

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED  
IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF  
THE RUSSIAN FEDERATION AND THE CABINET OF MINISTERS OF THE  
UKRAINE ON THE ENCOURAGEMENT AND THE MUTUAL PROTECTION OF  
INVESTMENTS, DATED 27 NOVEMBER 1998**

**- and -**

**THE UNCITRAL ARBITRATION RULES  
(ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION,  
CASE NO. 2008-8)**

**- between -**

**OA O TATNEFT**

**(the “Claimant”)**

**- and -**

**UKRAINE**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

**PARTIAL AWARD ON JURISDICTION**

**The Arbitral Tribunal:**

Professor Francisco Orrego Vicuña

The Honorable Charles N. Brower

The Honorable Marc Lalonde, P.C., O.C., Q.C.

**Registry:**

Permanent Court of Arbitration

**COUNSEL FOR THE PARTIES**

**OAD TATNEFT**

- Ms. Claudia Annacker, Cleary Gottlieb Steen Hamilton LLP
- Mr. William B. McGurn III, Cleary Gottlieb Steen Hamilton LLP
- Mr. Robert T. Greig, Cleary Gottlieb Steen Hamilton LLP

**UKRAINE**

- Mr. Eric A. Schwartz, King & Spalding LLP
- Mr. James Castello, King & Spalding LLP
- Mr. Alain Farhad, King & Spalding LLP
- Mr. Dmitri Grischenko, Grischenko & Partners
- Mr. Sergiy Voitovich, Grischenko & Partners

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## CHAPTER I – PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION PROCEEDINGS

1. By letter dated 11 December 2007,<sup>1</sup> OAO Tatneft (“Tatneft” or “Claimant”) sent a Notice of Dispute to the President, the Prime Minister, and the Ministry of Foreign Affairs of Ukraine requesting that they open negotiations pursuant to Article 9(1) of the *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and the Mutual Protection of Investments*, dated 27 November 1998 (the “Russia-Ukraine BIT”).<sup>2</sup> Claimant alleged that certain conduct by Ukraine amounted to “numerous breaches of the Ukraine-Russia BIT and, in particular, of Article 2, Article 4, and Article 5, and Article 3 in conjunction with Article 2(2)” of this treaty.
2. The Parties being unable to reach a settlement of the dispute, Claimant served on Ukraine (“Respondent”) a Notice of Arbitration and Statement of Claim dated 21 May 2008 (“Statement of Claim”), to submit the dispute to international arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”), in accordance with Article 9(2)(c) of the Russia-Ukraine BIT.
3. While Article 9(2) of the Russia-Ukraine BIT provides for a six-month waiting period before such submission, Claimant has relied on Article 3(1) of the Russia-Ukraine BIT, which requires Ukraine to grant Russian investors and their investments treatment no less favorable than that granted to Ukrainian or third States’ investors and their investments; as

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<sup>1</sup> Claimant’s Notice of Dispute pursuant to Article 9(1) of the Agreement Between the Government of the Russian Federation and the Cabinet of Ministries [*sic*] of the Ukraine on the Encouragement and the Mutual Protection of Investments of 27 November 1998, Exhibit C-25; Claimant’s Notice of Arbitration and Statement of Claim dated 21 May 2008, para. 58.

<sup>2</sup> Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and the Mutual Protection of Investments of 27 November 1998, Exhibits R-2, C-23. In view of the fact that there are some differences between these two English translations on which the respective Parties have relied in these proceedings, where one or the other Party has argued following a given version the Tribunal has so noted and decided accordingly. No issues other than those noted have been argued by either Party to turn on any such difference. The Tribunal, when quoting from this treaty in this Partial Award on Jurisdiction, has chosen generally to refer to the translation offered by Respondent (Exhibit R-2) except as otherwise indicated.

the United Kingdom-Ukraine BIT<sup>3</sup> provides in Article 8(1) for a three-month waiting period, Claimant has relied on this more favorable requirement.<sup>4</sup>

4. Article 9 of the Russia-Ukraine BIT provides, in its relevant part:

*1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes, which concern the amount, terms of and procedure for payment of compensation provided for in Article 5 hereof or with the procedure for effecting a transfer of payments provided for in Article 7 hereof, a notification in writing shall be handed in, accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.*

*2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:*

*[...]*

*(c) an “ad hoc” arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).<sup>5</sup>*

5. In its Statement of Claim, Tatneft alleged that certain “actions and omissions of Respondent constitute violations of its obligations to Tatneft under the Russia-Ukraine BIT, in particular Articles 2, 3(1), and 5 [...]”<sup>6</sup> and requested that the Tribunal order, *inter alia*, payment by Respondent of an amount in excess of US\$ 520 million for unpaid oil deliveries and compensation in an amount in excess of US\$ 610 million for Claimant’s loss of management rights and rights associated with its shareholding interest in Ukrtatnafta.<sup>7</sup>

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<sup>3</sup> Agreement between the Government of the United Kingdom, Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 10 February 1993 (the “United Kingdom-Ukraine BIT”), Exhibit C-24.

<sup>4</sup> Statement of Claim, para. 60.

<sup>5</sup> Russia-Ukraine BIT, Article 9, Exhibit R-2.

<sup>6</sup> Statement of Claim, para. 67.

<sup>7</sup> Statement of Claim, para. 68.

**B. CONSTITUTION OF THE ARBITRAL TRIBUNAL**

6. In its Statement of Claim, Claimant appointed Professor Dr. Rudolf Dolzer as the first arbitrator.
7. By letter dated 26 June 2008, Respondent appointed The Honorable Marc Lalonde, P.C., O.C., Q.C. as the second arbitrator.
8. By communications dated 24 July 2008, the above-mentioned co-arbitrators informed the Parties of their appointment of Professor Francisco Orrego Vicuña as the presiding arbitrator.
9. By letter dated 29 July 2008, Professor Orrego Vicuña informed the Parties that he accepted his appointment as presiding arbitrator.
10. By letter dated 13 August 2008, the PCA informed the Parties that it accepted their request that the PCA provide administrative support in this arbitration.
11. Following the first procedural meeting,<sup>8</sup> by letter dated 27 October 2008, Respondent gave notice of a challenge to Professor Dolzer pursuant to Article 11 of the UNCITRAL Rules. The Parties submitted comments on the challenge and subsequently agreed that the Secretary-General of the PCA (the “Secretary-General”) act as the appointing authority to decide the challenge. The Secretary-General invited the Parties on 19 November 2008 to submit further comments on the challenge, which they did.
12. On 19 December 2008, having reviewed the Parties’ further comments, the Secretary-General sustained Respondent’s challenge and invited Claimant to appoint a substitute arbitrator in accordance with Article 12(2) of the UNCITRAL Rules.
13. By letter of 16 January 2009, Claimant appointed The Honorable Charles N. Brower as arbitrator, in accordance with Article 12(2) of the UNCITRAL Rules.

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<sup>8</sup> See below, Section C of Chapter I.

**C. FIRST PROCEDURAL MEETING**

14. On 20 October 2008, the Tribunal held a first Procedural Meeting with the Parties in London. Present at the Procedural Meeting were:

**Tribunal:**

Professor Francisco Orrego Vicuña

Professor Rudolph Dolzer

The Honorable Marc Lalonde, P.C., O.C., Q.C.

**For Claimant:**

Mr. William B. McGurn III

Ms. Claudia Annacker

Mr. Lorenzo Melchionda

Mr. Milo Molfa

Mr. Vasily Mozgovoi

Mr. Peter Gloushkov

**For Respondent:**

Mr. Eric Schwartz

Ms. Sabine Konrad

Mr. Alain Farhad

Mr. Dmitri Grischenko

**Permanent Court of Arbitration:**

Paul-Jean Le Cannu

15. In anticipation of the Procedural Meeting, the PCA had circulated Draft Terms of Appointment and Procedural Order (“Draft Terms of Appointment”) to the Parties on behalf of the Tribunal. The Draft Terms of Appointment were not signed at the Procedural Meeting in view of the fact that Respondent announced that it would initiate the challenge procedure noted above. Following the decision on such challenge, the Terms of Appointment were revised, commented on by the Parties, duly signed in counterparts and dated 23 March 2009.

**D. WRITTEN PHASE OF THE PROCEEDINGS**

16. On 20 February 2009, as previously agreed by the Parties,<sup>9</sup> Respondent filed its Statement of Defense and Objections to Jurisdiction and Admissibility (“Statement of Defense”).
17. On 24 February 2009, the PCA, under instruction from the Tribunal, invited Claimant to submit its comments on the request Respondent made in its Statement of Defense that the Tribunal rule on the issue of jurisdiction as a preliminary question, in accordance with Article 21(4) of the UNCITRAL Rules.
18. By letter dated 10 March 2009, Claimant submitted its comments on Respondent’s request and submitted, *inter alia*, that the request should be denied.
19. On 12 March 2009, the PCA, under instruction from the Tribunal, informed the Parties that the Tribunal had decided to accept the proposed bifurcation. The Parties were invited to agree on a timetable for the jurisdictional phase of the proceedings by 23 March 2009.
20. By letters dated 23 March 2009, Claimant and Respondent each wrote to the Tribunal informing it that the Parties had not been able to reach an agreement on a timetable for the jurisdictional phase of the arbitration.
21. By letter dated 30 March 2009, the PCA, under instruction from the Tribunal, informed the Parties that the Tribunal had reached a determination regarding the timetable for the jurisdictional phase of the proceedings. Its decision stated that there was no need for a resubmission of Statement and Objections to Jurisdiction and Admissibility on the part of Respondent; that Claimant would have 90 days from the date of this letter to submit its Answer to such Objections; that Respondent would thereafter have 60 days for a Reply to such Answer; and that Claimant would then have 60 days for a Rejoinder to the Reply.
22. On 12 May 2009, Mr. Eric Schwartz informed the Tribunal that having joined the law firm of King & Spalding he would continue to represent Ukraine in the arbitration, along with Messrs James Castello, Alain Farhad, and their co-counsel at Grischenko & Partners.

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<sup>9</sup> Letter from Counsel for the Parties dated 1 October 2008.

23. On 29 June 2009, Claimant filed its Answer to Respondent's Statement of Defense and Objections to Jurisdiction and Admissibility ("Answer"), in accordance with the timetable provided for in the PCA's letter dated 30 March 2009.
24. By letter dated 10 August 2009, Respondent informed the Tribunal that, due to the unavailability of numerous institutions and individuals in Ukraine during the summer holidays, it would not be in a position to submit its Reply on Jurisdiction within 60 days of receiving Claimant's Answer. Respondent applied for an extension of the filing date from 28 August 2009 to 30 September 2009.
25. By letter dated 11 August 2009, the PCA, under instruction from the Tribunal, invited Claimant to comment on Respondent's letter of 10 August 2009.
26. By letter dated 13 August 2009, Claimant informed the Tribunal that it would be prepared to agree to an extension of Respondent's deadline for submission of its Reply from 28 August 2009 to 21 September 2009, provided that Claimant's deadline for submission of its Rejoinder was extended concomitantly, from 27 October 2009 to 14 December 2009.
27. By letter dated 13 August 2009, Respondent informed the Tribunal that it opposed Claimant's proposal of an extension until 21 September 2009 and that it had requested an extension until the 30 September 2009 because the full extension was needed.
28. By letter dated 17 August 2009, the PCA, under instruction from the Tribunal, informed the Parties that Respondent's request to have the deadline for submission of its Reply on Jurisdiction extended until 30 September 2009 was granted, and that Claimant would be afforded the same extension of its Rejoinder on Jurisdiction, until 30 November 2009.
29. By letter dated 24 August 2009, Claimant wrote to the Tribunal requesting an additional extension of its deadline for submission of its Rejoinder to Jurisdiction, from 30 November 2009 to 14 December 2009. Claimant noted that it had been authorized by Respondent to state that Respondent did not object to such an extension.
30. By letter dated 31 August 2009, the PCA, under instruction from the Tribunal, informed the Parties that Claimant's request dated 24 August 2009 had been granted and its deadline for submission of its Rejoinder would be amended in the agreed timetable to 14 December

2009. The PCA, under instruction from the Tribunal, further informed the Parties that the dates agreed upon for the hearing (29-31 March 2010) remained unchanged.

31. On 30 September 2009, Respondent filed its Reply on Jurisdiction (“Reply”), in accordance with the timetable provided for in the PCA’s letters dated 30 March 2009, 17 August 2009 and 31 August 2009.
32. On 14 December 2009, Claimant filed its Rejoinder on Jurisdiction (“Rejoinder”), in accordance with the timetable provided for in the PCA’s letters dated 30 March 2009, 17 August 2009 and 31 August 2009.
33. By letter dated 25 January 2010, Respondent requested that the Tribunal order Claimant to produce to the Tribunal and Respondent certain documents which Respondent believed to be “important for the determinations the Tribunal must soon make”<sup>10</sup> regarding the jurisdictional dispute between the Parties.
34. By letter dated 27 January 2010, the PCA, under instruction from the Tribunal, invited Claimant to submit its comments on Respondent’s request of 25 January 2010 by 2 February 2010.
35. By letter dated 2 February 2010, Claimant submitted reasons for which it believed Respondent’s request filed on 25 January 2010 should be rejected.
36. By letter dated 9 February 2010, the PCA, under instruction from the Tribunal, informed the Parties of the Tribunal’s following decision with respect to Respondent’s request (referred to below as the “Request”):

*1. The Tribunal notes that document production is primarily designed to assist the Parties in the preparation of their written pleadings, rather than their oral pleadings. In addition, the arguments raised in the Claimant’s Rejoinder have long been known to the Respondent. Any document request from the Respondent should have been filed following the submission in June 2009 of the Claimant’s Answer to the Respondent’s Objections to Jurisdiction and Admissibility, in which the Claimant’s arguments were originally submitted. In view of the foregoing and the long-established schedule of this case, the Request has been submitted at too late a stage to be accepted by this Tribunal.*

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<sup>10</sup> Letter from Respondent dated 25 January 2010.

*2. As the Parties may recall, the Tribunal granted in August 2009 the one-month extension of time requested by the Respondent to file its Reply, on the understanding that this extension would not jeopardize the hearing dates that were being considered at the time, namely March 29-31, 2010. Later that month, the Tribunal also granted the extension of time that the Claimant requested to file its Rejoinder, and expressly confirmed that the hearing would be held on the above-mentioned dates. Due to the tardiness of the Request, it would be very difficult, if not impossible, to accommodate it without disrupting the hearing, a step which the Tribunal is not prepared to take.*

*3. For the reasons set out above, the Request is denied. Without prejudice to the Tribunal's decision on jurisdiction, the Parties are further advised that if the Tribunal were to decide to join some jurisdictional issues to the merits, it would again assess whether the documentary evidence before it is sufficient. The Tribunal would have the opportunity to request the production of additional evidence relevant to these issues in the second phase of the proceedings. So would the Parties in their written pleadings on the merits.*

37. By letter dated 17 February 2010, the PCA, under instruction from the Tribunal, circulated Procedural Order No. 2 to the Parties concerning the organization of the hearing on jurisdiction scheduled for 29-31 March 2010.
38. By letter dated 26 March 2010, Respondent filed a request for leave from the Tribunal to produce additional documents, attaching the documents in question.
39. By letter of the same date, the PCA, under instruction from the Tribunal, invited Claimant to submit its comments on Respondent's letter of 26 March 2010.
40. On the same day, Claimant filed its comments regarding Respondent's letter, along with new legal authorities. Claimant did not object to the admission of the new documents filed by Respondent but indicated that it "would expect that should it seek leave to file new exhibits of its own in the jurisdictional phase of this arbitration, Claimant would be afforded the same treatment."<sup>11</sup>
41. By letter dated 28 March 2010, the PCA, under instruction from the Tribunal, informed the Parties of the Tribunal's decision (i) to admit the new documents that both Parties had submitted on 26 March 2010, and (ii) to draw the Parties' attention to the fact that the rule prohibiting the submission of new documents "except with leave of the Tribunal for exceptional reasons" remained fully applicable.

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<sup>11</sup> Letter from Claimant dated 26 March 2010.

**E. ORAL PHASE OF THE PROCEEDINGS**

42. From 29 March through 31 March 2010, the hearing on jurisdiction was held at the Peace Palace, at The Hague, The Netherlands. Present at the hearing were:

**Tribunal:**

Professor Francisco Orrego Vicuña

The Honorable Charles N. Brower

The Honorable Marc Lalonde, P.C., O.C., Q.C.

**For Claimant:**

Mr. William B. McGurn III

Ms. Claudia Annacker

Mr. Cameron Murphy

Mr. Lorenzo Melchionda

Ms. Laurie Achtouk-Spivak

Ms. Alexandra Karaganova

Ms. Natalia Bourobina

Mr. Peter Gloushkov

Mr. Igor Nazarchuk

**For Respondent:**

Mr. Eric Schwartz

Mr. James Castello

Mr. Alain Farhad

Ms. Lorraine de Germiny

Mr. Dmitri Grischenko

Ms. Iryna Telychko

**Permanent Court of Arbitration:**

Daniel Drabkin

Paul-Jean Le Canu

**Court reporter :**

Mr. Trevor McGowan

## CHAPTER II – FACTUAL BACKGROUND

43. Claimant is a publicly traded open joint stock company incorporated in accordance with Russian law and has its registered office in the Republic of Tatarstan,<sup>12</sup> a constituent republic of the Russian Federation. Tatneft is one of the largest producers of crude oil in Russia and produces 80% of the crude oil in Tatarstan.<sup>13</sup> The Government of the Republic of Tatarstan holds a 36% interest and special voting rights in Tatneft.<sup>14</sup> The rest of Tatneft's shares is held by other investors.<sup>15</sup>
44. Respondent is Ukraine, a sovereign State successor to the Ukrainian Soviet Socialist Republic.<sup>16</sup>

### A. THE CREATION OF UKRTATNAFTA

45. Tatneft is a shareholder of the Transnational Finance and Production Petroleum Company Ukrtatnafta (“Ukrtatnafta”),<sup>17</sup> a Ukrainian closed joint stock company<sup>18</sup> that owns and operates the oil refinery in Kremenchug (the “Kremenchug Refinery”).<sup>19</sup>
46. The Kremenchug Refinery had been specifically designed during the Soviet era to process and refine oil extracted in Tatarstan, which is highly viscose and sulfurous.<sup>20</sup> With the dissolution of the Soviet Union and the creation of new international borders, the

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<sup>12</sup> Statement of Claim, para. 3 ; Certificate of the Ministry of the Russian Federation for Taxes and Levies, Exhibit C-1. See also Answer, para. 20; Rejoinder, para. 7; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 46.

<sup>13</sup> Statement of Defense, paras. 6-7; Tatneft's 2006 Form 20-F, SEC Filing, p. 51, Exhibit R-3.

<sup>14</sup> Tatneft's 2006 Form 20-F filing with the U.S. Securities Exchange Commission, pp. 21-22, 137, 139, Exhibit R-3; Answer, para. 20 and footnote 25. Tatneft's “Golden Share” is a share carrying “the right to veto certain decisions taken at meetings of the shareholders and the Board of Directors.” (Tatneft's 2006 Form 20-F filing with the U.S. Securities Exchange Commission, F-10, Exhibit R-3).

<sup>15</sup> See, for example, Statement of Defense, para. 68; Answer, para. 20; Reply, paras. 65-67; Rejoinder, para. 9; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 23-27.

<sup>16</sup> Statement of Defense, para. 9.

<sup>17</sup> The lawfulness of Tatneft's acquisition of Ukratatnafta shares has recently been subject to litigation in Ukrainian courts, which have ordered Tatneft to return its shares in Ukrtatnafta. See below, para. 64.

<sup>18</sup> Treaty between the Government of Ukraine and the Government of the Republic of Tatarstan on Incorporation of Transnational Finance and Production Petroleum Company “Ukrtatnafta”, Article 1, Exhibit R-1; Agreement of incorporation and operation of Close Type Joint Stock Company – Transnational Finance and Production Petroleum Company “Ukrtatnafta”, para. 2.1, Exhibit R-8 (“1995 Incorporation Agreement”).

<sup>19</sup> Statement of Claim, para. 12.

<sup>20</sup> Statement of Defense, para. 51; Extract from Taneco's website, downloaded on 1 October 2009, Exhibit R-77; Reply, para. 120; Rejoinder, paras. 62, 284.

Kremenchug Refinery was separated from its oil supply located in Tatarstan.<sup>21</sup> To enable its continued operation, Ukrtatnafta was established as “an integrated interstate economic complex of Ukraine and the Republic of Tatarstan” pursuant to the *Treaty between the Government of Ukraine and the Government of the Republic of Tatarstan on Incorporation of Transnational Finance and Production Petroleum Company “Ukrtatnafta”* concluded on 4 July 1995 (the “Ukrtatnafta Treaty”).<sup>22</sup> According to Article 4 of the Ukrtatnafta Treaty, “the minimum amount of oil to be supplied from the Republic of Tatarstan to Ukraine for refinement by the production facilities of the company [...] [would] be equal to or greater than 8 million tons per annum starting in 1996, including up to 4 million tons of oil in 1995.”<sup>23</sup> The purpose of Ukrtatnafta was thus to exploit the Kremenchug Refinery efficiently and ensure an outlet for Tatar oil.<sup>24</sup> According to Claimant, because of its status as the largest producer of crude oil in Tatarstan, Tatneft was to be the principal supplier of oil to Ukrtatnafta under these arrangements.<sup>25</sup>

47. The conclusion of the Ukrtatnafta Treaty took place “within the framework of performance”<sup>26</sup> of the *Treaty between the Government of the Russian Federation and the Government of Ukraine on Cooperation in Development of the Fuel and Energy Complexes* signed on 7 September 1994 (the “1994 Fuel and Energy Cooperation Treaty”).<sup>27</sup> Among other things, the 1994 Fuel and Energy Cooperation Treaty encourages the creation of joint ventures and interstate companies as a form of cooperation to address the problems affecting interconnected energy projects in the aftermath of the USSR’s dismemberment.<sup>28</sup>

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<sup>21</sup> Statement of Defense, paras. 12, 51; Reply, para. 121.

<sup>22</sup> Ukrtatnafta Treaty, Article 3, Exhibit R-1. See also Decree of the President of the Republic of Tatarstan on Incorporation of Transnational Finance and Production Petroleum Company “Ukrtatnafta”, Exhibit R-6; decree of the President of Ukraine on Incorporation of Transnational Finance and Production Petroleum Company “Ukrtatnafta”, Exhibit R-5.

<sup>23</sup> Ukrtatnafta Treaty, Article 4, Exhibit R-1.

<sup>24</sup> Statement of Defense, para. 12.

<sup>25</sup> Statement of Claim, para. 12; Rejoinder para. 284; Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 57, 85.

<sup>26</sup> Ukrtatnafta Treaty, Article 3, Exhibit R-1.

<sup>27</sup> 1994 Fuel and Energy Cooperation Treaty, Exhibit R-7.

<sup>28</sup> 1994 Fuel and Energy Cooperation Treaty, Preamble and Article 7, Exhibit R-7; Statement of Defense, para. 47.

**B. THE CONCLUSION OF THE RUSSIA-UKRAINE BIT AND THE 1993 INVESTMENT COOPERATION AGREEMENT**

48. On 27 November 1998, the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine concluded the Russia-Ukraine BIT, the treaty under which Claimant brings its claims. The purpose of this treaty was, among others things, “to develop the basic provisions”<sup>29</sup> of the *Agreement on Cooperation in the Field of Investment* dated 24 December 1993 (the “1993 Investment Cooperation Agreement”), a multilateral agreement to which both Russia and Ukraine were signatory.<sup>30</sup>

**C. THE EVOLUTION OF UKRTATNAFTA’S SHAREHOLDING STRUCTURE**

49. Since its incorporation in 1995, Ukrtatnafta’s shareholding structure has undergone several changes. Pursuant to the Ukrtatnafta Treaty, Ukrtatnafta was incorporated “on a parity basis”<sup>31</sup> and, in the words of the Parties, “as a 50:50 joint venture” between Russian and Ukrainian interests.<sup>32</sup> Under the original shareholding structure, Ukrtatnafta was to be owned 20.01% by Tatneft, 29.734% by the State Committee of the Republic of Tatarstan on the State Property Administration (the “State Committee”), 49.986% by the State Property Fund of Ukraine, and the remaining fraction of a percentage by seven other shareholders.<sup>33</sup>

50. In exchange for its 20.01% share, Tatneft was to contribute “180.90 Million US Dollars in the form of the fixed assets pertaining solely to operation of the oil wells on 22 oil deposits

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<sup>29</sup> Russia-Ukraine BIT, Preamble, Exhibit R-2.

<sup>30</sup> 1993 Investment Cooperation Agreement, CLA-5. This Agreement was terminated for the Russian Federation as of 3 April 2002.

<sup>31</sup> Ukrtatnafta Treaty, Article 1, Exhibit R-1.

<sup>32</sup> Statement of Claim, para. 12; Statement of Defense, para. 13. Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 133; Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 4.

<sup>33</sup> Statement of Claim, para. 12; Statement of Defense, para. 14; Agreement of incorporation and operation of Close Type Joint Stock Company – Transnational Finance and Production Petroleum Company “Ukrtatnafta”, para. 5, Exhibit R-8 (“1995 Incorporation Agreement”). See also Charter of Closed Joint Stock Company Transnational Finance and Production Petroleum Company, Article 6, Exhibit C-120.

within the territory of the Republic of Tatarstan [...] for the term of 20 years.”<sup>34</sup> Tatneft did not, however, contribute those oil-related assets.<sup>35</sup>

51. On 20 May 1998, Ukratnafta entered into an option agreement with Zenit Bank (the “Option Agreement”), which acted as a trustee for Tatneft.<sup>36</sup> Pursuant to this agreement, Zenit Bank purchased an option on the acquisition of 30,000 shares in Ukratnafta with a nominal value of US\$ 1,000 per share,<sup>37</sup> and agreed to transfer the sum of US\$ 30 million to Ukratnafta prior to 1 June 1998 as payment for the option.<sup>38</sup> The option allowed Zenit Bank to demand repayment by Ukratnafta of the US\$ 30 million “at any time” and at first demand Ukratnafta was required to “return the monetary funds.”<sup>39</sup> The Option Agreement also provided that “the proposed participation of [Zenit Bank] in [Ukratnafta] shall be of temporary character and is aimed at an ownership of the block of shares for the benefits of JSC Tatneft until JSC Tatneft receives a license for buying out shares of a non-resident from [Zenit Bank].”<sup>40</sup> The term of the option was until 1 September 1998.<sup>41</sup>
52. The option was paid for by Zenit Bank by 1 June 1998 using funds provided by Tatneft under a trust agreement.<sup>42</sup> Shortly thereafter, at a general shareholders meeting on 10 June 1998,<sup>43</sup> the 1995 Incorporation Agreement was modified<sup>44</sup> following an expert reappraisal of the Kremenchug Refinery<sup>45</sup> and the exit from the company of certain shareholders as

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<sup>34</sup> 1995 Incorporation Agreement, para. 5, Exhibit R-8.

<sup>35</sup> Reply, para. 6; Rejoinder, para. 152.

<sup>36</sup> Trust Management Agreement No. 1//du-V/97 of 26 October 1997, Exhibit C-136; Rejoinder, paras. 157-159.

<sup>37</sup> Option Agreement No. 77 of 20 May 1998, para. 1.1, Exhibit C-137.

<sup>38</sup> Option Agreement No. 77 of 20 May 1998, para. 2.1, Exhibit C-137; Jurisdictional Hearing Transcript, Monday, 29 March 2010, pp. 125, 144-149.

<sup>39</sup> Option Agreement No. 77 of 20 May 1998, para. 2.3, Exhibit C-137.

<sup>40</sup> Option Agreement No. 77 of 20 May 1998, para. 1.2, Exhibit C-137.

<sup>41</sup> Option Agreement No. 77 of 20 May 1998, para. 1.1, Exhibit C-137.

<sup>42</sup> Rejoinder, para. 159, footnote 223; Trust Management Agreement No. 1//du-V/97 of 26 October 1997, Exhibit C-136; Foreign Currency Debit Memo No. 115\_9 of 1 June 1998 and Foreign Currency Debit Memo No. 115\_10 of 1 June 1998, Exhibit C-138.

<sup>43</sup> See Ukratnafta Minutes No. 3 of 10 June 1998, Exhibit C-131.

<sup>44</sup> Ukratnafta Minutes No. 3 of 10 June 1998, paras. 3.1-3.5, Exhibit C-131; Agreement of incorporation and operation of Close Type Joint Stock Company – Transnational Finance and Production Petroleum Company “Ukratnafta” New Wording Identification Code 001152307, Exhibit R-9 (“1998 Amended Incorporation Agreement”).

<sup>45</sup> In 1997 Ukratnafta’s shareholders unanimously agreed that a Ukrainian-Hungarian appraisal company would perform a second valuation to Ukraine’s initial valuation of the Kremenchug Refinery. See Minutes of Ukratnafta General Meeting No. 2 of 19 July 1997, para. 2, Exhibit C-122; and Rejoinder, paras. 154-155. The second appraisal

well as the entry of others.<sup>46</sup> In addition to a general reduction of the authorized capital of the company,<sup>47</sup> the shareholding of the State Property Fund of Ukraine, the State Committee and Tatneft were reduced,<sup>48</sup> while a Swiss company, Amruz Trading AG (“Amruz”) was, amongst others, introduced to Ukratnafta’s shareholding capital.<sup>49</sup> The Amended Incorporation Agreement<sup>50</sup> outlined the following ownership structure: Tatneft would own 0.278% of the capital, the State Committee 28.779%, the State Property Fund of Ukraine 43.054%, Amruz 8.336%, Zenit Bank 8.336%, Limited Liability Company “G-Auto LTD” 8.336%, and small minority shareholders owned the remaining 2.881%.<sup>51</sup> Tatneft was to contribute US\$ 1 million for its shares by 10 September 1998.<sup>52</sup>

53. On 1 June 1999, Ukratnafta concluded share purchase agreements with Amruz and Seagroup International Inc. (“Seagroup”), the latter a company registered in the United States.<sup>53</sup> Amruz and Seagroup each paid for their shares in Ukratnafta with promissory notes.<sup>54</sup> As a result of these agreements, Amruz held 8.336% of the shares in Ukratnafta (representing US\$ 30 million), and Seagroup held 9.96% of the shares in Ukratnafta (representing US\$ 35,845,132).<sup>55</sup> According to the Chief Control and Audit Office of

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significantly lowered the value of the Kremenchug Refinery, from US\$ 449.875 million to US\$ 154.95 million. See 1995 Incorporation Agreement, para. 5.2, Exhibit R-8; Rejoinder, para. 154-155; Reply, para. 9; Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 149.

<sup>46</sup> In particular, JV “Tink”, JV “Joy-Tatneftprom TR Communications”, and JSB “Expobank” ceased their founder memberships, and Bank “Zenit”, the Industrial and Financial Bank, Company “Amruz Trading AG”, and LLC “G-Auto Ltd.” became included as founders. See Ukratnafta Minutes No. 3 of 10 June 1998, Section 3.3, Exhibit C-131.

<sup>47</sup> The authorized capital of Ukratnafta was reduced from US\$ 900 million to US\$ 359.9 million. Ukratnafta Minutes No. 3 of 10 June 1998, Section 3.3, Exhibit C-131; see also Rejoinder, para 155.

<sup>48</sup> See 1998 Amended Incorporation Agreement, Exhibit R-9.

<sup>49</sup> Ukratnafta Minutes No. 3 of 10 June 1998, para. 3.3, Exhibit C-131.

<sup>50</sup> 1998 Amended Incorporation Agreement, Exhibit R-9.

<sup>51</sup> 1998 Amended Incorporation Agreement, Art. 5(4), Exhibit R-9.

<sup>52</sup> 1998 Amended Incorporation Agreement, Art. 5(3) and (5), Exhibit R-9.

<sup>53</sup> Share Sale and Purchase agreement No.02-1-99 between Ukratnafta and AmRuz Trading AG dated 1 June 1999, Exhibit C-16; Share Sale and Purchase agreement No.1747/12 between Ukratnafta and Seagroup International Inc. dated 1 June 1999, Exhibit C-17; Statement of Claim, para. 13.

<sup>54</sup> Share Sale and Purchase Agreement No.02-1-99 between Ukratnafta and AmRuz Trading AG dated 1 June 1999, Exhibit C-16; Share Sale and Purchase agreement No.1747/12 between Ukratnafta and Seagroup International Inc. dated 1 June 1999, Exhibit C-17.

<sup>55</sup> Agreement on Creation and Operation of Ukratnafta Transnational Financial and Industrial Petroleum Company 1999, Art. 5(3) and (4), Exhibit C-149 (the “1999 Incorporation Agreement”). In a general shareholders’ meeting of Ukratnafta of 27 July 1999, it was noted that “OAO Tatneft [was] currently in the process of completing formal procedures relating to the payment of its share in the charter capital of ZAO Ukratnafta.” (Minutes No. 5 of the General Shareholders’ Meeting of Ukratnafta of 27 July 1999, para. 2.5, Exhibit C-132).

Ukraine, only one of Amruz's thirty promissory notes was redeemed to Ukratnafta; similarly, out of the thirty-six promissory notes that Seagroup used as means of payment, only two were redeemed.<sup>56</sup> Ukratnafta subsequently sold the remaining promissory notes at a loss.<sup>57</sup>

54. On 23 May 2000, Ukratnafta's shareholders decided "[t]o agree with the transfer of 123,474,000 shares in AO Ukratnafta with the value of US\$30 million from ZENIT Bank to AO Tatneft."<sup>58</sup> On 16 June 2000, Ukratnafta concluded a share purchase agreement with Zenit Bank for 123,474,000 shares at a total price of US\$ 30 million.<sup>59</sup> The funds previously transferred to Ukratnafta by Zenit Bank pursuant to its Option Agreement<sup>60</sup> set off its payment obligations under the share purchase agreement.<sup>61</sup> Soon thereafter the shares Zenit Bank held in Ukratnafta were transferred to Tatneft.<sup>62</sup> On 14 August 2000, Tatneft also contributed US\$ 1 million directly to Ukratnafta's capital.<sup>63</sup> As a result of these transactions, Tatneft held 8.613% of the shares in Ukratnafta (representing US\$ 31 million).<sup>64</sup>

55. At this time, the State Committee owned 28.778% of the shares in Ukratnafta.<sup>65</sup> Amruz and Seagroup held 8.336% and 9.960% of the capital, respectively.<sup>66</sup> The shareholding of the

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<sup>56</sup> Chief Control and Audit Office of Ukraine, memorandum regarding the restoration of the State's right to ownership of the controlling block of shares of CJSC "Ukratnafta" dated 28 November 2006, p. 2, Exhibit R-10; Reply, para. 235.

<sup>57</sup> Chief Control and Audit Office of Ukraine, memorandum regarding the restoration of the State's right to ownership of the controlling block of shares of CJSC "Ukratnafta" dated 28 November 2006, pp. 2-3, Exhibit R-10.

<sup>58</sup> Minutes No. 6 of the General Shareholders' Meeting of ZAO Ukratnafta of 23 May 2000, para. 6.

<sup>59</sup> Share Purchase Agreement No. 23-001/Ukr of 16 June 2000, Article 1, Exhibit C-141.

<sup>60</sup> Option Agreement No. 77 of May 20, 1998, Exhibit C-137.

<sup>61</sup> Share Purchase Agreement No. 23-001/Ukr of 16 June 2000, Article 2.1, Exhibit C-141.

<sup>62</sup> Instrument of Transfer dated 19 July 2000, Exhibit C-143; Extracts from the Register of Owners of Registered Securities dated 19 July 2000, Exhibits C-142 and C-144. See generally Rejoinder, footnote 223. See also Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, page 119.

<sup>63</sup> Statements of Personal Account of 11 and 14 August 2000, Exhibit C-145; Statement of Defense, para. 16; Reply para. 2; Inspection Report, 8 September 2005, p. 12, Exhibit R-42; Rejoinder, para. 159, footnote 223; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 119; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 7.

<sup>64</sup> Minutes No. 7 of the General Shareholders Meeting of CJSC Ukratnafta of 28-29 August 2000, Exhibit C-147; Contract for Establishment and Operation of the Closed Joint Stock Company "Ukratnafta Transnational Finance and Production Petroleum Company" (as amended) ID code 00152307, Art. 5.3 and 5.4, Exhibit C-146. See also Statement of Register of owners of registered securities – Status of personal account as of 15 August 2000, Exhibit C-148.

<sup>65</sup> Contract for Establishment and Operation of the Closed Joint Stock Company "Ukratnafta Transnational Finance and Production Petroleum Company" (as amended) ID code 00152307, Art. 5.4, Exhibit C-146.

State Property Fund of Ukraine, which then amounted to 43.054% of Ukrtatnafta's capital,<sup>67</sup> was later transferred to NAK Naftogaz of Ukraine ("Naftogaz"), a Ukrainian oil and gas production company wholly owned and controlled by the Ukrainian Government.<sup>68</sup> Small minority shareholders owned the remaining 1.259% of Ukrtatnafta's shares.<sup>69</sup>

56. Several of the above-described transactions have been litigated in Ukrainian courts and as a result further developments with respect to Ukrtatnafta's shareholding structure have taken place.

**D. LITIGATION RELATING TO THE ACQUISITION OF SHARES IN UKRTATNAFTA BY AMRUZ, SEAGROUP AND TATNEFT**

57. The acquisitions of shares in Ukrtatnafta by Amruz, Seagroup and Tatneft have been litigated extensively.

58. On 8 August 2001, the State Property Fund of Ukraine initiated court proceedings seeking the invalidation of the share purchase agreements concluded between Ukrtatnafta and Amruz and Seagroup.<sup>70</sup> The State Property Fund was eventually unsuccessful in these proceedings.<sup>71</sup> Naftogaz subsequently initiated court proceedings to obtain the invalidation of Article 5.3 of Ukrtatnafta's Incorporation Agreement to the extent that it was amended to refer to the use of promissory notes by Amruz and Seagroup for the payment of their shares

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Decree No. 814 from the President of Ukraine (16 July 2004), Exhibit C-18; Statement of Claim, footnote 18; Statement of Defense, paras. 10, 17; 1998 Amended Incorporation Agreement, Art. 5(4), Exhibit R-9.

<sup>69</sup> Contract for Establishment and Operation of the Closed Joint Stock Company "Ukrtatnafta Transnational Finance and Production Petroleum Company" (as amended) ID code 00152307, Art. 5.4, Exhibit C-146.

<sup>70</sup> Judgments of the Supreme Court of Ukraine of 18 July 2002 and 1 November 2002, Cases No. 28/198 and 28/199, Exhibits C-86, C-87, C-88 and C-89; See also the judgments of the Supreme Court of Ukraine of 18 March 2008, Exhibit C-83 and C-84.

<sup>71</sup> Both the Economic Court of the city of Kiev (on 28 November 2001) and the Economic Court of Appeal of the city of Kiev (on 14 March 2002) had upheld the claim of the State Property Fund. The Supreme Economic Court of Ukraine, however, reversed the lower courts' decisions on 29 May 2002. The Supreme Court of Ukraine eventually rejected the State Property Fund's cassation appeals on 18 July 2002 and 1 November 2002 (Judgments of the Supreme Court of Ukraine of 18 July 2002 and 1 November 2002, Cases No. 28/198 and 28/199, Exhibits C-86, C-87, C-88 and C-89). See also the judgments of the Supreme Court of Ukraine of 18 March 2008, Exhibit C-83 and C-84. On 12 November 2002, the Economic Court of the Poltava Region also held that the reference to payment of shares with promissory notes in Art. 5.5 of Ukrtatnafta's Incorporation Agreement was valid. (Judgment of the Economic Court of the Poltava Region of November 12, 2002, Exhibit C-90).

in Ukratnafta.<sup>72</sup> The Supreme Court of Ukraine rejected Naftogaz's request in its decision of 18 April 2006.<sup>73</sup> In May 2007, however, the Ministry of Fuel and Energy of Ukraine applied for and obtained interim relief requiring the transfer of Amruz's and Seagroup's shareholding in Ukratnafta to Naftogaz.<sup>74</sup>

59. In addition, in July 2007, the Prosecutor General of Ukraine initiated court proceedings seeking the invalidation of the share purchase agreements entered into by Seagroup and Amruz, and an order that the shares be transferred to the State.<sup>75</sup> The Kiev Economic Court upheld the Prosecutor General's claims on 17 September 2007.<sup>76</sup> According to Respondent, the Kiev Economic Court of Appeal rejected appeals lodged by Amruz and Seagroup against the Economic Court's decisions on 30 October 2007.<sup>77</sup>
60. Shortly thereafter, in December 2007, Tatneft paid US\$ 57.1 million for all of the share capital of Seagroup and US\$ 23.9 million for a 49% stake in Amruz.<sup>78</sup> On 14 December 2007, according to Respondent, the Kiev Economic Court ordered measures for the enforcement of its decision of 17 September 2007.<sup>79</sup>

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<sup>72</sup> See Judgment of the Supreme Court of Ukraine of 18 April 2006, Case No. 15/559, Exhibit C-85.

<sup>73</sup> Judgment of the Supreme Court of Ukraine of 18 April 2006, Case No. 15/559, Exhibit C-85. The Economic Court of the City of Kiev had rejected Naftogaz's request on 10 January 2005 and its decision had been upheld by the Economic Court of Appeal of the City of Kiev on 1 April 2005. However, the Supreme Economic Court overturned the lower courts' decisions and granted the request on 6 September 2005. (See Judgment of the Supreme Court of Ukraine of 18 April 2006, Case No. 15/559, Exhibit C-85).

<sup>74</sup> Ruling of the Zhovtnetnyi District Court of the city of Dnipropetrovs'k of 22 May 2007, Exhibits R-12 and C-93; Statement of Claim, para. 36; Answer, para. 135.

<sup>75</sup> Judgments of the Economic Court of the city of Kiev of 17 September 2007, Cases No. 25/330 and 25/331, Exhibits C-91 and C-92. For the purpose of the share transfer, the State was represented by the Ministry of Fuel and Energy of Ukraine.

<sup>76</sup> Judgments of the Economic Court of the city of Kiev of 17 September 2007, Cases No. 25/330 and 25/331, Exhibits C-91 and C-92. See also Rejoinder, para. 135, footnote 127.

<sup>77</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 185; Respondent's Opening Statement, Slide 12 of Mr. Farhad's presentation (Part III: Tatneft's claims in relation to Seagroup and Amruz), Jurisdictional Hearing, 29 March 2010.

<sup>78</sup> Rejoinder, para. 259; see also Answer, para. 75 and footnote 69; Tatneft's Consolidated Financial Statements for the Years Ending 31 December 2008 and 2007, p. 14, Exhibit C-34.

<sup>79</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 186; Respondent's Opening Statement, Slide 12 of Mr. Farhad's presentation (Part III: Tatneft's claims in relation to Seagroup and Amruz), Jurisdictional Hearing, 29 March 2010.

61. In February 2008, the Supreme Court of Ukraine reopened the court proceedings brought by the State Property Fund of Ukraine in 2001<sup>80</sup> pursuant to a request from the Prosecutor General.<sup>81</sup> On 28 May 2008, the Kiev Economic Court—to which the cases had been remanded for a new trial<sup>82</sup>—annulled the share purchase agreements and ordered the return of Seagroup's and Amruz's shares to Ukrtatnafta.<sup>83</sup> The Kiev Economic Court's decisions were subsequently confirmed by the Supreme Court of Ukraine.<sup>84</sup>
62. On 15 May 2008, according to Claimant, the proceedings initiated in July 2007<sup>85</sup> were stayed pending the decision of the cases reopened by the Supreme Court of Ukraine in February 2008.<sup>86</sup> On 10 February 2009, again according to Claimant, the Kiev Economic Court of Appeals discontinued the proceedings initiated in July 2007.<sup>87</sup>
63. Finally, on 31 March 2009 following an application by a Ukrainian company called Korsan, the Economic Court of the Poltava Region handed down a judgment ordering Ukrtatnafta to sell Amruz's and Seagroup's shares, which had been returned to Ukrtatnafta pursuant to the judgment of 28 May 2008.<sup>88</sup> According to Claimant, the auction of Amruz's and Seagroup's shares took place in June 2009, the winner of which was Korsan.<sup>89</sup> As a result, Korsan now holds over 20% of Ukrtatnafta's shares.<sup>90</sup>

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<sup>80</sup> See above, para. 59; Judgments of the Supreme Court of Ukraine of 18 July 2002 and 1 November 2002, Cases No. 28/198 and 28/199, Exhibits C-86, C-87, C-88 and C-89.

<sup>81</sup> Judgments of the Supreme Court of Ukraine of 21 February 2008, Cases No. 28/198 and 28/199, Exhibits C-81 and C-82; Answer, para. 132.

<sup>82</sup> Judgments of the Supreme Court of Ukraine of 18 March 2008, Exhibit C-83 and C-84.

<sup>83</sup> Judgments of the Kiev Economic Court of 28 May and 2 June 2008, Cases 28/198-32/175 and 28/199-32/176 (referred to in the Judgments of the Supreme Court of Ukraine of 27 November and 11 December 2008, Cases 28/198-32/175 and 28/199-32/176, Exhibit R-11). According to Claimant, Amruz and Seagroup were ordered to return the shares without compensation (Answer, para. 134).

<sup>84</sup> Judgments of the Supreme Court of Ukraine of 27 November and 11 December 2008, Cases 28/198-32/175 and 28/199-32/176, Exhibit R-11.

<sup>85</sup> See above, para. 59.

<sup>86</sup> Answer, para. 133. Claimant refers to Cases No. 25/330 and 25/331 (see *supra*, footnote 75).

<sup>87</sup> Answer, para. 138, footnote 129. Claimant refers to Cases No. 25/330 and 25/331 (see *supra*, footnote 75).

<sup>88</sup> Judgment of the Economic Court of the Poltava of 31 March 2009, Case No. 17/60, Exhibit C-96; Answer, para 138, footnote 130.

<sup>89</sup> Answer, para. 145; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 83.

<sup>90</sup> Rejoinder, para. 235. According to Claimant, Korsan had already acquired a 1.154% of the shares in 2007 (*Ibid.*).

64. Even more recently, on 3 November 2009, the Economic Court of the Poltava Region declared that Tatneft's acquisition of shares of Ukratnafta was unlawful and ordered Tatneft to return its shares to Ukratnafta.<sup>91</sup>

#### **E. THE MANAGEMENT OF UKRTATNAFTA**

65. On 22 September 1994, prior to Ukratnafta's incorporation, Tatarstan and Ukraine agreed that the Chairman of Ukratnafta's Supervisory Board would be a representative of the former, and the Chairman of the Management Board a representative of the latter.<sup>92</sup>
66. On 31 January 2003, the Ukratnafta Supervisory Board decided "[t]o accept the proposal from the Ukrainian State Property Fund for the appointment of Pavel Vladimirovich Ovcharenko as Chairman of the Management Board of 'Ukratnafta' JSC."<sup>93</sup> Mr. Ovcharenko entered into an employment contract as Chairman of Ukratnafta's Management Board on 6 February 2003.<sup>94</sup> On 15 September 2004, the Chairman of the Supervisory Board of Ukratnafta dismissed Mr. Ovcharenko from his position as Chairman of the Management Board.<sup>95</sup> On 21 September 2004, the Dzerzhinsky District Court in Kharkov ruled that the Supervisory Board of Ukratnafta was prohibited from holding meetings and making decisions to appoint and remove the Chairman and members of the company's Management Board.<sup>96</sup> On the same day, the members of the Supervisory Board of Ukratnafta were given notice of the initiation of proceedings to enforce the court's ruling.<sup>97</sup> The Supervisory Board however confirmed its Chairman's decision to

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<sup>91</sup> Judgment of the Economic Court of the Poltava Region of November 3, 2009, Case 17/178, Exhibit C-126. See also Rejoinder, para. 230, footnote 306; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, Tuesday, 30 March 2010, p. 23.

<sup>92</sup> Minutes of the Meeting between the Government of Ukraine and the Government of the Republic of Tatarstan on the Establishment of Transnational Finance and Production Petroleum company "UKRTATNAFTA", para. 8, Exhibit R-15; Statement of Defense, para. 21.

<sup>93</sup> Minutes No. 3/N/2003 of the 31 January 2003 Meeting of the Supervisory Board of Directors of Ukratnafta, Exhibit C-3; Statement of Claim, para. 16.

<sup>94</sup> Employment Contract dated 6 February 2003, Exhibit R-17.

<sup>95</sup> Statement of Claim, para. 17; Order from the Chairman of the Supervisory Board of Ukratnafta dated 15 September 2004, Exhibit C-4.

<sup>96</sup> Minutes No. 5/N/2004 of the 21 September 2004 Meeting of the Supervisory Board of Directors of Ukratnafta, Item 1, Exhibit C-5; Judgment of the Avtozavodsky District Court of 9 November 2004, Exhibit C-7.

<sup>97</sup> Judgment of the Avtozavodsky District Court of 9 November 2004, Exhibit C-7; Minutes No. 5/N/2004 of the 21 September 2004 Meeting of the Supervisory Board of Directors of Ukratnafta, Exhibit C-5.

dismiss Mr. Ovcharenko.<sup>98</sup> To fill the position, the Supervisory Board appointed Mr. Sergey Glushko as Acting Chairman of the Management Board.<sup>99</sup>

67. On 9 November 2004, following an application from Mr. Ovcharenko, the Avtozavodsky District Court in Kremenchug issued a decision reinstating Mr. Ovcharenko on the ground that his dismissal

*[...] took place contrary to a court ruling prohibiting [Ukratnafta's] supervisory board from holding any meetings to appoint and recall the chairman and members of its supervisory board, because the latter's members were aware of that proscription at the time of their meeting in question, because the supervisory board there dealt with an issue which was reserved under applicable legislation exclusively for the company's general meeting, and because during its termination of the claimant as chairman of the company's management board, the supervisory board was governed by such provision of the employment contract as was at odds with Ukrainian employment legislation and was void.<sup>100</sup>*

68. Mr. Ovcharenko was reinstated on 11 November 2004.<sup>101</sup> In a general meeting of Ukratnafta's shareholders held the following day, the removal of Mr. Ovcharenko from the position of Chairman of the Management Board was unanimously approved and the Supervisory Board was instructed to consider the appointment of Mr. Glushko to fill this position.<sup>102</sup> The decision by the Avtozavodsky District Court of 9 November 2004 was subject to various appeal proceedings,<sup>103</sup> and was ultimately confirmed on 29 August 2007 by the Appellate Court of the Sumy Region.<sup>104</sup>
69. On 19 October 2007, the Head of the Enforcement Unit of the Department of State Enforcement Service of the Central Department of Justice in Poltava Region ordered the

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<sup>98</sup> Statement of Claim, para. 17; Minutes No. 5/N/2004 of the 21 September 2004 Meeting of the Supervisory Board of Directors of Ukratnafta, Exhibit C-5.

<sup>99</sup> Statement of Claim, para. 17; Minutes No. 5/N/2004 of the 21 September 2004 Meeting of the Supervisory Board of Directors of Ukratnafta, Exhibit C-5; Direction of the Chairman of the Supervisory Board of Ukratnafta dated 16 September 2004, Exhibit C-6.

<sup>100</sup> Judgment of the Avtozavodsky District Court of 9 November 2004, Exhibit C-7.

<sup>101</sup> Order No. 4/1245 of the Acting Chairman of the Supervisory Board of Ukratnafta dated 16 September 2004, Exhibit C-8.

<sup>102</sup> Minutes of General Meeting of Ukratnafta's Shareholder dated 12 November 2004, Exhibit C-9; Statement of Claim, para. 19.

<sup>103</sup> Statement of Defense, para. 25; Decision of the Appellate Court of the Sumy Region dated 29 August 2007, Exhibit R-16.

<sup>104</sup> Decision of the Appellate Court of the Sumy Region dated 29 August 2007, Exhibit R-16.

enforcement of the decision of 9 November 2004.<sup>105</sup> According to Claimant, on the same day, Mr. Ovcharenko entered Ukrtatnafta's facilities with "a squad of more than fifty armed men and at least one bailiff" and seized control of the refinery, its offices, and its bank accounts.<sup>106</sup> Claimant contends that Mr. Ovcharenko's conduct has deprived Tatneft "of payment for oil already delivered and [has] prevented Tatneft from continuing to enjoy its role as the principal supplier of oil to Ukrtatnafta."<sup>107</sup> Since this seizure, Mr. Ovcharenko has remained in control of the company.<sup>108</sup>

70. According to Respondent, Naftogaz took steps to organize a general shareholders' meeting for the purpose of considering the replacement of Mr. Ovcharenko in December 2007.<sup>109</sup> However, because the representatives of Tatneft and the Tatar shareholders did not attend the meeting, the quorum requirements were not met.<sup>110</sup> According to Claimant, Tatneft did not participate in the general shareholders' meeting in December 2007 because it had been "deprived of its status as a member of a control block [and] was bound to be outvoted by the very interests that had destroyed that block."<sup>111</sup>

#### **F. THE SALE OF OIL BY TATNEFT TO UKRTATNAFTA**

71. Under Contract No. 3-0407 dated 23 April 2007, a company called Suvar-Kazan, which Tatneft describes as its Commission Agent,<sup>112</sup> agreed to sell oil to a Ukrainian entity called Avto to supply the Kremenchug Refinery; the value of the contract was estimated at US\$ 1.8 billion.<sup>113</sup> According to Claimant, Suvar-Kazan thus sold US\$ 1.09 billion worth of oil to Avto that was delivered to Ukrtatnafta.<sup>114</sup> Two other companies, Taiz LLC and

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<sup>105</sup> Enforcement Order of the Head of the Enforcement Unit of the Department of State Enforcement Service of the Central Department of Justice in Poltava Region, Exhibit R-21.

<sup>106</sup> Statement of Claim, para. 21; See also Answer, paras. 96-97; Rejoinder, para. 248.

<sup>107</sup> Statement of Claim, para. 39; Answer, para. 78; Rejoinder, paras. 283-284.

<sup>108</sup> Statement of Claim, para. 22.

<sup>109</sup> Statement of Defense, para. 27; Answer, footnote 91; Reply, para. 201.

<sup>110</sup> Statement of Defense, para. 27; Answer, footnote 91; Reply, para. 201.

<sup>111</sup> Rejoinder, para. 251.

<sup>112</sup> Rejoinder, para. 281; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 198-199.

<sup>113</sup> Contract No. 3-0407 between Suvar-Kazan and Private Multisectoral Industrial and Commercial Enterprise AVTO dated 23 April 2007, Exhibit C-171; Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, p. 6, Exhibit R-40.

<sup>114</sup> Rejoinder, para. 281; Enroute Instructions for oil deliveries to Ukrtatnafta dated 16 and 30 May, 10 July, 13 August, and 12 September 2007, Exhibit C-172.

Technoprogress, were involved as intermediaries in these oil sales to Ukrtatnafta.<sup>115</sup> Ukrtatnafta failed to pay for the oil deliveries made pursuant to Contract No. 3-0407.<sup>116</sup> As a result, Avto claims to have been unable to make the required payments under the contract.<sup>117</sup> Tatneft in turn claims that “it is in fact owed US\$ 439 million for oil it provided to Ukrtatnafta and US\$ 81 million for damages incurred as a result of such failure to pay for the oil.”<sup>118</sup>

72. On 29 October 2007, Mr. Ovcharenko wrote to Tatneft to propose the signature of long-term oil supply contracts with Ukrtatnafta.<sup>119</sup> On 2 November 2007, the First Deputy General Director of Tatneft wrote to Mr. Glushko to inform him that Mr. Ovcharenko’s request contained unacceptable mistakes and would not be considered by Tatneft.<sup>120</sup>
73. On 18 April 2008, Suvar-Kazan entered into an agreement with Avto, Taiz and Technoprogress whereby the latter three companies assigned their claims for unpaid oil to Suvar-Kazan.<sup>121</sup> On the basis of this assignment agreement, Suvar-Kazan initiated proceedings before the State Arbitration Court of the Republic of Tatarstan (the “Arbitration Court”) to recover a sum in excess of 2.6 billion Ukrainian hryvna, the equivalent of approximately US\$ 583 million.<sup>122</sup> The Arbitration Court upheld Suvar-Kazan’s claim in the amount of 2.5 billion Ukrainian hryvna, including penalties.<sup>123</sup>

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<sup>115</sup> Avto had entered into a “Contract of Commission of Agency” with Taiz which in turn sold the oil either directly to Ukrtatnafta or through Technoprogress (Letter from Avto to Tatneft dated 10 December 2007, Exhibit C-173); see also Rejoinder, para. 282; Reply, para. 262; Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 199-200; Respondent’s Opening Statement, Slides 3-4 of Mr. Farhad’s presentation (Part IV: Tatneft’s claim for unpaid oil under the Russia-Ukraine BIT), Jurisdictional Hearing, 29 March 2010; Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, p. 6, Exhibit R-40.

<sup>116</sup> Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, p. 11, Exhibit R-40.

<sup>117</sup> Letter from Avto to Tatneft dated 10 December 2007; Letters from Avto to Suvar-Kazan dated 30 October and 6 November 2007; Letters from Suvar to Avto dated 13, 14 and 15 November 2007, Exhibit C-173.

<sup>118</sup> Rejoinder, para. 281.

<sup>119</sup> Letter from Mr. Ovcharenko to the First Deputy General Director of Tatneft dated 29 October 2007, Exhibit R-28.

<sup>120</sup> Letter from the First Deputy General Director of Tatneft to Mr. Glushko dated 2 November 2007, Exhibit R-29.

<sup>121</sup> Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, p. 6, Exhibit R-40. Ukrtatnafta sought the invalidation of the assignment agreement in the Ukrainian courts (*Ibid.*).

<sup>122</sup> Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, pp. 1-2, Exhibit R-40; Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 202.

<sup>123</sup> Decision of the State Arbitration Court of the Republic of Tatarstan of 5 September 2008, Case No. A65-9070/2008, p. 13, Exhibit R-40.

According to Claimant, evidence has been provided that less than US\$ 4 million have been paid by Ukratnafta out of the US\$ 439 million owed to Tatneft.<sup>124</sup>

74. The Tribunal will note other relevant facts in this case in connection with the examination of the Parties' arguments.

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<sup>124</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 21.

## **CHAPTER III – THE TRIBUNAL’S CONSIDERATIONS AND FINDINGS**

### **A. THE DISPUTE BROUGHT BEFORE THE TRIBUNAL**

75. The dispute brought before this Tribunal has as a triggering event what has been considered by Claimant to be the illegal “seizure” and “forcible takeover” of the Kremenchug Refinery by Mr. Pavel Ovcharenko on 19 October 2007, which, in Claimant’s view, had the result that Tatneft failed to receive payment for oil shipments and incurred losses in excess of US\$ 520 million. Claimant also asserts that it has been deprived of its role as the principal supplier of oil to Ukratnafta and that its investment in the latter company has been both harmed and put in peril. The amount claimed in compensation for loss of management rights and rights associated with its shareholding interest in Ukratnafta has been estimated by Claimant to be in excess of US\$ 610 million.
76. An additional claim in excess of US\$ 1.3 billion has also been submitted in connection with damages arising out of the alleged expropriation of the Ukratnafta shares belonging to Amruz and Seagroup.
77. Respondent denies that it has taken any action or been responsible for any inaction that might be in breach of the Russia-Ukraine BIT and submits that no damages have been proved by Claimant. Respondent has raised four main objections to the jurisdiction of the Tribunal and three concerning the admissibility of the claims, requesting their summary dismissal. Respondent’s objections to jurisdiction are premised on arguments against the application of the Russia-Ukraine BIT to this dispute. First, Respondent argues that a different treaty regime governs this dispute; second, Respondent contends that Claimant does not satisfy the definition of investor as provided in the Russia-Ukraine BIT; third, Respondent is of the view that Claimant has not made an investment under the Russia-Ukraine BIT; and fourth, Respondent argues that even if there was an investment, it was not made in conformity with Ukrainian law, and therefore does not satisfy the requirements for protection under the treaty. Respondent also objects to the admissibility of claims brought on behalf of Amruz and Seagroup, the admissibility of claims for unpaid oil deliveries, and finally objects that Tatneft has failed to state an arguable case concerning the alleged harm to its rights as a shareholder. As will be explained, this last objection was later partially withdrawn. These objections are addressed and decided in this Partial Award.

## B. OBJECTIONS TO JURISDICTION

### 1. First Objection to Jurisdiction: The Russia-Ukraine BIT Does Not Apply to Disputes concerning Ukrtatnafta

#### *Respondent's arguments*

78. It is Respondent's view that this case is not an investor-State arbitration but a dispute relating to an intergovernmental project, the Ukrtatnafta joint venture between Tatarstan and Ukraine.<sup>125</sup> Respondent maintains that since Ukrtatnafta was established pursuant to the Ukrtatnafta Treaty, which in turn was concluded within the framework of the 1994 Fuel and Energy Cooperation Treaty, a comprehensive regime governs the Ukrtatnafta project as a whole, including the procedures for the settlement of disputes that might arise.<sup>126</sup>
79. Such procedures are provided for under Article 14 of the 1994 Fuel and Energy Cooperation Treaty. Article 14 provides that:

*Disputed issues arising between business entities of the Parties in the execution of the agreements negotiated on the basis of the present Treaty shall, by agreement of the Parties, be subject to review by state arbitrage courts, provided no mutually acceptable solution was found theretofore.*

*Issues arising out of interpretation or application of the provisions of this Treaty shall be settled through negotiation and consultation in accordance with the rules of international law.*<sup>127</sup>

80. The first paragraph of Article 14 refers disputes between business entities to "state arbitrage courts," which are explained to be the ordinary judicial commercial courts.<sup>128</sup> The second paragraph refers issues arising out of interpretation or application of the Treaty to settlement "through negotiation and consultation in accordance with the rules of international law." Also the Ukrtatnafta Treaty provides in Article 11 that the Parties "shall settle all disputes related to the interpretation and fulfillment of the present Treaty by way of negotiation and consultation."<sup>129</sup> Disputes between "entities of the Parties" shall under

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<sup>125</sup> Statement of Defense, paras. 13, 39-40, 57 *et seq.*

<sup>126</sup> Statement of Defense, paras. 39-63; Reply paras. 16-111; and Legal Opinion of Zachary Douglas on Certain Questions of Jurisdiction and Admissibility ("Douglas Legal Opinion").

<sup>127</sup> 1994 Fuel and Energy Cooperation Treaty, Exhibit R-7.

<sup>128</sup> Statement of Defense, para. 49.

<sup>129</sup> Ukrtatnafta Treaty, Exhibit R-1.

Article 12(2) of the latter Treaty be dealt with by civil courts, state arbitrage courts and arbitration tribunals.<sup>130</sup>

81. Relying on the findings of the International Court of Justice in the *Right of Passage* case<sup>131</sup> and those in the *Tunisia/Libya Continental Shelf* case,<sup>132</sup> Respondent argues that the Ukratnafta Treaty regime is a case of *lex specialis* that will prevail over any other dispute settlement arrangements of a more general kind, such as those of the Russia-Ukraine BIT, which is thus inapplicable to this dispute.<sup>133</sup> Respondent notes, moreover, that as held in the *Mavrommatis Palestine Concessions* case<sup>134</sup> and in the *Southern Bluefin Tuna* case,<sup>135</sup> the principle of *lex specialis* also applies in the context of dispute resolution.
82. In Respondent's view, any recourse to the Russia-Ukraine BIT would upset the carefully-agreed dispute settlement arrangements expressly made by the parties to the specific treaties governing the Ukratnafta project noted above. As noted in the *Wintershall* case,<sup>136</sup> protecting the parties' agreement on a specific dispute resolution mechanism is a matter of importance. Respondent also notes that recourse to the Russia-Ukraine BIT would put Ukraine at a disadvantage as it could not bring potential counterclaims in relation to Tatarstan's oil delivery obligations because it would only allow for Russian investors to claim against Ukraine.<sup>137</sup> In addition, because the investment was made in Ukraine, it would not be possible either, in Respondent's view, for it to launch a parallel "investor" claim against Russia or Tatarstan to address the "complaints it might have concerning

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<sup>130</sup> Ukratnafta Treaty, Exhibit R-1.

<sup>131</sup> Statement of Defense, footnote 52; Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Reports 1960, p. 44, RLA-3.

<sup>132</sup> Statement of Defense, footnote 53 ; Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports 1982, p. 38, para. 24, RLA-4.

<sup>133</sup> See Statement of Defense, paras. 39-63; Reply paras. 16-111; and Douglas Legal Opinion generally.

<sup>134</sup> Statement of Defense, footnote 54; Mavrommatis Palestine Concessions (Greece v. The United Kingdom), PCIJ (Ser. A) No. 2, 1924, pp. 30-31, RLA-5.

<sup>135</sup> Statement of Defense, footnote 55; Southern Bluefin Tuna (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility of 4 August 2000, paras. 53-62, RLA-6.

<sup>136</sup> Statement of Defense, footnote 64; Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award(), 8 December 2008, RLA-9.

<sup>137</sup> Statement of Defense, para. 62.

Tatarstan's or the Russian Federation's defective implementation of the Ukrtatnafta project."<sup>138</sup>

*Claimant's arguments*

83. Claimant asserts to the contrary that the present dispute is governed by Article 9 of the Russia-Ukraine BIT as it relates specifically to the fact that Tatneft is a qualified investor that has made an investment covered by the Russia-Ukraine BIT and which is thus entitled to its protection.<sup>139</sup> Claimant notes in particular that Article 9 of the Russia-Ukraine BIT applies to “[a]ny dispute between one of the Contracting Parties and an investor of the other Contracting Party arising in connection with investments [...]”<sup>140</sup>
84. Claimant further argues that the principle of *lex specialis* applies “only where the parties and subject matter of conflicting norms are the same,”<sup>141</sup> a situation not present in this dispute because the subject matter of the 1994 Fuel and Energy Cooperation Treaty and the Ukrtatnafta Treaty are not concerned with investment protection but with pursuing cooperation in the energy field and the establishment of Ukrtatnafta following the dissolution of the Soviet Union.<sup>142</sup> It is noted that only the Russia-Ukraine BIT, signed more than three years later than the Ukrtatnafta Treaty was concluded, governs investment disputes, which is further confirmed by the fact that the Russia-Ukraine BIT makes no reference to those other treaties and instead relates to the 1993 Investment Cooperation Agreement.<sup>143</sup>
85. Claimant submits in this context that the Russia-Ukraine BIT refers to disputes between different parties and concerns subject matters different from the 1994 Fuel and Energy Cooperation Treaty and the Ukrtatnafta Treaty.<sup>144</sup> It notes in particular that this dispute is not between “business entities of the Parties” or “entities of the Parties,” as provided for by

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<sup>138</sup> Reply, para. 4.

<sup>139</sup> Answer, paras. 1-58; Rejoinder, paras. 69-145.

<sup>140</sup> Russia-Ukraine BIT, Exhibit C-23; Statement of Claim, para. 57; Answer, paras. 1-18; Rejoinder, para. 5.

<sup>141</sup> Answer, para. 2, footnote 5.

<sup>142</sup> Answer, para. 2.

<sup>143</sup> Answer, para. 2, footnote 6; Rejoinder, paras. 71-72.

<sup>144</sup> Answer, para. 4.

those other treaties, but it is a dispute between a Russian investor and Ukraine.<sup>145</sup> Moreover, the present dispute does not concern the interpretation or application of those other treaties. In any event, even if the dispute concerned issues of interpretation and application, this would not divest this Tribunal of jurisdiction as held in the *Mox Plant* case<sup>146</sup> or as evidenced by numerous situations of concurrent jurisdiction between international tribunals.<sup>147</sup>

86. Both the *Southern Bluefin Tuna* case and the *Mavrommatis* case, on which Respondent relies, are, in Claimant's view, inapposite in the present dispute because the first did not cancel out dispute settlement mechanisms in another treaty, and the second did not exclude jurisdiction over issues which could not have been submitted to alternative procedures.<sup>148</sup>

*The Tribunal's findings*

87. This first objection to the Tribunal's jurisdiction concerns in essence a question of treaty interpretation as to the operation of the principle of *lex specialis*. The Tribunal is called upon to decide which of two sets of treaties is to govern the present dispute as far as jurisdiction is concerned. The first set, relied upon by Respondent, is the 1994 Fuel and Energy Cooperation Treaty and the Ukrtatnafta Treaty, the latter being concluded "within the framework of performance of" the former.<sup>149</sup> The second set, relied upon by Claimant, is the 1993 Investment Cooperation Agreement and the Russia-Ukraine BIT, the latter being concluded to "develop the basic provisions of" the former.<sup>150</sup>
88. The dispute settlement provisions of these sets of treaties, as noted above, lead in opposite directions. The first set envisages negotiation and consultation for disputes concerning the

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<sup>145</sup> Answer, para. 5.

<sup>146</sup> Answer, para. 9, footnote 11; *The Mox Plant Case (Ireland v. United Kingdom)*, International Tribunal for the Law of the Sea, Order on the Request for Provisional Measures of 3 December 2001, International Legal Materials, 2001, vol. 41, p. 405 at p. 413, CLA-6.

<sup>147</sup> Answer, paras. 11-14.

<sup>148</sup> Answer, paras. 15-18.

<sup>149</sup> Ukrtatnafta Treaty, Article 3, Exhibit R-1.

<sup>150</sup> Russia-Ukraine BIT, Preamble, Exhibit R-2.

application or interpretation of the treaties at issue,<sup>151</sup> which is often the case in inter-governmental disputes, and contemplates domestic court proceedings for disputes relating to agreements entered into by “entities” or “business entities” of the parties.<sup>152</sup> The second set, however, provides specifically for investor-State arbitration when the dispute concerns measures affecting a protected investor and a qualifying investment.<sup>153</sup>

89. This discussion involves issues that often arise when competing titles to jurisdiction are involved. While in this case, in spite of the intense litigation before both Russian and Ukrainian courts, no competing jurisdiction appears to have arisen between different international tribunals, parallel rules on dispute settlement have indeed been invoked. As the jurisdiction of this Tribunal depends on which set of treaties should be applied, the question is also which international legal rules governing dispute settlement should prevail.
90. Although international law, or for that matter private law, does not thus far provide clear-cut rules on how to solve questions of concurrent jurisdiction, there are nonetheless some rules and principles that offer appropriate guidelines. The first such situation, not quite common, is when a treaty itself will establish the jurisdictional priority or exclusivity of one forum over another,<sup>154</sup> but this has not happened in this dispute. A second approach is that resulting from the operation of the principle of *lex specialis*.
91. Claimant has convincingly argued that *lex specialis* requires identity between the parties and the issues concerned so as to give rise to a situation where different sets of rules might be opposed or contradictory.<sup>155</sup> In this case, identity is not quite evident because on a *prima facie* basis Tatneft and Ukraine are not simply “business entities of the Parties” or

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<sup>151</sup> Article 11 of the Ukrtatnafta Treaty provides, “The Parties shall settle all disputes related to the interpretation and fulfillment of the present Treaty by way of negotiation and consultation.” Article 14(2) of the 1994 Fuel and Energy Cooperation Treaty provides, “Issues arising out of interpretation or application of the provisions of this Treaty shall be settled through negotiation and consultation in accordance with the rules of international law.” See Exhibits R-1 and R-7, respectively.

<sup>152</sup> Article 12(2) of the Ukrtatnafta Treaty provides, “The Parties hereby acknowledge that disputes arising between the entities of the Parties in the course of the conclusion and fulfillment of agreements shall be dealt with by civil courts, state arbitrage courts and arbitration tribunals in accordance with the prescribed order.” Article 14(1) of the 1994 Fuel and Energy Cooperation Treaty provides, “Disputed issues arising between the business entities of the Parties in the execution of the agreements negotiated on the basis of the present Treaty shall, by agreement of the Parties, be subject to review by state arbitrage courts, provided no mutually acceptable solution was found therefore.” See Exhibits R-1 and R-7, respectively.

<sup>153</sup> Russia-Ukraine BIT, Article 9, Exhibits R-2, C-23; see above, para. 4.

<sup>154</sup> See e.g. Article 14(3)(a) of the North American Agreement on Environmental Cooperation.

<sup>155</sup> See Answer paras. 1-18.

“entities of the Parties” as respectively referred to under the 1994 Fuel and Energy Cooperation Treaty and the Ukrtatnafta Treaty.<sup>156</sup> More complex arrangements and participations are involved in this dispute as shown by the facts in the record. Whether there is in this case a protected investor and a qualifying investment, elements which are essential for the operation of the Russia-Ukraine BIT, will be discussed below in connection with separate objections to the Tribunal’s jurisdiction.

92. In deciding cases of concurrent jurisdiction it is of the essence to ascertain whether the same, or related, parties and the same, or related, issues are in dispute, for otherwise there will be no conflict of rules. A Resolution adopted in 2003 by the *Institut de Droit International* on the doctrine of *forum non conveniens* in private international law, concluded that “[p]arallel litigation in more than one country between the same, or related, parties, in relation to the same, or related, issues, should be discouraged.”<sup>157</sup> It can be similarly concluded here that any concurrent international legal title to jurisdiction would require identical parties and issues, and that even then parallel litigation should be discouraged.
93. The Tribunal is also mindful of the difficulty to establish which set of rules is *lex generalis* and which is *lex specialis*. Respondent, as noted, asserts that the 1994 Fuel and Energy Cooperation Treaty and Ukrtatnafta Treaty are *lex specialis* because they were specifically designed to govern the energy and fuel cooperation between Tatarstan and Ukraine and the Kremenchug Refinery project, and thus they prevail so as to deprive the Tribunal of jurisdiction over this dispute. Claimant, to the contrary, believes that only the investment arrangements and the Russia-Ukraine BIT contain the applicable dispute settlement provisions, and thus the 1994 Fuel and Energy Cooperation Treaty and Ukrtatnafta Treaty do not govern this dispute as far as jurisdiction is concerned.
94. Were this dispute purely a diplomatic one involving two governments or States, the Tribunal would have no doubt about the appropriateness of resorting to the 1994 Fuel and Energy Cooperation Treaty and Ukrtatnafta Treaty in respect of their interpretation or

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<sup>156</sup> Article 14(1) of the 1994 Fuel and Energy Cooperation Treaty (Exhibit R-7); Article 12(2) of the Ukrtatnafta Treaty (Exhibit R-1). Note, the “Parties” in this context refers to Ukraine and Russia in the former treaty, and Ukraine and Tatarstan in the latter treaty.

<sup>157</sup> Institut de Droit International, *The Principles for Determining when the Use of the Doctrine of forum non conveniens and anti-injunctions is appropriate*, Session de Bruges, Vol. 70-II, 2004, at 253.

application. But the dispute evidently goes beyond that framework. While the Ukrainian State is involved as one of the parties, the other side consists of various entities that have intervened in the origin and development of the project, including Russia, Tatarstan and public and private entities. In addition, the main activities of Tatneft and Ukratnafta as described by the Parties, namely the production and the supply of oil and the operation of a refinery<sup>158</sup> with a view to securing profits,<sup>159</sup> are essentially of a business nature.<sup>160</sup> It is in the context of these activities that a dispute arose regarding shareholders' rights and control of the Kremenchug Refinery, and the alleged non-payment for oil deliveries. To that extent, the nature of the dispute is more related to business investments and activities, a fact that points in the direction of deciding for the application of the Russia-Ukraine BIT and related provisions, subject to the jurisdictional requirements of the latter being met.

95. The Tribunal notes Respondent's argument to the effect that the application of the Russia-Ukraine BIT would put Ukraine at a disadvantage because it could not submit a counterclaim nor launch an investor claim. Insofar as such counterclaim might concern Claimant, there is no impediment to it being introduced because that is a right in international arbitration, as envisaged under Article 19(3) and (4) of the UNCITRAL Arbitration Rules. If it concerns other entities, such as the Tatarstan or Russian Government, the very same provisions of the Ukratnafta Treaty or 1994 Fuel and Energy Cooperation Treaty invoked by Respondent would be available for it to take action in respect of obligations undertaken by those Governments.
96. The Tribunal is also mindful that the Parties have invoked various decisions of international courts or tribunals in support of their arguments. It should be noted in this respect that, in all the pertinent cases, the Permanent Court of International Justice ("PCIJ")—which was instrumental in clarifying the issues associated with concurrent jurisdiction under treaties between two parties—decided in favor of its jurisdiction in spite of requests to decline in

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<sup>158</sup> See above, paras. 43 and 46.

<sup>159</sup> Article 2 of Ukratnafta's Charter provides that one of the primary objectives of the company is "to increase yield and production profitability and to secure profits" (Charter of Closed Joint Stock Company Transnational Finance and Production Petroleum Company Ukratnafta of 1995, Article 2, Exhibit C-120). Article 3.1 of Tatneft's Articles of Association provides that "[t]he Company's main objective shall be gaining profit" (Articles of Association of OAO Tatneft, Article 3.1, Exhibit C-26).

<sup>160</sup> See also below the Tribunal's further analysis of Tatneft's activities, paras. 127 *et seq.*

favor of some other jurisdiction. So was done in the *Mavrommatis* case,<sup>161</sup> although only in respect of a preliminary issue, as was done in the *Chorzow Factory* case<sup>162</sup> and in the *Rights of Minorities* case.<sup>163</sup>

97. In the *Electricity Company of Sofia* case, the PCIJ took the view that new jurisdictional arrangements should not be understood as necessarily excluding earlier arrangements.<sup>164</sup> Neither could of course earlier arrangements be understood as excluding later ones.
98. This interplay of dates is also to be noted in the present case since, on the one hand, the 1993 Investment Cooperation Agreement came ahead of the 1994 Fuel and Energy Cooperation Treaty and Ukratnafta Treaty and, on the other hand, the Russia-Ukraine BIT was signed after the Ukratnafta Treaty was concluded. None of it, however, bears on the present dispute in view of the finding that the nature of the dispute under the Russia-Ukraine BIT is in principle different from the type of dispute envisioned by the dispute settlement arrangements under the Ukratnafta Treaty and the 1994 Fuel and Energy Cooperation Treaty.
99. The Tribunal must also note that the decision in the *Southern Bluefin Tuna* case argued by the parties, in spite of having been much criticized in the legal literature, came to the right conclusion in view of the fact that there were specific dispute settlement arrangements in force between the parties to that dispute, different from those under the Law of the Sea Convention. Moreover, as argued by Claimant, that decision did not cancel out dispute settlement mechanisms in the latter Convention.<sup>165</sup> In a different context, the *Mox Plant*

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<sup>161</sup> *Mavrommatis Palestine Concessions* (Greece v. The United Kingdom), PCIJ (Ser. A) No. 2, 1924; discussed in Yuval Shany, *The Competing Jurisdiction of International Courts and Tribunals*, 2003, at 230-235.

<sup>162</sup> *Factory at Chorzow* (Germany v. Poland), PCIJ (Ser. A) No. 9 (Jurisdiction), 1927.

<sup>163</sup> *Rights of Minorities in Upper Silesia* (Germany v. Poland), PCIJ (Ser. A) No. 15, 1928.

<sup>164</sup> *The Electricity Company of Sofia and Bulgaria* (Belgium v Bulgaria), PCIJ (Ser. A/B) No. 77 (Preliminary Objections), 1939; discussed by Hugh Thirlway, “The Proliferation of International Judicial Organs: Institutional and substantive questions – the International Court of Justice and other international courts” in Blokker and Schermers (eds.) *Proliferation of International Organizations*, 2001, at p. 251.

<sup>165</sup> Rejoinder, paras. 15-16; see also *Southern Bluefin Tuna* (New Zealand and Australia v. Japan), Award on Jurisdiction and Admissibility of 4 August 2000, para. 52, RLA-6.

arbitration involved an issue of exercise of judicial deference in favor of the European Court of Justice, where two treaties also prompted an issue of concurrent jurisdiction.<sup>166</sup>

100. Even if it were concluded that in this case the Parties are identical, this does not impact the operation of the dispute settlement arrangements under the Russia-Ukraine BIT in light of the conclusion that the dispute, due to its business nature, falls more accurately within the ambit of such arrangements than any alternative mechanism. Thus, the provisions of the BIT are to be regarded as the *lex specialis* governing dispute settlement in this case.

**2. Second Objection to Jurisdiction: Tatneft Is Not an Investor within the Meaning of the Russia-Ukraine BIT (Objection *Ratione Personae*)**

*Respondent's arguments*

101. Respondent objects to the jurisdiction of the Tribunal on the ground that Claimant is not an investor protected under the Russia-Ukraine BIT because it is controlled by the Government of Tatarstan, a fact that should prevail over Claimant's assertion that its shares are publicly traded in the form of global depository receipts and ordinary shares on various stock exchanges in Europe and Russia.<sup>167</sup>

102. Respondent argues in support of this view that Tatarstan holds approximately 36% of Tatneft voting stock by the intermediation of a company wholly-owned by the Government of Tatarstan and other corporate arrangements.<sup>168</sup> Moreover, the Tatar Government holds a "golden share" which, as disclosed by Claimant to the United States Securities and Exchange Commission ("SEC"), enables it to veto major decisions of shareholders, including changes in capital stock, charter amendments, liquidation or reorganization of Tatneft, and entering into major or interested party transactions, among other powers.<sup>169</sup> Respondent also contends that Claimant does not provide any information as to who are the beneficial owners of the shares not directly owned by Tatarstan. Respondent points to a

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<sup>166</sup> Mox Plant Case (Ireland v. United Kingdom), Procedural Orders No. 3, 4 and 6, online: Permanent Court of Arbitration <[www.pca-cpa.org](http://www.pca-cpa.org)>.

<sup>167</sup> Statement of Defense, paras. 64-106; Reply, paras. 112-124. See also Statement of Claim, para. 5; Answer, paras. 20-23; and Rejoinder, para. 7.

<sup>168</sup> Statement of Defense, para. 68; Management and Discussion Analysis of 30 September 2008, p. 1, Exhibit R-31.

<sup>169</sup> Statement of Defense, paras. 69-70; Tatneft's Form 20-F dated 10 November 2006, SEC Filing, p. 137, Exhibit R-3.

2005 report by Standard & Poor (the “S&P Report”) finding that more than 50% of Tatneft’s share capital is controlled by the Tatar State.<sup>170</sup>

103. Respondent further argues that the Tatar Government also controls the Board of Directors of Tatneft as the Prime Minister is the Chairman of the Board and five other high government officials participate in it, together with a number of employees of Tatneft.<sup>171</sup> In the filing noted above, Claimant explained to the SEC that “Tatarstan [owns], directly or indirectly, controlling or substantial minority stakes in [...] virtually all of the major enterprises in Tatarstan.”<sup>172</sup>
104. The control of Tatneft, Respondent further maintains, also results in the use of this company by the Government for public policy purposes, such as maintaining employment levels, expending on social assets, selling oil to certain customers or raising funds for the benefit of the Government.<sup>173</sup> Raising capital or paying debt for the Government has also been a consequence of that dependency.<sup>174</sup> Respondent believes that the company is also used to implement Russia’s geopolitical policies, particularly so as to reduce oil supplies to certain countries not of the like of the Russian Government.<sup>175</sup> The presence of these factors is indicative that Tatneft is controlled by the Government of Tatarstan and is being used for public, non-commercial purposes, particularly in relation to the Ukratnafta project.<sup>176</sup>
105. In Respondent’s argument, Tatneft “acquired its shareholding in Ukratnafta only because the Republic of Tatarstan designated Tatneft as a shareholder.”<sup>177</sup> It follows that Tatneft is in essence a vehicle of Tatarstan for the purposes of Ukratnafta.<sup>178</sup> Tatneft’s participation in the project was decided under the Ukratnafta Treaty and the company was designated as one of Tatarstan’s representatives in Ukratnafta. Further evidence of this relationship is

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<sup>170</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 26-27.

<sup>171</sup> Statement of Defense, paras. 71-73; Reply, paras. 73-76.

<sup>172</sup> Statement of Defense, para. 75; Tatneft’s Form 20-F dated 10 November 2006, SEC Filing, p. 85, Exhibit R-3.

<sup>173</sup> Statement of Defense, paras. 76-83; Reply, paras 79-84.

<sup>174</sup> *Id.*

<sup>175</sup> Reply, paras. 85-92.

<sup>176</sup> Statement of Defense, paras. 83-88; Reply, paras. 106-107.

<sup>177</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 6.

<sup>178</sup> Statement of Defense, paras. 84-88; Reply, paras. 108-111.

found in the fact that in October 2006 Tatneft and the Tatar Government entered into a five-year fiduciary management agreement under which Tatneft proposed candidates for the Ukrtatnafta's governing bodies and voted the Government's shares subject to instructions of the Government.<sup>179</sup>

106. On this background, Respondent asserts that Tatneft is an emanation of the Republic of Tatarstan, itself a subdivision of the Russian Federation, and should be treated identically to the State.<sup>180</sup> Whether a structural or functional test, or a combination thereof, is applied in this case, Tatneft's situation is not different from that of SODIGA in the *Maffezini* case,<sup>181</sup> in which a private commercial corporation with State participation in its stock was found to be governmental in nature because its aims were the development of new industries, with the result that Spain was held internationally responsible for the company's *conduct* towards investors. The same conclusion was reached in *Salini v. Morocco*<sup>182</sup> in respect of a company entrusted with the development of public works.<sup>183</sup>

107. In Respondent's understanding, the definition of investor under Article 1(2) of the Russia-Ukraine BIT does not extend to a Contracting State party to that treaty; it only refers to "any natural person" and to "any legal entity" to the extent that one or the other is legally capable of carrying out investments in the territory of the other Contracting Party, and subject to requirements of nationality or incorporation.<sup>184</sup> Although such reference to "any legal entity" is broad, a State is a different category of foreign investor as understood under both Russian and Ukrainian law. In fact, the Russian investment law of 4 July 1991

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<sup>179</sup> Statement of Defense, para. 87; Reply, para. 109; Tatneft's Form 20-F dated 10 November 2006, SEC Filing, p. 58, Exhibit R-3.

<sup>180</sup> Statement of Defense, paras. 89-97 ; Reply, paras. 55-111.

<sup>181</sup> *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, RLA-11.

<sup>182</sup> *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, RLA-12.

<sup>183</sup> Statement of Defense, paras. 92-97.

<sup>184</sup> Statement of Defense, paras. 98-107. Article 1(2) of the Russia-Ukraine BIT provides that "Investor of a Contracting Party' shall imply: a) any natural person, who is a citizen of the state of a Contracting Party, and who is legally capable under its respective legislation to carry out investments on the territory of the other Contracting Party; b) any legal entity, set up or instituted in conformity with the legislation prevailing on the territory of the given Contracting Party, under the condition that the said legal entity is legally capable, under the legislation of its respective Contracting Party, to carry out investments on the territory of the other Contracting Party." See Russia-Kraine BIT, Exhibit R-2.

considers “foreign states” as separate from foreign legal persons and foreign citizens;<sup>185</sup> so too the Ukrainian foreign investment law of 1996 considers “foreign countries, international governmental and non-governmental organizations” as a category different from legal entities and natural persons.<sup>186</sup>

108. Respondent takes the position that the Russia-Ukraine BIT does not refer at all to investments by States or State entities and is only concerned with the case of individuals and private companies, just as is the case with investment arbitration generally.<sup>187</sup> Moreover, both Ukraine’s and Russia’s treaty practice has been to expressly include government-controlled entities when they have intended to have their investments protected,<sup>188</sup> but this was not the case of the Russia-Ukraine BIT in spite of the fact that various inter-governmental agreements relating to joint projects between both countries were in force at the time the Russia-Ukraine BIT was concluded. When a State wishes to protect its own interests it does not need to rely on investment treaty claims but can resort directly to diplomatic protection and negotiations.<sup>189</sup>

109. In Respondent’s argument, the basic principle applicable in this matter was noted in the *CSOB* case<sup>190</sup> to the effect that State-controlled entities discharging governmental functions or acting as agents of the government should not be treated as nationals of another Contracting State under Article 25 of the ICSID Convention, but since it was concluded that this was not the case in that dispute the tribunal affirmed its jurisdiction.<sup>191</sup> Respondent asserts that it is positively the case here and that that principle is not restricted to the ICSID Convention but is rooted in the customary law rules on attribution, as reflected in Article 5 of the International Law Commission (“ILC”) Articles on State

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<sup>185</sup> Statement of Defense, para 101, footnote 101; Russian Federation Law No. 1545-1 of 4 July 1991, Article 1, Exhibit R-35.

<sup>186</sup> Statement of Defense, para. 102, footnote 102; Ukraine Law on the Regime of Foreign Investments of 19 March 1996, Article 1, Exhibit R-36.

<sup>187</sup> Reply, paras. 22-34.

<sup>188</sup> Reply, para. 25.

<sup>189</sup> Reply, paras. 22-34.

<sup>190</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, Decision on Objections to Jurisdiction, ICSID case No. ARB/97/4, 24 May 1999, CLA-29.

<sup>191</sup> Reply, para. 41.

Responsibility.<sup>192</sup> Relying by analogy on the ILC Articles on State Responsibility,<sup>193</sup> Respondent argues that Tatneft’s shareholding participation in Ukratnafta meets the test for attribution under Articles 5 and 8 and relevant arbitration awards, and thus constitutes, in the words of Mr. Zachary Douglas, a “sovereign investment activity” that does not qualify for protection under the BIT.<sup>194</sup>

110. In this context it is also argued by Respondent that it is not appropriate to examine only the nature of the activity undertaken but also its purpose, which in this case is inextricably related to governmental policies and functions.<sup>195</sup> It is pointed out that in fact the transformation of a former State entity into Tatneft as a joint stock company following the demise of the Soviet Union has not resulted in independence from the Government.<sup>196</sup> The shareholding structure explained above, coupled with the “golden share” privileges and Tatarstan’s control of Tatneft’s management, are each expressions of such public purpose, and so is Tatneft’s support of public policies and financial operations that only benefit the Government.<sup>197</sup>

111. Finally, Claimant erroneously argues that its participation in Ukratnafta could not be held to have been pursuant to government direction because, if this were true, Claimant would have been entitled to immunity, which it was not.<sup>198</sup> In Respondent’s view, Claimant wrongly assumes that an entity that does not qualify as an investor under the BIT would

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<sup>192</sup> Reply, para. 43; International Law Commission’s Articles on State Responsibility, Article 5, p. 62, RLA-23. Article 5 reads as follows: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

<sup>193</sup> Citing the Douglas Legal Opinion at para. 23, Respondent states that “although the problem this Tribunal needs to resolve is one of jurisdiction and not attribution, ‘it is a problem of jurisdiction that should be resolved by reference to the rules of attribution *by way of analogy*’.” (emphasis in original)

<sup>194</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 8; Douglas Legal Opinion, paras. 29-50.

<sup>195</sup> Reply, paras. 46-54.

<sup>196</sup> Reply, paras. 58-62.

<sup>197</sup> Reply, paras. 63-92.

<sup>198</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 74.

necessarily be entitled to immunity.<sup>199</sup> In any event, Claimant did not raise any argument involving immunity before the Ukrainian courts.<sup>200</sup>

112. Respondent concludes that Tatneft was involved in the Ukrtatnafta project to act as the agent for Tatarstan and discharge its obligations under the Ukrtatnafta Treaty, thus furthering both States' energy policies.<sup>201</sup> Both the nature and the purpose of Tatneft's participation in Ukrtatnafta points to the exercise of governmental functions which preclude the protection of this instrumentality as an investor under the Russia-Ukraine BIT, thus resulting in the Tribunal's lack of jurisdiction in this dispute.<sup>202</sup>

*Claimant's arguments*

113. Claimant believes the situation to be quite different from the view put forth by Respondent. Following the collapse of the Soviet Union, the assets of Tatneft Amalgamation, a State-owned and operated company, were transferred to Claimant, OAO Tatneft, a newly-incorporated joint stock company.<sup>203</sup> Privatization followed by the sale in 1994 of portions of its shares to managers and workers, and after 1996 by public offering of depository receipts in London, New York and Frankfurt stock exchanges.<sup>204</sup> As a result of this process of privatization, approximately 65% of Tatneft shares are presently owned by private shareholders unrelated to Tatarstan.<sup>205</sup> Claimant further argues that while it is impossible for Tatneft, a publicly traded company, to know each of the beneficial owners of its shares, it is clear that the Tatar Government owns no more than 36% of Tatneft's shares, directly and indirectly. The S&P Report's conclusion that Tatarstan controls more than 50% of Tatneft's share capital is simply unsupported.<sup>206</sup>

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<sup>199</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 74-75.

<sup>200</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 76.

<sup>201</sup> Reply, paras. 93-95.

<sup>202</sup> Reply, paras. 96-111.

<sup>203</sup> Answer, para. 20.

<sup>204</sup> Answer, para. 20.

<sup>205</sup> Answer, para. 20; see also Tatneft's Form 20-F dated 10 November 2006, SEC Filing, p. 139, Exhibit R-3.

<sup>206</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp. 47-48.

114. It is further explained that only six out of fifteen members of the Board of Directors are officials of the Government of Tatarstan.<sup>207</sup> The principal objective of the company, as any other major oil company, is to undertake for-profit activities, and the fact that it might also undertake activities relating to its social responsibility does not make it an emanation of the Republic of Tatarstan.<sup>208</sup>
115. In Claimant's view, Respondent has failed to prove that Tatneft is owned or controlled by the Republic of Tatarstan, and not even the fact that the latter owns a golden share changes this conclusion as it can only appoint one member of the Board of Directors and exercise some other limited veto rights not unknown to many other companies.<sup>209</sup> The Executive Board does not include any person holding a position in the Tatar Government nor is the General Director a government official.<sup>210</sup> While filings before the SEC have been invoked by Respondent to prove government control over Tatneft, this amounts only to a disclosure of all kinds of risks that could give rise to liability if not disclosed, but does not state or suggest that Tatneft is under such control.<sup>211</sup> Tatneft is also subject to anti-monopoly legislation and operates in a competitive environment.<sup>212</sup>
116. Never has Tatneft exercised sovereign functions that could be equated to functions *de jure imperii*, not even at the time of the Soviet Union, because it was a production unit the mission and core business of which were oil drilling and refining.<sup>213</sup> Not even the alleged financial transactions that Respondent invokes as evidence of government control amount to more than one-time occurrences in the form of loans that were repaid to Tatneft.<sup>214</sup> Claimant further maintains that it does not implement Tatarstan's domestic policies except to the extent mandated by law to every company, and even less so does it implement the Russian Federation's foreign policy.<sup>215</sup>

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<sup>207</sup> Answer, para. 20; see also Tatneft's Form 20-F dated 10 November 2006, SEC Filing, pp. 121-124, Exhibit R-3.

<sup>208</sup> Answer, paras. 21-23.

<sup>209</sup> Rejoinder, paras. 12-19.

<sup>210</sup> Rejoinder, para. 15.

<sup>211</sup> Rejoinder, paras. 20-22.

<sup>212</sup> Rejoinder, paras. 27-28.

<sup>213</sup> Rejoinder, paras. 29-30.

<sup>214</sup> Rejoinder, paras. 32-38.

<sup>215</sup> Rejoinder, paras. 39-50.

117. It is also argued by Claimant that its participation in the Ukrtatnafta project is not to serve as the Tatar Government's agent under the Ukrtatnafta Treaty, but only to contribute in the framework of the commercial nature of the project to the recreation of the integrated oil production and refining complex that had existed before international borders were set following the collapse of the Soviet Union.<sup>216</sup> Also Ukrtatnafta was incorporated as a commercial company to attend these ends.<sup>217</sup> It is not for Tatneft to perform the obligations of Tatarstan as to the supply of oil under the Ukrtatnafta Treaty and this could have been done by any other company.<sup>218</sup>
118. It is also explained that at first Tatneft and Tatar Government officials attended the Ukrtatnafta General Meetings separately, and the fact that later a power of attorney was given to Tatneft to undertake such representation does not prove dependency but, to the contrary, shows that since the outset Tatneft was not conceived as representing the Tatar Government for otherwise those powers of attorney would be unnecessary.<sup>219</sup>
119. Claimant also argues that, in any event, whether Tatneft is a private or public company is irrelevant for qualifying as an investor under Article 1(2) of the Russia-Ukraine BIT since it satisfies both the requirement of having been instituted in accordance with Russian legislation and being legally able under that legislation to carry out investments in Ukraine.<sup>220</sup> Neither of these requirements excludes publicly-owned or controlled investors which, moreover, are expressly envisaged as investors under the Russian investment law noted above.<sup>221</sup> Russian treaty practice also reflects this broad understanding of the concept of investor, with the sole exception of the bilateral investment treaties of both Russia and Ukraine with the United States because of the policy followed by the latter in this respect.<sup>222</sup> Similarly, Respondent's efforts to rely on the European Convention of Human Rights so as to deny protection to public investors under the Russia-Ukraine BIT do

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<sup>216</sup> Rejoinder, paras. 51-68.

<sup>217</sup> Rejoinder, para. 53; Charter of Closed Joint Stock Company Transnational Finance and Production Petroleum Company Ukrtatnafta of 1995, Article 5(2), Exhibit C-120.

<sup>218</sup> Rejoinder, paras. 61-68.

<sup>219</sup> Rejoinder, para. 68.

<sup>220</sup> Rejoinder, para. 69.

<sup>221</sup> Rejoinder, paras. 70-72.

<sup>222</sup> Rejoinder, paras. 77-79.

not alter such understanding in light of the fact that Article 34 of the Convention, unlike the Russia-Ukraine BIT, excludes governmental entities from lodging individual complaints.<sup>223</sup> While Respondent cannot find any support in Article 1(2) of the BIT to exclude public or mixed entities from the definition of investor,<sup>224</sup> Respondent's analogy argument based on the international law on attribution is equally unsupported.<sup>225</sup> According to Claimant, "(t)here are no rules of attribution of general applicability under international law, and there is no justification for applying the rules of attribution that form part of the law of State responsibility as such to other areas of international law."<sup>226</sup>

120. Claimant also maintains that, as held in *Saluka*, the "Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed."<sup>227</sup>

121. In Claimant's view, *Maffezini* dealt with a different matter, namely the requirements of Article 25(1) of the ICSID Convention as to qualifying investors, a situation not given in the instant case because no such limitations apply to non-ICSID arbitration and because the Russia-Ukraine BIT specifically contains a definition of investor.<sup>228</sup> It is explained that Russia is not a party to the ICSID Convention nor does the Russia-Ukraine BIT provide for the choice of ICSID arbitration.<sup>229</sup> Furthermore, the 1993 Investment Cooperation Agreement specifically includes "the member-states [...] and the state and administrative-territorial entities," thus including both public and private investments, an objective which the Russia-Ukraine BIT has preserved.<sup>230</sup>

122. It follows, in Claimant's argument, that Tatneft is a private commercial entity not controlled *de jure* or *de facto* by the Tatar Government, and it does not carry out

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<sup>223</sup> Rejoinder, para. 136.

<sup>224</sup> Rejoinder, para. 89.

<sup>225</sup> Rejoinder, para. 90.

<sup>226</sup> Rejoinder, para. 90.

<sup>227</sup> Answer, para. 33; *Saluka Investments BV v. The Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para. 241, CLA-24.

<sup>228</sup> Answer, para. 35; *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, RLA-11.

<sup>229</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 35.

<sup>230</sup> Answer, paras. 38-40; see 1993 Investment Cooperation Agreement, Article 2, CLA-5.

governmental functions.<sup>231</sup> Should a structural test be applied to reach a determination, the nature of Tatneft's activity shows that it is different from the exercise of governmental authority since investing in a downstream refinery to process its oil is not a governmental function, as concluded in respect of another commercial activity in *Jan de Nul*.<sup>232</sup> If a functional test were applied, it would lead, as in *CSOB*, to the conclusion that even if Claimant were promoting governmental policies and purposes, these would not lose their commercial nature.<sup>233</sup>

123. It is further noted that Tatneft could not and has not claimed immunity from jurisdiction before a foreign court, what might have been done if its activities were considered to be *jure imperii*, as concluded in respect of the National Iranian Oil Company by the Court of Appeals of The Hague.<sup>234</sup> Consequently, the Ukrainian courts would have been prohibited from taking measures of constraint.<sup>235</sup>
124. Claimant argues lastly that all the cases that have applied the structural test to some effect involve situations where the government's capital participation is above 51% or effectively designates or controls the company's management.<sup>236</sup> Any attempt to pierce Tatneft's corporate veil, as Respondent pretends, would be entirely unwarranted in light of the corporate structure explained above.<sup>237</sup>

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<sup>231</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 46; Answer, paras. 42-43; Rejoinder, paras. 29-31.

<sup>232</sup> Rejoinder, para. 115, footnote 155; *Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 166, 171, CLA-114.

<sup>233</sup> Answer, paras. 44-47; *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, paras. 20 *et seq.*, CLA-29 and cited in Answer, para. 46.

<sup>234</sup> Rejoinder, paras. 101-104; *N.V. Cabolent v. National Iranian Oil Company*, Court of Appeals of The Hague, Judgment of 28 November 1968, *International Law Reports*, 1974, vol. 47, p. 141, at pp. 144-145, CLA-106.

<sup>235</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 40.

<sup>236</sup> Rejoinder, paras. 111-112; *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7, 25 January 2000, RLA-11; *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, RLA-12; *Nykomb v. Latvia*, SCC Case No. 118/2001, Award, 16 December 2003, paras. 110-112, RLA-26; *Wintershall A.G. et al. v. Government of Qatar*, Partial Award on Liability of 5 February 1988, in: A. J. van den Berg (ed.), *Yearbook of Commercial Arbitration*, 1990, vol. XV, p. 30 at paras. 12-13, RLA-32.

<sup>237</sup> Rejoinder, paras. 140-143.

*The Tribunal's findings*

125. Article 1(2) of the Russia-Ukraine BIT provides that:

*'Investor of a Contracting Party' shall imply: a) any natural person, who is a citizen of the state of a Contracting Party, and who is legally capable under its respective legislation to carry out investments on the territory of the other Contracting Party; b) any legal entity, set up or instituted in conformity with the legislation prevailing on the territory of the given Contracting Party, under the condition that the said legal entity is legally capable, under the legislation of its respective Contracting Party, to carry out investments on the territory of the other Contracting Party.'*<sup>238</sup>

126. As summarized above, Respondent argues that Claimant does not qualify as an investor under this definition.<sup>239</sup>

127. The arguments set out by Respondent raise two main questions. The first question is whether or not Tatneft is State-controlled. If this is answered in the affirmative, the second question is whether as such it would nonetheless qualify as an investor under the Russia-Ukraine BIT. As will be explained, the Tribunal is persuaded that the first issue should be answered negatively, and thus there shall be no need for the Tribunal to examine the second question.

128. The Tribunal shall to this end begin with an examination of what has come to be known as a "structural test." Both Parties appear to agree on the fact that from a strict legal point of view Tatneft is a corporate entity separate from the Tatar Government, incorporated as a joint stock company and endowed with its own corporate legal personality. This is also quite evidently a matter of record which the Tribunal accepts as established.

129. The question then turns to an examination of whether in fact governmental control is in place in respect of Tatneft. There is undoubtedly a government presence in Tatneft's governing bodies and some features of its operations. The fact that the Tatar Prime Minister is the Chairman of the Board of Directors, that some other government officials participate in it, and that Tatarstan owns a so-called "golden share" resulting in some veto rights and administration privileges, points in that direction.

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<sup>238</sup> See also *supra*, footnote 184.

<sup>239</sup> Statement of Defense, paras. 64-106; Reply, paras. 112-124.

130. Those aspects of government presence, however, are not in themselves enough to reach a conclusion on the issue before the Tribunal. It is also necessary for the Tribunal to note that the Tatar Government's shareholding is limited to 36% of the stock, that the participation of Tatar Government officials in the Board does not constitute a majority of its members, and that the "golden share" privileges have not been shown to have been exercised in the conduct of Tatneft's affairs, as explained by Claimant. The argument that the Tatar Government's shares are held by means of a wholly-owned government entity<sup>240</sup> does not change the factual situation noted above; nor for that matter does the allegation that the rest of the shares in Tatneft are owned by individuals or entities that could be related to that Tatar Government. While the S&P Report points out that "obscure intermediary vehicles are used for the control by regional authorities in Tatneft,"<sup>241</sup> this assertion, besides its rather general scope, does not appear to offer evidence on which the Tribunal could rely to establish that government control in fact exists. Therefore, in the absence of specific evidence in this respect there would be no justification to undertake the piercing of Tatneft's corporate veil nor would this appear to meet the strict legal conditions normally required for such a piercing.
131. The transition of Tatneft from a State company to a commercial joint stock corporation has followed a pattern which is rather typical of the former Soviet Republics that have substituted market economy models for their past centrally-planned status. Privatization has usually accompanied this transition, as is the case here. This transition is not unknown to Western economies either, as noted by the *Maffezini* decision in the case of SODIGA in Spain and by many other cases in which State-owned companies have been privatized. In this context it is not unusual that the government will retain certain rights, particularly in respect of the structure of the capital stock or charter amendments.
132. These surviving rights do not suggest, however, that the company keeps on being a State-owned entity or that the transition in question is fictitious unless other expressions of control are available, such as government ownership of a majority of the capital stock, as was the case in *Maffezini*, *Salini v. Morocco* and others noted above in the context of

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<sup>240</sup> Tatarstan holds approximately 36% of Tatneft voting stock through OAO Svyazinvestnetekhim, a company wholly-owned by the Government of Tatarstan and one of its subsidiaries. See above, para. 102; Management and Discussion Analysis of 30 September 2008, p. 1, Exhibit R-31; Statement of Defense, para. 68.

<sup>241</sup> 2005 S&P Report on "Transparency and Disclosure by Russian State-Owned Enterprises," p. 8, Exhibit R-60; see also Reply, paras. 65-68.

Claimant's argument. Significant control of management and operational decisions might offer other indications of factual State ownership, but such control does not appear to be present in this case.

133. In connection with the structural test, tribunals have also examined on occasions whether the nature of the activity undertaken would be indicative of some form of exercise of sovereign authority associated to the concept of *jure imperii*, as was the case in *Jan de Nul* noted above. Claimant's argument to the effect that investing in a downstream refinery to process the oil produced in another country cannot be considered an activity *de jure imperii*, or is in some other way attributable to the State, is persuasive. While in some countries oil production and refining is done by private companies, in others it is done by public entities, but even the latter will not normally be operating in the context of sovereign powers. The Tribunal must accordingly conclude that the structural test for establishing government control has not been met in the instant case.
134. The fact that Tatneft has not invoked sovereign immunity before the courts of Ukraine has also been raised as an argument to justify that it is thus not a State-owned or controlled entity. The Tribunal does not believe this argument to be dispositive of the issue since not claiming immunity does not mean that it could not have been invoked as a matter of law if the entity so claiming qualifies for this jurisdictional protection. The Tribunal must note, however, that the distinction between *jure imperii* and *jure gestionis* was born in the context of claims to sovereign immunity, so as to prevent jurisdiction in the first case and allow for it in the second.
135. The Tribunal must proceed to examine next whether in spite of government control not having been shown from a "structural" point of view, there might still be a case for finding that the "functional test" is met. Respondent believes in this respect that in fact Tatneft is used by the Tatar Government to pursue its public policies, expressed in terms of employment goals, social undertakings, the supply of oil to preferred clients, budgetary contributions and raising capital for public purposes, among other expressions.
136. Claimant itself has explained that some such purposes have been pursued in the context of the company's activities, but that these have been for the most part imposed by law on every company incorporated in Tatarstan, or are policies that any major company might

pursue anywhere in the world in terms of social responsibility. It has also been noted that financial transactions have taken the form of repayable loans and that in any event they are one-time occurrences.

137. As with the structural test, the Tribunal is convinced that some such functional elements are present in Tatneft's policies, but they do not appear to amount to the core of its business and are rather marginal. Because of its past close connection with the Tatar Government, it is perhaps inevitable that some of these policy elements might have survived in Tatneft, but again that does not mean that the company loses its essential commercial aims in the undertaking of business. It would be quite different if business were undertaken on behalf of the State for the accomplishment of its public objectives. In Claimant's argument this was not even the case under the Soviet Union because Tatneft was established as a production unit of oil and gas and its refining.
138. The Tribunal is mindful that the Commentary on the ILC's Articles on State Responsibility concludes that not even the conduct of State-owned and controlled corporate entities is attributable to the State unless involving the exercise of governmental authority.<sup>242</sup> While questions of attribution belong to the merits of the case, Respondent has invoked such rules, with particular reference to Articles 5 and 8 of the International Law Commission's Articles on State Responsibility, to find guidance by analogy as to whether for jurisdictional purposes Tatneft's conduct should be attributable to Tatarstan,<sup>243</sup> which in Respondent's view is the case here, including the attribution of Tatneft's shareholding in Ukrtatnafta.<sup>244</sup>
139. The Tribunal cannot fail to note, however, that Respondent's argument stresses that Ukraine cannot be held responsible for court decisions, such as those concerning Mr. Ovcharenko and their consequences, because of considerations of proximity and foreseeability, an argument that does not seem to follow its views on attribution.<sup>245</sup>

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<sup>242</sup> Commentary on Article 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: *Report of the International Law Commission on the Work of its Fifty-third Session*, Yearbook of the International Law Commission, 2001, vol. II(2), p. 26 at p. 48, para. 6, CLA-2; see also Rejoinder, para. 107.

<sup>243</sup> Douglas Legal Opinion, para. 23.

<sup>244</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 8; Reply, paras. 18, 43.

<sup>245</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 217-218.

140. The Tribunal is not persuaded that Tatneft has been empowered to exercise governmental authority in light of the facts of this case, despite that its participation finds its origins in the Ukrtatnafta Treaty and other governmental measures adopted for its negotiation and materialization. It should also be noted that even though the Tatar President resolved in his Decree of 1994 to approve the transfer of various shares and rights to the authorized fund of Ukrtatnafta, the Decree refers to those shares held by the Republic of Tatarstan and State-owned assets, which insofar as Tatneft was concerned were at the time undergoing privatization.<sup>246</sup> The effects on the question of parity of this and other decisions concerning the Tatar contribution is a separate matter that shall be discussed further below.<sup>247</sup> As will also be discussed below, business decisions characterize Tatneft's activities and the company is subject to legislation on competition, taxation and other aspects that are typical of private entities, just like the nature of such activities is in essence unrelated to the exercise of governmental authority.
141. The Parties have argued extensively about the filings of Tatneft before the SEC and whether these again show that the company is under government dependency and ultimately an instrumentality of the Tatar Government. In that filing Tatneft indeed asserted that "the Tatarstan government is able to exercise considerable influence over us. The Tatarstan government has used its influence in the past to mandate oil sales and to cause us to raise capital for the benefit of Tatarstan or to pay the debts of Tatarstan when independently we may not have entered into such transactions."<sup>248</sup>
142. Claimant has explained that such filings must refer to all possible risks in order to avoid potential liability if some form of government interference results in the underperformance of the instruments offered. The Tribunal notes that the filing in question, which was made in 2006, refers to instances of "past" influence, which may well have been the case at a certain point in time.<sup>249</sup> That does not mean, however, that it is necessarily so at present. The providing of information about risk is the very purpose of such filings and because, in the context of operating in a former Soviet Republic, government influence or intervention cannot be excluded as an absolute certainty at some future juncture, a precautionary risk

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<sup>246</sup> Decree of the President of Tatarstan dated 13 December 1994, Exhibit R-6.

<sup>247</sup> See below, para. 193 and footnote 341.

<sup>248</sup> Tatneft's Form 20-F dated 10 November 2006, SEC Filing, p. 84, Exhibit R-3.

<sup>249</sup> Tatneft's Form 20-F dated 10 November 2006, SEC Filing, pp. 84-85, Exhibit R-3.

disclosure might be justified but does not alter the commercial elements involved in a company of this kind.

143. The Tribunal also notes the Parties' discussion on whether there are "political elements" to this dispute that could affect the Tribunal's jurisdiction. The Tribunal, however, is satisfied that no such argument has been made by Respondent but that Respondent only asserts that the likely Russian pressure against Ukraine reveals that the dispute is typically inter-governmental.<sup>250</sup>
144. The Parties have also discussed whether Tatneft's participation in the Ukratnafta project is merely as an agent for the Tatarstan Republic or as a fully independent commercial company. The question of a fiduciary arrangement or powers of attorney mentioned above has been at the heart of this discussion.<sup>251</sup>
145. The Tribunal believes that there is nothing unusual in that both the interests of the Tatar Government and one major oil company incorporated in that Republic might coincide in a foreign business project, or that practical questions might justify the convenience of granting powers of attorney for a period of time.
146. Furthermore, the fact that the Ukratnafta project was established and organized under a treaty does not show that all forms of participation might be tainted by government dependency. Many projects set under international agreements facilitate the business operations of both public and private entities, particularly where trans-border questions arise.
147. The Tribunal is also mindful that, as held in *CSOB*, not even the pursuit of public policies can always be equated with the loss of the commercial nature of the specific activity undertaken, be it banking as in that case or oil processing as in this one. The *CSOB* tribunal held that "the steps taken by CSOB to solidify its financial position in order to

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<sup>250</sup> Reply, para. 2; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 12.

<sup>251</sup> In regard to the power of attorney granted to Tatneft from the Ministry of Property of Tatarstan with respect to its shareholding in Ukratnafta, see Powers of Attorney dated 23 October 2006, Exhibit C-66 and Tatneft's Form 20-F dated 10 November 2006, SEC Filing, p. 58, Exhibit R-3; Statement of Defense, paras. 8, 87; Reply, para. 109; Answer, para. 120; Rejoinder, paras. 68, 131.

attract private capital for its restructured banking enterprise do not differ in their nature from measures a private bank might take to strengthen its financial position.”<sup>252</sup>

148. The question this Tribunal must answer is thus whether in this case the kind of measures taken by Tatneft in the pursuit of its business might differ in their nature from measures any other major oil company may take. The facts underlying the functional test in this case do not lead in the direction of finding that Tatneft is an instrumentality of the Tatar Government but rather a private entity with government links surviving former times.
149. The Tribunal fully understands Respondent’s views that tend to identify those elements of governmental presence that could disqualify Tatneft from claiming under the Russia-Ukraine BIT. Indeed, according to Respondent, the Ukrtatnafta project is a government-to-government project in which Tatneft has not participated in commercial terms.<sup>253</sup> Claimant’s argument stresses those elements that are typical of private commercial ventures. While a company like Tatneft, originating in past models, shows a certain interaction of both elements, the Tribunal must find which of the two predominates.
150. In light of the Tribunal’s findings about Tatneft not meeting the structural or the functional test for establishing *de jure* or *de facto* government control, or for establishing that it carries out government functions, the Tribunal must conclude that business-related aspects predominate in Tatneft’s operations and that it is thus entitled to claim as a private investor under the Russia-Ukraine BIT. The record of profits obtained by Tatneft between 2005 and 2008, which Claimant explained at the hearing,<sup>254</sup> is not insignificant and confirms the predominant business orientation of the company.
151. Even if it were held that Tatneft is a public company in light of its origins and some of its features, it is not unusual to have such companies claiming as investors in investment

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<sup>252</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, Decision on Objections to Jurisdiction, ICSID case No. ARB/97/4, 24 May 1999, para. 25, CLA-29.

<sup>253</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 22

<sup>254</sup> Claimant’s Opening Statement, Slide 9 of Mr. McGurn’s presentation, Jurisdictional Hearing, 30 March 2010; Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 4.

arbitration. Claimant has invoked in this connection the cases of *AGIP*, *EDF*, *Saipem*, *CSOB*, *Telenor* and other companies.<sup>255</sup>

152. In light of the Tribunal's conclusion reached above that Tatneft is entitled to claim as a private investor, the Tribunal need not address the issue of whether public entities are allowed to claim under the Russia-Ukraine BIT or under Russian or Ukrainian investment laws. The Tribunal's conclusion regarding Tatneft's private investor status does not prejudice this important issue, which has been prominently and competently discussed by the Parties in their pleadings.

3. **Third Objection to Jurisdiction: Tatneft's Participation in Ukrtatnafta Is Not an Investment within the Meaning of the Russia-Ukraine BIT (Objection *Ratione Materiae*)**

*Respondent's arguments*

153. Respondent submits a third objection to the Tribunal's jurisdiction in terms that, even if it were admitted that the Russia-Ukraine BIT applies to this dispute and that Tatneft is an investor under its terms, the Tribunal still cannot exercise jurisdiction over this claim as Claimant's participation in Ukrtatnafta is not an "investment" according to the definition of investments provided in Article 1(1) of the Russia-Ukraine BIT.<sup>256</sup>

154. In Respondent's view, Ukrtatnafta was described by the Ukrtatnafta Treaty as "an integrated interstate economic complex of Ukraine and the Republic of Tatarstan" (Article 3) with the principal purpose of securing the oil supply to the Contracting Parties (Article

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<sup>255</sup> Claimant's Opening Statement, Slide 14 of Dr. Annacker, Jurisdictional Hearing, 30 March 2010; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 32.

<sup>256</sup> Article 1(1) of the Russia-Ukraine BIT provides that

"Investments" shall denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation, and in particular:

- a) movable and immovable property and any other rights of property therein;
- b) monetary funds and also securities, liabilities, deposits and other forms of participation;
- c) rights to objects of intellectual property, including authors' copyrights and related rights, trade marks, the rights to inventions, industrial samples, models and also technological processes and know-how;
- d) rights to perform commercial activity, including rights to prospecting, development and exploitation of natural resources. (Russia-Ukraine BIT, Exhibit R-2)

5) by means of the refinement of oil from Tatarstan (Article 4).<sup>257</sup> This is further confirmed by Ukratnafta's Charter to the effect that the project is conceived as a mechanism for the economic integration of the two countries.<sup>258</sup> All these factors indicate that "Tatneft participated in Ukratnafta because of a political decision" in light of which Tatneft's participation is inseparable from Tatarstan's participation, and is quite different from an ordinary commercial one.<sup>259</sup>

155. Because of that integrated participation, the contribution of assets by Tatneft was never made in the original form envisaged and had to be amended.<sup>260</sup> Respondent notes in particular Tatneft's failure to contribute certain oil deposits committed to the project, which was later changed to the purchase of shares at a monetary value.<sup>261</sup> A participation originating in a political decision of Tatarstan directed to use Tatneft as a vehicle to implement its own obligations under the Ukratnafta Treaty does not qualify as an investment within the meaning of Article 1(1) of the Russia-Ukraine BIT.<sup>262</sup> Such a situation does not correspond to an investment decision by the investor; unlike the investor in *Tokios Tokelès*, Tatneft has not caused an investment in Ukratnafta by means of the contribution of money or effort from which a return or profit is expected.<sup>263</sup>

*Claimant's arguments*

156. In Claimant's view, Tatneft's participation in Ukratnafta complies with all the requirements and conditions that the Russia-Ukraine BIT envisages in its definition of investments, particularly in terms of encompassing all kinds of property and intellectual values, including monetary funds and securities and the right to perform commercial activity, as well as prospecting, development and exploitation of natural resources, among

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<sup>257</sup> Statement of Defense, para. 109; Ukratnafta Treaty, Exhibit R-1.

<sup>258</sup> Ukratnafta Charter, Article 2.1, Exhibit R-24; Statement of Defense, para. 110.

<sup>259</sup> Statement of Defense, paras. 112-113.

<sup>260</sup> Reply, paras. 6-10, 139; see also Statement of Defense, para. 16.

<sup>261</sup> Reply, paras. 6-10.

<sup>262</sup> Statement of Defense, paras. 107-113; Reply, paras. 126-128.

<sup>263</sup> Reply, paras. 127-128; *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 75, CLA-17.

others. At no point does this definition exclude the protection of investments that, like here, have been made for a mixed public and commercial purpose.<sup>264</sup>

157. Claimant further argues that arbitral tribunals have consistently rejected the pretension of introducing additional requirements in the definitions of investment included in the applicable bilateral investment treaties. This was in particular the case of *Tokios Tokelès*, where Ukraine attempted to introduce an origin-of-capital requirement. So too in *Saluka* the tribunal refused to take into consideration the motives of the investor's decision to invest as nothing in the bilateral investment treaty allowed it to do so.<sup>265</sup>
158. Claimant also asserts that in this case the combination of mixed commercial and public motives are predominant features of the investment undertaken, as confirmed by the Ukrtatnafta Charter (Article 2.1) and the 1993 Investment Cooperation Agreement, which the Russia-Ukraine BIT sought to develop.<sup>266</sup> Claimant points to Article 3 of the 1993 Investment Cooperation Agreement which defines the "Parties' investments" as "types of property, financial, intellectual valuables invested by Parties' investors into objects of entrepreneurial activity and other types of activity for the purpose of gaining profit (income) or a social effect."<sup>267</sup> It is noted that profit and social effects reflect that very purpose of a mixed commercial and public nature related to investments under these provisions.<sup>268</sup>

#### *The Tribunal's findings*

159. The Tribunal must begin its considerations in this matter by examining the definition of "investments" in Article 1(1) of the Russia-Ukraine BIT. Like with many bilateral investment treaties, the definition is indeed broad and intends to cover all activities that might be related to the economic interest of the investor in undertaking such investment. The definition refers to "all kinds of property and intellectual values" invested in the territory of another "Contracting Party," identifying in particular "movable and immovable

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<sup>264</sup> Answer, paras. 49-58.

<sup>265</sup> Answer, para. 54, footnote 55; *Saluka Investments BV v. The Czech Republic*, UNCITRAL Arbitration, Partial Award, March 17, 2006, para. 209, CLA-24.

<sup>266</sup> Answer, paras. 55-56.

<sup>267</sup> Answer, para. 57; 1993 Investment Cooperation Agreement, Article 3, CLA-5.

<sup>268</sup> Answer, para. 58.

property and any other rights of property therein, [...] monetary funds and also securities, liabilities, deposits and other forms of participation” and “rights to perform commercial activity, including rights to prospecting, development and exploitation of natural resources.”<sup>269</sup>

160. The Tribunal would have great difficulty in concluding that Tatneft’s participation in Ukratnafta does not qualify as an investment in light of the definition noted. In fact it qualifies as an investment under almost all the kinds of property listed therein. Tatneft’s contribution may have been amended to separate it from the obligation to supply oil produced in certain deposits and assign to such contribution a monetary value, but far from disqualifying the investment made, it comes to confirm that the activity was conceived as encompassing various kinds of assets of economic value.

161. The Tribunal rejects entering into an examination of the motives behind the investment, unless there were evidences of bad faith, abuse of the law or improper behavior, which is not the case here. Although allegations of a set-up have been made in connection with the share purchases by Amruz and Seagroup, there is no evidence of this on record and the allegation has been denied.<sup>270</sup> This Tribunal agrees with the decision in *Saluka*, noted above, which refused to take into account the investor’s motives. Indeed, rather than examining the motives behind the investment, this Tribunal must seek to establish, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, the ordinary meaning of the terms of the Russia-Ukraine BIT in their context and in light of its object and purpose, and whether Claimant’s alleged investment falls within the meaning of those terms. The Tribunal notes, further, that it is a generally accepted view that no additional conditions to those agreed by the parties should be introduced by tribunals in the definition of investments. As long as the activities undertaken meet the elements of the definition noted, which is the case here, they should be considered as a covered investment.

162. The Parties have again argued in this context whether the investment relates to public or business purposes, or a combination thereof. The Tribunal finds Claimant’s argument that mixed purposes characterize its investment to be persuasive. In fact, such purpose is not only in accordance with the legal texts governing the Ukratnafta project noted but also

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<sup>269</sup> See *supra*, footnote 256.

<sup>270</sup> Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 8.

reflects the realities described above about the interaction of both public and private interests that has been typical of the transition period between the command economies of the past and the market economies of the present.

163. It is also relevant to note in this respect that in *CSOB* the tribunal held that a State-owned enterprise is not necessarily performing State functions when it takes advantage of State policies allowing for a restructuring to compete in a free market economy.<sup>271</sup> Even less would that be the case when the enterprise has accomplished its transition to privatization and competition but still relies on certain government policies to that effect. Unlike *Maffezini*, however, in this case the private entity is operating for profit and is not discharging what could be considered as essentially governmental functions delegated to it by the State.<sup>272</sup>

164. These mixed purposes do not alter the fact that the interest and activity of Tatneft in the Ukrtatnafta project are, in their essence, commercially-orientated. The Tribunal must also note that the very definition of investments in the Russia-Ukraine BIT provides that “[n]o alteration of the type of investments, which the funds are put in, shall affect their nature as investments [...]”<sup>273</sup> Whether the contribution made took one form or another is irrelevant as it was conceived in either case as a type of investment in the Ukrtatnafta fund, and thus its nature as an investment does not change. The Tribunal thus concludes that Tatneft has made an investment within the meaning of the BIT.

#### **4. Fourth Objection to Jurisdiction: Tatneft’s Participation in Ukrtatnafta Is Not in Conformity with Ukrainian Legislation (Objection *Ratione Materiae*)**

##### *Respondent’s arguments*

165. In close connection with the objection to the Tribunal’s jurisdiction examined above, Respondent asserts that even if Tatneft’s shareholding in Ukrtatnafta were to be qualified as a private investment, it still would not qualify for protection under the Russia-Ukraine BIT

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<sup>271</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 23, CLA-29.

<sup>272</sup> *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para. 80, RLA-11.

<sup>273</sup> Russia-Ukraine BIT, Exhibit R-2. Article 1 states that “No alteration of the type of investments, which the funds are put in, shall affect their nature as investments, unless such alteration is contrary to the laws of a Contracting Party on whose territory the investments were made.”

because it was not made in conformity with the legislation of the State where the investment was made, as required under Article 1(1) and reiterated under Article 2(1).<sup>274</sup>

166. Respondent asserts that the requirement of conformity with the host State's legislation is not limited to the initiation of the investment, as Claimant contends,<sup>275</sup> but is a continuing requirement such that protections under the Russia-Ukraine BIT should only be extended insofar as the investment is at all relevant times in compliance with the law.<sup>276</sup> Unlike the relevant provision in *Fraport*,<sup>277</sup> the language used in Article 1(1) of the Russia-Ukraine BIT is not tied to the admission of the investment itself, and thus *Fraport* should not be relied upon to limit the requirement of complying with the host State's legislation.<sup>278</sup> In any event, Respondent argues that Tatneft's investment was not originally made in compliance with Ukrainian law, and Tatneft also did not abide by the continuing requirement of parity in the Ukrtatnafta Treaty.<sup>279</sup>
167. In Respondent's view, breach of Ukrainian legislation is found at the very origin of Tatneft's investment. While Ukrtatnafta was registered in December 1995 with Tatneft listed as a founding shareholder holding 20.01% of shares, Tatneft did not make any contribution to Ukrtatnafta until 14 August 2000, when it paid US\$ 1 million in cash, with its shareholding reduced to 0.278%.<sup>280</sup> This was followed by its acquisition of shares in Ukrtatnafta held by Zenit Bank, a Russian commercial bank Tatneft had co-founded, valued at US\$ 30 million, although the purchase price paid by Tatneft to Zenit has not been revealed.<sup>281</sup> This operation brought Tatneft's shareholding in Ukrtatnafta to 8.613%.<sup>282</sup>

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<sup>274</sup> Statement of Defense, paras. 114-115; Reply, paras. 129-132. As noted above, investments are defined under Article 1(1) of the Russia-Ukraine BIT as "all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation." Article 2(1) of the Russia-Ukraine BIT similarly provides that "Each Contracting Party shall encourage the investors of the other Contracting Party to make investments on its territory and shall allow such investments in so far as it is in conformity with its respective legislation." See Exhibit R-2.

<sup>275</sup> Answer, para. 71.

<sup>276</sup> Reply, para. 131.

<sup>277</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 300, CLA-32.

<sup>278</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 116-117.

<sup>279</sup> Reply, para. 132.

<sup>280</sup> Reply, para. 134; Statement of Defense, para. 112; 1995 Incorporation Agreement, p. 4, Exhibit R-8; 1998 Incorporation Agreement, Exhibit R-9.

<sup>281</sup> Statement of Defense, para. 112; Reply, para. 134.

Thus, from Ukratnafta's incorporation in December 1995 until August 2000, Tatneft appeared and acted as a shareholder in Ukratnafta without making any contribution to the company, which violated the Ukratnafta Incorporation Agreement and Ukrainian legislation.<sup>283</sup> Respondent emphasizes that in light of these facts, it should be recognized that Tatneft's investment was made in August 2000, and not December 1995 upon Ukratnafta's incorporation, as Claimant contends.<sup>284</sup>

168. Respondent relies on the 1995 Incorporation Agreement, which provided that Tatneft's contribution in the form of fixed assets was to be made "no later than 30 days" from the date of registration of the company.<sup>285</sup> While Tatarstan's failure to contribute oil deposits prevented Tatneft from contributing the fixed assets used to extract oil from such deposits, even the amended contribution of US\$ 1 million that was due on or before 10 September 1998 pursuant to the 1998 Amended Incorporation Agreement was not paid until August 2000.<sup>286</sup> Despite Tatneft's failure to make its contribution, Tatneft was not excluded from Ukratnafta's shareholding and in fact voted its shares at annual general shareholders' meetings in violation of Ukrainian law.<sup>287</sup>

169. Pursuant to Article 33 of the Law on Business Entities, Tatneft was required to contribute the full value of its shares "not later than one year after" the company's registration.<sup>288</sup> Pursuant to Article 8 of the Law on Securities and Stock Exchange, no shares could be issued to Tatneft prior to its actual contribution in August 2000.<sup>289</sup> Finally, pursuant to

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<sup>282</sup> Reply, para. 134; see also 1999 Amended Incorporation Agreement, Exhibit C-149.

<sup>283</sup> Reply, para. 135.

<sup>284</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 119-120.

<sup>285</sup> Reply, para. 136; 1995 Incorporation Agreement, Articles 5.3 and 5.5, Exhibit R-8.

<sup>286</sup> Statement of Defense, para. 112; 1998 Amended Incorporation Agreement, Articles 5.3 and 5.5, Exhibit R-9.

<sup>287</sup> Statement of Defense, para. 112; Reply, para. 138; Minutes No. 2 of General Shareholders' Meeting of Ukratnafta dated 19 July 1997, Exhibit R-34; Ukratnafta Minutes No. 3 of 10 June 1998, Exhibit C-131..

<sup>288</sup> Reply, para. 136; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 121-123. Article 33 of the Ukrainian Law on Business Entities, Exhibit R-78, provides: "Within the terms prescribed by the constituent meeting, but not later than one year after registration of a joint stock company, the shareholder shall pay up the full value of the shares. Upon failure to pay up within the prescribed term the shareholder shall pay for the period of delay 10 per cent per annum of the amount of the overdue payment, unless otherwise provided by the company's charter. When the failure to pay up is pending for 3 months after the prescribed term for payment, the joint stock company may dispose of such shares as prescribed by the company's charter. [...]"

<sup>289</sup> Reply, para. 136; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 121-123. Article 8 of the Law on Securities and Stock Exchange, Exhibit R-80, provides in relevant part: "Shares may be rendered to the recipient (purchaser) only after full payment of their value."

Article 41(2) of the Law on Business Entities, Tatneft had no right to participate in any meetings of shareholders before its contribution in August 2000.<sup>290</sup> Respondent maintains that both Tatneft and Tatarstan must have been aware of the irregularity of their shareholder status as they participated in the general shareholders' meetings in 1997 and 1998, and voted for the exclusion of other shareholders that had not yet contributed their share capital.<sup>291</sup> Because of these non-conformities with host State legislation, Tatneft's investment falls outside the scope of the Russia-Ukraine BIT's protections.

170. Tatneft's investment was also not made in conformity with Ukrainian law because it was made in conjunction with and in support of Tatneft's attempt to subvert the parity requirement established in the Ukrtatnafta Treaty and other constituent documents of Ukrtatnafta through the acquisition of majority control of the company.<sup>292</sup>

171. The maintenance of parity between the Tatar and Ukrainian sides was an essential requirement of the Ukrtatnafta Treaty, not just at the origin, as Claimant contends, but throughout the life of the project.<sup>293</sup> Respondent relies on the language of the Ukrtatnafta Treaty which provided for the incorporation of Ukrtatnafta "on a parity basis,"<sup>294</sup> and notes the Tatar presidential decree of 13 December 1994 and the minutes of the 1994 meeting between Ukrainian and Tatar governmental officials, each of which reference parity between Tatar and Ukrainian sides in relation to the Ukrtatnafta project.<sup>295</sup> The 1995 Incorporation Agreement and the original Ukrtatnafta Charter even refer to the preservation of parity in the event of modification of the Ukrtatnafta fund.<sup>296</sup> Respondent argues that it is evident in Tatneft's own Statement of Claim that it breached the parity of the Ukrtatnafta

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<sup>290</sup> Reply, para. 137; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 121-123. Article 41(2) of the Ukrainian Law on Business Entities, Exhibit R-23, provides in relevant part: "The right to participate in a general meeting of shareholders shall be vested in the persons holding shares as on the date of the general meeting (other than the constituent meeting)."

<sup>291</sup> Reply, para. 150, footnote 211.

<sup>292</sup> Statement of Defense, para. 116; Reply, para. 140.

<sup>293</sup> Reply, para. 145.

<sup>294</sup> Reply, para. 142; Ukrtatnafta Treaty, Exhibit R-1.

<sup>295</sup> Reply, paras. 142-144.

<sup>296</sup> Reply, para. 144, footnotes 203 and 204; 1995 Incorporation Agreement, Art. 5.15, Exhibit R-8; Ukrtatnafta Charter, Art. 6.5, Exhibit C-30.

project when it became allied in interest with Tatarstan, Amruz and Seagroup to leverage a controlling position of 55.7% in the company.<sup>297</sup>

172. Respondent contends that the introduction of Amruz in 1998 and Seagroup in 1999 to the shareholding of Ukratnafta violated the Ukratnafta Treaty because it “was designed covertly to alter the equilibrium between the parties” agreed in the documents noted above.<sup>298</sup> Evidence of this lies in the fact that Amruz and Seagroup paid with promissory notes, thus not contributing to the company’s working capital needs, and still obtained the valuable position of power broker between the Ukrainian and Tatar parties.<sup>299</sup>
173. Although Claimant has argued that the State Property Fund of Ukraine supported the 1998 Amended Incorporation Agreement<sup>300</sup> that changed the parity requirement, and therefore Respondent is estopped from arguing the agreement’s illegality,<sup>301</sup> Respondent retorts that no decision of a shareholders’ meeting could alter the requirements of the Ukratnafta Treaty, and therefore such decisions are ineffective.<sup>302</sup> Moreover, the actions taken at the 1998 shareholders’ meeting, including the decision to amend the 1995 Incorporation Agreement and Ukratnafta Charter and alter parity, are ineffective because a valid quorum of 60% of the shareholders was not present at the meeting. This is because both Tatneft and Tatarstan had no legal right to attend and vote shares they had not legally acquired.<sup>303</sup>

*Claimant’s arguments*

174. In Claimant’s view, Respondent’s late argument that the 1998 amendments to the Ukratnafta Incorporation Agreement are invalid because Tatneft had not made its contribution within the prescribed time, and was hence not entitled to have shares issued in its name or vote in shareholders’ meetings until full payment had been received, is contradicted by the facts of the case.

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<sup>297</sup> Statement of Defense, paras. 118-119; Reply, paras. 140-146.

<sup>298</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 155.

<sup>299</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 155.

<sup>300</sup> See *supra*, footnote 44.

<sup>301</sup> See Answer, paras. 64-65; Rejoinder, paras. 198-209.

<sup>302</sup> Reply, para. 149; Respondent argues that the Ukratnafta Treaty could only be amended upon the agreement of the parties thereto to “modifications and amendments ... as proposed by the Cabinet of Ministers of Ukraine and the Cabinet of Ministers of the Republic of Tatarstan ...”. See Ukratnafta Treaty, Article 12, Exhibit R-1.

<sup>303</sup> Reply, para. 150

175. While the Ukratnafta Treaty was clear that from the outset Ukraine would contribute the Kremenchug Refinery to the Ukratnafta project, the assets to be contributed by Tatneft and Tatarstan were not identified with equal specificity and the question became subject to intense negotiations between the Parties.<sup>304</sup> When the original envisaged contribution of certain Tatarstan oil fields and oil-related assets proved to be unfeasible in economic terms, Ukratnafta shareholders sought other alternatives.<sup>305</sup> Following a reappraisal of the Kremenchug Refinery and a reduction of its capital value, it was agreed in 1999 that Tatarstan would transfer shares of its oil company Tatneftprom to Ukratnafta.<sup>306</sup>
176. It was also agreed that Claimant would contribute US\$ 31 million in cash to Ukratnafta instead of oil-related assets.<sup>307</sup> In view of the need to obtain authorization from Russia's Central Bank to make a cash contribution, Tatneft's contribution was made in the form of US\$ 1 million transfer in its own name and US\$ 30 million share purchases by Zenit Bank, acting as Tatneft's trustee and becoming a temporary shareholder in Ukratnafta.<sup>308</sup> Following the authorization of the Russian Central Bank in 2000, Zenit's shares in Ukratnafta were later repurchased by Tatneft.<sup>309</sup> Claimant also submits that its expertise and technical knowledge in the oil sector were also crucial to Ukratnafta's viability and as such are also a kind of investment protected under the Russia-Ukraine BIT.<sup>310</sup>
177. Claimant disagrees with Respondent's interpretation of Article 33 of the Ukrainian Law on Business entities. Claimant asserts that Article 33 sets out the legal consequences when there is a violation of the law.<sup>311</sup> A shareholder shall pay 10% per annum of the amount overdue, a penalty that was never invoked; and the company may dispose of the outstanding shares, which Ukratnafta did not do.<sup>312</sup> Additionally, the contractual

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<sup>304</sup> Rejoinder, para. 151.

<sup>305</sup> Rejoinder, para. 152.

<sup>306</sup> Rejoinder, paras. 154-156; Minutes No. 5 of the General Shareholders' Meeting of Ukratnafta of 27 July 1999, para. 2(1), Exhibit C-132; Delivery and Acceptance Certificate dated 9 September 1999, Exhibit C-134.

<sup>307</sup> Rejoinder, para. 157.

<sup>308</sup> Rejoinder, para. 158; Article 6 of the Federal Law "On Banks and Banking Activities" of December 2, 1990, Exhibit C-135; Trust Management Agreement No. I/du-V/97 of October 26, 1997, Exhibit C-136.

<sup>309</sup> Rejoinder, para. 159; Minutes of Ukratnafta's General Meeting No.6 of May 23, 2000, para. 6, Exhibit C-150.

<sup>310</sup> Rejoinder, para. 161.

<sup>311</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 78.

<sup>312</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 78; Ukrainian Law on Business Entities, Article 33, Exhibit R-78.

obligation of the founders of Ukrtatnafta to make their contributions within thirty days under the 1995 Incorporation Agreement does not qualify as “legislation” within the meaning of Article 1(1) of the Russia-Ukraine BIT.<sup>313</sup>

178. Claimant asserts, moreover, that Tatneft and Tatarstan have at all times prior to these proceedings, and even months after they were commenced, been recognized by Respondent as legitimate shareholders in Ukrtatnafta.<sup>314</sup> Ukraine never sought to exclude Tatneft or Tatarstan from shareholders’ meetings or question their right to vote despite the complications in the formation of the capital of Ukrtatnafta.<sup>315</sup> Only in its Reply did Ukraine take the position for the first time that the 1998 shareholders’ meeting was illegal and ineffective due to the alleged lack of prescribed 60% quorum of shareholders.<sup>316</sup> Moreover, in certain Ukrainian court proceedings, the Ukrainian Government took the position that the shareholders’ resolutions and amended agreements were in general lawful and lack of payment of the contributions within the given deadline constituted, if anything, a curable breach.<sup>317</sup> Finally, the lack of quorum argument could no longer be invoked, as the applicable statute of limitations is long expired.<sup>318</sup>

179. Claimant also disagrees with Respondent’s interpretation of the meaning of “parity” in the Ukrtatnafta Treaty and related documents. Claimant first argues that the stipulation to incorporate Ukrtatnafta “on a parity basis” did not amount to a requirement but was rather a description of the initial distribution of the share capital of Ukrtatnafta.<sup>319</sup> Even if the language of parity was mandatory and not descriptive, the requirement had a temporal limitation and only applied to the initial distribution of the capital shares at the time of

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<sup>313</sup> Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 77; see also 1995 Incorporation Agreement, Articles 5.3 and 5.5, Exhibit R-8.

<sup>314</sup> Rejoinder, para. 163.

<sup>315</sup> Rejoinder, para. 164.

<sup>316</sup> Rejoinder, para. 164; see also Reply, paras. 137-139.

<sup>317</sup> Rejoinder, paras. 165-167, footnotes 234-237; Claimant’s Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 69.

<sup>318</sup> Rejoinder, para. 170, footnote 139.

<sup>319</sup> Answer, para. 61.

incorporation, and Ukrtatnafta was not intended to remain incorporated on a parity basis in perpetuity.<sup>320</sup>

180. If the parity issue had been so essential to Ukrainian law it would have been spelled out in specific mandatory terms in the Ukrtatnafta Treaty and subsequent instruments governing the Ukrtatnafta project, but this was not generally the case.<sup>321</sup> The only reference to the applicability of the parity principle to modification of the shareholding structure was contained in the 1995 version of the Incorporation Agreement; however, this was freely amendable and in fact amended to delete this language in 1998.<sup>322</sup> The lack of a continuing parity requirement is further confirmed by the fact that shareholders from the start intended Ukrtatnafta to be transformed into an open joint stock company.<sup>323</sup>
181. Considering that following the expropriation events alleged by Claimant Ukrainian shareholders now control over 60% of Ukrtatnafta's shares, Claimant argues that Ukraine itself would be in breach of a continuing parity requirement, if one exists.<sup>324</sup>
182. In Claimant's interpretation according to the express language in Article 1(1) of the Russia-Ukraine BIT and the ruling in *Fraport*, the requirement to make an investment in accordance with the host State's legislation is limited to the initiation of the investment and does not extend to post-investment violations.<sup>325</sup> Claimant explains that the share distribution in 1995 was indisputably made on a parity basis.<sup>326</sup>
183. Moreover, before the share purchases of Amruz and Seagroup intervened resulting in Respondent's view in the violation of parity, references to such parity were abandoned by amendments made to the constituent documents of Ukrtatnafta, including the 1995

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<sup>320</sup> Answer, para. 62; Rejoinder, paras. 173-174; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 65.

<sup>321</sup> Rejoinder, paras. 172-174.

<sup>322</sup> Rejoinder, para. 175; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 66.

<sup>323</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 65; 1995 Incorporation Agreement, Article 16.1, Exhibit R-8.

<sup>324</sup> Rejoinder, paras. 181, 198, 202.

<sup>325</sup> Answer, paras. 70-72; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 73.

<sup>326</sup> Answer, para. 63.

Incorporation Agreement and Ukratnafta Charter.<sup>327</sup> Thus, Amruz's and Seagroup's investments were made at a time when parity was no longer envisioned.<sup>328</sup>

184. Finally, none of Claimant's actions amount to a breach of a fundamental principle of the host State's laws, according to the qualification of this requirement in *L.E.S.I.*, or to misrepresentation, as was the case in *Plama*, or to an intent to acquire jurisdiction by some fictitious and abusive acquisition, as was the case in *Phoenix*.<sup>329</sup>

185. In any event, Claimant asserts, Respondent should be estopped from relying on alleged violations of Ukrainian law as a bar to jurisdiction and admissibility. Ukraine did not protest any of the events it now protests until a decade after the events occurred, despite the fact that Ukrainian officials sat on the management and supervisory boards of the company.<sup>330</sup> All of the 1998 amendments to the Ukratnafta Incorporation Agreement were unanimously approved by Ukratnafta shareholders, including the State Property Fund of Ukraine.<sup>331</sup> Ukraine never protested the participation of Tatneft or Tatarstan in general meetings of shareholders, and it never claimed a violation of Article 33 of the Law on Business Entities or Article 8 of the Law on Securities and Stock Exchange; moreover, it expressly consented to the admission of Amruz and Seagroup into the Ukratnafta shareholding, and the deletion of references to parity in the company's founding documents.<sup>332</sup>

186. As held in *Fraport* and *Kardassopoulos*, principles of fairness should require a tribunal to hold a government estopped from invoking as a jurisdictional defense a violation of its domestic laws in respect of an investment that itself had endorsed.<sup>333</sup> More specifically,

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<sup>327</sup> Answer, para. 64, footnote 61.

<sup>328</sup> Answer, para. 64.

<sup>329</sup> Rejoinder, paras. 195-197, footnotes 261, 262, 263; *L.E.S.I. S.p.A. & Astaldi S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 83(iii), CLA-138; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 137-140, 144, RLA-16; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 144, RLA-37.

<sup>330</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp. 60-1.

<sup>331</sup> Answer, para. 65; Rejoinder, para. 198.

<sup>332</sup> Rejoinder, paras. 164-167, footnotes 236-237, para. 198; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp 67-68.

<sup>333</sup> Answer, paras. 66-69, footnotes 62-65; Rejoinder, paras. 198-209; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 77; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 346, CLA-32; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/8, Decision on Jurisdiction, 6 July 2007, para. 182, CLA-33.

Respondent is estopped from arguing that an agreement which it has approved was not initially valid.<sup>334</sup> Moreover, considering that Ukrainian shareholders now control over 60% of Ukrtatnafta's shares, Respondent also should not be heard to allege an illegality where it is itself in breach.<sup>335</sup>

*The Tribunal's findings*

187. In connection with this objection to jurisdiction the Tribunal must address whether or not Claimant's investment was made in compliance with Ukrainian legislation, as required by Articles 1(1) and 2(1) of the Russia-Ukraine BIT.
188. Respondent has alleged breaches of the Ukrtatnafta Incorporation Agreement, Ukrainian Law on Business Entities and Ukrainian Law on Securities and Stock Exchange arising from the circumstances of Claimant's contribution to Ukrtatnafta in exchange for its shareholding. As will be explained, the Tribunal is persuaded that Claimant's non-compliance with the time limits imposed on its contribution does not deprive the investment of protection under the Russia-Ukraine BIT. Once the participation in the form of contributing the development of certain Tatarstan oil fields and oil-related assets did not prove feasible, an alternative arrangement was agreed upon, including the commitment of Tatarstan to contribute shares in Tatneftprom and of Tatneft to pay US\$ 31 million for the shares issued.<sup>336</sup> True enough, this last payment was done late and through an intricate financial arrangement involving Zenit Bank,<sup>337</sup> but there is no evidence that the late capital contribution caused Tatneft's investment to be illegal.
189. While the thirty-day period imposed by the 1995 Incorporation Agreement was not complied with, this was only upon the realization that the intended contribution of fixed assets was unfeasible, and this does not amount to a breach of legislation. Moreover, under Article 33 of the Ukrainian Law on Business Entities, if shares are not paid within three months after expiration of the prescribed term (of not more than one year), the company

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<sup>334</sup> Rejoinder, paras. 198-209. See also Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment on the Merits of 15 June 1962, Separate Opinion of Vice-President Alfaro, ICJ Reports 1962, p. 6 at p. 39, CLA-140.

<sup>335</sup> Rejoinder, para. 202.

<sup>336</sup> Statement of Defense, para. 16; Answer, footnote 48; Reply, paras. 9-10; Rejoinder, paras. 154-157; Minutes No. 5 of the General Shareholders' Meeting of Ukrtatnafta of 27 July 1999, para. 2(1), Exhibit C-132.

<sup>337</sup> Reply, paras. 9-10, 134; Rejoinder, paras. 157-160.

may dispose of such shares, but this is not mandatory and in this case Ukratnafta did not.<sup>338</sup> Despite the tardiness of its contribution, Tatneft was recognized as a Ukratnafta shareholder and exercised voting rights without any objections by Ukrainian shareholders, and therefore the pertinent contributions cannot be considered to be tainted by illegality.

190. The Tribunal is also mindful of the provision in Article 1(1) of the Russia-Ukraine BIT to the effect that “[n]o alteration of the type of investments, which the funds are put in, shall affect their nature as investments, unless such alteration is contrary to the laws of the Contracting Party on whose territory the investments were made.” In the absence of a specific law of Ukraine that would have been breached as a result of implementing a different form of participation, the changes in that participation, which transformed it into a different kind of economic arrangement pursuing the same ends, do not affect the protections afforded to the investment under the BIT.

191. In light of the Tribunal’s conclusion that Claimant’s late contribution does not render its shareholding invalid, Respondent’s objection based on Article 41 of the Law on Business Entities is also without merit. Article 41 establishes that the right to participate in general meetings of shareholders is vested in persons holding shares at the date of the general meeting, and quorum for a valid meeting requires the attendance of shareholders holding over 60% of the votes.<sup>339</sup> While Respondent has argued that all actions taken at the 1997 and 1998 shareholders’ meetings are invalid due to a lack of quorum, Claimant has persuasively argued that it would be incorrect to count Tatneft’s shares for purposes of counting total outstanding shares, but not to count them for purposes of constituting quorum. Even if Tatneft’s shares were invalid, Respondent has not alleged that quorum would not have been met at these meetings without counting Tatneft’s shares as part of the total outstanding shares. Thus it does not appear that these meetings were tainted by illegality.

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<sup>338</sup> Article 33 of the Ukrainian Law on Business Entities, Exhibit R-78, provides: “Within the terms prescribed by the constituent meeting, but not later than one year after registration of a joint stock company, the shareholder shall pay up the full value of the shares. Upon failure to pay up within the prescribed term the shareholder shall pay for the period of delay 10 per cent per annum of the amount of the overdue payment, unless otherwise provided by the company’s charter. When the failure to pay up is pending for 3 months after the prescribed term for payment, the joint stock company may dispose of such shares as prescribed by the company’s charter. [...]”

<sup>339</sup> Article 41 of the Ukrainian Law on Business Entities, Exhibit R-23, provides in relevant parts: (para. 2) “The right to participate in a general meeting of shareholders shall be vested in the persons holding shares as on the date of the general meeting (other than the constituent meeting)”; (para. 8) “The General Meeting shall be acknowledged as valid if attended by Shareholders holding, under the company Charter, over 60 percent of the votes.”

192. Moreover, as explained above, the Tribunal is of the opinion that Tatneft's late contribution does not make its shareholding invalid, and this is further evidenced by the fact that Ukrainian parties never objected to its presence or participation at these shareholder meetings. It is also noteworthy that any objection based on breach of either the Ukrainian Law on Business Entities or the Ukrainian Law on Securities and Stock Exchange is inapposite due to the expiry of the applicable three year limitations period.<sup>340</sup>
193. Respondent has also alleged that Tatneft's investment was not made in conformity with Ukrainian legislation because it was made in support of its attempt to subvert the parity between Ukrainian and Tatar sides, a requirement entrenched in governing documents of the Ukrtatnafta project. There is no doubt that the Ukrtatnafta Treaty provided for the incorporation of Ukrtatnafta "on a parity basis,"<sup>341</sup> but the Parties have divergent opinions on the implications of this provision. The Tribunal must thus determine whether parity was a) merely descriptive of the initial distribution of shares, b) a requirement applicable only at the stage of incorporation, or c) a requirement that was applicable to the entire life of the Ukrtatnafta project.
194. It is reasonable to assume that the stipulation in the Ukrtatnafta Treaty to incorporate Ukrtatnafta "on a parity basis" was mandatory and required that Tatarstan's and Ukraine's participation be on equal footing at the outset of the company's incorporation. This objective was well-reflected in the parity of the initial contributions envisaged, and was in fact complied with in terms of the initial distribution of capital shares.
195. It is relevant that, unlike the Ukrtatnafta Treaty, the Ukrtatnafta Charter and 1995 Incorporation Agreement each stipulated that parity would be preserved in the event of alteration of the Ukrtatnafta fund. These documents could be amended by shareholder agreement and were in fact amended in 1998 to remove the mandatory language of preserving parity. The fact that the Ukrtatnafta Treaty, which could not be freely amended by shareholders, did not contain similar language, indicates that the Ukrtatnafta Treaty did not impose a continuing parity requirement on the Ukrtatnafta project. It would have been

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<sup>340</sup> Civil Code of Ukraine of 1963 (Article 71) and 2003 (Article 257), Exhibits C-153 and C-154, respectively.

<sup>341</sup> Note that the Decree of the President of Tatarstan dated 13 December 1994, Exhibit R-6, and the Minutes of the Meeting between the Government of Ukraine and the Government of the Republic of Tatarstan on the Establishment of Transnational Finance and Production Petroleum company "UKRTATNAFTA", Exhibit R-15, also give evidence that Ukrtatnafta was incorporated on a parity basis.

different if the Ukrtatnafta Treaty had mandated that the share distribution would have to be preserved on an equal basis at all times, but this was not the case. Thus, while the Ukrtatnafta Charter and 1995 Incorporation Agreement did provide for the preservation of parity, these documents were validly amended by unanimous vote of shareholders 1998, at the same time that Amruz was introduced to Ukrtatnafta's shareholding structure.

196. The fact that Amruz and Seagroup were accepted as new shareholders is also indicative that the parity basis had a flexibility inherent to the financial or operational needs of Ukrtatnafta, and if the Tatar Government, Tatneft and these new shareholders achieved some form of shareholder alliance resulting in the control of 55.7% of the stock, this cannot be held contrary to Ukrainian legislation but is rather the expression of normal majorities in a joint stock company and its voting arrangements. Claimant's argument that Ukraine itself now controls 60% of Ukrtatnafta shares which would, following Respondent's views, also be in breach of parity, is persuasive and shows that parity was not understood as a continuing requirement under the Ukrtatnafta Treaty.
197. The Tribunal is also of the opinion that the language of Articles 1(1) and 2(1) of the Russia-Ukraine BIT indicates that Claimant's investment should be in conformity with the host State's legislation at its initiation, but does not convey the meaning that this would have to be a permanent requirement. Indeed, Article 2(1) establishes that Ukraine "shall allow"<sup>342</sup> or "shall admit"<sup>343</sup> investments in accordance with its legislation, which points to the initiation of the investment. The discussion in *Fraport* that "the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment"<sup>344</sup> is illustrative of the question that in certain instances that might be the appropriate conclusion unless clear evidence to the contrary is available. This evidence is not available in this instant case.
198. As noted above, it is undisputed that Ukrtatnafta was in fact incorporated on a parity basis in 1995. It is noteworthy, however, that Claimant's investment also complied with host State law in 2000 when its amended capital contribution was actually transferred to

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<sup>342</sup> Russia-Ukraine BIT, Exhibits R-2 and C-23.

<sup>343</sup> Russia-Ukraine BIT, Exhibit C-23, Corrigendum to translation.

<sup>344</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 345, CLA-32. Note that in the present case there is no allegation of subsequent State action affecting the legality of the investment.

Ukratnafta, firstly because the parity requirement under the Ukratnafta Treaty only applied to incorporation, and secondly because the continuing parity requirement under the Ukratnafta Charter and 1995 Incorporation Agreement had been removed by unanimous shareholder vote in 1998. Thus, at the initiation of the investment, Tatneft complied with the parity noted in the Ukratnafta Treaty; and in 2000, it complied with the new structure of capital contributions unanimously agreed at the shareholders meetings in 1998 and 1999.

199. In light of the Tribunal's above findings, it is not necessary for the Tribunal to decide whether Respondent should be estopped from invoking this jurisdictional defense, as Claimant contends. True enough, the record shows the State Property Fund of Ukraine supported the 1998 Amended Incorporation Agreement, including the alterations noted in respect of the parity of the project, just as a number of Ukrainian Government officials participating in the pertinent meetings did, particularly in their capacity as members of Ukratnafta's supervisory board.<sup>345</sup> These facts provide further evidence that for the Ukrainian shareholders the new kinds of arrangements which altered the parity of the project were satisfactory and were not understood to be in breach of Ukrainian legislation.
200. In any case, it has not been shown that any supposed breach concerned a fundamental principle of the host State's legislation as required by the *L.E.S.I.* case.<sup>346</sup> Finally, there are no indications on record to the effect that Claimant engaged in abusive conduct in breach of the host State's legislation or otherwise acted in bad faith. For the reasons stated above, therefore, Respondent's objection to the Tribunal's jurisdiction on this count cannot be upheld.

### C. OBJECTIONS TO ADMISSIBILITY

201. As explained above at paragraph 77 of this award, Respondent has also submitted three objections concerning the admissibility of Tatneft's claims. The first objection is based on the understanding that Claimant cannot claim for the interests of Amruz and Seagroup; the second objection concerns the allegation that Claimant has no *ius standi* to claim for unpaid oil deliveries; and the third objection is that Tatneft has failed to state an arguable case

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<sup>345</sup> Minutes of Ukratnafta's General Meeting No. 3 of 10 June 1998, Exhibit C-131.

<sup>346</sup> See *supra*, footnote 329.

concerning the alleged harm to its rights as a shareholder. This last claim was, however, partially withdrawn at the opening of the Jurisdictional Hearing.<sup>347</sup> The pertinent objections will be examined next.

**1. First Objection to Admissibility: Tatneft Has No *Ius Standi* to Claim on behalf of Amruz and Seagroup**

*Respondent's arguments*

202. In Respondent's view, it is unclear what legal theory Claimant relies upon as the basis of its additional US\$ 1.3 billion claim<sup>348</sup> in relation to Amruz and Seagroup.<sup>349</sup> In fact, according to Respondent, there is no legal theory that may support Tatneft's claim: if Tatneft is bringing a claim for loss of the "enhanced value" of its own shareholding based on the existence of a shareholders' alliance, "such a claim is manifestly without merit";<sup>350</sup> if Tatneft is bringing a claim for indirect loss as a shareholder in Seagroup and Amruz due to the latter's loss of their own shares in Ukratnafta, Tatneft has no standing to claim on behalf of Amruz and Seagroup.<sup>351</sup> Indeed, even if the rights of Seagroup and Amruz had been harmed, these companies are not parties to the arbitration and have separately submitted "cooling-off letters" to Ukraine, respectively invoking the Energy Charter Treaty and the Ukraine-USA BIT, just as Tatarstan has also submitted such a letter in connection with the Russia-Ukraine BIT.<sup>352</sup>

203. Respondent further contends that Claimant can only claim for a loss relating to an investment if it acquired the investment prior to the time its cause of action arose, which it

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<sup>347</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 3. Respondent's objections concerning Articles 2(2) and 3(1) of the Russia-Ukraine BIT were not expressly withdrawn. Statement of Defense, para. 154-167.

<sup>348</sup> Reply, para. 230. Respondent refers to the new claim submitted by Claimant in its Answer, p. 66.

<sup>349</sup> Reply, para. 231; Statement of Defense, para. 120.

<sup>350</sup> Reply, para. 232; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 171-172. See also Statement of Defense, para. 147.

<sup>351</sup> Reply, para. 232.

<sup>352</sup> Statement of Defense, para. 121; Reply, paras. 237-238; Notice of Dispute pursuant to Article IV of the Agreement Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment of March 4, 1994, Exhibit R-37; Notice of Dispute pursuant to Article 26 of the Energy Charter Treaty of December 17, 1994, Exhibit R-38. Respondent also contends that in any event Tatarstan's claim could only be dealt with under the inter-governmental dispute settlement arrangements of the Ukratnafta Treaty and not under the Russia-Ukraine BIT (Reply, para. 240).

did not in this case.<sup>353</sup> Respondent refers to several judicial proceedings, the first of which was initiated in 2001, regarding the invalidation of the agreements for the purchase of Ukratnafta shares by Amruz and Seagroup.<sup>354</sup> In particular, Respondent insists that while Claimant acquired shares in Amruz and Seagroup in December 2007, Ukrainian courts twice held earlier that year that the share purchase agreements were invalid and ordered the transfer of Amruz's and Seagroup's shares to a third party (Naftogaz in May 2007 and the Ministry of Fuel and Energy of Ukraine in December 2007).<sup>355</sup> Respondent thus concludes that the acquisition of the shares took place after the alleged harm had occurred, as confirmed by Claimant's own statements.<sup>356</sup> Because "the wrongful act had occurred on the claimant's own case before that acquisition in December 2007," there was no composite act, contrary to Claimant's argument at the hearing.<sup>357</sup> What happened after the alleged deprivation of Amruz's and Seagroup's shares in 2007 "was the continuation of the same."<sup>358</sup>

204. In addition, the sole purpose of Tatneft's belated acquisition of shares in Amruz and Seagroup was to sue Respondent in this particular forum.<sup>359</sup> At a time when Amruz's and Seagroup's shares had been taken away and the refinery of which they were shareholders had been raided, according to Claimant, by Mr Ovcharenko, there was no rational, let alone commercial, justification for this acquisition.<sup>360</sup> It follows that Tatneft's attempt to transfer their alleged injury to itself by acquiring shares in these two companies amounts to impermissible forum shopping.<sup>361</sup>

205. Finally, Respondent contends that the purchase by these companies of founding shares was contrary to the original understanding that shareholders would be limited to entities of

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<sup>353</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 173. See also Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 174-175. Respondent refers to Z. Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), para. 551.

<sup>354</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 181-186.

<sup>355</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 184-186.

<sup>356</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 187-191.

<sup>357</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 61.

<sup>358</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 58.

<sup>359</sup> Reply, para. 251; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 186, 191.

<sup>360</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 188.

<sup>361</sup> Reply, para. 232.

Tatarstan and Ukraine.<sup>362</sup> Respondent also notes that the payment of founding shares with promissory notes, as these companies did, is contrary to Ukrainian legislation.<sup>363</sup> While it is unnecessary, in Respondent's view, to resolve these issues because Tatneft's claims are inadmissible, these "oddities" further undermine the legitimacy of these claims.<sup>364</sup>

206. To conclude, Respondent asks the Tribunal to find that "Ukraine has not consented to arbitrate the claims of Swiss or American entities under the Ukraine-Russia BIT, that Tatneft did not own shares in Seagroup and AmRuz at the time that these entities' claims of expropriation arose, and that therefore those claims do not have the requisite nationality requirement to be brought under the Russia-Ukraine BIT [...] its claims in relation to AmRuz and Seagroup should be deemed inadmissible and outside the scope of the jurisdiction of this Tribunal."<sup>365</sup>

#### *Claimant's arguments*

207. Claimant argues in respect of this first objection that at the time the improper transfer of shares from Amruz and Seagroup to Naftogaz and the illegal taking of the Kremenchug Refinery took place,<sup>366</sup> Tatneft, the State Committee and both Amruz and Seagroup were "aligned in interest," the latter three having granted powers of attorney to Tatneft to represent their interests.<sup>367</sup> As a result of this shareholder alliance, Tatneft's shareholding in Ukrtatnafta enjoyed "a significant enhancement in value."<sup>368</sup> By depriving Amruz and Seagroup of their shareholder rights, Respondent "has arrogated to itself a controlling interest in Ukrtatnafta [...],"<sup>369</sup> thus causing additional material damage to Claimant's investment.<sup>370</sup> Claimant further argues that "respondent's objection that claimant may not claim the enhanced value of its shareholding resulting from its shareholder alliance with

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<sup>362</sup> Reply, para. 233.

<sup>363</sup> Reply, paras. 235-236.

<sup>364</sup> Reply, para. 233.

<sup>365</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 195-196.

<sup>366</sup> Statement of Claim, paras. 15, 31, 32.

<sup>367</sup> Answer, para. 121. See also Claimant's Oral pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 84: "Tatneft had been granted powers of attorney by AmRuz and Seagroup and the Republic of Tatarstan to represent their interests until October 2010 and October 2009 respectively."

<sup>368</sup> Answer, para. 74; Rejoinder, para. 257.

<sup>369</sup> Statement of Claim, para. 36.

<sup>370</sup> Statement of Claim, Section E, p. 8.

AmRuz and Seagroup and the Republic of Tatarstan is a question that cannot be addressed without the full record”<sup>371</sup> and “[t]he extent to which this alliance which created a control block increased the value of Tatneft shareholding is a question for the merits phase.”<sup>372</sup>

208. In addition, while it is correct to argue that Amruz and Seagroup are not parties to this arbitration, Tatneft is entitled to claim as an indirect shareholder for the harm caused to its interests by the expropriation measures affecting those companies.<sup>373</sup> Relying on Article 15 of the ILC Articles, Claimant argues that “the persistent failure of respondent to remedy the raider action and the various court decisions that resulted in AmRuz and Seagroup losing title to their shares constitute composite acts which began before claimant acquired an indirect interest in Ukrtatnafta and which continued thereafter,”<sup>374</sup> ultimately “ripen[ing] into an outright transfer of title to the shares in June 2009 [...]”<sup>375</sup> Claimant points out that “[i]n December 2007 none of the court proceedings pending against AmRuz and Seagroup resulted in [a] final and irrevocable judgment” and “[t]he court proceedings that actually deprived AmRuz and Seagroup of their shares in Ukrtatnafta had not been initiated in December 2007.”<sup>376</sup>

209. Finally, Tatneft argues that, because it was a shareholder in Amruz and Seagroup, it decided not to cause them to pursue separate arbitrations under the Energy Charter Treaty or the Ukraine-USA BIT “in an effort to streamline the resolution of claims.”<sup>377</sup> Claimant further contends that Respondent’s assertions that the acquisition of shares in these companies would amount to impermissible forum shopping are inapposite because the arbitrations pursued under those other treaties would be no less efficacious than the present one and thus no advantage can be gained by resorting to the Russia-Ukraine BIT.<sup>378</sup> On the other hand, contrary to impermissible forum shopping such as that considered in *Phoenix*,

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<sup>371</sup> Claimant’s Oral pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 83.

<sup>372</sup> Claimant’s Oral pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 84.

<sup>373</sup> Rejoinder, paras. 259-262.

<sup>374</sup> Claimant’s Oral pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 39.

<sup>375</sup> Claimant’s Oral pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 39.

<sup>376</sup> Claimant’s Oral pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 40.

<sup>377</sup> Rejoinder, para. 261.

<sup>378</sup> Rejoinder, para. 262.

in this case there is no substitution of an entity in a State having an investment treaty for an entity in a State not qualifying for treaty protection.<sup>379</sup>

*The Tribunal's findings*

210. Both parties are in agreement about the fact that neither Amruz nor Seagroup are parties to this arbitration. In light of Respondent's argument that it was not clear whether Tatneft was claiming on behalf of Amruz and Seagroup or under some other entitlement and following Claimant's clarifications at the hearing,<sup>380</sup> the Tribunal has to address two distinct issues: (i) the admissibility of Tatneft's claim as an indirect shareholder for the loss arising out of the alleged deprivation of Amruz's and Seagroup's shareholding in Ukrtatnafta; and (ii) the admissibility of Tatneft's claim arising out the exclusion of the allied shareholders including Amruz and Seagroup and the consequential loss of the "enhanced value" of Tatneft's shareholding in Ukratatnafta.
211. With respect to the first issue, Respondent insisted at the hearing that the Tribunal should focus on two elements: first, whether Claimant's interest in Amruz and Seagroup was acquired before or after the events giving rise to the alleged harm and thus whether Claimant met the legal requirement of being in control of the investment at the time the alleged harm took place; second, whether this acquisition was made for litigation purposes as opposed to commercial purposes.<sup>381</sup> If both elements are present, Tatneft's claim should be held inadmissible.
212. Respondent has cited Mr. Zachary Douglas to the effect that if "Claimant maintains that its investment has been expropriated, for example, then it must be able to demonstrate that it had effective control over that investment at the time of the alleged expropriation."<sup>382</sup> Because Tatneft acquired shares in both Amruz and Seagroup it might eventually qualify as an indirect investor in Ukrtatnafta as far as the shares of these companies in the latter are

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<sup>379</sup> Rejoinder, para. 263, footnote 348; Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 144, RLA-37.

<sup>380</sup> Claimant's Oral pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 83.

<sup>381</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 169 and 180.

<sup>382</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 175. Respondent quoted Z. Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), para. 551.

concerned,<sup>383</sup> but still this status would have to exist at the critical date of the measures affecting such companies.

213. The evidence produced by Claimant indicates that it acquired shares in Amruz and Seagroup in December 2007.<sup>384</sup> Respondent does not challenge that Tatneft had control of Amruz and Seagroup after that date.<sup>385</sup> A number of the acts complained of by Claimant, especially the court proceedings that were commenced in 2008 and resulted in the sale of Amruz's and Seagroup's shares by auction in June 2009,<sup>386</sup> took place after the acquisition. It is true, however, that Claimant, Amruz and Seagroup alleged in 2008 that the interests of Amruz and Seagroup started to be adversely affected in 2007, i.e. prior to Tatneft's acquisition. In its Statement of Claim, Tatneft indicated that the improper transfer of Amruz's and Seagroup's shares to Naftogaz in May 2007 deprived them of their shareholder rights.<sup>387</sup> Similarly, Seagroup stated in broader terms in its Notice of Dispute dated 10 June 2008 that "[d]uring 2007, as a result of a series of actions and omissions of the Ukrainian Government, the Ukrainian courts and enforcement officers, Seagroup has been deprived of its shares in Ukratnafta and of its shareholder rights, suffering significant and ongoing damages."<sup>388</sup> Amruz's Notice of Dispute of 11 June 2008 is identically worded and refers to the same date and events.<sup>389</sup>

214. As set forth in Chapter II, following an application for interim relief by the Ministry of Fuel and Energy of Ukraine, Amruz and Seagroup were indeed ordered to transfer their shares in Ukratnafta to Naftogaz on 22 May 2007.<sup>390</sup> On 17 September 2007 and 30 October 2007, the Economic Court and the Economic Court of Appeal of the city of Kiev successively upheld claims from the Prosecutor General of Ukraine seeking the invalidation of the share purchase agreements entered into by Seagroup and Amruz and ordered the transfer of their

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<sup>383</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 79.

<sup>384</sup> See above, para. 60.

<sup>385</sup> See e.g. Reply, para. 242; Douglas Legal Opinion, para. 58.

<sup>386</sup> See e.g. Claimant's Oral pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp. 82-83.

<sup>387</sup> Statement of Claim, paras. 32, 36.

<sup>388</sup> Notice of Dispute pursuant to Article IV of the Agreement Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment of March 4, 1994, Exhibit R-37.

<sup>389</sup> Notice of Dispute pursuant to Article 26 of the Energy Charter Treaty of December 17, 1994, Exhibit R-38.

<sup>390</sup> See above, para. 58.

shares to the State (represented by the Ministry of Fuel and Energy of Ukraine).<sup>391</sup> On 14 December 2007, according to Respondent, the Economic Court of the city of Kiev ordered measures for the enforcement of its decision of 17 September 2007.<sup>392</sup>

215. In subsequent submissions, however, Claimant has given evidence of a third court action that was initiated in February 2008, after its acquisition of shares in Amruz and Seagroup, and resulted this time in a final and irrevocable decision to transfer these shares to a third party.<sup>393</sup> By contrast, the outcome of the first court proceedings that took place in the first half of 2007 was temporary by nature since the court ordered the transfer of the shares by way of interim relief. The second court proceedings were stayed in May 2008 pending the resolution of the third court proceedings and eventually discontinued in February 2009.<sup>394</sup> It is only in late 2008, in the third court proceedings, that the issue of the validity of Amruz's and Seagroup's share purchase agreements reached the Supreme Court of Ukraine which then confirmed the annulment by the lower courts of the purchase agreements and the order to return the shares to Ukratnafta.<sup>395</sup> The returned shares were then sold at an auction in June 2009 to a company called Korsan, following a court order to that effect.<sup>396</sup>
216. While Claimant concedes that there is no evidence in the record that Claimant sought to obtain any specific guarantee with respect to its purchase of shares in December 2007,<sup>397</sup> the Tribunal agrees that when Tatneft acquired its shares in Amruz and Seagroup, the court decisions that affected these shares could still be subject to review by higher courts and thus were not final.<sup>398</sup> Claimant could still seek to obtain a remedy. In addition, in previous proceedings regarding the validity of Amruz's and Seagroup's acquisition of shares in Ukratnafta, the Supreme Court of Ukraine had twice handed down decisions in

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<sup>391</sup> See above, para. 59.

<sup>392</sup> See above, para. 59.

<sup>393</sup> Answer, paras. 131-138; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp. 81-82; Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 31 March 2010, pp. 40-41.

<sup>394</sup> See Answer, para. 133, para. 138, footnote 129; and above, para. 62.

<sup>395</sup> See above, para. 63.

<sup>396</sup> See above, para. 63.

<sup>397</sup> Claimant's Oral pleadings, Jurisdictional Hearing Transcript, 31 March 2010, pp. 63-64. Claimant referred to declarations of Ukrainian politicians that the alleged takeover of the Kremenchug Refinery was illegal (*Ibid.*, p. 64).

<sup>398</sup> Respondent indicated at the hearing that there were different levels in the hierarchy of Ukrainian courts (Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 183). The highest level was never reached in the first and second proceedings.

favor of Amruz and Seagroup, in 2002 and as recently as April 2006.<sup>399</sup> The prospect of prevailing in the new proceedings of 2007 and 2008, though uncertain, was not unreasonable or unlikely.

217. The Tribunal thus further agrees that the cumulation of the three above-described court proceedings, which concerned the same issue and all resulted in the transfer of Amruz's and Seagroup's shares to a third party, along with the alleged raid on Ukrtatnafta, should be considered in aggregate to determine what the alleged breach was and when it occurred.<sup>400</sup> It is only in mid-2009, when the shares were auctioned and acquired by Korsan, or at the earliest in late 2008, when the Supreme Court of Ukraine confirmed the lower court's decision to transfer Amruz's and Seagroup's shares to Ukrtatnafta, that it became clear that Amruz and Seagroup had been fully and finally deprived of their shares. This repeated pattern of allegedly harmful acts and decisions would aptly be characterized as a composite act, the extent of which was revealed when it crystallized in the course of 2009. The Tribunal thus concludes at least some of the alleged harm to its indirect investment occurred after the acquisition of Tatneft's shares in Amruz and Seagroup.
218. The Tribunal now turns to the second element of Respondent's objection, namely that Tatneft acquired its shares in Amruz and Seagroup for purposes of litigation, and thus attempted to "forum shop."
219. The Tribunal notes that while Amruz and Seagroup had in fact submitted notices of dispute to Ukraine separately from Tatneft, which could have led to separate arbitrations under a different bilateral investment treaty or the Energy Charter Treaty, the companies were of course free to pursue the course of action they thought best for their interests, particularly in view of the fact that Tatneft had acquired their shares. Claimant explains that the course of action followed was that deemed to be more efficient as it avoided parallel arbitrations and reduced costs for both parties.<sup>401</sup> The Tribunal is not to sit in judgment of the parties' litigation strategies, except when there might be some form of abuse.

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<sup>399</sup> See above, para. 58.

<sup>400</sup> Report of the International Law Commission on the Work of its Fifty-third Session, p. 62 point (2), p. 63 point (7), UN GAOR, 56<sup>th</sup> Sess., Supp. No. 10, UN Doc. A/56/10 (2001). See also Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 31 March 2010, p. 61.

<sup>401</sup> See Rejoinder, para. 261.

220. Indeed, it is one thing to artificially build up a case for taking advantage of a given arbitration forum, such as was considered in the *Phoenix* case noted above and other investment arbitrations,<sup>402</sup> which is certainly not permissible because it amounts to an abuse of rights or bad faith and possibly to misrepresentation of the facts to the tribunal, and quite another to choose a given forum as a matter of legitimate convenience. The Tribunal notes in this respect Claimant's argument to the effect that no particular advantage could be obtained by bringing a case to this forum as opposed to the Ukraine-US BIT or the Energy Charter Treaty, and that in any event Claimant is not substituting a status of protected investor for that of an investor which otherwise is not entitled to protection, which is the essence of forum shopping.<sup>403</sup> Similar standards of protection are available under the various treaties mentioned; those standards might even be superior in some respects under the Ukraine-USA BIT or the Energy Charter Treaty. There is no evidence that Tatneft's purpose was to defeat the nationality requirement of the applicable BIT, as argued by Respondent.<sup>404</sup>

221. The Tribunal concludes that the second element of Respondent's admissibility objection, namely that Tatneft acquired in Amruz and Seagroup solely for litigation purposes, is also missing. Tatneft's claim as an indirect shareholder for the loss arising out the alleged deprivation of Amruz's and Seagroup's shareholding in Ukratatnafta is therefore admissible.

222. The Tribunal finally turns to the alleged inadmissibility of Tatneft's claim arising out the exclusion of the allied shareholders and the consequential loss of the "enhanced value" of its shareholding in Ukratatnafta.

223. The Tribunal notes that Respondent has not specifically alleged that this particular claim would amount to forum shopping but rather that it has no legal or factual basis.<sup>405</sup> In any event, the Tribunal is of the view that Claimant has convincingly argued that there existed an alliance of shareholders before the alleged harm took place. The powers of attorney

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<sup>402</sup> *Supra*, footnote 379; *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, , 17 ICSID Rev. 142; 41 ILM 867 (2002).

<sup>403</sup> Rejoinder, paras. 262-263.

<sup>404</sup> See Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 175. The Tribunal notes, further, that the fact that Claimant's case evolved over time to take into account new factual developments, and is different in subsequent submissions from what it was in its Statement of Claim, is not prohibited and does not lead to the conclusion that Claimant's litigation strategy amounts to forum shopping.

<sup>405</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 171. See also above, para. 202.

relied upon by Claimant in support of the existence of this shareholder alliance were first issued in 2004 and 2006 and gave it significant discretion in a number of areas,<sup>406</sup> at a time when Claimant and the other allied shareholders together held 55.7% of Ukratatnafta's share capital.<sup>407</sup>

224. The Tribunal further agrees that the issue is not whether "Tatneft's involvement in the shareholders alliance or the enhanced value it fosters are separate rights protected by the Russia-Ukraine BIT" but rather whether "its involvement in the shareholders' alliance increases the value of its investment in Ukratatnafta."<sup>408</sup> Whether damages were caused to Tatneft's investment as a consequence of the alleged exclusion of the allied shareholders and what their quantum is, if any, is not something to be decided at this stage; this will require a full submission of the facts and evidence on the merits, including, *inter alia*, detailed explanations about the legal nature of the shareholders' alliance, a matter on which the Tribunal put specific questions to Claimant at the jurisdictional hearing.<sup>409</sup>

**2. Second Objection to Admissibility: Tatneft Has No *Ius Standi* to Claim for Unpaid Oil Deliveries**

*Respondent's arguments*

225. The second objection to admissibility made by Respondent is that Tatneft cannot claim for unpaid oil deliveries because it did not have a supply contract with Ukratatnafta and such supply was done by the intermediation of several Ukrainian and Tatar companies.<sup>410</sup> A request made by Ukratatnafta to secure such contract was rejected by Tatneft on the grounds

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<sup>406</sup> Power of Attorney from the Ministry of Land and Property Relations of the Republic of Tatarstan to Mr. Shafagat Takhautdinov, General Director of OAO Tatneft, dated 23 October 2006, Exhibit C-66; Power of Attorney from AmRuz to Mr. Nail Maganov dated 1 November 2004, Exhibit C-67; Power of Attorney from AmRuz to Mr. Shafagat Takhautdinov dated 5 November 2004, Exhibit C-68; Power of Attorney from AmRuz to Mr. Nail Maganov dated 25 September 2006, Exhibit C-69; Power of Attorney from AmRuz to Mr. Nurislam Syubaev dated 19 October 2006, Exhibit C-70; Power of Attorney from AmRuz to Mr. Shafagat Takhautdinov dated 30 October 2007, Exhibit C-71; Power of Attorney from Seagroup to Mr. Nail Maganov dated 3 November 2004, Exhibit C-72; Power of Attorney from Seagroup to Mr. Shafagat Takhautdinov dated 3 November 2004, Exhibit C-73; Power of Attorney from Seagroup to Mr. Nail Maganov dated 2 October 2006, Exhibit C-74; Power of Attorney from Seagroup to Mr. Nurislam Syubaev dated 19 October 2006, Exhibit C-75; Power of Attorney from Seagroup to Mr. Shafagat Takhautdinov dated 30 October 2007, Exhibit C-76. See Answer, para. 121.

<sup>407</sup> Statement of Claim, para. 15; Answer, para. 121.

<sup>408</sup> Rejoinder, para. 257.

<sup>409</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, pp. 91-97.

<sup>410</sup> Statement of Defense, para.124; Reply, paras. 276-277.

that it had been made by an unrecognized official of the company following the dispute about the appointment of Mr. Ovcharenko already noted, and it was thus Tatneft that chose not to become Ukrtatnafta's supplier.<sup>411</sup> In any event, this claim is unrelated to Claimant's alleged investment, i.e. its shareholding participation, and would at most involve a doubtful contractual debt the situs of which is probably Tatarstan.<sup>412</sup> Relying on *Joy Mining and Romak*, Respondent concludes that Claimant's claim for unpaid oil is not a protected investment within the meaning of the Russia-Ukraine BIT.<sup>413</sup> It is also noted in this respect that the refusal to supply the oil results in a violation of the Republic of Tatarstan's obligations under the Ukrtatnafta Treaty.<sup>414</sup>

226. It is further explained that it appears that the same claims for oil deliveries have been brought before the courts of Tatarstan by another company that exported oil produced by Tatneft, Suvar-Kazan, and this company has obtained a decision in its favor and has seized assets of Ukrtatnafta by way of interim relief.<sup>415</sup> This confirms that the oil supplier to Ukrtatnafta was not Tatneft but other companies either in Tatarstan or Ukraine.<sup>416</sup> Under Ukrainian law parties cannot assign their claims to third parties.<sup>417</sup> In the end there would be a serious risk of Tatneft obtaining double recovery.<sup>418</sup>

227. Respondent also maintains that the temporal scope of considerations of admissibility is not limited and can take into account developments occurring after the arbitration was initiated, as was held in *SGS v. Philippines*.<sup>419</sup> Taking into account the evidence on events occurring both before and after the date that these proceedings were instituted, the debt for oil

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<sup>411</sup> Statement of Defense, para. 125; Letter from Mr. Ovcharenko to Claimant dated 29 October 2007, Exhibit R-28; Letter from Claimant to Ukrtatnafta dated 2 November 2007, Exhibit R-29.

<sup>412</sup> Reply, para. 256; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 211.

<sup>413</sup> Reply, paras. 254-256.

<sup>414</sup> Reply, para. 273.

<sup>415</sup> Statement of Defense, paras. 128-131; Reply, para. 280; Award of the Arbitration Court of the Republic of Tatarstan, City of Kazan, Case No. A65-90702008, Exhibit R-40.

<sup>416</sup> Statement of Defense, para. 130.

<sup>417</sup> Statement of Defense, para. 130.

<sup>418</sup> Statement of Defense, para. 131; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 203.

<sup>419</sup> Reply, para. 260; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 177, RLA-20.

deliveries not only has been paid but has been “overpaid.”<sup>420</sup> A number of assignments of claims took place between some of the intermediary companies, in particular Avto and Suvar-Kazan, and were invalidated by Ukrainian courts with the consequence that Ukrtatnafta refused to recognize the validity of those assignments and make payments to those companies.<sup>421</sup> Those assignments artificially created jurisdiction in the courts of Tatarstan, which granted the compensation noted and ordered the seizure of Ukrtatnafta’s shares in Tatneftprom, representing the total contribution of Tatarstan to Ukrtatnafta.<sup>422</sup> Ukrtatnafta, however, has paid its debts in full to Taiz and Tekhnoprogress, the Ukrainian intermediaries.<sup>423</sup>

228. In Respondent’s view, it follows from the above facts that Tatneft has failed to state a *prima facie* case concerning the claims for unpaid oil deliveries because it has not shown how the measures adopted affected its investment and resulted in a breach of the Russia-Ukraine BIT.<sup>424</sup> Relying on *SGS v. Philippines* Respondent asserts that the “mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal.”<sup>425</sup>

229. Claimant’s reliance on *Siemens v. Argentina* to claim for consequential damages from the non-payment to other entities is in Respondent’s view misplaced.<sup>426</sup> That case accepted to protect Siemens from claims of its contractors and suppliers against the company,<sup>427</sup> but here Tatneft is seeking something quite different, namely that the Tribunal order Ukraine to compensate Claimant for claims it has against third parties to which it would have supplied

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<sup>420</sup> Reply, paras. 261-266.

<sup>421</sup> Reply, paras. 262-264.

<sup>422</sup> Reply, para. 265; Award of the Arbitration Court of the Republic of Tatarstan, City of Kazan, Case No. A65-9070/2008, Exhibit R-40.

<sup>423</sup> Reply, para. 264; Examples of wire transfer orders from Ukrtatnafta to Taiz and Tekhnoprogress, Exhibit R-99.

<sup>424</sup> Reply, paras. 267-269.

<sup>425</sup> Reply, para. 269; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 161, RLA-20.

<sup>426</sup> Reply, para. 278, referring to Answer, para. 88.

<sup>427</sup> *Siemens A.G. v. The Argentine Republic*, Award, ICSID Case No. ARB/02/8, 6 February 2007, para. 387, CLA-42.

oil.<sup>428</sup> This is not the meaning of the protection of investments under either the Russia-Ukraine BIT or international law.<sup>429</sup>

*Claimant's arguments*

230. Claimant asserts that it has not brought in this case a contractual claim for the breach of an oil supply contract between Tatneft and Ukratnafta; rather, its claim is that the illegal seizure of bank accounts and taking control of Ukratnafta by Mr. Ovcharenko has deprived Tatneft of payment for oil deliveries and of the benefit to continue being the principal supplier of oil to Ukratnafta.<sup>430</sup>
231. Because the critical date for determining admissibility is when the arbitration was instituted (namely, 21 May 2008), and the Russian court decision in favor of Suvan-Kazan was issued several months later (September 2008), the latter cannot be relied upon for raising an objection to admissibility.<sup>431</sup> That court decision can at the most have relevance in determining the amount of compensation due, which is a matter for the merits.<sup>432</sup>
232. Claimant also maintains that consequential damages have been awarded by tribunals when the claims arise out of events that are the direct and immediate consequence of the host State's violation of its treaty obligations, as decided in the *Siemens* case, a matter which again can only be examined at the merits stage.<sup>433</sup> In this case the causal link results from the fact that the illegal takeover of the Kremenchug Refinery resulted in non-payment to intermediaries for oil supplied, which in turn have failed to pay Tatneft.<sup>434</sup>
233. It is also explained that the reason why Tatneft refused to enter into a supply contract with Ukratnafta at the time it was proposed by Mr. Ovcharenko was not just that this official was not recognized as having been validly appointed, but also because Tatneft was at the

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<sup>428</sup> Reply, para 278.

<sup>429</sup> Reply, para. 279.

<sup>430</sup> Statement of Claim, para. 39; Answer, para. 78; Rejoinder, paras. 267-284.

<sup>431</sup> Answer, paras. 79-81, footnote 73; *Ceskoslovenska Obchodní Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ICSID Review, 1999, vol. 14, p. 251 at p. 261, para. 31, CLA-29.

<sup>432</sup> Answer, para. 82.

<sup>433</sup> Answer, paras. 87-88, footnote 79; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 387, CLA-42.

<sup>434</sup> Rejoinder, para. 269.

time owed US\$ 520 million by Ukratnafta for oil that had been delivered but not paid for.<sup>435</sup> A similar reason explains the interruption of oil supplies to the Kremenchug Refinery in 2005.<sup>436</sup>

234. Whether partial payments took place or not is a question concerning quantum and not admissibility.<sup>437</sup> In any event, the payments made to both Taiz and Tekhnoprogress, Ukrainian companies that together with Avto are under the control of businessmen related to Mr. Ovcharenko, has not resulted in any payment reaching Tatneft but has rather benefited entities connected to the new Ukratnafta administration.<sup>438</sup> These payments were objected to by the Ukrainian Prime Minister as “unlawful and have features of financial machinations and considerably violate the interests of the major shareholders of Ukratnafta, JSC.”<sup>439</sup> Even if the payments ordered in connection with the seizure of Ukratnafta’s shares in Tatneftprom materialize, they still fall short of the amount owed to Tatneft.<sup>440</sup>

*The Tribunal’s findings*

235. The Tribunal must now turn to the examination of the objection to admissibility made in connection with the question of unpaid oil deliveries to Ukratnafta. While no contract has directly linked Tatneft to Ukratnafta in this matter, but instead a number of intermediaries were used, the issue is still whether Claimant is entitled to receive payments for oil sold to Ukratnafta and which have allegedly remained unpaid as a consequence of the measures affecting the latter, particularly in terms of interventions in the bank accounts and financial operations of the company following the reinstatement of Mr. Ovcharenko.

236. Respondent has appropriately invoked the decision in *Joy Mining* in order to draw a distinction between ordinary sales contracts, which in its view is the case here, and

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<sup>435</sup> Answer, para. 90-91.

<sup>436</sup> Answer, para. 92; Rejoinder, para. 284.

<sup>437</sup> Rejoinder, para. 271.

<sup>438</sup> Rejoinder, para. 275.

<sup>439</sup> Rejoinder, para. 277, footnote 366; Governmental Telegram from Mr. Minnikhanov to Ms. Tymoshenko, dated 18 June 2009, Exhibit R-49.

<sup>440</sup> Rejoinder, para. 279.

investments.<sup>441</sup> It has invoked the decision in *Romak* insofar as it required that if the parties wished to consider some other transaction as an investment, including a “pure” “one-off sales contract,” this would have to be worded in terms that leave no room for doubt about the intention of the parties.<sup>442</sup>

237. Those findings are right insofar as contracts and similar transactions are concerned, but here the claim consists of consequential damages relating to the events surrounding the Kremenchug Refinery and the management of Ukratnafta, and not a contractual claim between the Parties. In the Tribunal’s view, this is a matter that requires examination on the merits and only then will it be possible to establish whether some breach of rights or treatment has occurred and whether payment has been made, to whom, in what amount, and under what entitlement. The Parties’ discussions about the meaning of *Siemens* in this context are also relevant to the merits of the case. Therefore, while Tatneft’s claim for consequential damages in relation to unpaid oil deliveries is admissible, complex questions of litigation between some such intermediaries and Ukratnafta, including the seizure of assets, and their eventual incidence on the issue of double recovery needs also to be examined on the merits.

238. The Tribunal must also take note that Tatneft’s claim in this matter involves the allegation that it lost its role as main supplier of oil to Ukratnafta and the potential significance of this consequence for the value of its shares. Respondent asserts that Tatneft was offered the opportunity to enter into a long-term oil supply contract with Ukratnafta and the offer was refused by Claimant. There is no doubt a question concerning the role of Mr. Ovcharenko in Ukratnafta that appears to have explained this refusal, but more importantly, a decisive reason explained by Tatneft is that it was owed at the time millions of dollars and was not willing to commit further resources with an uncertain future. However that may be, the validity of this claim and its eventual resulting damages can only be assessed by the Tribunal on the merits.

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<sup>441</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 210; Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, para 58, RLA-55.

<sup>442</sup> Respondent’s Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, pp. 210-211; Romak v. Uzbekistan, UNCITRAL Arbitration, Award, 26 November 2009, RLA-68.

**3. Third Objection to Admissibility: Tatneft Has Failed to State an Arguable Case concerning Alleged Violations of its Rights under the BIT and Ensuing Damages**

*Respondent's arguments*

239. As noted above, Respondent originally objected to admissibility on the ground that Claimant failed to state an arguable case that demonstrated *prima facie* that there was a violation of the Russia-Ukraine BIT in respect of its rights as a shareholder in Ukratnafta, or that harm and damages ensued from such claim.<sup>443</sup> This objection, however, was withdrawn in light of judicial proceedings taking place in Ukraine after Respondent's Reply on Jurisdiction was submitted.<sup>444</sup> This withdrawal was made without concession in respect of the merits of this and related claims. Accordingly, it shall not be addressed by the Tribunal at this stage.
240. As a factual matter, however, it is appropriate to note that the Economic Court of the Poltava Region declared on 3 November 2009 that Tatneft's purchase of shares representing 8.613% of Ukratnafta had been unlawful and ordered Tatneft to return those shares to Ukratnafta.<sup>445</sup> No compensation for these measures has thus far been offered or paid.<sup>446</sup>
241. In addition to Respondent's jurisdictional defense to the allegation that it breached Article 5(1) of the Russia-Ukraine BIT concerning the expropriation of shares, which has now been clearly withdrawn,<sup>447</sup> Respondent also made in its Statement of Defense two other arguments concerning the need for Claimant to make an arguable case. These objections were not expressly withdrawn and therefore will be addressed by the Tribunal.
242. One such argument concerns the guarantee of legal protection to Claimant under Article 2(2) of the Russia-Ukraine BIT, which provides:

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<sup>443</sup> Statement of Defense, paras. 144-149; Reply, paras. 157-224.

<sup>444</sup> Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 4.

<sup>445</sup> Rejoinder, paras. 230-232; Judgment of the Economic Court of the Poltava Region of 3 November 2009, Case 17/178, Exhibit C-126.

<sup>446</sup> Claimant's Oral Pleadings, Jurisdictional Hearing Transcript, 30 March 2010, p. 23.

<sup>447</sup> Statement of Defense, paras. 150-153; Reply, paras. 157-224; Respondent's Oral Pleadings, Jurisdictional Hearing Transcript, 29 March 2010, p. 4.

*Either Contracting Party shall guarantee, in conformity with its legislation, the complete and unconditional legal protection of investments of investors of the other Contracting Party.*<sup>448</sup>

243. Respondent asserts that such protection is not an unconditional guarantee of treatment and it is different from a full security and protection clause.<sup>449</sup> As such it cannot give an investor an individual enforceable right under international law and, moreover, the protection that is to be granted in conformity with Ukraine's legislation has not been removed and it could be enforced before the Ukrainian courts.<sup>450</sup>

244. The second of Respondent's arguments concerns Article 3(1) of the Russia-Ukraine BIT, which provides:

*Each Contracting Party shall provide on its respective territory a regime for the investments made by investors of the other Contracting Party, and also with respect to the activity involved in making such investments which regime shall be no less favorable than the one granted to its own investors or investors of any third state, precluding the use of discriminatory measures, which could interfere with the management and disposal of those investments.*<sup>451</sup>

245. While Claimant asserts that this provision "requires Ukraine to grant to Russian investors and their investments treatment no less favorable than that granted by Ukraine to its own investors or to investors of third States and their investments,"<sup>452</sup> Respondent maintains that the Article noted does not refer to "treatment" but to "a regime for the investments," which is a different matter as it addresses only a system of general application and not a specific treatment to a certain investor.<sup>453</sup> Because this is not a case of most favored nation treatment it cannot be used to import Article 2(2) of the United Kingdom-Ukraine BIT and the fair and equitable treatment and full protection and security therein envisaged, as Tatneft pretends.<sup>454</sup>

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<sup>448</sup> Russia-Ukraine BIT, Article 2(2), Exhibit R-2; Statement of Defense, para. 156, footnote 128.

<sup>449</sup> Statement of Defense, para. 155.

<sup>450</sup> Statement of Defense, paras. 158-159.

<sup>451</sup> Russia-Ukraine BIT, Article 3(1), Exhibit R-2; Statement of Defense, para. 161, footnote 131.

<sup>452</sup> Statement of Claim, para. 46.

<sup>453</sup> Statement of Defense, paras. 160-164.

<sup>454</sup> Statement of Defense, paras. 156-167.

*Claimant's arguments*

246. In view of the withdrawal noted above it would not be appropriate to examine Claimant's arguments concerning Article 5(1) of the Russia-Ukraine BIT, but they shall be examined in respect of Articles 2(2) and 3(1).
247. Claimant asserts that the failure to grant "complete and unconditional legal protection" under Article 2(2) of the Russia-Ukraine BIT and the need to ensure most favored nation treatment under Article 3(1), which in every version of Russian bilateral investment treaties in other languages is translated as "treatment" and not "regime," provide ample grounds to consider that it is plausible that if the matter is discussed and proved on the merits the alleged violations of the Russia-Ukraine BIT might be established to the satisfaction of the Tribunal.<sup>455</sup> Claimant submits that it has stated an admissible case in this respect.

*The Tribunal's findings*

248. The Tribunal believes first that the reference to "complete and unconditional legal protection" envisaged in Article 2(2) of the Russia-Ukraine BIT is not to be taken lightly in that potentially it might involve a substantial guarantee of treatment benefiting the investor in light of the facts of the case. This treatment can only be discussed in the context of the merits of the case.
249. The Tribunal must also note that Claimant relies on the most favored treatment provided for in Article 3(1) of the Russia-Ukraine BIT to the effect that it can invoke the application of Article 2(2) of the United Kingdom-Ukraine BIT. The latter Article provides for fair and equitable treatment and the enjoyment of full protection and security, which Tatneft considers applicable because it grants a more favorable treatment to British investors and their investments in Ukraine. Again this particular claim can only be considered in the context of the specific treatment envisaged, which is a matter for the merits. At that point it will also be necessary to examine whether Article 2(2) of the Russia-Ukraine BIT is in some respect analogous to Article 2(2) of the United Kingdom-Ukraine BIT, or entails a different kind of legal obligation.

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<sup>455</sup> Answer, paras. 163

250. At this stage, however, the Tribunal is satisfied that these claims are admissible. While it is not implausible to argue that the events described might have compromised fair and equitable treatment and full protection and security if the standard of the United Kingdom-Ukraine BIT is held applicable in this respect, or if the Russia-Ukraine BIT is interpreted to encompass similar obligations, these issues are of course also matters to be decided at the merits.
251. It should be noted, as explained in the narrative of facts above, that Article 3(1) has also been invoked in connection with Article 8(1) of the United Kingdom-Ukraine BIT which entitles U.K. investors to commence arbitration after a three-month waiting period rather than the six-month period envisaged in the Russia-Ukraine BIT, and which consequently affords more favorable treatment to such investors.<sup>456</sup> This issue has not been objected to in the context of jurisdiction or otherwise and hence will not be addressed by the Tribunal.
252. In light of the above considerations, the Tribunal concludes that the objections to admissibility of Tatneft's claims cannot be upheld, without prejudice to the examination of defenses on the merits and the evidence offered at that stage about the manner in which Respondent may have breached the Russia-Ukraine BIT, and the related damages and links of causality with the measures taken.

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<sup>456</sup> See above, para. 3.

**CHAPTER IV – DECISION**

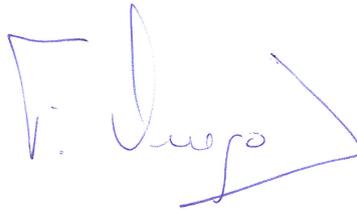
253. For all of the reasons set out above, the Tribunal decides as follows:

- a) Respondent's objections to jurisdiction and admissibility are dismissed;
- b) all questions concerning costs are reserved for subsequent determination.

The Tribunal invites the Parties to confer and agree on a procedural calendar for the merits phase of this arbitration, and to report to the Tribunal thereon within 60 days of the issuance of this Partial Award.

Place of Arbitration: Paris, France

Dated: 28 September 2010



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Professor Francisco Orrego Vicuña  
Presiding arbitrator



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The Honorable Charles N. Brower  
Co-arbitrator



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The Honorable Marc Lalonde  
P.C., O.C., Q.C.  
Co-arbitrator