remedy alleged procedural deficiencies.
596. A failure to inform a party of claims directed against it and the conduct of legal proceedings without its participation give rise to serious due process concerns since they may indicate that a party was deprived of its fundamental procedural rights.
597. In the present case it appears undisputed, however, that the notice of claim was sent to [Company D]’s registered address and that notwithstanding having received knowledge of the proceedings, [Company D] did not challenge them and chose to appeal only at the second instance level to the supreme court.
598. Also in regard to the alleged inability to effectively voice opposition to having a judge decide the issue where grounds of a conflict of interests were suspected by [Company A]’s lawyer, it is hard to follow Claimant’s logic.
599. While it is difficult to establish whether [...], failed to reappear at the [...] court hearing because he was no longer admitted to the “locked” court room³²⁰ or out of his own failure to return within the given time-frame,³²¹ there is nothing in the record to show that [...] or [Company D], took any legal steps to challenge the alleged deprivation of procedural rights stemming from the participation of a judge who should have been recused from making a decision and which was made on the basis of a hearing without the presence of a lawyer.
600. It can be expected from a party raising a serious procedural impropriety that it defends its procedural rights by challenging the decisions made on the basis of the alleged impropriety. In the case at hand, [...] made a belated appeal on [...] against the findings of the first and second instance in which it challenged the timeliness of the Prosecutor’s request and the correctness of the courts’ decisions on the City’s restitution claim.³²² But [Company D]

³²⁰ Hearing Transcript D3:P476:L6-15[...]

³²¹ Hearing Transcript D3:P474:L13-17 [...]

³²² Decision of Supreme Commercial Court of Ukraine, [...], CE-50, p. 2.

does not appear to have raised the alleged procedural deficiencies, in particular, the alleged lack of notice or the alleged lack of independence and impartiality of the lower court judge as grounds for the appeal.

601. On the basis of the above considerations, this Tribunal is unable to find that the Respondent State can be regarded as having committed a denial of justice concerning Case 3.

(iv) Case 4: [...]; Claim in the economic/commercial courts to invalidate KCC approvals for the lease and sale of Plots 2 and 3, the lease and sale contracts and [Company A's] ownership certificates

602. This case was initiated by the Prosecutor on [...]. It was brought against KCC and [Company A], naming [Company D] a third party, seeking the invalidation of KCC's approvals for the lease and sale of Plots 2 and 3, of the lease and sale contracts between KCC and [Company A], and of [Company A]'s ownership certificates for the two land plots.

603. On [...], the first instance court, the Economic Court of Kiev, held a formal procedural hearing. On [...], it granted the Prosecutor's request.³²³

604. After a first failed appeal attempt for lack of payment of court fees, [Company A] appealed on [...]. The Kiev Appellate Economic Court denied [Company A's] appeal on [...].³²⁴

605. A further appeal by [Company A], dated [...], was rejected by the Supreme Economic Court of Ukraine on [...].³²⁵ A second appeal by [Company A], dated [...], was returned to [Company A] without review of the merits on [...]. A third appeal by [Company A], dated [...], was rejected by the Supreme Economic Court of Ukraine due to a missed deadline on [...].³²⁶

³²³ Decision of the Economic Court of Kyiv, [...], CE-52.

³²⁴ Decision of the Kyiv Appeal Economic Court, [...], CE-53.

³²⁵ Judgment of the Supreme Economic Court, Case 38/484, [...], R-80.

³²⁶ Respondent Counter-Memorial, ¶ 365.3.

606. In regard to Case 4, Claimant basically alleges that substantive due process violations led to the loss of Claimant's land on Plots 2 and 3.

1. Fundamentally wrong outcome, substantive due process violation leading to the loss of Plots 2 and 3

607. In regard to Case 4, as a result of which [Company D] ultimately lost Plots 2 and 3 to the KCC, Claimant alleges that this outcome was also reached in violation of substantive due process. It specifically asserts that "a series of grave violations of substantive and procedural legislation of Ukraine" had been committed.³²⁷ In fact, these violations are specifically described in Claimant's Memorial as follows:

a) Wrong grounds for invalidation of KCC decisions

608. Claimant appears to argue that the courts wrongly relied upon civil law grounds for the invalidation of the KCC decisions, although its complaint appears to also reprimand the use of these civil law grounds for the invalidation of the ensuing land plot transaction.³²⁸

609. Respondent replies that the courts correctly applied the civil law grounds to the invalidity of the contracts providing for the transfer of the land plots, while the grounds for the invalidity of the KCC decision were found in the regulations governing the procedure of the KCC.³²⁹

610. In fact, Claimant's gravamen is rather ambiguous since it also asserts that the violation of the civil law code provisions was wrongly relied upon for the invalidation of the transactions.³³⁰

611. An analysis of the lengthy [...] decision of the Economic Court of Kiev³³¹ demonstrates that the court broadly discussed both the internal administrative law rules relating to the procedure, the bases for the legality of KCC decisions as well as the civil law grounds for

³²⁷ Claimant Memorial, ¶ 78.

³²⁸ Claimant Memorial, ¶ 78(a) [...]

³²⁹ Respondent Counter-Memorial, ¶¶ 368-370.

³³⁰ Claimant Memorial, ¶ 78(a)

³³¹ Decision of the Economic Court of Kyiv, [...], CE-52.

the invalidation of ensuing transactions. It addressed not only the absence of a formal debate on the issue of deciding upon the lease and sale of the plots, but also other procedural errors, such as a failure to include the items in the formal agenda, using an expedited procedure without giving specific reasons, etc.³³² In addition, the court addressed the lack of substantive preconditions for the KCC decisions such as a failure of required approvals for the partial use of the property as car parks that at the time was only designated for residential or social buildings.³³³

612. In regard to the objections raised, this Tribunal fails to see any severe misapplications of Ukrainian law and most importantly, does not find any egregious misapplication of the law of the host State that may amount to a violation of due process.

b) Breach of the “bilateral restitution” principle under Article 216 UCC

613. Furthermore, Claimant asserts that “[t]he Court also violated Article 216 of the Civil Code of Ukraine as it did not apply a bilateral restitution and did not allow the parties to return to the position the[y] would have been had the transaction never occurred.”³³⁴

614. In fact, it is unclear what Claimant refers to in regard to this claim. Obviously, Claimant feels aggrieved that as a result of the invalidation of the transaction between the KCC and [Company A] it lost Plots 2 and 3 (which it had acquired from [Company A]) to the KCC.

615. Respondent confirmed that Article 216(1) UCC would have been an effective legal remedy for [Company D].³³⁵ However, it stressed that [Company D] neither availed itself of it nor of other remedies available to it under Ukrainian law.³³⁶

³³² *Ibid.*, p. 4 *et seq.*

³³³ *Ibid.*, p. 13 *et seq.*

³³⁴ Claimant Memorial, ¶ 78(b).

³³⁵ Respondent Post-Hearing Brief, ¶ 48.

³³⁶ *Ibid.*, ¶ 50.

616. Indeed, it is unclear how Claimant had wished the court to have applied Article 216 UCC in a way that either [Company A] or [Company D] would have been made whole for the loss of the land plots.
617. Article 216(1) UCC provides for *restitutio in integrum* (as well as, in the alternative, for damages) between the parties of an invalidated transaction,³³⁷ whereas Article 216(2) UCC also provides a remedy to third parties suffering harm as a result of such invalidity to be reimbursed by the “guilty party”.³³⁸
618. Thus, while the first paragraph of Article 216 UCC deals with the legal consequences of an invalidated transaction between the Parties to such transaction, paragraph 2 also permits third parties to claim resulting damages. This is also acknowledged by Respondent stressing, however, that in both cases the parties have to request restitution or damages respectively. Furthermore, Respondent alleges that neither [Company A] nor [Company D] made any such requests.³³⁹
619. In fact, the court files do not indicate nor does Claimant allege that such requests had been made either by [Company A] or [Company D]. The parties and their experts did have some heated exchanges about the practical availability of such a remedy for Claimant,³⁴⁰ but even Claimant does not assert that they were actually sought.
620. Under these circumstances, the Tribunal is not in a position to assess whether the Ukrainian courts wrongly denied the parties any restitution or damages. Furthermore, it appears obvious to the Tribunal that the specific application of Article 216 UCC requires complex legal assessments of causality and wrongdoing (*argumento* “guilty party”) which can give rise to a violation of an international due process standard only if the reasoning applied is

³³⁷ Article 216(1) UCC (“An invalid transaction creates no legal consequences, apart from those related to its invalidity. In case of a transaction invalidity, each party is obliged to return the other party in kind everything received for the fulfilment of such transaction. Should this prove to be impossible, in particular if the received benefit lies in the use of property, work performed, or service provided, the relevant party should reimburse the cost of what has been received in the prices existing at the moment of reimbursement.”).

³³⁸ Article 216(2) UCC, YK 64 (“Should the invalid transaction cause damage or moral damage to the other party to the transaction or any third party, they are to be reimbursed by the guilty party.”).

³³⁹ Respondent Counter-Memorial, ¶ 372 [...]

³⁴⁰ Hearing Transcript P735:L11-16 (Katser); Hearing Transcript P875:L1-10.

far from anything a reasonable adjudicator may have relied upon in order to arrive at a certain result.

621. In the present case, Claimant has not substantiated that this happened.
622. The same considerations also apply in regard to the question of whether Claimant or its subsidiary properly pursued their rights in the Ukrainian courts in order to get the invalidation of the KCC rescinded and/or the purchase price back and/or another form of redress to be made whole for the loss of the land plots.
623. In addition to damages under Article 216 UCC, Respondent asserts that Claimant had additional effective legal options, such as Article 1166 UCC, which allows general tort claims against a wrongdoer causing property damage, or Article 1173 UCC, which provides for damages claims against self-governing entities, like the KCC, for harm caused by illegal decisions regardless of guilt.³⁴¹
624. As with the potential claim under Article 216 UCC, there is no indication in the record that Claimant or its subsidiary actually instituted any legal proceedings aimed at covering for the loss of the land plots under either of the potentially legally available remedies.
625. In such a situation, the Tribunal is unable to find that Respondent breached its due process obligations under the Treaty.
- c) Granting a legally unavailable remedy in the form of the invalidation of land ownership certificates
626. Finally, Claimant seems to assert that by invalidating the land ownership certificates, the Ukrainian courts had granted a legally unavailable remedy.³⁴²
627. Respondent counters that Ukrainian courts “routinely hold land ownership certificates to be invalid.”³⁴³

³⁴¹ Respondent Closing Slides, Slide 25.

³⁴² Claimant Memorial, ¶ 78(c) [...]

³⁴³ Respondent Counter-Memorial, ¶ 375.

628. Indeed, the claim that domestic courts should not be in a position to invalidate ownership certificates appears surprising, though, of course, possible. Subsequent assertions by Claimant indicate, however, that it does not question the power of courts to revoke or invalidate ownership certificates as a matter of principle, but rather takes issue with the revocation of the ownership certificates in the specific case.³⁴⁴
629. This assertion, again focuses on a potential misapplication of Ukrainian law, but fails to state any grounds as to why such misapplication, if at all, should rise to the level of an egregious breach so as to constitute a violation of the international due process standard.
630. As a consequence, the Tribunal finds that no denial of justice was established in regard to Case 4.
631. More generally the Tribunal finds that the procedural irregularities in regard to all four court cases do not rise to the level of an “outrageous failure of the judicial system”. Because it cannot be said that the Ukrainian courts “administered justice in a seriously inadequate way” there was no denial of justice amounting to a violation of the fair and equitable treatment obligation of the Treaty or under customary international law.

c. Related Fair and Equitable Treatment Claims

632. Claimant’s claims focus on the alleged denial of justice in the course of the four court proceedings. However, its submissions also contain a number of closely related fair and equitable treatment claims, such as the claims that “Ukraine has failed to maintain a stable legal and business framework in subsequently annulling, through its courts, the legal basis of the investment” and that “Ukraine has failed to act in good faith in unlawfully depriving Claimant of its investment through its courts.”³⁴⁵

³⁴⁴ Claimant Memorial, ¶ 85(a) [...]

³⁴⁵ Claimant Memorial, ¶ 97.

633. Although seemingly phrased along the elements identified in investment jurisprudence as aspects of fair and equitable treatment,³⁴⁶ a closer look reveals that both arguments basically replicate the notion that the host State owes the investor due process.
634. Similarly, Claimant has neither adduced any arguments, nor produced any evidence, that the stability-related obligations to act consistently may have been violated when it asserts that “Ukraine has failed to act in a consistent manner towards Claimant.”³⁴⁷
635. In addition, Claimant failed to substantiate how “Ukraine has failed to act transparently towards Claimant.”³⁴⁸
636. Therefore, the Tribunal is unable to find any basis for holding Ukraine liable for a breach of the fair and equitable treatment obligation of the Treaty for the related allegations.

d. Harassing Criminal Investigations Against Claimant’s Subsidiaries

637. In addition to the core denial of justice claims involving the four court cases addressed above, Claimant asserts that Ukrainian officials “raided” its local subsidiaries, [Company D] and [Company C], in the course of criminal investigations which led to an “intimidation” of their officers.³⁴⁹ However, Claimant failed to explain to what extent the actual conduct of the investigations went beyond the intrinsic nuisance factor of any State organs investigating private parties for alleged wrongdoing, so as to amount to a level of harassment that would offend international standards.
638. The Tribunal is of the view that a host State may indeed violate its obligations under the fair and equitable treatment standard by instituting proceedings or investigations against foreign investors in a way that displays grossly harassing features, as evidenced in cases like *Swisslion v. Macedonia*³⁵⁰ or *Romp petrol v. Romania*.³⁵¹ However, it is also reluctant

³⁴⁶ See above ¶¶ 437 *et seq.*

³⁴⁷ Claimant Memorial, ¶ 97.

³⁴⁸ *Ibid.*

³⁴⁹ See Claimant Post-Hearing Brief, ¶ 100 [...]

³⁵⁰ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, RLA-53.

³⁵¹ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, RLA-61.

to consider that any exercise of a State's investigative powers should be considered potentially falling short of its obligations under the fair and equitable treatment standard.

639. In the present case, Claimant has failed to indicate in what regard the criminal investigations had been carried out by Ukrainian authorities against [Company D] and [Company C] in such an abusive manner that they amounted to a violation of fair and equitable treatment.

640. As a consequence, the Tribunal is unable to find that the criminal investigations amounted to a breach of the Treaty's fair and equitable treatment standard.

B. FULL PROTECTION AND SECURITY

(1) The Parties' Positions

a. Claimant's Position

[...]

b. Respondent's Position

[...]

(2) Tribunal's Analysis

645. In addition to its fair and equitable treatment claims, Claimant also asserts that the host State's acts and omissions fell short of the obligation under Article 2(2) of the Treaty to accord full protection and security to Claimant's investment.³⁵² Basically, Claimant asserts that Respondent breached this obligation on the basis of the same conduct³⁵³ pleaded for a violation of the fair and equitable treatment standard discussed above.³⁵⁴ This is particularly evident in the claim that Respondent breached its full protection and security

³⁵² Claimant Defence to Preliminary Objections and Reply on the Merits, ¶¶ 134-141.

³⁵³ Claimant Memorial, ¶ 139.

³⁵⁴ See above ¶ 491.

obligation “through the actions of the Prosecutor and the actions and inactions of the Ukrainian courts.”³⁵⁵

646. Further, Claimant alleges that “the raids in the offices of both [Company C] and [Company D] and the intimidation their officers received are a text book example of lack of full protection of [sic] security.”³⁵⁶

647. Respondent rejects Claimant’s broad interpretation of the full protection and security standard and argues that it should be interpreted restrictively to apply only to physical protection,³⁵⁷ adding that even if Claimant’s broad interpretation of the legal standard were retained, there would have been no breach based on the facts.³⁵⁸ The Tribunal notes, however, that in its post-hearing brief, Respondent appears to accept that the full protection and security standard goes beyond physical protection to also encompass access to the courts.³⁵⁹

648. Article 2(2) first sentence of the Treaty contains a typical combined fair and equitable treatment and full protection and security clause which provides as follows:

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

649. This Tribunal is aware that some investment tribunals have been of the opinion that fair and equitable treatment and full protection and security embody a combined unitary concept.³⁶⁰

³⁵⁵ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 134.

³⁵⁶ Claimant Post-Hearing Brief, ¶ 100. See also Hearing Transcript D1:P167:L18.

³⁵⁷ Respondent Counter-Memorial, ¶¶ 443-450; Respondent Rejoinder on the Merits, ¶ 147.

³⁵⁸ Respondent Rejoinder on the Merits, ¶ 148.

³⁵⁹ Respondent Post-Hearing Brief, ¶ 104 [...]

³⁶⁰ *Occidental Exploration and Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, CLA-9, ¶ 187 (“The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.”).

650. In the Tribunal’s view, however, it is hard to believe that contracting parties of a BIT choose the separate wording of “full protection and security” in order to mean the same thing as “fair and equitable treatment”. It thus finds it implausible to consider that the two standards should be interpreted to have an identical meaning.
651. Rather, the Tribunal concurs with the view that the two standards should be interpreted as separate standards with different meanings that may partly overlap, but focus on different situations. While “fair and equitable treatment” more broadly protects investments against interferences by acts and omissions of host States, “full protection and security” requires host States to exercise a level of due diligence in order to prevent third parties from interfering with such investments.³⁶¹
652. Notwithstanding this broad distinction, it is well accepted that there are overlaps between the two standards. In particular, in regard to protection that goes beyond physical protection, it is widely accepted that in formulations like the one in the Treaty at hand, according to which host States have to accord “full” protection and security, such qualifier indicates that the standard goes beyond physical security.³⁶² This reading has been specifically accepted in regard to the identical full protection and security clause in the United Kingdom-Tanzania BIT in *Bewater Gauff v. Tanzania*³⁶³ and by Respondent in regard to Claimant’s claim that it includes the right of access to the courts.³⁶⁴

³⁶¹ See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, CLA-2, ¶ 167 (“[...] the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.”).

³⁶² *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, IIC 24, Award, 14 July 2006, CLA-22, ¶ 408 (“[...] when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”).

³⁶³ *Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, IIC 330, Award, 24 July 2008, CLA-23, ¶ 729 (“The Arbitral Tribunal adheres to the *Azurix* holding that when the terms “protection” and “security” are qualified by “full”, the content of the standard may extend to matters other than physical security.” [emphasis in original]).

³⁶⁴ Respondent Post-Hearing Brief, ¶ 104 [...]

653. In the present case, Claimant’s allegations under the full protection and security rubric mostly relate to the same factual allegations dealt with under the fair and equitable treatment claims. Basically, Claimant asserts that Ukraine’s obligations under the full protection and security standard were breached “through the actions of the Prosecutor and the actions and inactions of the Ukrainian courts.”³⁶⁵ Even assuming that fair and equitable treatment violations would at the same time amount to full protection and security violations, since the Tribunal did not find such breaches of fair and equitable treatment it cannot find any full protection and security violations.
654. Claimant further alleges that “the raids in the offices of both [Company C] and [Company D] and the intimidation their officers received are a text book example of lack of full protection of [sic] security.”³⁶⁶
655. In fact, in the Tribunal’s view, this claim more aptly falls under a fair and equitable treatment claim as well since it does not concern allegations of host State organs failing to protect an investment against third party attack, but rather alleges that Ukraine’s officials harassed the investor.
656. The Tribunal acknowledges that the protection owed under the full protection and security standard may also be viewed as extending to prevent attacks on investments by organs of the host State.³⁶⁷ As stated above, analysing the allegations in the context of the fair and equitable treatment claims, the Tribunal fails to recognise that the actual conduct of the criminal investigations against Claimant’s subsidiaries, [Company D] and [Company C], amounted to a level of harassment that would offend international standards.³⁶⁸

C. UNREASONABLE OR DISCRIMINATORY IMPAIRMENT OF THE MANAGEMENT,

³⁶⁵ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 134.

³⁶⁶ Claimant Post-Hearing Brief, ¶ 100. See also Hearing Transcript D1:P167:L18.

³⁶⁷ *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, RLA-9, ¶¶ 78-86 (regarding the actions of the Sri Lankan security forces excessive and a breach of the full protection and security standard); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award and concurring and dissenting opinion, ICSID Case No. ARB/05/22, IIC 330, 24 July 2008, CLA-23, ¶ 730 (“The Arbitral Tribunal also does not consider that the ‘full security’ standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.”).

³⁶⁸ See above ¶¶ 6377 *et seq.*

MAINTENANCE, USE, ENJOYMENT AND DISPOSAL OF THE INVESTMENT

(1) The Parties' Positions

a. Claimant's Position

[...]

b. Respondent's Position

[...]

(2) Tribunal's Analysis

662. Relying on Article 2(2) second sentence of the Treaty, Claimant also argues that “the conduct of the Ukrainian courts and Prosecutor amount to unreasonable impairment of its investment”³⁶⁹

663. Respondent rejects this claim submitting that there was nothing unreasonable in the actions of the Prosecutor and/or the courts that would amount to a violation of the applicable standard of “a ‘wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety’”.³⁷⁰

664. Indeed, the Tribunal fails to recognize any additional aspects that have not yet been discussed under the fair and equitable treatment section of this award. Claimant alleges that the actions of the Ukrainian Prosecutor and the courts amounted to an “unreasonable impairment of its investment”.³⁷¹ However, there is nothing that would add to what the Tribunal discussed already in the context of a potential breach of fair and equitable treatment.³⁷²

665. Article 2(2) second sentence of the Treaty provides as follows:

Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or

³⁶⁹ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 143. See also Claimant Memorial, ¶¶ 132-137.

³⁷⁰ Respondent Rejoinder, ¶ 149.

³⁷¹ Claimant Memorial, ¶¶ 132-137; Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 143.

³⁷² See above ¶¶ 491 *et seq.*

disposal of investments in its territory of investors of the other Contracting Party.

666. It contains the UK version of what is often referred to as a BIT standard prohibiting “arbitrary or discriminatory” measures. In practice, the ordinary meaning of the terms “arbitrary” and “unreasonable” is considered to be identical whereas the notion “discriminatory” adds another element. “Arbitrary” or “unreasonable” are often understood as “derived from mere opinion”, “capricious”, “unrestrained”, or “despotic.”³⁷³
667. The close overlap with the fair and equitable treatment standard is also reflected in the general acceptance that the notion of “unreasonableness/arbitrariness” has been adequately explained in the ICJ’s *ELSI (United States of America v. Italy)* case according to which “[arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”³⁷⁴ The Tribunal shares with the Parties the view that this judicial pronouncement in the context of interpreting a FCN treaty provision prescribing “arbitrary or discriminatory measures” lays down useful guidance which has been relied upon in investment practice.
668. For instance, the tribunal in *Plama v. Bulgaria*³⁷⁵ explained the notion of unreasonableness/arbitrariness in terms of an absence of “reason or fact” when it stated that “[unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference.”³⁷⁶

³⁷³ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, IIC 24, Award, 14 July 2006, CLA-22, ¶ 392 (“In its ordinary meaning, ‘arbitrary’ means ‘derived from mere opinion’, ‘capricious’, ‘unrestrained’, ‘despotic.’ Black’s Law Dictionary defines the term, *inter alia*, as ‘done capriciously or at pleasure’, ‘not done or acting according to reason or judgment’, ‘depending on the will alone.’” [footnotes omitted]).

³⁷⁴ *Elettronica Sicula S.P.A. (ELSI)*, (*United States of America v. Italy*), International Court of Justice, Judgment, 20 July 1989, ¶ 128.

³⁷⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

³⁷⁶ *Ibid.*, ¶ 184 (footnotes omitted).

669. The Tribunal in *Toto v. Lebanon*³⁷⁷ broadened this notion by adding the following aspects:

An unreasonable or discriminatory measure is defined in this case as (i) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in wilful disregard of due process and proper procedure.³⁷⁸

670. The Tribunal sees no need to enter into the disputed area of whether and to what extent the prohibition of unreasonable and discriminatory measures overlap with the guarantees inherent in fair and equitable treatment or not. Suffice it to state that in the present context, the allegedly unreasonable conduct consists in the “the conduct of the Ukrainian courts and Prosecutor”³⁷⁹ and that Claimant has not put forward any allegations that would transcend the claim that the Ukrainian courts and the Prosecutor had violated due process in the way the court cases were conducted. Since these issues were addressed in detail under the fair and equitable treatment claim,³⁸⁰ the Tribunal sees no reason to repeat itself here.

671. For the sake of completeness, even if a more specific claim had been made (e.g. that the actions of the Prosecutor in tandem with the courts were intended to inflict damage on the investor without serving any apparent legitimate purpose or were taken for reasons that were different from those put forward by them) the Tribunal does not believe that such allegations could stand scrutiny.

672. It was the task of the Prosecutor to review and, if necessary, challenge the legality of the decision-making process of public institutions and, if need be, to bring further action to protect their financial and other interests. Thus, it can hardly be maintained that the institution of the court proceedings by the Prosecutor did not serve any “apparent legitimate purpose” and was only made in order to inflict damage on the investor. Of course, a successful litigation could, and actually did, result in a situation that led to the loss of the

³⁷⁷ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012.

³⁷⁸ *Ibid.*, ¶ 157.

³⁷⁹ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶ 143. See also Claimant Memorial, ¶¶ 132-137.

³⁸⁰ See above ¶¶ 491 *et seq.*

investment, but it is hard to maintain that this was the major purpose. Rather, it was the protection of the internal decision-making process and safeguarding that property in public ownership should not be privatized upon a questionable decision-making process that was at least the apparent legitimate purpose. Likewise, the Prosecutor did not put forward any different reasons for claiming the restitution of the land plots. The Parties may reasonably differ as to whether the court cases were correctly decided as a matter of Ukrainian law. However, it is not possible to argue that they were not based on legal standards but decided in a wholly discretionary fashion.

673. Therefore, the Tribunal finds that Claimant failed to establish a violation of the standard contained in Article 2(2) second sentence of the Treaty protecting against impairment of investments by unreasonable or discriminatory measures.

D. EXPROPRIATION

(1) The Parties' Positions

a. Claimant's Position

[...]

b. Respondent's Position

[...]

(2) Tribunal's Analysis

690. Claimant claims to have lost its investment by judicial expropriation. In particular, it argues that it was unlawfully deprived of its investment which it lost in the various court cases as a result of a lack of due process/denial of justice.³⁸¹

691. Claimant specifically relies on *ADC v. Hungary*,³⁸² arguing that “due process of law in the expropriation context demands an actual and substantive legal procedure for a foreign

³⁸¹ Claimant Post-Hearing Brief, ¶¶ 79, 81, 94; Claimant Defence to Preliminary Objections and Reply on the Merits, ¶¶ 106 [...]

³⁸² *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51.

- investor to raise its claims against the depriving actions already taken or to be taken against it. And some basic legal mechanisms, such as reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful.³⁸³
692. In this context, Claimant specifically invokes a number of third party BITs concluded by Ukraine which demand that an expropriation has to be carried out in accordance with “due process of law” upon which it relies via the Treaty’s MFN clause.³⁸⁴
693. In Claimant’s view the four court cases concerning the land plots acquired by Krederi through its subsidiaries fell short of due process and constituted a denial of justice.³⁸⁵ Thus, the loss of its investment was not only uncompensated but also unlawful under the criteria of Article 6 of the Treaty.
694. Further, Claimant also argues that compensation is owed for lawful expropriation.³⁸⁶
695. Respondent rejects the notion that judicial decisions which rule on the legality of decisions leading to a transfer of ownership rights *in rem* and, in particular, that court cases which determined the title to the three land plots in issue amount to expropriation.³⁸⁷
696. Specifically invoking *Swisslion v. Macedonia*³⁸⁸ and *Arif v. Moldova*,³⁸⁹ Respondent argues that a “judicial expropriation” requires an “unlawful activity by the court itself”,³⁹⁰

³⁸³ Claimant Post-Hearing Brief, ¶ 84.

³⁸⁴ Claimant Memorial, ¶ 147.

³⁸⁵ Claimant Post-Hearing Brief, ¶ 94 [...]

³⁸⁶ Claimant Post-Hearing Brief, ¶ 79.

³⁸⁷ Respondent Rejoinder on the Merits, ¶ 77 [...]

³⁸⁸ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, RLA-53.

³⁸⁹ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-59.

³⁹⁰ Respondent Rejoinder on the Merits, ¶¶ 92-95.

and that no wrongful taking can arise from the legitimate application of Ukrainian law by the Ukrainian courts.³⁹¹

697. According to Respondent, Claimant failed to demonstrate unlawful activity by the court itself.³⁹²
698. Before turning to the central issue in dispute whether, i.e., whether the conduct of the Ukrainian courts and authorities constituted a form of judicial expropriation, the Tribunal will analyse the applicable expropriation clause of the Treaty, in particular in view of Claimant’s perceived need to rely on the MFN clause in order to import a due process requirement.
699. Claimant submits that the MFN provision in the Treaty should be interpreted to allow for the importation of more favourable substantive protections in third party BITs³⁹³ and relies on the MFN clause to import a more favourable provision from the Ukraine-Bosnia and Herzegovina BIT which “like the Ukraine/UK BIT, prohibits the Ukraine from expropriating, either directly or indirectly, any foreign investment except for a public purpose, in the absence of non-discrimination, and against the payment of compensation, and, in addition provides that there must be due process of law.”³⁹⁴
700. Respondent argues that Claimant cannot import Article 4 of the Ukraine-Bosnia and Herzegovina BIT, an alternative expropriation standard, through the MFN clause. It argues that Claimant has not provided the legal basis and reasoning on which it relies to import such a provision via the MFN clause.³⁹⁵ According to Respondent, “an MFN provision is not a free for all allowing an investor to ‘pick and mix’ protections of all and any type from any available treaty. Each protection or provision sought to be imported must be justified on its own terms.”³⁹⁶

³⁹¹ *Ibid.*, ¶¶ 92-94.

³⁹² *Ibid.*, ¶¶ 106-108.

³⁹³ Claimant Defence to Preliminary Objections and Reply on the Merits, ¶¶ 149-154.

³⁹⁴ Claimant Memorial, ¶ 147.

³⁹⁵ Respondent Counter-Memorial, ¶¶ 465-468.

³⁹⁶ *Ibid.*, ¶ 466.

a. The Requirement of Due Process Under the UK-Ukraine BIT's Expropriation Clause

701. Article 6(1) first sentence, the core provision of the expropriation clause of the Treaty, provides:

Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having equivalent effect to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose and against prompt, adequate and effective compensation. [...]

702. This is followed by a second sentence which lays down the specifics of the “compensation” mentioned in the first sentence.

703. Article 6(1) third sentence of the Treaty finally provides:

[...] The Investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

704. Although this sentence does not expressly speak of “due process”, it is generally recognized that it embodies the notion of what an expropriation in accordance with due process requires: the possibility to have both the decision to expropriate and, in particular, the amount of compensation challenged in orderly judicial or other court-like proceedings.³⁹⁷

³⁹⁷ See, Article 5(3) Austria/Georgia BIT (2001) (“Due process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article by a judicial authority or another competent and independent authority of the latter Contracting Party.”).

705. This understanding of the requirement of due process is also reflected in the reasoning of the tribunal in *ADC v. Hungary*³⁹⁸ upon which Claimant relies.³⁹⁹

Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “*the actions are taken under due process of law*” rings hollow.⁴⁰⁰

706. Thus, in the Tribunal’s view, the requirement that an expropriation be not only accompanied by compensation, but also carried out for a public purpose and in accordance with due process of law is already inherent in Article 6(1) of the Treaty. Therefore, there is no need to invoke any third-party BIT with an express due process requirement in its expropriation clause via the MFN clause of the Treaty.

b. Judicial Expropriation

707. As a general matter, this Tribunal takes the view that it is not excluded that judicial action may, in certain situations, amount to expropriation. This was recognized by the tribunal in *Saipem v. Bangladesh*⁴⁰¹ which found that the host State’s judiciary expropriated the investor’s immaterial rights under an ICC arbitral award. In its jurisdictional decision the tribunal held that “[...] there is no reason why a judicial act could not result in an expropriation.”⁴⁰² And in its award,⁴⁰³ the same tribunal found that the annulment of an

³⁹⁸ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51.

³⁹⁹ Claimant Post-Hearing Brief, ¶ 84.

⁴⁰⁰ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51, ¶ 435.

⁴⁰¹ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures, 21 March 2007, CLA-31; Award, 30 June 2009, CLA-32.

⁴⁰² *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures, 21 March 2007, CLA-31, ¶ 132.

⁴⁰³ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, CLA-32.

ICC award, in which “Saipem’s residual contractual rights under the investment [were] crystallised”,⁴⁰⁴ amounted to an expropriation of such rights.

708. Also, the fact that in disputes over ownership ultimate outcomes will usually not benefit the State, but a third party, does not, as a matter of principle, exclude the possibility that a judicial determination may amount to expropriation. This was acknowledged by the tribunal in *Rumeli v. Kazakhstan*,⁴⁰⁵ which found a creeping expropriation, although the judiciary’s action did not benefit the State, but a third party.⁴⁰⁶
709. While it is possible that judicial action amounts to expropriation, it is the exception rather than the norm. In any kind of private law dispute over ownership of movable or immovable property, courts will make a decision which of the disputing parties claiming ownership rights prevails. This will result in a finding that one party will be entitled to ownership whereas the other (or others) will not. Such judicial determinations do not constitute expropriation. Similarly, where property transfers are held to be invalid, the resulting transfers of ownership do not amount to expropriation.
710. In this regard the Tribunal concurs with the view expressed by the *Saipem v. Bangladesh* tribunal⁴⁰⁷ which found that, in the specific circumstances, the host State’s judicial actions annulling an ICC award amounted to indirect expropriation,⁴⁰⁸ but held that in the peculiar case of a judicial expropriation the “substantial deprivation” of ownership rights in itself

⁴⁰⁴ *Ibid.*, ¶ 128 (“[...] Saipem’s residual contractual rights under the investment as crystallised in the ICC Award.”).

⁴⁰⁵ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, CLA-12.

⁴⁰⁶ *Ibid.*, ¶ 704 (“It is a characteristic of judicial expropriation that it is usually instigated by a private party for his own benefit, and not that of the State. This is no doubt a relevant consideration, although not in itself decisive, as has already been observed. The Tribunal considers however, and Respondent indeed accepted in paragraph 259 of its Rejoinder, that a transfer to a third party may amount to an expropriation attributable to the State if the judicial process was instigated by the State.”).

⁴⁰⁷ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, CLA-32.

⁴⁰⁸ *Ibid.*, ¶ 129 (“In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of “measures having similar effects” within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is “a nullity”. Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.”).

was not sufficient for a finding of expropriation because otherwise “any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.”⁴⁰⁹ Rather, an additional element of illegality was required in order to turn a judicial decision into an indirect expropriation of the intangible rights under an arbitral award. In this case, the tribunal found that the “Bangladeshi courts abused their supervisory jurisdiction over the arbitration process”⁴¹⁰ and interfered with the arbitral process contrary to the New York Convention.⁴¹¹

711. This approach was explicitly endorsed in *Swisslion v. Macedonia*,⁴¹² in which an ICSID tribunal held “[...] that a predicate for alleging a judicial expropriation is unlawful activity by the court itself.”⁴¹³ Since there was no such illegality the *Swisslion v. Macedonia* tribunal rejected the expropriation claim and argued that otherwise any lawful termination of contractual rights might easily be qualified as expropriatory.⁴¹⁴

712. This approach was equally shared by the tribunal in *Garanti Koza v. Turkmenistan*,⁴¹⁵ which held:

A seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process. Actions by state courts to enforce contract rights, including

⁴⁰⁹ *Ibid.*, ¶ 133 (“That said, given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts’ intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.”).

⁴¹⁰ *Ibid.*, ¶ 159.

⁴¹¹ *Ibid.*, ¶¶ 163-169.

⁴¹² *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, RLA-53.

⁴¹³ *Ibid.*, ¶ 313.

⁴¹⁴ *Ibid.*, ¶ 314 (“[...] the courts’ determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor’s rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State’s being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant’s expropriation claim is not established.”).

⁴¹⁵ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, RLA-121.

rights to terminate a contract, have generally not been held by investment arbitration tribunals to amount to expropriation, regardless of whether the state or an instrument of the state is the contract party enforcing its rights.⁴¹⁶

713. The Tribunal recognizes that Claimant also understands that for judicial action to amount to expropriation a due process violation is required.⁴¹⁷ In order to avoid a situation whereby any title annulment would constitute indirect expropriation or a measure tantamount to expropriation it is therefore necessary to ascertain whether an additional element of procedural illegality or denial of justice was present. Only then may a judicial decision be qualified as a measure constituting or amounting to expropriation.
714. Thus, for this Tribunal, it was necessary to ascertain whether the judicial action which led to the withdrawal of Claimant's property rights in the contested land plots was tainted by breaches of due process.
715. Since the Tribunal has come to the conclusion in its assessment of the fair and equitable treatment claim that the challenged judicial proceedings do not rise to the level of a breach of due process⁴¹⁸ the Tribunal finds that the judicial proceedings do not constitute indirect expropriation.
716. Therefore, Claimant's claim for expropriation is dismissed.
717. The Tribunal has carefully considered the Parties' submissions, including the expert reports, on damages. However, given its rulings on liability, the Tribunal does not think that it is necessary to address the Parties' damages submissions here.

E. CONCLUSIONS ON LIABILITY

718. For the reasons stated above, the Tribunal dismisses all claims. The Tribunal nonetheless notes what it considers an unsatisfactory outcome of this case: In the result the investor has lost the properties it purchased without being recouped the original sale price paid to, and

⁴¹⁶ *Ibid.*, ¶ 365.

⁴¹⁷ Claimant Post-Hearing Brief, ¶ 9 [...]

⁴¹⁸ See above ¶ 631.

retained by, the City of Kiev. Although the legal process leading to that result has been held not to violate applicable standards, and the Respondent has flagged that local remedies may be available to deal with that situation, the Tribunal remains uncomfortable with the result.

VIII. COSTS

719. Each Party has requested that it be awarded its costs.

A. THE PARTIES' REQUESTS AS TO COSTS AND EXPENSES OF THE PROCEEDINGS

(1) Claimant's Position

[...]

(2) Respondent's Position

[...]

B. THE TRIBUNAL'S DECISION

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

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

732. Article 61(2) and further provisions in Articles 28 and 47(j) of the ICSID Arbitration Rules give no clear guidance as to the manner in which costs should be allocated as between the Parties and thus endows the Tribunal with wide discretion to allocate all costs of the

arbitration, including attorney's fees and other costs, between the parties as it deems appropriate.⁴¹⁹

733. This wide discretion enjoyed by ICSID tribunals contrasts with the general rule under the 2010 UNCITRAL Arbitration Rules according to which the costs of the arbitration shall “in principle” be borne by the unsuccessful party.⁴²⁰
734. The absence of a clear “loser pays” or “costs follow the event” principle in ICSID arbitration, coupled with the international dispute settlement tradition prevailing in interstate disputes, may explain the fact that in past ICSID practice, most tribunals have simply “split the costs” by deciding that each party should bear its own costs and that the costs of the tribunals and the Centre should be borne in equal shares by the parties.
735. This public international law approach to allocating costs between the parties, often also referred to as the “American” rule, clearly prevailed until a few years ago.⁴²¹

⁴¹⁹ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, ¶ 362 (“Article 61(2) does not prescribe a particular test for tribunals to assess costs, nor does it place any restrictions on a tribunal’s ability to do so. In light of this, the Tribunal understands the power granted under this Article to be broad, allowing the Tribunal discretion in making its determination.”); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 560 (“[...] The Tribunal considers that Article 61(2) of the ICSID Convention gives it the power to award costs (defined to include legal fees, out of pocket expenses as well as costs of the arbitration) and the discretion to decide at what level to do so. [...]”); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 316 (“Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate. [...]”).

⁴²⁰ Art. 42(1) UNCITRAL Arbitration Rules 2010 (“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”).

⁴²¹ *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶ 150 (“The Tribunal is aware that, while it can order the losing party to pay all costs, it is common ICSID practice for each party to bear its own legal costs and for the arbitration costs to be divided equally regardless of the outcome of the arbitration.”); *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶ 125 (“The claims were not frivolous, and they were pursued in good faith and with all due expedition. The claims were, equally, defended in good faith and with due expedition. Both sides agreed to the separation of the jurisdictional issue, and this proved a sensible and economical step. The Tribunal does not consider that there is any reason to depart from the normal practice in such cases, according to which each Party shall bear its own costs, and the costs of the Tribunal shall be divided equally between the Parties.”); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 322 (“The Tribunal notes that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails. [...]”).

736. It is a more recent development that also ICSID tribunals have started awarding costs (or parts of the costs) to the successful party in investment cases.⁴²² This may involve the costs of the proceedings and also the costs of a party's legal representation. Such a "loser pays" principle, also referred to as the "English" rule, intends to put the prevailing party in a position as if it would not have had to incur the costs of pursuing a claim or defending against it.⁴²³
737. While it is therefore clear that in the absence of a well-defined guidance in the ICSID Convention and Arbitration Rules, ICSID tribunals remain vested with broad discretion, it is also required that such discretion be exercised in a rational way, taking into account relevant factors⁴²⁴ to justify cost decisions.
738. In the opinion of this Tribunal these factors include:
- (i) First, when assessing the outcome of the proceedings it is necessary to look at the overall outcome of the case and not merely to consider whether a claimant prevailed on specific claims. This includes both the jurisdictional and admissibility aspects as well as the merits of a case. Equally, the quantum awarded in the ultimate decision has to be put in relation to the

⁴²² *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, RLA-28, ¶ 338; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 316 *et seq*; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 152; *ADC Affiliate Limited and ADC & ADMC Management Limited. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 542; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶ 692.

⁴²³ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 563 ("[...] The present Tribunal is of the view that a rule under which costs follow the event serves the purposes of compensating the successful party for its necessary legal fees and expenses, of discouraging unmeritorious actions and also of providing a disincentive to over-litigation. [...]); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶ 466 ("There is no rule in ICSID arbitration that 'costs follow the event', nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings. However, in the exercise of its discretion to allocate costs, the Tribunal has the authority to award all or part of a party's costs of the arbitration and its legal fees and expenses. Taking into account all factors in this case, the Tribunal has decided partially to apply this principle.").

⁴²⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 620 ("In the Tribunal's view, the apportionment of costs requires an analysis of all of the circumstances of the case, including to what extent a party has contributed to the costs of the arbitration and whether that contribution was reasonable and justified.").

compensation or damages originally claimed in order to assess the relative “success” of the parties.⁴²⁵

- (ii) Second, investment tribunals are empowered to take into account the behaviour of the parties concerning proceedings and more generally. This includes issues of *bona fides*, for example, the question whether claims are brought in good faith or reflect harassing litigation, but also whether claims are fraudulently instituted⁴²⁶ or whether investments are structured for the sole purpose of instituting investment arbitration.⁴²⁷ ICSID tribunals have been quite explicit in awarding costs against a party in case of abuse of process⁴²⁸ and frivolous proceedings.⁴²⁹ Likewise, the good faith of a host

⁴²⁵ *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 147 (“*The outcome of the proceedings is undoubtedly the first factor the Arbitral Tribunal can and must take into account. In the present case, the outcome is shared, since the Respondent’s objection to jurisdiction is rejected, but the Claimant’s claim is dismissed on the merits. There are good reasons, therefore, to decide that the costs and expenses should be shared.*” [italics in original]).

⁴²⁶ *Europe Cement Investment & Trade SA v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶ 185 (“In the circumstances of this case, where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.”); *Cementownia “Nowa Huta” SA v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶ 177 (“In the circumstances of this case, the Arbitral Tribunal intends to employ this principle [“costs follow the event”] for the following reasons: - The Claimant has filed a fraudulent claim; - The Claimant has failed on all its requests for relief; - The Claimant has delayed the present arbitration proceeding and therefore raised its costs; [...]”); *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 63 (referring to “special circumstances [...], such as procedural misconduct, the existence of a frivolous claim, or an abuse of the BIT process or of the international investment protection regime.”).

⁴²⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 151 (“In the circumstances of this case, the Tribunal intends to employ this principle [“costs follow the event”]. The Tribunal has concluded not only that the Claimant’s claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention. It is also to be noted that the Claimant filed a request for provisional measures which was rejected in its entirety by the Tribunal and which added to the costs of the proceeding. The Respondent has been forced to go through the process and should not be penalized by having to pay for its defence.”).

⁴²⁸ *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 201 (“The Tribunal is of the view that a finding of abuse of process justifies an award of costs against the unsuccessful party. Thus, the Claimants shall pay for the entirety of the costs of the proceedings, *i.e.* for the costs of the Arbitral Tribunal and for the costs of the proceeding.”).

⁴²⁹ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶¶ 153-154 (“In light of the Tribunal’s finding that the Claimant’s claim was brought before the Centre on the basis of a transaction that did not correspond to an arrangement that was meant to deploy any legal consequences other than on paper and, as a result, plainly could not fulfil the requirements of an investment within the meaning of Article 25(1) of the ICSID Convention

State should be taken into account when assessing its action even though it may be qualified as a breach of investment standards,⁴³⁰ and *vice versa*.

- (iii) Third, ICSID tribunals are empowered to take into account the behaviour of the parties during the arbitral proceedings.⁴³¹ This may include poor and inefficient pleadings, applying various forms of abusive, harassing or delaying tactics or engaging in various other forms of inappropriate litigation techniques. The absence of such behaviour clearly points towards abstaining from any cost shifting.⁴³² Also the litigating parties' willingness to comply with the ICSID Administrative and Financial Regulations, including their duty to make advance payments for the costs of the proceedings, may be an element to be taken into consideration.⁴³³

and Article 1(b) of the Netherlands-Turkey BIT, the Tribunal considers it appropriate that the Claimant bear in full his legal fees and expenses, as well as the arbitration costs [...].”)

⁴³⁰ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 621 (“In the Tribunal’s view, after a consideration of all the relevant circumstances, the principles above may be adjusted to take into account that the respondent is a sovereign State. In particular, it considers that, even if a tribunal finds that a State has breached its international obligations vis-à-vis an investor, consideration must be given to the State’s motives and good faith. In particular, where the actions of a State have been guided by its good faith understanding of the public interest and the State could reasonably doubt that it was breaching its international obligations, the Tribunal may consider it appropriate to apportion costs in a manner that alleviates the burden on the respondent State. These considerations apply to situations in which the State is the respondent, not the claimant.”).

⁴³¹ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 562 (“In this regard [allocating costs], the Tribunal has considered, among other things, the following factors: [...] the conduct of the Parties during the proceedings; [...]”); *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 63 (referring to “special circumstances [...], such as procedural misconduct.”).

⁴³² *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, ¶ 31 (“[...] on there being no evidence of recklessness or bad faith on the Claimant’s part, this Tribunal is of the opinion that it would be improper to make an award for such legal costs as the Respondent may have incurred in the defense of its interests in this arbitration.”); *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 15.3.3 (“It is the view of the Tribunal that no frivolous claim was filed in the proceeding and that no bad faith was observed from the parties. In fact, the Tribunal notes that the submissions and the argumentations of both parties were presented in a professional manner. Consequently, the Tribunal concludes that each party shall bear its own costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat.”).

⁴³³ *Eudoro A. Olgún v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, ¶ 85 (“[...] the conduct of the Republic of Paraguay needlessly prolonged these proceedings by repeatedly failing to meet the deadlines set by the Tribunal, in particular, the obligations imposed by the ICSID Administrative and Financial Regulations. For the above reasons, this Tribunal feels that it is fair that the parties each contribute part of the expenses

- (iv) Further, tribunals should take into account a number of additional factors, such as the reasonableness of the costs claimed, in particular, in relation to the size, complexity, and significance of the case, but also in relation to the costs claimed by the other party. Similarly, the question whether a dispute leads to a “clear-cut” case or whether the outcome was indeed “close” should be a factor in deciding on costs.⁴³⁴

739. On the basis of these general considerations, the Tribunal considers that in the present case the following elements are relevant to the exercise of its discretion:

- (i) In regard to the relative success of the Parties, it is clear that while Claimant succeeded on the jurisdictional level, its claims for breaches of the Treaty, as well as for compensation for an alleged judicial expropriation were all dismissed.
- (ii) However, both Claimant’s and Respondent’s relative successes on jurisdiction and the merits were not clear-cut cases. As demonstrated by the Tribunal’s analysis above, the jurisdictional arguments were fiercely disputed and both Parties had strong arguments. Similarly, the acts and omissions on the part of Respondent, although found falling short of constituting breaches of Article 2 of the Treaty were clearly not beyond reproach in the sense that they did not come close to a judicial environment foreign investors would wish to encounter.

arising from these proceedings, dividing the procedural costs in equal shares, and each assuming the costs for their legal representation.”).

⁴³⁴ *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 148 (“*The decision on the merits* seems to support this conclusion [to decide that the costs and expenses should be shared], in the light of the facts. True, the Claimant’s attitude in the way it presented, and later embarked on, the project has carried particular weight in the outcome of the proceedings. Nonetheless – and in this respect it concurs with the assessment of the CRCICA Arbitral Tribunal – this Arbitral Tribunal considers that the Respondent was not itself completely beyond reproach in the phase leading to the conclusion of the Contract.” [italics in original]); *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, ¶ 85 (“[...] while the oversight exercised by the Paraguayan State through its bodies did not rise to a level of negligence that created liability to pay the losses suffered by the Claimant, it is also true that it cannot be considered to have been exemplary. [...] For the above reasons, this Tribunal feels that it is fair that the parties each contribute part of the expenses arising from these proceedings, dividing the procedural costs in equal shares, and each assuming the costs for their legal representation.”).

- (iii) Respondent's decision not to pay its share of the advances on the costs of the proceedings which would have amounted to USD 300,000 contrasts with its willingness to make rather generous payments to its legal defence in the total amount of USD 2,191,332.25.
- (iv) Further, the behaviour of Parties during the proceedings did not always prove very helpful to the Tribunal. In particular, when it came to establishing the facts of the case, the Parties both clearly refrained from telling the whole story. While Respondent insinuated bad faith on the part of Claimant both when structuring the investment as a strawmen's operation and when bringing investment claims, Claimant remained vague and evasive when it came to the actual background of the investment. Similarly, Respondent did not display any major effort aimed at trying to shed light on the underlying alleged bad faith operations or even alleged corruption.
- (v) On the other hand, the Tribunal appreciates the cooperative behaviour of the Parties' representatives in the conduct of the proceedings. While strenuously opposing each other, they continued to respect procedural fair play and abstained from any forms of abusive, harassing or delaying tactics.

740. In these circumstances and considering that the claims were not frivolous, were pursued and defended in good faith and with all due expedition, the Tribunal considers that there is no reason to depart from the traditional practice in ICSID cases that each Party shall bear its own costs.

741. For these reasons, and having taken into account all the circumstances of the case, the Tribunal concludes that the Parties shall bear on an equal basis the fees and expenses of the members of this Tribunal, and of the International Centre for Settlement of Investment Disputes, and that each Party shall bear the legal fees and expenses incurred by it in relation to this case.

742. The total costs of the proceedings, including the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre, amount to USD 627,423.33. These costs are broken down as follows:

Arbitrators' Fees and Expenses	USD 391,303.03
ICSID's Administrative Fees	USD 138,000.00
Direct Expenses	USD 98,120.30
Total	USD 627,423.33

743. The above costs of the proceedings have been paid out of the advances entirely made by Claimant.

744. Since Claimant has paid its own as well as Respondent's shares of the advances on costs for the proceedings in a total amount of USD 750,000⁴³⁵ and since Respondent has not paid its share of these advances, Claimant is therefore entitled to receive half of the costs of the proceedings, i.e. USD 313,711.67, from Respondent. Claimant is further entitled to be reimbursed the unused remaining balance of the advances as reflected in the Financial Statement.⁴³⁶

IX. DECISION

745. Having carefully considered all of the evidence and arguments presented by the Parties, both in their written pleadings or other correspondence and in oral submissions, the Arbitral Tribunal decides,

- (i) by majority, that it has jurisdiction over the claims raised by Claimant;
- (ii) unanimously, that all claims are dismissed;

⁴³⁵ The Centre received USD 750,000 from Claimant even though Claimant submitted that it paid USD 600,000, see above, ¶ 720.

⁴³⁶ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account.

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- (iii) unanimously, that each Party shall bear its own costs and that the Parties shall bear the costs of the proceedings in equal shares. Respondent shall therefore reimburse Claimant the amount of USD 313,711.67 corresponding to its share of the costs of the proceedings advanced by Claimant.

[Signed]

Dr. Markus Wirth
Arbitrator

Date: 28 June 2018

[Signed]

Dr. Gavan Griffith QC
Arbitrator

Date: 28 June 2018

[Signed]

Prof. August Reinisch
President of the Tribunal

Date: 28 June 2018