

Case No: CL-2015-000015

Neutral Citation Number: [2016] EWHC 153 (Comm)  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Rolls Building, 7 Rolls Buildings  
Fetter Lane, London EC4A 1NL

Date: 02/02/2016

**Before :**

**MR. JUSTICE TEARE**

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**Between :**

<b>Gold Reserve Inc.</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>The Bolivarian Republic of Venezuela</b>	<b><u>Defendant</u></b>

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**Graham Dunning QC and Christopher Harris** (instructed by **Stephenson Harwood LLP**)  
for the **Defendant**

**Michael Bools QC** (instructed by **Norton Rose Fulbright LLP**) for the **Claimant**  
Hearing dates: 18-20 January 2016

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**Judgment**

**Mr. Justice Teare :**

1. This is an application by the Defendant, the Republic of Venezuela (“Venezuela”), to set aside an order of this court made *ex parte* on documents alone granting leave to the Claimant, Gold Reserve Inc. (“GRI”), to enforce an arbitration award in the same manner as a judgment of this court and giving judgment in the terms of the award.
2. The arbitration award was dated 22 September 2014 and was made pursuant to the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (“ICSID”). The members of the tribunal were Professor Piero Bernardini (President), Mr. David A.R. Williams QC and Professor Pierre-Marie Dupuy. By the award Venezuela was ordered to pay GRI approximately US\$713 million plus interest and costs. The seat of the arbitration was Paris. The hearing took place initially in Washington DC (between 13 and 17 February 2012) and then in Paris (between 15 and 16 October 2013). Following further written submissions the arbitration was closed on 23 July 2014.
3. The proceedings before this court seeking permission to enforce the award as if it were a judgment were commenced on 19 May 2015 and Phillips J. made the requested order on 20 May 2015 *ex parte* on documents alone.
4. The arbitration concerned mining concessions and mining rights in Venezuela (the Brisas Project) held indirectly by GRI, a Canadian company.
5. On 18 April 1988 and 3 March 1998 the two concessions forming the Brisas Project were granted to a Venezuelan company, Compania Arifere Brisas del Cuyuni (“CAB”). In November 1992 CAB was acquired by Gold Reserve de Venezuela, a subsidiary of Gold Reserve Corp., a company incorporated in the State of Washington. Thus that US company became the indirect owner of the Brisas Project.
6. In January 1998 a Bilateral Investment Treaty (“BIT”) for the promotion and protection of investments was made between Venezuela and Canada. The treaty aimed to promote investments in the host state, either Venezuela or Canada, by citizens or enterprises of the other contracting state, and to protect them.
7. In October 1998 GRI became the parent company of Gold Reserve Corp. and so became the indirect owner of the Brisas Project. That came about because of a restructuring of GRI and Gold Reserve Corp. whereby Gold Reserve Corp. merged with a subsidiary of GRI (another US company) and shareholders in Gold Reserve Corp. transferred their shares to GRI in return for shares in GRI itself. There is unchallenged evidence that “upon the merger...the shareholders, management, employees, company headquarters and company operations of the Gold Reserve group of companies was left completely unchanged.”
8. Thereafter between 1998 and 2008 GRI raised some US\$225 million in equity financings and convertible debt, largely from Canadian sources, and spent close to US\$300 million in developing the Brisas Project. In addition it retained in its own name consultants, experts and financial advisers, interacted with lenders in connection with due diligence of the Brisas Project and concluded contracts for the Brisas Project.

9. I asked counsel for GRI whether I was right to assume that the restructuring of GRI and Gold Reserve Corp. were designed to take the benefit of the protection afforded by the BIT to Canadian companies. I was told that that would not be an unreasonable inference. Mr. Bools said that “one might reasonably infer that if you were planning to make hundreds of millions of dollars of investment into this Venezuelan mine, you might want to arrange your affairs in such a way as to maximise the protection.” He said that he was not sure that there was any evidence on the point. I was, however, referred in the course of his submissions to two statements of A. Douglas Belanger, the President of GRI. At paragraph 9 of his first statement he said that “the primary purpose of establishing a Canadian parent company was to enhance the Company’s position amongst Canadian investors, many of whom had a significant focus on natural resource companies”. Thus it would appear that the company restructuring was for at least two purposes, first, to enhance its ability to raise finance from Canadian investors and, second, to gain the benefit of the protection afforded by the BIT to Canadian companies.
10. It was the case of GRI before the arbitral tribunal that GRI was, within the terms of the BIT, an “investor” entitled to the protection afforded by the BIT. In particular it claimed to be entitled as an “investor” to submit its claim against Venezuela to an arbitration under the ICSID Additional Facility Rules. Venezuela maintained that GRI was not an “investor” who was entitled to arbitrate a claim against Venezuela with the result that the tribunal had no jurisdiction. The tribunal resolved that dispute in favour of GRI.
11. Venezuela maintains its position and therefore submits that this court had no power to make an order against Venezuela because, by reason of state immunity, Venezuela is immune from the jurisdiction of the English courts and had not lost that immunity because it had not agreed to arbitrate with GRI.
12. Venezuela is not bound by the decision of the tribunal on the question of jurisdiction and so this court may decide this question afresh. If Venezuela is right then the order made by this court must be set aside. Venezuela also maintains that the arbitration claim form ought to have been served pursuant to section 12 of the State Immunity Act 1978 (it was not) and that there was non-disclosure of material matters by GRI when applying *ex parte* with the result that the court’s order should be set aside.

#### State Immunity

13. It is common ground that Venezuela is entitled to state immunity pursuant to section 1 of the State Immunity Act of 1978 unless it agreed in writing to submit a dispute to arbitration in which case it is not immune as respects proceedings in the courts of the United Kingdom which relate to arbitration; see section 9 of the 1978 Act.
14. Article XII of the BIT is entitled “Settlement of Disputes between an Investor and the Host Contracting Party”. It provides as follows:

#### “Article XII

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former

Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph; a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

3. ....

4. The dispute may, by the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

6. (a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12), shall satisfy the requirements for:

(i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and

(ii) an “agreement in writing” for purposes of Article II of the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).

(b) The venue for any arbitration under this Article shall be such so as to ensure enforceability under the New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention.”

15. Since only an “investor” may submit a claim to arbitration it is also necessary to note the definition in the BIT of “investment” and “investor”.

“Article 1 Definitions

For the purpose of this Agreement:

.....

(f) “investment” means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter’s laws. In particular, though not exclusively, “investment” includes:

(i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;

(ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;

(iii) money, claims to money, and claims to performance under contract having a financial value;

(iv) goodwill;

(v) intellectual property rights;

(vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

...

(g) “investor” means

in the case of Canada:

(i) any natural person possessing the citizenship of Canada in accordance with its laws; or

(ii) any enterprise incorporated or duly constituted in accordance with applicable laws of Canada,

who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela;...”

16. Other Articles of the BIT have been mentioned in argument. They are set out in an Appendix to this Judgment.
17. The BIT is a treaty between two sovereign countries. The mechanism by which the BIT can give rise to an agreement in writing for the purposes of section 9 of the State Immunity Act 1978 is to regard the consent of the state to arbitrate claims by an investor (as defined in the BIT) as a unilateral offer to an investor to arbitrate, which offer is accepted by the investor when he commences arbitration against the state; see Douglas, *The International Law of Investment Claims* (2009) at p.75 and also *Republic of Ecuador v Occidental Exploration and Production Company* [2006] 2 WLR 70 at paragraph 32 where Mance LJ described how the similar terms of the bilateral investment treaty in that case gave rise to an agreement in writing. This analysis is also reflected in Article XII paras.2, 4, 5 and 6 of the BIT. Mr. Dunning QC on behalf of Venezuela pointed out that this analysis does not sit happily with the terms of section 9(2) of the State Immunity Act which provides that the section did not apply to any arbitration agreement between states and section 17(2) of the Act which provides that other references in the Act to an agreement, but not section 9, included references in a treaty. He suggested that Parliament did not make provision for an agreement in writing between a state and an investor to arise from a treaty between states. Mr. Bools QC on behalf of GRI responded that the agreement in writing between the state and the investor was not to be found in the treaty between two states but in the unilateral offer of the state (admittedly to be found in the treaty) and in the investor’s acceptance of that offer by commencing arbitration against the state. Such an agreement in writing did not fall foul of section 9(2). Mr. Dunning’s suggestion was not said to be the main point upon which Venezuela relied and it was not clear to me whether the court was being asked to rule on it. If a ruling is necessary I would accept Mr. Bools’ submission. The agreement in writing between Venezuela and the investor is distinct from the treaty between states as was expressly stated by Simon J. in *Czech Republic v EMV* [2008] 1 AER (Comm) 531 at para. 23.
18. The real issue in the present case is whether GRI was an “investor” within the meaning of the BIT to whom Venezuela had made an offer to arbitrate.
19. Mr. Dunning QC on behalf of Venezuela submitted that GRI was not an “investor” within the meaning of the BIT and so was not entitled to accept the offer to arbitrate. The definition of an investor was an enterprise incorporated in accordance with the

laws of Canada “who makes the investment in the territory of Venezuela” and who does not possess the citizenship of Venezuela. He submitted that GRI did not make the investment in the territory of Venezuela. GRI “acquired” the indirect ownership of shares and mining rights “without taking any active step of its own by way of commitment of money or resources to the economy of Venezuela in connection with that acquisition....the acquisition [by GRI] of these two indirectly held assets was the passive result of a merger and share swap between its previous US parent company and its own subsidiary.....the word “make” in the phrase “makes the investment” requires some active contribution by the putative investor .....both of the “investments” existed prior to [GRI’s] acquisition and [GRI] acquired them passively from a non-protected person (a US company) without making the investment; [GRI] committed no resources “in the territory of Venezuela at all in connection with that acquisition.”

20. Mr. Bools QC on behalf of GRI submitted that GRI was an investor within the meaning of the BIT and so was entitled to accept Venezuela’s offer to arbitrate. He submitted that, having regard to the definition of “investment” which was expressed in terms of the product of an investment, for example, shares or goodwill, “the bare language of the definition in the BIT does not make grammatical sense”. Thus he submitted that “one cannot “make a share” or “make a goodwill”.....the language of the definitions only makes sense if “make an investment” is read as “make an investment in an investment”: thus one could “make an investment in shares” or “make an investment in intellectual property rights”.....as an ordinary matter of language if one does “make an investment in shares or good will or intellectual property rights” it does not mean that one transfers money to the shares, goodwill or intellectual property rights, it means that one *acquires* those things, as in the meaning of such phrases “I invested heavily in gilts today”, “he invested in ICI” or “I invested in a new car”. Thus he submitted that one can make an investment by acquiring shares or the rights under a concession as GRI did and there is no “superadded requirement for the transfer of economic value to Venezuela.” He submitted that GRI made an investment in the CAB shares and in the Brisas project when GRI acquired an indirect interest in those assets in October 1998 and transferred something of benefit or value in return, namely, the transfer of shares in GRI to the shareholders of Gold Reserve Corp. GRI further invested in those assets when transferring funds to the Brisas Project to operate and develop it.
21. The dispute between the parties is as to a matter of interpretation of the BIT. It is common ground that the proper approach to interpretation of the BIT is to have reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties which provide:

“Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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

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

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

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

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

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

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

#### *Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION*

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

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.”

22. Thus the court should have regard to the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The object and purpose of the BIT is to promote and protect investments in the host state by enterprises from the other contracting state. An important feature of the BIT is the availability of recourse to international arbitration as a means of resolving disputes between the host state and the enterprise from the other contracting state. I accept that there is no presumption in favour of a wide construction of “investor” with a view to favouring the jurisdiction of the arbitral tribunal. Such an approach is appropriate when construing the scope of arbitration agreements between commercial entities (see *Fiona Trust v Privalov* [2008] 1 Lloyd’s Rep. 254 at paragraphs 13 and 15) but is not appropriate in the context of arbitration agreements between states and investors arising out of bilateral investment treaties when deciding who qualifies as an investor

entitled to accept the state's offer to arbitrate. In deciding the meaning and scope of the definition of an investor, and thereby deciding with whom the host state had agreed to arbitrate, I accept, as was stated by the tribunal in *Libananco Holdings v Turkey* (ICSID Case No. ARB/06/8), that

“the correct approach is to interpret the BIT even-handedly and objectively, on its terms, under the rules laid down in the Vienna Convention, and without any presumption either in favour of or against the Tribunal's own jurisdiction.”

23. The question of construction which has arisen in the present case is familiar to those who practise in the rarefied air of international investment arbitration. In an article entitled “*Legal Responses to Corporate Manoeuvring in International Investment Arbitration*” by Voon, Mitchell and Munro, *Journal of International Dispute Settlement* (2014) 5 pp.41-68, the authors say at p.42

“Most of the thousands of bilateral international investment agreements (IIAs) currently in effect contain investor-State dispute settlement mechanisms, allowing investors of one party to the IIA to bring claims for breaches of the IIA against the other party: the host State of the investment. ....respondent States frequently complain that the putative “investor” is, in reality, a mere instrument used by a third person or entity that would not otherwise qualify as a protected investor with standing to bring a claim under the relevant IIA. Such complaints often arise in circumstances where the original owner of the relevant investment has transferred the investment to a legal entity in another country. These kinds of corporate manoeuvres may raise questions about the jurisdiction of the tribunal hearing the investor's claims, the admissibility of the investor's claims, and the substance of those claims.”

24. Mr. Dunning supported his argument by reference to textbooks and awards but his essential submission was attractively simple. The parties to the BIT were not content with defining investor merely by reference to nationality. The parties imposed a further requirement, namely, that the entity claiming to be an investor must have “made the investment in the territory of Venezuela.” Making an investment was to be contrasted with merely holding or controlling an investment. Whilst GRI held or controlled the investment it did not make the investment in the shares of CAB or in the Brisas Concession. That investment was made by the US company Gold Reserve Corp.
25. I have noted each of the sources relied upon by Mr. Dunning but whilst all are of interest and illustrate the types of arguments which can be deployed when an issue arises as to the entitlement of an investor to the protection of a BIT none is of real assistance because the sources do not involve the form of words to be construed in the present case. Thus, frequent reference was made to the decision in *Salini v Kingdom of Morocco* ICSID Case No. ARB/00/4 as to the meaning of “investment” when deciding whether, for the purposes of Article 25 of the ICSID Convention, a dispute was “in relation to an investment”. This case has been described in *The definition of*

*Investment under the ICSID Convention: A defence of Salini* by Grabowski, Chicago Journal of International Law Vol. 15 Article 13 at p.290 as “the leading case on the subject”. The tribunal said at paragraph 52:

“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction .....In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

26. This is, no doubt, an important observation in the context of Article 25 of the ICSID Convention but it can only be of limited assistance when construing the detailed definitions of investment and investor in the BIT.
27. Reference was also made to *The International law of Investment Claims* by Douglas where the author, at paragraph 404, stated:

“The territorial nexus between the claimant’s contribution of capital and the economy of the host state is also a fundamental aspect of the economic materialisation of the investment; indeed it is the realisation of the prime objective for the contracting state parties to enter into an investment treaty in the first place. It is self-evident that this aspect of the economic rationalisation of the investment must be interpreted strictly to ensure that the claimant has fulfilled its side of the quid pro quo before resorting to arbitration with the host state. In other words the territorial connection between the claimant’s contribution of capital and an investment enterprise in the host state must be direct rather than indirect or consequential”.

28. Again, the author was construing a different document from that which this court must construe and so his comments can only be of limited assistance. As it happens the definition of “investor” in the BIT incorporates a territorial nexus because the investor must be one who makes an investment “in the territory of Venezuela.” Nevertheless, it is that definition which must be construed in its context. For example, in the light of the reference in the definition of investment to assets owned or controlled “directly or indirectly” caution must be exercised before concluding that the final sentence in the above quotation is apt to describe the nature of the investment which is within the definition in the BIT.
29. Mr. Dunning also referred to *Standard Chartered Bank v United Republic of Tanzania* ICSID Case No. ARB/10/12 (November 2012), *Alapi Elektrik v Turkey* ICSID Case No. ARB/08/13 (July 2012) and *KT Asia v Kazakhstan* ICSID Case No. ARB/09/8 (October 2013). But none of these involved the definition of “investor” which the court must construe in the present case. I must ascertain the ordinary meaning of the definition of “investor” in this case in its context and having regard to the object and purpose of the BIT. The observations made by the learned and distinguished arbitrators in those cases may illuminate the parties’ submissions but they cannot determine the issue in the present case.

30. The agreed definition of “investor” is one “who makes the investment in the territory of Venezuela.” Since there is an agreed definition of “investment” (stated to be “for the purpose of this Agreement”) and that word is used in the definition of “investor” one would ordinarily read that definition into the definition of “investor”. “Investment” means any kind of asset owned or controlled either directly or indirectly by an investor and includes shares in a company and rights to extract or exploit natural resources. Thus the shares in CAB which GRI owns or controls indirectly through Gold Reserve Corp. are an “investment” as are the two concessions forming the Brisas Project which were granted to CAB. Mr. Bools submitted that the literal reading of the definition of an investor, one who “makes the investment”, is, when one reads into it the definition of investment, one who “makes any kind of asset, including shares or mining concessions, in the territory of Venezuela”.
31. The meaning of one “who makes shares” or one “who makes mining concessions” is not clear or obvious. Indeed, Mr. Bools submitted that such phrases do not make sense. He further submitted that the definition of “investor” should therefore be read as one who makes an investment in the investment, in this case, the CAB shares or the Brisas Project.
32. This submission highlights two meanings of “investment” in ordinary language. Investment can mean the contribution of resources, usually capital, to acquire an asset, as in “he made an investment of US\$1 million in acquiring a painting by Monet”. But an investment can also mean the asset which is acquired by the act of investing, as in “he exhibited his investment (the painting by Monet) at his stately home”. The expressed definition of “investment” in the BIT uses investment in this latter sense of asset.
33. I agree that defining an investor as one “who makes assets” does not make sense in the context of the BIT. But that suggests that in this particular context, and elsewhere in the BIT where reference is made to making investments<sup>1</sup>, the parties cannot have intended that the expressed definition of investment, any kind of asset, should be mechanically incorporated into the definition of investor. In other instances there is no such problem, as in Article III para.2 which provides that “Each Contracting Party shall grant investors of the other Contracting Party, as regards their expansion, management, conduct, operation, use, enjoyment, sale, or disposal of their investments or returns, treatment no less favourable than which, in like circumstances, it grants to investors of any third State.”<sup>2</sup> But where a mechanistic incorporation of the definition of investment produces a form of words which does not make sense in the context of the BIT the parties should, in my judgment, be understood as meaning to use the words they actually used, namely, one “who makes the investment in the territory of Venezuela”.
34. Whilst that phrase must be construed in its context it is necessary to have regard, as was stressed by Mr. Dunning, to its two components; the concept of “making” an investment and the use of the definite article in “the investment”.

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<sup>1</sup> See Article II para.1 which provides that “Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory”; and see also Article XVI para.1 and XVII para.2. These articles are set out in the appendix to this judgment.

<sup>2</sup> For other instances see Article II para.2, Article III para 1, Article IV para.1 and Article V para 1 (a) and (b) which are set out in the appendix to this Judgment.

35. The ordinary meaning of “making” an investment includes the exchange of resources, usually capital resources, in return for an interest in an asset. That reflects the first of the two ordinary meanings of investment to which I referred above. Examples were suggested by Mr. Bools; “I invested [that is, made an investment] in gilts today, he invested [that is, made an investment] in ICI or I invested [that is, made an investment] in a new car”. But the fact that a person has acquired an asset does not necessarily indicate that he has made an investment in that asset. Thus if a person inherits gilts, shares in ICI or a vintage Alvis motor car one would not say that he has invested in those assets. He has acquired them by inheritance but one would not describe him as having invested in them. He owns those investments but he did not make an investment in them.
36. Both parties made extensive reference to *Standard Chartered Bank v United Republic of Tanzania* ICSID Case No. ARB/10/12 (November 2012). In that case the tribunal had to decide whether an investment was one “of” SCB (UK). If it was then SCB (UK) was entitled to the protection afforded by a BIT between the UK and Tanzania. The facts were that a company, IPTL, agreed to build an electrical generation facility for a company owned by the government of Tanzania. IPTL raised funds from Malaysian banks in 1997. In 2005 SCB Hong Kong (“SCB HK”), a subsidiary of SCB (UK), acquired the loans to IPTL. IPTL defaulted on the loans from 2006 onwards. SCB (UK), by virtue of its equity ownership of SCB HK, sought the protection of the UK-Tanzania BIT as an investor. The tribunal, having considered the text of the UK-Tanzania BIT and other materials, concluded (at para. 257) that in order for the investment to be “of” SCB (UK) it had to be *made* by and not simply *held* by the investor. What was required was that “the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turns owns the investment is not sufficient” (see para. 230). The activity of purchasing debt, which qualified as a relevant investment, was done by SCB HK, not by SCB (UK) (see para.260). The record reflected “no action by the Claimant itself concerning the investment and the Claimant has explicitly disavowed any reliance on control of SCB HK or its assets” (see para.261).
37. The present relevance of the case is the light it casts on what is required in order for a person to *make* an investment. Mere passive ownership of an asset is insufficient. What is required is an active relationship between the investor and the investment. I agree that in the context of the BIT in this case a person can only be one who “makes the investment” if there is some action on his part. Passive holding of an asset by itself would not amount to making the investment. That is so, it seems to me, as a matter of the ordinary use of language.
38. What is the investment which the investor must make for the purposes of the definition of “investor” in the BIT? It is described in the definition as “the investment”.
39. Mr. Dunning submitted that on the true construction of the BIT the contribution of value had to be for the purpose of creating or acquiring the asset in respect of which the protection afforded by the BIT was sought. That was “the investment”. Mr. Bools submitted that GRI had indeed contributed something of value at the time when it acquired its indirect interest in the CAB shares and the Brisas Project (an issue which

I will address later in this judgment) but he also relied upon the later provision of US\$300 million to support and develop the Brisas Project. This was, he submitted, a (further) investment in the Brisas Project.

40. I accept that as a matter of ordinary use of language one can say that a person has made an investment in an asset which he already owns when he expends money in supporting or developing that asset. Thus if a person inherits a vintage Alvis motor car and later spends money in having it restored one can say that he has made an investment in the vintage car.
41. Is the definition of an investor in the context of the BIT apt to exclude that ordinary use of the phrase “make an investment”? Mr. Dunning said it was excluded because the definition of an investor was one who “makes the investment” which referred to the investment in creating or acquiring the asset. I do not consider that the use of the definite article has this effect. In my judgment the use of the definite article makes clear that the investor must invest in the asset in respect of which the protection provided by the BIT is sought. Were the definition of an investor, one “who makes the investment”, restricted to making the investment which created or acquired the asset the category of investments which are promoted and protected by the BIT would exclude investments which took the form of funding the development of assets in Venezuela where such investments were made by a person who, although the indirect owner or controller of such assets, had not paid to create or acquire such assets. This would not, in my judgment, be consistent with the object and purpose of the BIT. In this context it is relevant to refer not only to the preamble which refers to the promotion and protection of investments but also to Article III para.2 which refers to the expansion and management of investments. A construction of the BIT which did not promote and protect investments which took the form of funding the development of assets in Venezuela where such investments were made by a person who, although the indirect owner or controller of such assets, had not paid to create or acquire such assets would sit uncomfortably with the expressed desire to promote and protect the expansion and management of assets in Venezuela.
42. This approach is even-handed and is not motivated, as suggested by Mr. Dunning, by “a presumption that all investments should be protected”. The object and purpose of the BIT is not merely to protect investments but to promote investments. The promotion of investments in Venezuela benefits that country and the protection of investments by a Canadian enterprise benefits that enterprise. Venezuelan assets such as rights to exploit mineral resources may need foreign investment not only to create or acquire them but also to develop and maintain them. Usually, investment in the development of an asset will be made by the enterprise which has paid to create or acquire the asset. But such investment may be made by an enterprise which, although it indirectly owns or controls the asset, did not pay for it. In my judgment it is consistent with the object and purpose of the BIT that such investment is promoted and protected by the BIT. That appears to me to be an even-handed and objective approach which gives effect to the ordinary use of the language of the BIT in its context.
43. I can now consider whether GRI qualifies as an investor. Did it “make the investment in the territory of Venezuela” either when it acquired its indirect interest in the CAB shares and the Brisas Project or when it provided US\$300 million to support and develop the Brisas Project.

44. Mr. Bools submitted that GRI transferred some benefit on its acquisition of the CAB shares and Brisas Project in 1999, namely, the shares in GRI, and thereby made an investment. I was not persuaded by this submission. The share swap was between shareholders of GRI and the shareholders of Gold Reserve Corp. I accept that the shareholders of GRI transferred some benefit to the shareholders in return for obtaining shares in Gold Reserve Corp., namely, their own shares in GRI. But to describe this as a transfer of benefit by GRI fails to distinguish between the legal personality of GRI and the legal personality of its shareholders. They are separate and distinct. There is no evidence that GRI made any payment or transferred anything of value to Gold Reserve Corp. in return for becoming the indirect owner or controller of the shares in CAB or of the Brisas Project. It may be that there was some “action” by the directors of GRI at the time of the company re-organisation but I was not referred to any evidence of such action, none was in evidence and it would not be right for me to speculate as to what that action might have been. Whilst GRI undoubtedly became the indirect owner or controller of the shares in CAB and of the Brisas Project I must conclude that it did not at that time make an investment in the assets in respect of which the protection of the BIT was sought.
45. In the light of my conclusion it is unnecessary to consider the further question addressed by counsel, namely, whether, assuming that GRI did make an investment when it acquired the two assets in question, such investment was “in the territory of Venezuela”, having regard to the fact that GRI made the investment indirectly through a US company rather than through a Venezuelan company.
46. However, in subsequent years GRI expended nearly US\$300 million in developing the Brisas Project. This money clearly went into “the territory of Venezuela”. In my judgment GRI thereby made an investment in the assets in respect of which it sought the protection of the BIT. Those assets were an investment within the definition of investment in the BIT. The assets were “shares” and “rights ...to exploit natural resources” which were “owned or controlled” by GRI “indirectly....in the territory of the other Contracting Party”, namely, Venezuela. GRI was an investor within the definition of investor in the BIT. GRI was an “enterprise incorporated ...in accordance with the applicable laws of Canada “who [made] the investment in the territory of Venezuela.”
47. The position of GRI is, in my judgment, materially different from the position of SCB (UK) in *Standard Chartered Bank v United Republic of Tanzania*. Whereas SCB (UK) did nothing concerning the investment and disavowed any control over SCB HK and its assets, GRI raised finance for the purpose of developing the Brisas Project and provided those funds to the Brisas Project for that purpose. Moreover, it did in fact control the Brisas Project in its own name by retaining consultants, experts and financial advisers, by interacting with lenders in connection with due diligence of the Brisas Project and by concluding contracts for the Brisas Project.
48. Mr. Dunning submitted that GRI could not rely upon its later provision of funds because funding was not an investment within the definition of “investment”. Once spent it was not an asset. However, the expenditure was to develop assets which were within the definition of “investment”. Mr. Dunning further submitted that prior to the expenditure the CAB shares and the Brisas Project held indirectly by GRI were not protected by the BIT and that expending funds on a non-protected investment was not “making an investment” but was expending funds on a non-protected investment. I

accept that before the expenditure the assets held by GRI were not protected by the BIT but the act of making the expenditure on those investments or assets was an investment within the meaning of the BIT. Finally, Mr. Dunning submitted that the expenditure was irrelevant because “in substance” it was not made by GRI. In substance, he submitted, Gold Reserve Corp. continued to run the business and decide on and control any money that was spent after having been attracted by the Claimant. After the restructuring everything was still done and controlled by the US company, “which effectively carried on business as before, except that it was now a subsidiary of this Whitehorse<sup>3</sup> nameplate vehicle.” However, whilst the personnel taking the relevant decisions were, it appears, in the United States those decisions were taken in the name of GRI who, as a Canadian company, raised finance from Canadian sources and provided the funds for the development of the Brisas Project. I do not consider that the separate corporate personality of GRI can be ignored in the manner that Mr. Dunning sought to do.

49. I have therefore concluded, in agreement with the arbitral tribunal, that GRI was an investor within the meaning of the BIT and therefore party to an agreement in writing with Venezuela to arbitrate its claim against Venezuela.
50. This conclusion appears to me to be consistent with the object and purpose of the BIT. The preamble records that the promotion and protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them. Concluding that GRI’s contribution of US\$300 million to the Brisas Project in Venezuela enables it to qualify as an investor will serve to promote investment in Venezuela by Canadian enterprises. The investment of US\$300 million by a Canadian enterprise in a Venezuelan mining project which it owns or controls indirectly is surely the very sort of investment which the BIT was designed to encourage.
51. It follows that Venezuela has lost its right to rely upon state immunity in these proceedings.

#### Section 12 of the State Immunity Act

52. Section 12 provides as follows:

“(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

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<sup>3</sup> I was told that Whitehorse (population 23,000) is the largest city in the Yukon (total population 27,000 and an area twice the size of the UK) in the north west of Canada where GRI was registered.

(3) A state which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to procedures against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.”

53. The arbitration claim in the present case was instituted by the issue of an arbitration claim form. That claim form was never served. Mr. Dunning submits that because there was no compliance with section 12 (1) the order should be set aside.

54. In order to understand why the arbitration claim form was never served it is necessary to have regard to CPR Part 62 which concerns arbitration claims. The relevant section of Part 62 is Section III entitled Enforcement. It provides as follows:

“62.18-

(1) An application for permission under –

(a) section 66 of the 1996 Act;

(b) section 101 of the 1996 Act;

(c) section 26 of the 1950 Act; or

(d) section 3(1)(a) of the 1975 Act,

to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.

(2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.

(3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part.

(4) With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.

(5) Where the applicant applies to enforce an agreed award within the meaning of section 51(2) of the 1996 Act-

(a) the arbitration claim form must state that the award is an agreed award; and

(b) any order made by the court must also contain such a statement.

(6) An application for permission must be supported by written evidence-

(a) exhibiting-

(i) where the application is made under section 66 of the 1996 Act or under section 26 of the 1950 Act, the arbitration agreement and the original award (or copies);

(ii) where the application is under section 101 of the 1996 Act, the documents required to be produced by section 102 of that Act; or

(iii) where the application is under section 3(1)(a) of the 1975 Act, the documents required to be produced by section 4 of that Act;

(b) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award; and

(c) stating either-

(i) that the award has not been complied with; or

(ii) the extent to which it has not been complied with at the date of the application.

(7) An order giving permission must-

(a) be drawn up by the claimant; and

- (b) be served on the defendant by-
  - (i) delivering a copy to him personally; or
  - (ii) sending a copy to him at his usual or last known place of residence or business.
- (8) An order giving permission may be served out of the jurisdiction-
  - (a) without permission; and
  - (b) in accordance with rules 6.40 to 6.46 as if the order were an arbitration claim form.
- (9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set-
  - (a) the defendant may apply to set aside the order; and
  - (b) the award must not be enforced until after-
    - (i) the end of that period; or
    - (ii) any application made by the defendant within that period has been finally disposed of.
- (10) The order must contain a statement of-
  - (a) the right to make an application to set the order aside;and
  - (b) the restrictions on enforcement under rule 62.18(9)(b).
- (11) Where a body corporate is a party any reference in this rule to place of residence or business shall have effect as if the reference were to the registered or principal address of the body corporate.”

- 55. In the present case, and in accordance with Part 62.18 (1), the application to enforce the award was made without notice. The judge, having read the arbitration claim form and the witness statement of Mr. Neil Q. Miller of Norton Rose Fulbright, the solicitors for GRI, made an order granting permission to enforce the award in the same manner as a judgment of this court and ordered that judgment be entered for GRI against Venezuela in terms of the award. The order provided that Venezuela might apply to set aside the order within 2 months and 22 days after service of the order.
- 56. Part 62.18(7) required such an order to be served on the Defendant and Part 62.18(8) provided that such an order may be served out of the jurisdiction without permission

and in accordance with rules 6.40-6.46 “as if the order were an arbitration claim form”. For this reason Norton Rose Fulbright arranged for the order (but not the arbitration claim form) to be served on Venezuela in accordance with section 12 (1) of the State Immunity Act.

57. Mr. Dunning submitted that section 12(1) focusses upon the type of document in question, namely, that required to institute the relevant proceedings. An arbitration claim form is the document required to institute an arbitration claim, including one for the enforcement of an arbitration award. Accordingly, section 12(1) provides that it shall be served in the manner set out in that section. Mr. Bools submitted that section 12(1) only applies to documents which institute proceedings which are required to be served. In this case, pursuant to CPR Part 62.18, the arbitration claim form was not a document which was required to be served. The document which was required to be served was the order made by the judge.
58. In my judgment Mr. Bools’ submission is to be preferred. Section 12(1) expressly applies to documents “required to be served”. Mr. Dunning’s submission did not appear to me to give effect to those words.
59. However, Mr. Dunning referred to two authorities which, he submitted, suggested that that conclusion was wrong. The first was *Westminster City Council v Iran* [1986] 1 WLR 979. That case concerned the Iranian Embassy and an attempt by Westminster City Council to recover its costs in securing the premises following the damage it had suffered after the SAS had stormed the embassy to free hostages held there. The Council wished to register its expenses as local land charges. That was opposed by solicitors acting for the Iranian Government on the grounds that the property formed part of the diplomatic mission of that government and that state immunity applied. The Chief Land Registrar referred the matter to the court and required the Council to take out “an originating summons or such other originating process as may be appropriate for the purpose of bringing the matter before the court.” The Council issued an originating summons. RSC Ord.10 r.5 required personal service of such a document. The Iranian Government’s solicitors refused to accept service and service by the means described in section 12(1) of the State Immunity Act was not possible. One question which arose was whether section 12(1) applied. It was submitted that it did not because the originating summons was not a document required to be served for instituting proceedings against a state but was merely a document chosen as a convenient method of bringing the matter before the court in compliance with the Chief Land Registrar’s order. That submission was not accepted. Peter Gibson J. said at p.982:

“It is true that the Chief Land Registrar by his order was not insisting on an originating summons and that any other appropriate originating process could have been used, although in my judgment the originating summons was the correct form; see RSC Ord 5 r.3. But whatever originating process was chosen, it must have been envisaged that the city council would be instituting proceedings as plaintiff and the only other known interested party, the Iranian Government, would be defendant, and that by analogy with rule 300 of the Land Registration Rules 1925 the Iranian Government would be served with the proceedings, so that it could participate in the hearing before

the court. It seems to me therefore that the wording of the opening words of section 12(1) of the State Immunity Act 1978 is satisfied in the present case. ”

60. It does not appear to me that this case supports Mr. Dunning’s submission. The assumption underlying the argument in that case was that section 12(1) applied to documents which were required to be served. The debate was as to whether in the circumstances of that case the originating summons was required to be served. The rules of court required it to be served personally and the court held that it must have been envisaged by the Chief Land Registrar that the Iranian Government would be served.
61. The second case relied upon was *AIC Ltd. v The Federal Government of Nigeria* 2003 EWHC 1357 QB. That case concerned the registration of a foreign judgment against the Government of Nigeria pursuant to the Administration of Justice Act 1920. The main point argued as to the application of the State Immunity Act was that the registration of a judgment under the 1920 Act (which had been ordered without notice) did not involve the exercise by the court of its adjudicative jurisdiction and so section 1 did not apply. Stanley Burnton J. held that the registration of a judgment was an adjudicative act; see paragraph 21. But at paragraph 22 the judge considered an assumption made by those acting for the claimant that service of a notice of an order for registration of a judgment under the 1920 Act was the equivalent of “a writ or other document required to be served for instituting proceedings against a State” within the meaning of section 12(1) of the 1978 Act. The judge held that that assumption and another assumption that an application by the State to set aside the registration is the equivalent of the entry of an appearance were unfounded. The judge held that an application to set aside the registration is not the equivalent of an entry of an appearance. “An entry of appearance is an act that preceded a judgment, whereas an application to set aside a registration is made after judgment has been entered into.” The Judge further held that sections 12(4) and (5) of the Act which concerned judgment in default of appearance “cannot be made to apply to the registration of a judgment under the 1920 Act on an application made without notice to the defendant state”. He concluded: “An application for the registration of a judgment against a state under the 1920 Act must be made by the issue and service of a claim form.”
62. Mr. Dunning referred me to CPR 74 which provides, in the context of registration of a judgment, a very similar procedure to that required by CPR 62.18 for the enforcement of an arbitration award. In both cases the claimant may proceed without notice and in both cases when an order is made it must be served on the defendant and permission to serve out of the jurisdiction is not required. The “critical” point, submitted Mr. Dunning, was that there is nothing in CPR 74 requiring that the claim form be served. Yet Stanley Burnton J. stated that an application for the registration of a judgment against a state under the 1920 Act must be made by the issue and service of a claim form.
63. The basis of the decision appears to be that section 12, which deals in sub-section (1) with the mode of service, in sub-sections (2) and (3) with entry of appearance and in sub-sections (4) and (5) with judgments in default of appearance, must be applicable in its entirety to the proceedings in question. The procedure of ordering registration of a judgment without notice to the defendant and providing for the defendant to apply to set aside the order was not the equivalent of the provisions for entry of an

appearance and for judgments in default of appearance. The judge concluded that an application for registration of a judgment required the issue and service of a claim form.

64. With diffidence and with great respect to Stanley Burnton J. I do not consider that the provisions of section 12 must be read in that manner. In my judgment section 12 makes special provision with regard to the questions of service, entry of appearance and judgments in default of appearance. But if the particular proceedings do not involve any one of those steps then the special provision of section 12 relating to that step does not apply. This appears to me to be clearly so with regard to section 12(1). It only applies to writs or other documents “required to be served”. If the document instituting the proceedings is not required to be served then the sub-section has no application. If an entry of appearance (now acknowledgment of service) is required then sub-sections (2) and (3) apply. If an entry of appearance (now acknowledgment of service) is not required then the sub-sections do not apply. If judgment in default of appearance (now acknowledgment of service) is sought then sub-sections (4) and (5) apply. If it is not sought then they do not apply.
65. In any event, the decision was not a decision concerning an application to enforce an arbitration award, though I accept that there are similarities between the two procedural regimes in CPR Part 62 and CPR Part 74.
66. I therefore remain of the view that section 12(1) does not require the service of the arbitration claim form on Venezuela in the manner there set out because CPR Part 62.18 did not require the arbitration claim form to be served.

#### Failure to give full and frank disclosure

67. There is no dispute that since GRI made an application without notice it owed a duty to make full and frank disclosure to the court of all relevant matters. Mr. Dunning submitted that GRI breached that duty with regard to state immunity and with regard to the procedure and requirements of service.
68. With regard to state immunity Mr. Dunning submitted that Mr. Miller, who made the witness statement in support of the application without notice, did not refer to the fact that the arbitration agreement had been disputed in the arbitration or to the fact that the arbitration agreement was still being disputed by Venezuela in proceedings in Paris and Luxembourg. In the result it was said that the court was not alerted to the fact that there was a substantial and continuing dispute concerning the agreement to arbitrate.
69. Mr. Miller, at paragraph 8 of his witness statement, informed the court that the defendant, Venezuela, was a foreign state within the meaning of the State Immunity Act and at paragraph 15 he referred to the BIT. At paragraphs 17-29 he referred to the arbitration agreement, GRI’s consent to arbitrate and Venezuela’s consent to arbitrate. In particular, at paragraphs 18 and 19 Mr. Miller informed the court that it had been determined in the award that GRI was an investor and therefore that the tribunal had jurisdiction to hear the claim. Mr. Miller referred the court to paragraphs 222-271 of the award “which set out the details of the parties’ contentions and the Arbitration tribunal’s analysis and findings.” At paragraphs 20-25 Mr. Miller explained the mechanics by which an investor submitted a claim to arbitration. At paragraphs 54-55

Mr. Miller informed the court that Venezuela was not entitled to state immunity: “Specifically, the Defendant agreed in writing to submit any dispute which may arise to arbitration...”. At paragraphs 64-66 Mr. Miller referred to proceedings in Paris in which Venezuela sought the annulment of the award.

70. In my judgment the reasonable judicial reader of this statement would appreciate that there had been a dispute between the parties in the arbitration as to whether GRI was an investor, that the tribunal had determined that GRI was an investor and that accordingly GRI was entitled to submit its claim to arbitration pursuant to the provisions of the BIT. The reader would also appreciate that it was because of the agreement to arbitrate that Venezuela was not entitled to state immunity. Unless he chose to look up paragraphs 222-271 of the award the reader would not know the nature of the arguments or the basis of the tribunal’s conclusion. The reader might guess that Venezuela would wish to advance the same arguments before the court and therefore maintain that it remained entitled to state immunity but he would certainly be unaware that Venezuela had relied upon the same arguments post-award in proceedings in Paris and in Luxembourg.
71. When a judge is faced with an application for permission to enforce an award against a state as if it were a judgment the judge will have to decide whether it is likely that the state will claim state immunity. If that is likely then he would probably not give permission to enforce the award but would instead specify (that being the language of CPR part 62.18(2)) that the claim form be served on the state and consider whether it was a proper case for granting permission to serve out of the jurisdiction. He would envisage that there would be an *inter partes* hearing to consider the question of state immunity. For that reason any applicant for permission must draw the court’s attention to those matters which would suggest that the state was likely to claim state immunity. Indeed, since the court is required by section 1(2) of the State Immunity Act to give effect to state immunity even though the state does not appear, it is important that the court be informed of the available arguments with regard to state immunity.
72. I do not consider that Mr. Miller’s witness statement sufficiently drew the court’s attention to the nature of the arguments Venezuela had advanced before the tribunal. In *Siporex Trade v Comdel* [1986] 2 Lloyd’s rep.428 at p.437 Bingham J. said that the applicant “must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents.” I accept that Mr. Miller did not simply exhibit the award but carefully referred the court to those paragraphs which recorded the arguments of Venezuela before the tribunal. I accept that the judge therefore had the means to educate himself as to the nature of those arguments. But where, as here, it was known that Venezuela was continuing to rely upon those arguments and therefore was likely to rely upon state immunity it was incumbent upon the applicant to summarise those arguments for the benefit of the judge. That was the more necessary where the application was on documents alone and the judge might well be considering the application after a busy day in court dealing with other matters.
73. It is also the case that Mr. Miller did not mention at all that post-award Venezuela had continued to rely upon those arguments in proceedings in Paris and in Luxembourg. Mr. Miller did refer to the proceedings in Paris in which Venezuela had sought the annulment of the award. The reader might have guessed that Venezuela was thereby

continuing to rely upon the arguments which had been rejected by the arbitral tribunal but the court should not have to rely upon guesswork. Where Venezuela had relied upon the same arguments post-award in Paris and Luxembourg the court ought to have been told that that was the case. Such information was material to the court's decision as to whether it was appropriate to order service of the arbitration claim form on Venezuela so that there could be an *inter partes* hearing.

74. Finally, Mr. Miller told the court in unqualified terms that Venezuela was not entitled to state immunity. On an *ex parte* application, as Bingham J. stated in *Siporex Trade v Comdel* at p.437, the applicant "must...identify any likely defences". Consistently with that guidance Mr. Miller ought to have identified what Venezuela might say in relation to the proposition that it was not entitled to state immunity. He did not do so. I accept that in the Paris and Luxembourg proceedings post-award Venezuela had not in terms relied upon state immunity but it must have been likely that, if Venezuela was continuing to maintain that GRI was not an investor and that therefore there was no arbitration agreement in writing, it would rely upon that immunity in the English proceedings.
75. I have noted that in his written skeleton argument Mr. Bools submitted that for the purposes of the *ex parte* application all that was required was for GRI to produce apparently valid documentation showing the arbitration agreement and to satisfy the court that GRI had a good arguable case that the state did not have state immunity. It was not clear from his oral submissions that this position was maintained. In any event I am unable to accept it. The submission was based upon the judgment of Mance LJ in *Yukos Oil Company v Dardana* [2002] EWCA Civ 543. However, that case did not involve any potential issue of state immunity and does not appear to have concerned any alleged breach of the duty to give full and frank disclosure on an *ex parte* application. Mr. Bools also relied upon the judgment of Evans LJ in *Al-Adsani v Government of Kuwait* [1994] PIQR 236 in which it was said that on an application for leave to serve out all that the claimant need show is a good arguable case that the defendant is not entitled to state immunity. That may well be correct but it does not limit the claimant's duty to make full and frank disclosure on an *ex parte* application.
76. Had GRI given full and frank disclosure with regard to the state immunity defence I have no doubt that an *ex parte* order would not have been made.
77. With regard to procedure and the requirements for service Mr. Dunning submitted that Mr. Miller had made no reference to the fact that its application for judgment in terms of the award did not fall within the scope of CPR 62.18(8)(a) and that therefore permission to serve out was required. He further submitted that no reference had been made to section 12(1) of the State Immunity Act, that GRI was not intending to serve the arbitration claim form, that GRI did not draw the attention of the court to its power to specify the parties on whom the claim form should be served, that GRI was intending to serve only the *ex parte* order without any accompanying acknowledgement of service and that the draft order would require Venezuela to raise its state immunity objection and any other grounds for challenging the order within the same period of two months and 22 days with the risk that by raising other grounds it thereby submitted to the jurisdiction.
78. With regard to the application for judgment to be entered in terms of the award Mr. Bools pointed out that section 101(3) of the Arbitration Act provides that where leave

is given to enforce an award in the same manner as a judgment judgment may be ordered in terms of the award. That being so I do not consider that permission to serve an application to enter judgment in terms of the award out of the jurisdiction was required.

79. With regard to section 12(1) of the Arbitration Act it is arguable that there was no obligation to refer the court to this section because, for the reasons I have given, it does not require service of the arbitration claim form where the judge decides *ex parte* to make an order granting permission to enforce the award. However, I have concluded that since it is an important section of primary legislation it ought to have been mentioned in order to explain why it has no application in circumstances where the court decides to make the order *ex parte*.
80. With regard to the suggestion that GRI ought to have informed the court that GRI was not intending to serve the arbitration claim form on Venezuela Mr. Miller had informed the court that GRI was making the application pursuant to CPR Part 62.18 and 19. In my experience that is often done on such applications; the party making the application does not usually take the judge through each sub-paragraph of the rule. By contrast with lengthy exhibits the judge can be expected to refer to CPR Part 62.18 and 19 to remind himself of the applicable rules and procedure. That will inform him that if he makes an order *ex parte* it is the order that will be served not the arbitration claim form.
81. With regard to the suggestion that GRI ought to have informed the court that it had power to specify the parties upon whom the claim should be served that would have been apparent to the court from a reading of CPR Part 62.18 to which it had been referred.
82. With regard to the suggestion that GRI ought to have informed the court that it was intending to serve the order without a form for the acknowledgment of service, no such form is required where the order is made *ex parte*. Instead, where an order is made *ex parte* the defendant has to be informed of its right to challenge the order and that the order cannot be enforced until any such application has been determined. This would have been apparent to the judge from his reading of CPR Part 62.18 to which he had been referred and from the terms of the draft order.
83. The final complaint was that the court ought to have been informed that the draft order would require Venezuela to raise its state immunity objection and any other grounds for challenging the order within the same period of two months and 22 days with the risk that by raising other grounds it had thereby submitted to the jurisdiction; see sections 2(3) and (4) of the Arbitration Act 1996 and *The Prestige* [2015] EWCA Civ 333 and [2015] 2 Lloyd's Rep. 33 at paragraph 51. It seems to me that there is force in this complaint. It was, I think, common ground that if Venezuela challenged the jurisdiction on the grounds of state immunity and at the same time submitted that enforcement of the award should be denied upon any of the grounds set out in section 103(2) of the Arbitration Act there was, at the very least, a risk that such conduct would amount to a submission to the jurisdiction. It was because of this risk that it has been agreed between the parties that the time for reliance upon any of the grounds in section 103(2) has been extended until after the challenge to the jurisdiction on the grounds of state immunity has been determined. It seems to me that this risk ought to have been mentioned to the court so that it could have made an appropriate order

protecting Venezuela's position. It seems to me that if this risk had been disclosed it is likely that such an order would have been made.

84. There having been a failure to give full and frank disclosure with regard to the likelihood that Venezuela would rely upon state immunity and with regard to two aspects of procedure the court must decide whether to set aside the *ex parte* order or allow it to stand but marking the failure to give full and frank disclosure with an appropriate order as to costs.
85. Mr. Dunning submitted that where there has been a failure to give full and frank disclosure the order should generally be set aside and the jurisdiction to maintain it should be sparingly exercised; see *Re OJSC Ank Yugraneft* [2010] BCC 475 at paragraphs 102-103. I have noted and sought to take into account the nine principles there summarised.
86. In the present case the failure to give full and frank disclosure was serious and resulted in judgment being given for a very substantial sum against a sovereign state. The failure was deliberate in the sense that, although Mr. Miller did not seek to hide Venezuela's arguments from the court (because he referred the court to the relevant paragraphs of the award) he must have decided not to summarise the respective cases of the parties before the tribunal and not to inform the court that Venezuela had continued to rely upon its argument post-award. There is therefore a powerful case for setting aside the order.
87. However, it is necessary to examine the present position carefully. The court has now determined the state immunity defence. It has concluded that Venezuela has lost the right to rely upon its state immunity. Accordingly, were the order set aside and were GRI to issue a fresh arbitration claim form seeking permission to enforce the award as a judgment, such permission would be given because it is now known that Venezuela has lost its right to rely upon state immunity. There would be no purpose in ordering service of the arbitration claim form on Venezuela and therefore no need to consider whether there was a useful purpose in permitting service of the claim form out of the jurisdiction. The only consequence of setting aside the order would be to cause GRI to incur extra expense and delay enforcement of the award. No assets of Venezuela in the jurisdiction which are susceptible to execution have been identified in evidence but Mr. Bools explained that, because a freezing order cannot be obtained against a state (see section 13(2) of the State Immunity Act), it would not be in GRI's interests to identify any at this stage. Since GRI has gone to the trouble and expense of seeking permission to enforce the award as a judgment it seems likely that GRI is aware of assets within the jurisdiction which are susceptible to enforcement (see section 13(3) of the State Immunity Act). However, the extra expense and delay to GRI can be said to be unexceptional in circumstances where they have been caused by GRI's failure to give full and frank disclosure.
88. It is possible that Venezuela wishes to contend that the award should not be enforced because of one or more of the reasons specified in section 103(2) of the Arbitration Act. No such argument has yet been identified but that is because Venezuela does not wish to run the risk of being held to have submitted to the jurisdiction. But the setting aside of the court's order is not necessary to enable that to be done. The consent order which has been agreed by the parties has extended the time for taking such points.

89. It is in these circumstances that Mr. Bools has submitted that setting aside the court's order would be wholly disproportionate and that the only result would be extra cost and delay.
90. I do not consider that setting aside the court's order would be wholly disproportionate. GRI's failure to give full and frank disclosure was serious and as a result it obtained judgment for a very substantial sum of money against a sovereign state, albeit that the order could not be acted upon until after any challenge to it had been determined.
91. However, the circumstances of the present case are striking. Had there been full and frank disclosure the court would have ordered that the arbitration claim form be served on Venezuela in order that there could be an *inter partes* hearing of the jurisdiction issue. But that hearing has now taken place and it has been determined that Venezuela has lost its right to rely upon state immunity. In those circumstances I consider that this is one of those rare cases where it is appropriate, notwithstanding a serious failure to give full and frank disclosure, to maintain the order but to mark the claimant's failure with an appropriate order as to costs. I consider that an appropriate order as to costs is that GRI pays Venezuela's costs of the full and frank disclosure issue on an indemnity basis and that GRI bears its own costs of that issue.

#### The form of the order

92. On the first day of the hearing Mr. Dunning took a further point and submitted a supplementary skeleton argument in respect of it. He submitted that the order, when setting out the terms of the award, went beyond the terms of the award and gave GRI interest which the tribunal had not awarded, namely, interest on costs and interest from the date of the judgment at the rate provided in the Judgments Act, namely, 8%.
93. The effect of the award was as follows:
- (1) Venezuela shall pay GRI US\$713,032,000 in compensation for breach of the BIT (paragraph 863 (ii) of the award).
  - (2) Venezuela shall pay interest on that sum from 14 April 2008 to the date of the Award at the US Government Treasury Bill Rate, compounded annually (also paragraph 863(ii) of the award).
  - (3) Post-award interest on the total of the principal and interest ((1) and (2) above) shall run at the rate of LIBOR plus 2% compounded annually from the date of the award until payment (paragraph 863 (iii) of the award).
  - (4) Venezuela shall pay GRI US\$5 million on account of its costs (paragraph 863 (iv) of the award).
94. The terms in which permission was to given to enforce the award and the terms in which judgment was entered provided as follows:
- (1) USD713,032,000 "being compensation for the Defendant's breach of the BIT" (paragraph 1(a) of the order).

(2) USD5,000,000 “being the costs awarded to the Claimant” (paragraph 1(b) of the order).

(3) USD22,299,575 “being pre-award interest”. That accurately reflects, but quantifies, the sum awarded by way of interest in paragraph (ii) of the Award (paragraph 1(c) of the order).

(4) “Post award interest at a rate of LIBOR plus 2%, compounded annually, from 22 September until judgment is entered” (paragraph 1(d) of the order).

95. Paragraph 5 of the order provided that interest pursuant to section 17 of the Judgments Act 1838 shall be paid from the date of the judgment until payment in full.
96. Mr. Dunning submitted that the order of the court should be in precisely the same terms as the award. No variation was permitted. The terms in which the order had been made improved GRI’s position in two respects. First, it awarded interest on costs and, second, it awarded interest at the Judgments Act rate (of 8%) from the date of the judgment.
97. Mr. Bools submitted that it was sufficient if the order was to the same effect as the award; the order did not have “slavishly” to follow the terms of the award.
98. There is no dispute that save in the two respects identified by Mr. Dunning the order was to the same effect as the award. It is therefore an arid question whether the order should be in precisely the same terms as the award or whether it is sufficient if it is to the same effect. I would only observe that as a matter of good practice and in order to prevent dispute the terms of the order should mirror the terms of the award.

#### Interest on costs

99. Mr. Dunning submitted that the effect of the order was to grant interest on costs.
100. I accept that the order is open to this interpretation. However, Mr. Bools submitted in his short written response provided after the hearing that there was no intent to seek interest on costs and that the order should not be read in that way. That being so the terms of the order should be varied to make clear that interest on costs is not payable.
101. In circumstances where the order grants leave to enforce the arbitration award in the same manner as a judgment I consider that the fair interpretation of the order, and in particular paragraph 1(d) dealing with post-award interest, is that it does not purport to award interest on costs. However, for the avoidance of doubt the order should be amended to make that clear.

#### Judgments Act Interest

102. The second complaint is that paragraph 1(d) of the order provides for interest at the rate directed by the tribunal to run until judgment as opposed to payment and that after judgment paragraph 5 of the order grants interest pursuant to the Judgments Act 1838 (8%). Thus GRI’s judgment is more valuable to it than the award.

103. Mr. Dunning submitted that the court must enter judgment in terms of the award and must follow the award; see *Walker v Rowe* [2000] 1 Lloyd's Rep.116 at paragraph 17(5), *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) at paragraph 18 and *Colliers International property Consultants v Colliers Jordan L Jafaar Sdn Bhd* [2008] 2 Lloyd's Rep.368 at paragraph 15. The court cannot "improve" the award.
104. Mr. Bools submitted that once the award has merged into the judgment GRI is entitled to interest pursuant to the Judgments Act and in support of that proposition he relied upon *Dalmia v National Bank* [1978] 2 Lloyd's Rep. 223 at p.275 and *Sonatrach v Statoil* [2014] EWHC 875 (Comm) at paragraph 55 (and see also *Gater Assets Ltd.* [2008] 2 Lloyd's Rep. 295).
105. In the present case the award and hence the judgment were for sums in a foreign currency. In those circumstances the court has a discretion to order interest at such rate as it thinks fit instead of at the statutory rate; see section 44A of the Administration of Justice Act 1970 referred to in the White Book Vol 1 at paragraph 40.8.4. This discretion was not, I think, mentioned in either of the two cases relied upon by Mr. Bools but he accepted that such discretion existed.
106. In the present case the arbitration tribunal considered that interest should run *until payment* at the rate stated in the award. In principle the court's discretion should be exercised by awarding interest at the rate considered appropriate by the arbitral tribunal. The parties have submitted their dispute to arbitration and the arbitral tribunal has considered what rate of interest ought to be paid until the date on which the sum awarded by the tribunal has been paid. The court should respect that decision. In this regard I note that in *Dalmia v National Bank* Megaw LJ said at p.302 that:
- "an English court, even if it had a discretion so to do, ought not to do something which, in effect, would be to substitute its own decision for the arbitrator's decision on a matter within the arbitrator's jurisdiction."
107. I shall therefore exercise the court's discretion by ordering that the rate of interest payable under the Judgments Act should be at the rate fixed by the tribunal.
108. The fact that interest was being sought at the rate fixed by the Judgments Act and that such rate was higher than that awarded by the tribunal ought to have been brought to the attention of the court as should have been the court's discretion to award a lower rate than 8%. If those matters had been disclosed the court would be likely to have exercised its discretion in the way I have done. I have considered whether this failure to disclose, when added to the other failures, requires the order to be set aside and not maintained. But I do not consider that it does. GRI should pay the costs of this issue on an indemnity basis.

### Conclusion

109. Venezuela has lost its right to rely upon state immunity in these proceedings. The arbitration claim form did not require to be served on Venezuela. GRI failed to make full and frank disclosure but in the particular circumstances of this case the court has decided to maintain the order but with an appropriate order as to costs. The order

should be varied to make clear that there is no interest on costs and that the rate of interest from judgment until payment is the rate awarded by the tribunal.

### Appendix

Recognizing that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them,

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#### ARTICLE II

##### Establishment, Acquisition and Protection of Investment

1. Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.
2. Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.
3. Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party, in accordance with its laws and regulations, but in all cases on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by investors or prospective investors of any third state.

#### ARTICLE III

##### Most-Favoured-Nation (MFN) Treatment after Establishment and Exceptions to MFN

1. Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State.
2. Each Contracting Party shall grant investors of the other Contracting Party, as regards their expansion, management, conduct, operation, use, enjoyment, sale, or disposal of their

investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third State.

3. Paragraph (3) of Article II and paragraphs (1) and (2) of this Article do not apply to treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement establishing, strengthening or expanding a free trade area or customs union.

#### ARTICLE IV

##### National Treatment after Establishment

1. Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors.

2. Each Contracting Party shall grant to investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants its own investors with respect to the expansion, management, conduct, operation, use, enjoyment, sale or disposal of the investment or returns.

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#### ARTICLE XVI

##### Application and Annex

1. This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement. This Agreement shall, however, not create a right to dispute settlement under Articles XII and XIV regarding actions taken and completed prior to the entry into force of this Agreement.

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#### ARTICLE XVII

##### Entry into force

1. Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.

2. This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing

of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVI inclusive of, and the Annex to, this Agreement shall remain in force for a period of fifteen years.