IN THE MATTER OF AN ARBITRATION UNDER
THE 2017 ARBITRATION RULES OF THE STOCKHOLM CHAMBER OF COMMERCE

CASE V 2019/058

BETWEEN

MR ZAZA OKUASHVILI

Claimant

AND

GEORGIA

Respondent

Partial Final Award on Jurisdiction and Admissibility

31 August 2022

The Tribunal:

Georgios Petrochilos QC (President)
Mr Giorgio Mandelli
Professor Rolf Knieper

Seat of Arbitration: Stockholm, Sweden

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DEFINED TERMS AND ABBREVIATIONS

Application	Claimant's Application for Interim Measures, dated 9 November 2021
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016; not in force)
CJEU	Court of Justice of the European Union
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction and Admissibility, dated 18 June 2021
Claimant's Response	Claimant's Response on Jurisdiction and Admissibility, dated 20 November 2020
GBS Disputes	Gaillard Banifatemi Shelbaya Disputes
GEL	Georgian Lari (Georgia's national currency)
Georgia-BLEU BIT	Agreement between the Belgo-Luxembourg Economic Union and the Republic of Georgia on the Reciprocal Promotion and Protection of Investments (signed 23 June 1993; in force 3 July 1999)
HSMP	Highly Skilled Migrant Programme
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965; in force 14 October 1966)
ILC	International Law Commission
IUSCT	Iran-United States Claims Tribunal

MFN	Most Favoured Nation
OGT	LLC OGT
Omega-2	Omega-2 Ltd
PO1	Procedural Order No 1, dated 7 October 2019
Respondent's Answer	Respondent's Answer to the Claimant's Request for Arbitration, dated 31 May 2019
Respondent's Objections	Respondent's Objections to Jurisdiction and Admissibility and Request for Bifurcation, dated 17 July 2020
Respondent's Reply	Respondent's Reply on Jurisdiction and Admissibility, dated 19 March 2021
RfA	Request for Arbitration, dated 1 May 2019
SCC	Stockholm Chamber of Commerce
SCC Board	Board of the Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules or **Rules**	2017 Arbitration Rules of the Stockholm Chamber of Commerce
SoC	Statement of Claim, dated 17 April 2020
TEU	Treaty on European Union (signed 7 February 1992; amended 13 December 2007; in force 1 December 2009)
TFEU	Treaty on the Functioning of the European Union (signed 25 March 1957; amended 13 December 2007; in force 1 December 2009)
ToA	Terms of Appointment, dated 7 October 2019
Treaty	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the

	Republic of Georgia for the Promotion and Protection of Investments (signed 15 February 1995; in force 15 February 1995)
VCLT	Vienna Convention on the Law of Treaties (signed 23 May 1969; in force 27 January 1980)

I. INTRODUCTION

1. This Partial Final Award is made pursuant to Article 44 of the 2017 Arbitration Rules of the Stockholm Chamber of Commerce (***SCC Rules*** or ***Rules***).

A. THE PARTIES

2. The Claimant in this arbitration is Mr Zaza Okuashvili. He is represented in this arbitration by Mr Greg Fullelove, Mr Daniel Harrison, and Ms Katie Bewlock of Osborne Clarke LLP; and Mr Samuel Wordsworth QC, Mr Lucas Bastin QC, and Ms Jackie McArthur of Essex Court Chambers.

3. The Respondent in this arbitration is Georgia. It is represented in this arbitration by the Ministry of Justice of Georgia and Dr Yas Banifatemi, Mr Ashish Mitter, and Ms Arianna Rosato of Gaillard Banifatemi Shelbaya Disputes (for short, ***GBS Disputes***).

B. THE ARBITRAL TRIBUNAL

4. The Tribunal is constituted as follows:

   (i) Dr Georgios Petrochilos QC of Three Crowns LLP, 104 avenue des Champs-Élysées, 75008 Paris, France, as President, appointed by the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (***SCC Board***).

   (ii) Mr Giorgio Mandelli of King & Spalding International LLP, 125 Old Broad Street, London, EC2N 1AR, United Kingdom, appointed by the Claimant.

   (iii) Professor Rolf Knieper of Reichsforststrasse 20, 60528 Frankfurt/Main, Germany, appointed by the Respondent.

5. By the Terms of Appointment (***ToA***) dated 7 October 2019, the parties confirmed that the members of the Tribunal had been validly appointed and that they had no objection to the appointment of any member of the Tribunal with regard to their independence or impartiality, in respect of matters known to them as at 7 October

2019.[1] Ms Amelia Keene of Three Crowns LLP was appointed as Tribunal Secretary with the approval of the SCC and the consent of the parties.[2]

6. On 31 May 2021, Ms Julia Sherman of Three Crowns LLP replaced Ms Keene as Tribunal Secretary, again with the approval of the SCC and the consent of the parties.[3]

C. THE ARBITRATION AGREEMENT

7. The Claimant invokes Articles 3 and 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Georgia for the Promotion and Protection of Investments, which entered into force on 15 February 1995 (the ***Treaty***).[4]

8. Article 3 of the Treaty provides:[5]

> **National Treatment and Most-favoured-nation Provisions**
>
> (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

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1 Terms of Appointment, 7 October 2019 (***ToA***), ¶ 10.

2 ToA, ¶¶ 13-14.

3 *See* Letter from the SCC to Tribunal and Parties, 31 May 2021.

4 Request for Arbitration (***RfA***), 1 May 2019, ¶¶ 28-39. *See also* ToA, ¶ 3.

5 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Georgia for the Promotion and Protection of Investments (done in London on 15 February 1995; entered into force on 15 February 1995) (***Treaty***), **Exhibit C-1**.

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

9. The relevant provisions of Article 8 of the Treaty are as follows:[6]

> **Reference to International Centre for Settlement of Investment Disputes**
>
> (1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.
>
> . . .
>
> (4) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

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6 Treaty, **Exhibit C-1**, Article 8(1) and (4).

10. By virtue of the most-favoured-nation clauses in Article 3 of the Treaty, the Claimant additionally invokes Article 10 of the Agreement between the Belgo-Luxembourg Economic Union and the Republic of Georgia on the Reciprocal Promotion and Protection of Investments, which entered into force on 3 July 1999 (the ***Georgia-BLEU BIT***).

11. Article 10 of the Georgia-BLEU BIT provides as follows:[7]

> **Article 10. Settlement of Investment Disputes**
>
> 1. Any investment dispute between an investor of one Contracting Party and the other Contracting Party shall be notified in writing by the first party to take action. The notification shall be accompanied by a sufficiently detailed memorandum. As far as possible, such dispute shall be settled amicably between the parties to the dispute or otherwise by conciliation between the Contracting Parties through diplomatic channels.
>
> 2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the receipt of the notification, the dispute shall be submitted to international arbitration, any other legal remedy being excluded.
>
> To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration. Such consent implies that both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted.
>
> 3. In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter mentioned organisations, at the option of the investor:
>
> - the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965, when

[7] Agreement between the Belgo-Luxembourg Economic Union and the Republic of Georgia on the Reciprocal Promotion and Protection of Investments (done in Brussels on 23 June 1993; entered into force on 3 July 1999) (***Georgia-BLEU BIT***), **Exhibit C-3**, Article 10.

each State party to this Agreement has become a party to the said Convention. As long as this requirement is not met, each Contracting Party agrees that the dispute shall be submitted to arbitration pursuant to the provisions of the additional facility of the I.C.S.I.D.;

- the Arbitral Court of the International Chamber of Commerce in Paris;

- the Arbitration Institute of the Chamber of Commerce in Stockholm.

If the arbitration procedure has been introduced upon the initiative of a Contracting Party, this Party shall request the investor involved in writing to designate the arbitration organisation to which the dispute shall be referred.

4. At any stage of the arbitration proceedings or of the execution of an arbitral award, none of the Contracting Parties involved in a dispute shall be entitled to raise as an objection the fact that the investor who is the opponent party in the dispute has received compensation totally or partly covering his losses pursuant to an insurance policy or to the guarantee provided for in Article 7 of this Agreement.

5. The arbitral tribunal shall decide on the basis of:

- the national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made;

- the provisions of this Agreement;

- the terms of the specific agreement which may have been entered into regarding the investment;

- the principles of international law.

6. The arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to execute the awards in accordance with its national legislation.

12. As described below, the Respondent contests the validity of the Claimant's reliance upon these treaties to found the Tribunal's jurisdiction, to which the

Respondent objects. In addition, the Respondent contests the admissibility of the claims submitted by the Claimant, as also described below.[8]

[8] *See* Respondent's Answer to the Claimant's Request for Arbitration (***Respondent's Answer***), 31 May 2019, ¶¶ 3-8; Respondent's Objections to Jurisdiction and Admissibility and Request for Bifurcation, 17 July 2020 (***Respondent's Objections***), ¶¶ 1-8, 299. *See also* ToA, ¶ 4.

II. PROCEDURAL HISTORY

A. THE ORGANIZATION OF THE PROCEEDINGS AND THE PHASE ON JURISDICTION AND ADMISSIBILITY

13. The arbitration was commenced on 1 May 2019, when the Claimant filed its Request for Arbitration (***RfA***), invoking Articles 3 and 8 of the Treaty and Article 10 of the Georgia-BLEU BIT. In its RfA, the Claimant appointed Mr Mandelli as arbitrator and proposed that the "place and seat of the arbitration be London, England".[9]

14. On 3 May 2019, the SCC wrote to the Respondent, notifying it of the Claimant's RfA and inviting it to provide its Answer by 31 May 2019.

15. On 31 May 2019, the Respondent filed its Answer to the Claimant's RfA, objecting to the Tribunal's jurisdiction over the claims asserted in the RfA as well as to the admissibility of these claims. The Respondent appointed Professor Knieper as arbitrator and proposed that "the place and seat of the arbitration be Paris, France".[10]

16. On 17 June 2019, the SCC Board appointed Dr Petrochilos QC as President of the Tribunal in accordance with Article 17 of the SCC Rules.[11] Further, the SCC Board fixed Stockholm, Sweden as the place and seat of the arbitration.[12]

17. Pursuant to Article 18 of the SCC Rules, the Secretariat of the Arbitration Institute of the SCC referred the case to the Tribunal on 1 August 2019, and set 1 February 2020 as the deadline for the rendering of the Final Award in the arbitration.[13] This time-limit has subsequently been extended, to 2 September 2022, as described below.

18. The Tribunal held a case management conference with the parties on 30 September 2019. The Respondent indicated that it would request that the

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9 RfA, ¶ 43.

10 Respondent's Answer, ¶ 57.

11 Letter from the SCC to the Tribunal and Parties, 17 June 2019, p 1. *See also* Procedural Order No 1, 7 October 2019 (***PO1***), ¶ 7.

12 Letter from the SCC to the Tribunal and Parties, 17 June 2019, p 1. *See also* PO1, ¶ 3.

13 Letter from the SCC to the Tribunal and Parties, 1 August 2019. *See also* PO1, ¶ 8.

Tribunal bifurcate the proceedings so that questions of jurisdiction and admissibility could be addressed separately from the merits of the Claimant's claims.

19. On 7 October 2019, the Tribunal issued Procedural Order No 1, by which it set the procedural timetable for the arbitration. This included several permutations, depending on whether the proceedings were to be bifurcated or not. The procedural timetable was subsequently revised following correspondence between the parties and the Tribunal.

20. On 7 January 2020, the SCC Board granted the Tribunal's request for an extension of the date for the rendering of the Final Award until 2 August 2020.[14]

21. The Claimant filed its Statement of Claim (***SoC***) on 17 April 2020.

22. On 28 May 2020, the SCC Board granted a request by the Tribunal for an extension of the date for the rendering of the Final Award until 2 August 2021.[15]

23. On 17 July 2020, the Respondent filed its Objections to Jurisdiction and Admissibility and Request for Bifurcation.

24. On 28 July 2020, the Claimant wrote to the Tribunal, confirming its agreement to bifurcate the proceedings.[16]

25. On 30 July 2020, the Tribunal directed that, by agreement of the parties, the proceedings would be bifurcated.[17]

26. On 3 September 2020, the Tribunal issued a revised procedural timetable for the arbitration. Pursuant to the revised timetable, the hearing on jurisdiction and admissibility was set for 19-21 July 2021.

27. On 20 November 2020, the Claimant filed its Response on Jurisdiction and Admissibility.

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14 Letter from the SCC to the Tribunal and Parties, 7 January 2020.

15 Letter from the SCC to the Tribunal and Parties, 28 May 2020.

16 Email from the Claimant to the Tribunal, 28 July 2020.

17 Email from the Tribunal Secretary to the Parties, 30 July 2020.

28. On 4 December 2020, the parties exchanged document production requests. On 15 January 2021, the parties submitted to the Tribunal their respective objections to the document production requests formulated by the other side.

29. On 29 January 2021, the Tribunal issued its decisions on document production, by which it (a) directed the Claimant to produce certain documents to the Respondent and (b) noted the Respondent's agreement to produce certain documents to the Claimant.[18]

30. On 19 March 2021, the Respondent filed its Reply on Jurisdiction and Admissibility.

31. On 18 June 2021, the Claimant filed its Rejoinder on Jurisdiction and Admissibility.

32. On 28 June 2021, the Tribunal and parties held a pre-hearing organizational conference by video-conferencing.

33. Following consultations with the parties, on 30 June 2021, the Tribunal issued its directions for the organization of the hearing. As recorded in the Tribunal's directions, the parties agreed to a virtual format for the hearing and to dispense with written post-hearing submissions in favour of oral closing submissions.

34. On 9 July 2021, the SCC Board granted the Tribunal's request for an extension of the date for the rendering of the Final Award until 2 August 2022.[19]

35. The hearing on jurisdiction and admissibility was held virtually between 19 and 21 July 2021.

36. For the Claimant, the hearing was attended as follows:

    (i) Mr Zaza Okuashvili, Claimant.

    (ii) Mr Greg Fullelove, Mr Daniel Harrison, Ms Katie Bewlock, and Ms Florence Dove of Osborne Clarke LLP.

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18 Letter from the Tribunal to the Parties, 29 January 2021 and Annexes.

19 Letter from the SCC to the Tribunal and Parties, 9 July 2021.

(iii) Mr Samuel Wordsworth QC, Mr Lucas Bastin QC, and Ms Jackie McArthur of Essex Court Chambers.

(iv) Ms Nato Gagnidze, Claimant's Expert Witness.

(v) Mr Levan Agdgomelashvili, Claimant's Representative.

(vi) Ms Mariam Gurgenidze, Interpreter.

37. For the Respondent, the hearing was attended as follows:

(i) Mr Beza Dzamashvili, Ms [redacted], Mr [redacted], and Ms [redacted].

(ii) Dr Yas Banifatemi, Dr Paschalis Paschalidis, Mr Ashish Mitter, Ms Arianna Rosato, Mr Lodovico Amianto, and Ms Sukriti Rai of GBS Disputes.

38. On 20 July 2021, the Tribunal circulated questions to the parties, which it requested that the parties address in closing submissions the following day; as, in fact, they duly did on 21 July 2021.

39. Further to the Tribunal's invitation, on 9 September 2021, the parties submitted a joint proposal for the timing of corrections to the hearing transcript and the filing of cost submissions.

40. On 27 September 2021, the parties submitted their cost submissions to the Tribunal. Each party submitted its comments on the other's cost submission on 4 October 2021.

B. THE CLAIMANT'S APPLICATION FOR INTERIM MEASURES

41. In the evening of 9-10 November 2021, the Claimant submitted an Application for Interim Measures, whereby he sought that the Tribunal "*exercise its powers to grant interim relief under Article 37(1) of the Rules*" as follows:

> [**A**]**n interim direction** in the form of an order that Georgia will immediately cease all actions in relation to the bankruptcy of LLC OGT (**Case N2/19300-20**), to preserve the *status quo* as at 10 November 2021,

> including that it will not (by its courts, or otherwise) appoint or confirm the appointment of a bankruptcy manager in respect of LLC OGT, and it will not (by the National Agency of Public Registry, or otherwise) register the appointment of a bankruptcy manager in respect of LLC OGT, until the Tribunal has made a ruling on this Application. . . .
>
> [**I**]**nterim measures** in the form of an order prohibiting Georgia (whether acting through a court, the National Agency of Public Registry, the National Bureau of Enforcement, or in any other capacity) from taking any further steps in relation to bankruptcy proceedings in respect of LLC OGT. The Claimant seeks that the order have effect until the resolution of the Claim by way of final award in the arbitration between the Parties, or as otherwise ordered by the Tribunal in a further award or procedural order.[20]

42. Following directions from the Tribunal, on 10 November 2021, the Respondent submitted Comments on the Claimant's Application and the Claimant answered two questions posed to it by the Tribunal.

43. Later on 10 November 2021, the Tribunal issued its ruling on the Claimant's application for an interim direction to preserve the *status quo*, which the Tribunal dismissed, and also its directions as to procedural next steps.[21]

44. On 24 November 2021, the Respondent submitted its Response to the Claimant's Application for Interim Measures.

45. On 25 November 2021, the Claimant requested that: "(i) he be permitted to submit a short Reply to the Respondent's Response; and (ii) the Tribunal schedule a brief virtual hearing on the Application."[22]

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20 Claimant's Application for Interim Measures, 9 November 2021 (***Application***), ¶¶ 44-45 (emphasis in original).

21 *See* Decision on Interim Measures, 14 December 2021, ¶ 9; Email from the Tribunal Secretary to the Parties, 10 November 2021.

22 Email from the Claimant to the Tribunal, 25 November 2021.

46. On 26 November 2021, the Respondent wrote to oppose the Claimant's request for a hearing and to seek "*an opportunity to respond to the Claimant's [Reply] submission*," should further briefing be ordered.[23]

47. On 28 November 2021, the Tribunal granted the Claimant's request to submit a Reply by 1 December 2021 and also leave to the Respondent to submit a Rejoinder by 6 December 2021.[24] Both of these pleadings were duly submitted.

48. On 7 December 2021, the Claimant asked the Tribunal to indicate if it wished to hold a hearing on the Claimant's Application.[25]

49. On 10 December 2021, the Tribunal informed the parties that it would be able to decide the Claimant's Application without further briefing.

50. On 14 December 2021, the Tribunal rendered its Decision on Interim Measures. It dismissed the Claimant's Application for Interim Measures and reserved its decision on costs incurred in relation to the Claimant's Application.[26]

51. On 23 March 2022, the Respondent submitted an updated statement of costs.

52. On 22 June 2022, the SCC Board granted the Tribunal request for an extension of the date for the rendering of the Final Award until 2 September 2022.[27]

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23 Email from the Respondent to the Tribunal, 26 November 2021.

24 Email from the Tribunal Secretary to the Parties, 28 November 2021.

25 Letter from the Claimant to the Tribunal, 7 December 2021.

26 *See* Decision on Interim Measures, 14 December 2021, ¶ 44.

27 Letter from the SCC to the Tribunal, 22 June 2022.

III. FACTUAL BACKGROUND

53. The factual allegations underpinning the Claimant's substantive claim for violation of the Treaty are disputed by the Respondent.[28] Disputed as these allegations are, they are helpful context to the determinations that the Tribunal must make as to the existence and exercise of its jurisdiction. The allegations are therefore summarized in Section III.C for that purpose; the Tribunal makes no finding in respect of these allegations.

54. The factual determinations necessary to determine the Tribunal's jurisdiction are set out in Section V of this Award.

A. THE CLAIMANT

55. Mr Okuashvili is a Georgian national by birth. He is also a Russian national, although the evidence in the record does not indicate whether by birth or by naturalization.

56. The Claimant left Georgia in 2004, following the events set out below in Section III.C.1. In 2005, the Claimant entered the United Kingdom on a multiple-entry tourist visa.[29] He then applied to emigrate to the UK under the Highly Skilled Migrant Programme (***HSMP***).[30] In December 2005, the Home Office approved this application for a period of one year.[31]

57. Since 2006, the Claimant has resided in the UK, apparently for at least the majority of each year, and has paid taxes in the UK.[32]

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28 Respondent's Objections, ¶ 15.

29 Georgian Passport of Zaza Okuashvili (No 62N2269228), issued 4 November 2004, **Exhibit R-22**, p 4.

30 As noted below, the Claimant's HSMP application is not on record. However, from the remaining documentation that is on the record, it is clear that the Claimant did in fact apply under the HSMP.

31 Letter from the Home Office to Ferguson Snell & Associates Ltd, 23 December 2005, **Exhibit R-25**.

32 First Witness Statement of Zaza Okuashvili, 17 April 2020 (***First Okuashvili Witness Statement***), ¶ 9.

58. During the same period, the Claimant has also paid taxes in Georgia.[33] The Claimant also maintains various businesses in Georgia, which are mentioned below in Section III.B.

59. In January 2007, the Claimant applied for an extension of stay (limited leave to remain) in the United Kingdom as an HSMP participant.[34] In May 2007, the Claimant submitted a request to vary his application for further leave to remain in the United Kingdom from the Highly Skilled Migrant Category to a Working Category.[35] This request was granted in September 2007, with the Home Office granting the Claimant an initial 24 months to remain in the United Kingdom in that capacity.[36]

60. At some point thereafter, the Claimant applied to re-instate his status as a Highly Skilled Migrant.[37] This application was approved some time before December 2009. On 22 December 2009, the Claimant applied for indefinite leave to remain in the United Kingdom.[38] The Claimant's application was apparently granted on 24 December 2009.[39]

61. On 12 January 2011, the Claimant lodged an application for naturalization as a British citizen with the UK Border Agency. On 22 February 2011, the Claimant was naturalized as a British citizen.[40] On 30 March 2011, the Claimant was issued a UK passport.[41]

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33 First Okuashvili Statement, ¶ 9.

34 Application for Extension of Stay in the United Kingdom as an HSMP Participant, 8 January 2007, **Exhibit C-392**. As noted below, it is unclear to the Tribunal whether the Claimant received a provisional grant of limited leave to remain following this application, or other response from the UK authorities. In any event, the Claimant remained in the United Kingdom. *See below*, ¶ 124.

35 Request to Vary Application for Further Leave to Remain, 11 May 2007, **Exhibit C-393**.

36 Letter from the Home Office to John Snell, 5 September 2007, **Exhibit C-394**.

37 Application for an Initial Grant of Leave (Switching) or an Extension of Leave under Tier 1 (General Main Applicant), undated, **Exhibit R-18**.

38 Application for Indefinite Leave to Remain in the United Kingdom, 22 December 2009, **Exhibit R-30**.

39 Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, p 2. As noted below, the approval of the Claimant's indefinite leave to remain application is not in the record. *See below*, ¶ 124.

40 Certificate of Naturalisation of Zaza Okuashvili, 22 February 2011, **Exhibit C-278**.

41 *See* United Kingdom Passport of Zaza Okuashvili, issued 30 March 2011, **Exhibit C-14**.

62. The Claimant owns real estate and other property in the UK, including his primary residence, which the record indicates he acquired in 2013 or 2014. The Claimant lives at this residence with his youngest son, who was born in the UK and is a British citizen.[42]

63. The Claimant has two older sons, who also live in London and were granted indefinite leave to remain in the UK in November 2019.[43]

64. Until April 2022, the Claimant was married to Ms [redacted], who resides in Georgia and is a member of the Parliament of Georgia.[44] The Claimant and Ms [redacted] in April 2022.[45]

B. THE CLAIMANT'S BUSINESS

65. The Claimant submits that he is the ultimate beneficial owner of a group of companies known as the "Omega Group", which had interests in, *inter alia*, the Georgian tobacco, distribution, automobile, printing, and television sectors.[46]

66. As stated by the Claimant,[47] the Omega Group includes the following companies:

(i) LLC OGT (***OGT***), a company established under Georgian law that produces and sells cigarettes and other tobacco products in Georgia;

(ii) Omega-2 Ltd (***Omega-2***), a company established under Georgian law that markets and distributes OGT's tobacco products;

(iii) Omega Motor Group LLC, a company established under Georgian law that sells cigarettes and roll-your-own tobacco products;

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42 First Okuashvili Witness Statement, ¶ 9(a); Knightsbridge Property Leave, 3 January 2014, **Exhibit C-279**; Knightsbridge Property Leasehold Land Registry Title, 11 November 2019, **Exhibit C-281**; Second Witness Statement of Zaza Okuashvili, 20 November 2020 (***Second Okuashvili Witness Statement***), ¶¶ 6, 8; Hearing Tr., Day 2, 5:15-7:11 (Bastin/Okuashvili). *See also* Claimant's Response, ¶ 50.

43 *See* First Okuashvili Witness Statement, ¶ 9(c)-(d); Second Okuashvili Witness Statement, ¶ 8. Hearing Tr., Day 2, 3:13-4:6 (Bastin/Okuashvili).

44 First Okuashvili Witness Statement, ¶ 9(c); Email from the Claimant to the Tribunal, 5 April 2022.

45 Email from the Claimant to the Tribunal, 5 April 2022.

46 Statement of Claim, 17 April 2020 (***SoC***), ¶ 1.

47 SoC, ¶ 8.

(iv) Omega Motors LLC, a company established under Georgian law that sells imported cars in Georgia;

(v) Ilioni Ltd, a company established under Georgian law that provides printing services to OGT and other customers; and

(vi) Iberia TV Ltd, a company established under Georgian law that operates a national TV network in Georgia.

C. THE DISPUTED EVENTS

67. As noted, the Tribunal provides this summary of the events relevant to the Claimant's substantive claim under the Treaty without prejudice to the parties' positions on the merits. The Tribunal further notes that the Respondent disputes the facts alleged in the Claimant's SoC and has reserved its rights in respect of any claim and/or allegation made therein.[48]

1. 2004 events

68. According to the Claimant, "the Respondent sent armed men to invade and occupy the premises of Omega Group companies in 2004, without a legal basis for doing so, and in a manner that lasted several months and occasioned the shutdown of those premises."[49] This conduct was purportedly in response to allegations that the Omega Group [redacted]—allegations that the Claimant rejects.[50] The Claimant contends that the occupation of the Omega Group companies did not end until the Claimant agreed to transfer the licence of Iberia TV to individuals associated with the Respondent's government at that time.[51] The Claimant does not allege that this conduct constituted a breach of the Respondent's obligations under the Treaty, but rather presents it as context for subsequent events.

48 *See* Respondent's Objections, ¶ 15.
49 SoC, ¶ 74.
50 SoC, ¶ 74.
51 SoC, ¶ 74.

69. Some time in 2004, following these events, the Claimant left Georgia and did not return until 2007.[52] The Claimant contends that he has repeatedly sought investigation of the 2004 events, but that these efforts have been stymied and that, to date, no criminal charges have been brought against any official.[53] The Claimant submits that the Respondent's alleged failure to investigate the 2004 occupation of the Omega Group constitutes a breach of the Treaty.[54]

2. 2015-2016 events

70. The Claimant recounts that, in late November or early December 2015, he met with Mr Bidzina Ivanishvili regarding the 2004 events. Mr Ivanishvili, who became Prime Minister of Georgia after the 2004 events, is, according to the Claimant, "the head of the current ruling party in Georgia" (the Georgian Dream party).[55] During the meeting, Mr Ivanishvili allegedly said that the Respondent "should compensate the Omega Group" for the 2004 events.[56]

71. In late February or early March 2016, the Claimant met with Mr [redacted], an associate of Mr Ivanishvili.[57] At this meeting, Mr Partskhaladze allegedly told the Claimant that "that he would have to pay USD [redacted] to open up relations between the Omega Group and the government, to make the government well disposed towards the Omega Group's claim, and to receive about GEL [redacted] as compensation for losses relating to the events in 2004."[58] The demand for USD [redacted] was purportedly repeated in a subsequent meeting in April 2016 between the Claimant and Mr Ivanishvili.[59]

72. According to the Claimant, the circumstances of these meetings indicated "that the government was fully aware of this demand for a payment by Mr Okuashvili, and that refusal to comply with it would pose a danger to the physical safety of

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52 *See above*, ¶ 56. *See also* First Okuashvili Witness Statement, ¶ 42.
53 SoC, ¶¶ 75-77.
54 SoC, ¶ 87.
55 SoC, ¶ 24.
56 SoC, ¶ 67.
57 SoC ¶, 68.
58 SoC, ¶ 68.
59 SoC, ¶ 69.

individuals connected to the Omega Group."[60] The Claimant alleges that, as a result of this threat, the Omega Group deposited GEL [redacted] (USD [redacted]) in the bank account of [redacted] (a company apparently unaffiliated with the Omega Group) on 20 April 2016.[61] These funds were later withdrawn from the company's bank account, in circumstances that (in combination with the above meetings), the Claimant alleges constitute extortion under Georgian law.[62] The Claimant alleges that this unlawful conduct "was undertaken by, on behalf of or in complicity with the Respondent's officials."[63]

3. 2016-2018 events

73. According to the Claimant, by 2016, OGT had outstanding tax liabilities of GEL [redacted].[64] The Claimant says that OGT's tax arrears were caused by the Respondent's refusal to prevent multinational companies from engaging in anti-competitive conduct. This is said to have caused harm to the Claimant's investment and be in breach of the Treaty.[65]

74. In December 2016, OGT representatives had a meeting with the [redacted], regarding OGT's tax arrears.[66] The Claimant alleges that he was informed by [redacted] that OGT could submit an application to the Ministry of Finance to have its tax arrears restructured and, if it did so within three months' time, the application would be granted.[67] The Claimant contends that OGT submitted this application on 25 April 2017.[68] However, according to the Claimant, the Ministry of Finance has never considered the application.[69]

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60 SoC, ¶ 68.
61 SoC, ¶ 70.
62 SoC, ¶¶ 67-72.
63 SoC, ¶ 72.
64 SoC, ¶ 39.
65 SoC, ¶¶ 54-64.
66 SoC, ¶ 39.
67 SoC, ¶ 39. *See also* First Okuashvili Statement, ¶ 102.
68 SoC, ¶ 40.
69 SoC, ¶ 42.

75. The Claimant says that in a separate development, in early August 2017, he was pressured to enter into a "corrupt" joint venture arrangement with [redacted], a Georgian company owned by former government officials with ties to Mr Ivanishvili.[70] The Claimant further alleges that companies in the Omega Group were pressured "to make cash payments to the [redacted]".[71] According to the Claimant, he and the Omega Group resisted these pressures.[72]

76. On 25 April 2018, in connection with OGT's tax arrears, the Tbilisi City Court authorized the seizure and compulsory sale of OGT's property (which had been attached in March 2017).[73] These measures were upheld by the Tbilisi Appeals Court on 19 July 2018.

77. On 11 August 2018, the Claimant met with the [redacted], and his representatives, regarding the Claimant's application for a tax deferral.[74] According to the Claimant, "[redacted]" in respect of the deferral.[75] Rather, [redacted] demanded that OGT pay its outstanding tax arrears with immediate effect, "failing which excise stamps would not be granted to OGT" and the Ministry of Finance "would demand immediate payment of OGT's entire tax debt of (by now) more than GEL [redacted]."[76] The Claimant submits that excise stamps are essential to his business as they are necessary for the sale of tobacco products in Georgia, and thus, without them, OGT was unable to operate.[77]

78. After this meeting, Mr [redacted], a former government official, allegedly explained to representatives of the Omega Group that "the demand for an immediate payment to the Revenue Service would be dropped if the Omega Group were to enter into the corrupt joint venture arrangement" with [redacted].[78]

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70 SoC, ¶¶ 24-25.
71 SoC, ¶¶ 25.
72 SoC, ¶¶ 26-34.
73 SoC, ¶ 46.
74 SoC, ¶ 43.
75 SoC, ¶ 43.
76 SoC, ¶ 43.
77 SoC, ¶ 3(a).
78 SoC, ¶ 44.

However, the Claimant says, the Omega Group continued to refuse to make any "corrupt arrangement" with [redacted].[79]

79. The Claimant contends that, because of this refusal, in August 2018, Georgia's Revenue Service started refusing to provide excise stamps to Omega Group companies.[80] The Claimant contends that, due to the Revenue Service's refusal and the Respondent's conduct in respect of OGT's tax arrears, the Claimant's investments in OGT and Omega-2 have been "destroyed" since mid-2018.[81]

80. In September 2018, the Claimant recorded a public statement in which "he set out wrongs committed against the Omega Group and the government's corruption."[82] According to the Claimant, in the following months, "TV news companies in Georgia released several recordings which exposed corruption within the Georgian government (including involving Mr Ivanishvili) and political pressure and extortion against the Omega Group."[83] The subject matter of these recordings includes the alleged extortion of USD [redacted] (GEL [redacted]) from Mr Okuashvili by Mr Ivanishvili and others in 2016.[84]

81. Following this public statement, and the subsequent press coverage, Mr [redacted], "an emissary" of the Respondent, reached out to representatives of the Omega Group.[85] According to the Claimant, during a series of meetings in October 2018, Mr [redacted] indicated that the Claimant could "earn the government's goodwill" if he publicly supported [redacted] in the upcoming presidential elections (the first round of which was to be held on 28 October 2018).[86]

82. Specifically, the Claimant claims that during these meetings he was "passed on a demand from Mr Ivanishvili, the then Business Ombudsman, and now [in 2021] [redacted] (the head of the

79 SoC, ¶ 44.
80 SoC, ¶¶ 12-13.
81 SoC, ¶¶ 12-13.
82 SoC, ¶ 26.
83 SoC, ¶ 26.
84 SoC, ¶ 26.
85 SoC, ¶ 27.
86 SoC, ¶¶ 28-29, 34, 45.

government's [redacted])" to record a pre-scripted statement refuting the corruption allegations against Mr Ivanishvili and stating that they were "false information" disseminated on orders of the [redacted].[87] (Mr [redacted], [redacted] of Mr Ivanishvili.)[88] Mr [redacted] said that in exchange for making the pre-scripted statement–[89]

> the Respondent would (*inter alia*) issue excise stamps to OGT so it could restart operations, and would sign a tax agreement with OGT writing off the late payment penalty and requiring OGT to pay only GEL [redacted] of the GEL [redacted] principal (and even then deferred for two years and payable over the next three years).

The Claimant says that he refused to make the requested statement and told Mr [redacted] that "he would only read a statement if it did not include lies".[90]

83. On 26 October 2018, representatives of the Omega Group allegedly met with [redacted].[91] According to the Claimant, during this meeting, "the Minister of Finance and the Head of the Revenue Service stated terms on which OGT's tax arrears could be paid."[92] The Claimant characterizes this as an oral agreement between himself and the Respondent about the payment of the tax arrears.[93]

84. The same day, the Revenue Service granted OGT [redacted] excise stamps, which would be enough for two weeks' production.[94] Some time after the meeting, representatives of the Omega Group allegedly "told Mr [redacted] that Mr Okuashvili would not read the proposed public statement".[95] In response, so

87 SoC, ¶ 28.
88 SoC, ¶ 28.
89 SoC, ¶¶ 29, 45.
90 SoC, ¶ 29.
91 SoC, ¶ 31.
92 SoC, ¶ 31.
93 SoC, ¶ 45.
94 SoC, ¶ 30.
95 SoC, ¶ 31.

the Claimant says, "Mr [redacted] said that Mr Okuashvili's refusal to read the statement would have serious negative consequences for the Omega Group."[96]

85. The first round of the presidential elections was held on 28 October 2018. As no candidate secured an absolute majority of the vote, a second-round vote was scheduled for 28 November 2018 between the candidates supported by the Georgia Dream and United National Movement parties.[97]

86. On 29 October 2018, OGT sent a letter to the Ministry of Finance seeking to "confirm[] the terms of the agreement" allegedly reached with the Respondent during the 26 October 2018 meeting.[98] According to the Claimant, while OGT has written to the Respondent to formalize the agreement several times, the Respondent has "refused to formalise the arrangement."[99] On 8 November 2018, OGT paid its tax liability for the month of October 2018.[100]

87. Following the first-round election results, Mr [redacted] allegedly "informed the Omega Group that the second round of elections was a second chance for the Omega Group to earn the government's goodwill."[101] However, according to the Claimant, he again refused to make a statement refuting his allegations against Mr Ivanishvili.[102]

88. The Claimant says that Omega Group companies continued to apply for excise stamps in the ordinary way through November 2018, as well as through letter appeals to the Respondent's Revenue Service and Minister of Finance.[103] These applications were not granted.

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96 SoC, ¶ 31.
97 SoC, ¶ 32.
98 SoC, ¶ 45.
99 SoC, ¶ 46.
100 SoC, ¶ 45.
101 SoC, ¶ 32.
102 SoC, ¶ 32.
103 SoC, ¶ 33.

89. On 23 November 2018, Minister Machavariani gave a television interview in which he denied having reached an agreement with OGT regarding its tax arrears.[104]

90. On [redacted].[105] According to the Claimant, shortly thereafter, almost all of OGT's applications for excise stamps were "cancelled".[106] The Claimant contends that other Omega Group companies similarly have been refused excise stamps or had their applications cancelled since November 2018.[107]

91. In December 2018, the Respondent wrote to OGT, denying that an agreement regarding OGT's tax arrears had been reached at the 26 October 2018 meeting.[108]

92. On 22 February 2019, the Claimant allegedly received a notice demanding full repayment of OGT's tax liability within seven days.

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104 First Okuashvili Statement, ¶ 156.

105 SoC, ¶ 35.

106 SoC, ¶ 35.

107 SoC, ¶ 49.

108 *See* Letter from [redacted] to [redacted], 5 December 2018, **Exhibit C-196**; Letter from [redacted] to [redacted], 18 December 2018, **Exhibit C-54**; Letter from [redacted] to [redacted] 4 March 2019, **Exhibit C-243**. *See also* SoC, ¶ 46.

IV. THE PARTIES' REQUESTS FOR RELIEF

93. The Respondent requests that the Tribunal:[109]

> (i) Declare that it does not have jurisdiction over the Claimant's claims;
>
> (ii) Dismiss the entirety of the Claimant's claims for lack of jurisdiction *ratione personæ*;
>
> (iii) In the alternative, dismiss the entirety of the Claimant's claims for lack of jurisdiction on account of the fact that the Respondent did not consent to the Tribunal's jurisdiction;
>
> (iv) In the alternative, dismiss the entirety of the Claimant's claims for lack of jurisdiction on account of the absence of a valid arbitration agreement; and
>
> (v) In any event, order the Claimant to pay to the Respondent the full costs of this arbitration, including, without limitation, the fees and expenses of the Arbitral Tribunal, the administrative charges of the Stockholm Chamber of Commerce, as well as the Respondent's legal costs and expenses and (plus interest); and,
>
> (vi) Grant the Respondent such further relief as the Arbitral Tribunal deems fit and proper.

94. The Claimant requests that the Tribunal:[110]

> a. **DECLARE** that it has jurisdiction to determine this dispute and that the claims advanced by the Claimant are admissible;
>
> b. **ORDER** the Parties to liaise to seek to agree a timetable for the future conduct of the arbitration; and
>
> c. **ORDER** the Respondent to pay all the costs and expenses of the jurisdictional phase of this arbitration, including the Claimant's legal fees and other expenses, and the expenses of the Tribunal (with the total sum thereof to be fixed at the time of the final Award).

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109 Respondent's Reply, ¶ 420.

110 Claimant's Rejoinder, ¶ 132.

V. THE TRIBUNAL'S ANALYSIS

95. The Respondent raises the following objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims:

(i) The Tribunal lacks jurisdiction *ratione personæ* because the Claimant is not covered by the scope of the Treaty (Article 1(c)), on account of his dual Georgian-British nationality.[111]

(ii) The Tribunal lacks jurisdiction because the Claimant cannot rely on Article 3 of the Treaty to import the Respondent's consent to SCC arbitration from Article 10(3) of the Georgia-BLEU BIT.[112]

(iii) The Tribunal lacks jurisdiction because the arbitration agreements relied upon by the Claimant are contrary to EU law, and thus invalid under Swedish law.[113]

(iv) The Claimant's claims are inadmissible because they have not been submitted to local remedies or negotiation.[114]

(v) The Claimant's claims are inadmissible because they constitute an abuse of right or process.[115]

96. The Tribunal addresses each of these objections individually, respectively in sub-sections A-E below.

A. WHETHER THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONÆ*

97. The Respondent's first preliminary objection concerns the Tribunal's jurisdiction *ratione personæ*. The Respondent raises three self-standing arguments in the alternative:

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111 Respondent's Objections, Section II; Respondent's Reply on Jurisdiction and Admissibility, 19 March 2021 (***Respondent's Reply***), Section II.

112 Respondent's Objections, Section III; Respondent's Reply, Section III.

113 Respondent's Objections, Section IV; Respondent's Reply, Section IV.

114 Respondent's Objections, Section V; Respondent's Reply, Section V.

115 Respondent's Objections, ¶¶ 105, 113-118; Respondent's Reply, ¶¶ 172-178.

(i) Dual Georgian-British nationals are excluded from Article 1(c) of the Treaty, which defines "nationals" of the Contracting Parties.[116]

(ii) Even if such dual nationals come within the scope of the Treaty, the Claimant's "dominant and effective" nationality is Georgian, not British.[117]

(iii) In any event, the Tribunal should decline to exercise jurisdiction because the Claimant's investments predate his acquisition of British nationality.[118]

98. The Tribunal considers each of these objections in turn.

1. Whether the Treaty excludes dual Georgian-British nationals

99. It is common ground that the Claimant is a Georgian national by birth and continues to be a Georgian national.[119] Further, the Claimant was naturalized as a British citizen on 22 February 2011,[120] and received a UK passport on 30 March 2011. Although the Claimant's British nationality is not disputed as a fact, the circumstances in which it was obtained are (and discussed in sub-section 2 below). Further, the Respondent states that it does not recognize the Claimant as a British national.[121]

100. The key fact for the purposes of the discussion in this sub-section 1 is that the Claimant holds the nationalities of Georgia and the UK. This dual nationality is said by the Respondent to place the Claimant outside the scope of the Treaty. While the Claimant is also a Russian national, no objection has been taken by the Respondent on grounds of his Russian nationality.

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116 Respondent's Objections, ¶¶ 17, 50-80; Respondent's Reply, ¶¶ 47-123.

117 Respondent's Objections, ¶¶ 17, 81-104; Respondent's Reply, ¶¶ 124-171.

118 Respondent's Objections, ¶¶ 17, 105-125; Respondent's Reply, ¶¶ 172-178.

119 Respondent's Objections, note 7; First Okuashvili Witness Statement, ¶ 5.

120 First Okuashvili WS, ¶ 7; United Kingdom Passport of Zaza Okuashvili, 30 March 2011, Exhibit C-14; Certificate of Naturalisation of Zaza Okuashvili, 22 February 2011, **Exhibit C-278**.

121 Respondent's Objections, note 7 ("the Claimant acquired UK nationality in contravention of Georgian law which prohibits Georgians from acquiring the nationality of a foreign State. Therefore, the Respondent does not recognize the Claimant as a UK national. The Claimant was born Georgian and maintains his Georgian nationality to date.").

101. The Respondent contends that Article 1(c) of the Treaty has the effect of excluding Georgian-British nationals by making a *renvoi* to the domestic laws of the Contracting Parties.[122] Article 1(c) reads as follows:[123]

> For the purposes of this Agreement:
>
> (c) "nationals" means:
>
> > (i) in respect of the Republic of Georgia: Georgians within the meaning of the law of the Republic of Georgia;
> >
> > (ii) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom[.]

102. As Georgian nationality law in effect at the time the Treaty was concluded prohibited dual nationality, the Respondent claims that the term "national" in the Treaty perforce excludes Georgian-UK dual nationals.[124] The Respondent also contends that the reference to the International Centre for Settlement of Investment Disputes (***ICSID***) in Article 8 of the Treaty further confirms that the Contracting Parties intended to exclude dual nationals from the scope of the Treaty, because Article 25(2)(a) of the ICSID Convention bars dual nationals having the nationality of the State party to the dispute from accessing ICSID arbitration;[125] and that such a reading is consistent with the object and purpose of the Treaty.[126]

103. For his part, the Claimant contends that the Treaty does not exclude dual Georgian-British nationals, either in respect of the ordinary meaning of the term "nationals" used in the Treaty or by virtue of a *renvoi* to domestic law.[127] In any

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122 Respondent's Objections, ¶¶ 52-57; Respondent's Reply, ¶ 90.

123 Treaty, **Exhibit C-1**, Article 1(c).

124 Respondent's Objections, ¶¶ 52-57; Respondent's Reply, ¶¶ 90, 93. *See also* Law of the Republic of Georgia on Citizenship of Georgia dated 25 March 1993, amended 24 June 1993, **Exhibit RL-1**, Articles 1, 32(D); Organic Law of Georgia on Georgian Citizenship dated 30 April 2014, amended 1 October 2019, **Exhibit RL-4**, Article 21(1)(c).

125 Respondent's Objections, ¶¶ 5, 58-72; Respondent's Reply, ¶¶ 47, 64-84.

126 Respondent's Objections, ¶¶ 34-35, 73-77; Respondent's Reply, ¶¶ 51-63.

127 Claimant's Response, ¶¶ 9-23; Claimant's Rejoinder, ¶¶ 20-23.

event, the Claimant contends, he remains a Georgian national only because Georgia has failed to comply with its own domestic law and withdraw his nationality.[128]

104. The Tribunal observes, in the first place, that Article 1(c) of the Treaty has the effect of requiring each Contracting Party to treat as a "national" of the other Contracting Party a person who, under the law of the latter State, is a national of that State. That *renvoi* is consistent with the fundamental rule regarding nationality which is enshrined in Article 1 of the 1930 Nationality Convention[129] and now regarded as having the status of customary law. This reads as follows:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

105. As the same Convention goes on to state in Article 3, multiple nationalities are not inconsistent with international law as a matter of principle. This provision reads as follows:

> Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

106. Article 3 does not have the effect of requiring each of the States of nationality to recognize a "person having two or more nationalities" as a national of a foreign State. The Claimant's thesis is that Article 1(c) of the Treaty has that effect. The Respondent's thesis is that it does not, in that it must be read as excluding from the definition of "nationals" of the United Kingdom persons who are also "nationals" of Georgia.

107. The Tribunal agrees with the Claimant, for three reasons.

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128 Claimant's Response, ¶¶ 8, 24-32; Claimant's Rejoinder, ¶¶ 24-25.

129 Convention on Certain Questions Relating to the Conflict of Nationality Law (done in The Hague on 12 April 1930; entered into force 1 July 1937) (***The Hague Convention***), 179 LNTS 4137.

108. First, Article 1(c) of the Treaty is plainly worded and unqualified. On its express terms, a person who has the nationality of one of the Contracting Parties is a "national" of that State. Article 1(c) does not, on its express terms, make the status of "national" of one Contracting State dependent on his/her status as a national of the other Contracting State. Thus, a Georgian-British dual national may be regarded as being a "national" of both of the Contracting Parties.

109. This does not necessarily have the effect of permitting a dual national such as the Claimant to claim protection under the Treaty both as a Georgian national (for his investments in the UK) and a British national (for his investments in Georgia). Even on the Respondent's case, by application of the principle of dominant nationality, discussed in sub-section 2 below, only one of the two nationalities will be capable of being relied upon. On the Respondent's own view, it does not offend international law for a person holding the nationality of States *A* and *B* to assert rights against *B* as a national of *A*, provided that in the circumstances relevant to that assertion, nationality *A* is dominant compared to *B*. If such a person were excluded from the scope of Article 1(c), he or she would have no entitlement to Treaty protection at all, at any time.

110. Secondly, the object and purpose of Article 1(c) is precisely to determine which persons may rely on the Treaty vis-à-vis a Contracting Party; hence the term "nationals" is used throughout the provisions of the Treaty. It is not the object and purpose of Article 1(c) to set out in what circumstances Georgia or the UK may grant or withdraw nationality. That is to say, Article 1(c) deals with matters of opposability, *ie* which persons may rely upon the Treaty as "nationals" of one Contracting Party having Treaty entitlements vis-à-vis the other Contracting Party. It follows that if the Contracting Parties intended to limit the circle of persons entitled to rely upon the Treaty, those limitations would have been placed in Article 1(c).

111. Thirdly, and in a related vein, Georgia's investment-treaty practice confirms that conclusion. Article 1(3)(a) of the Georgia-Israel BIT, concluded contemporaneously with the Treaty, defines "investors" as "natural persons who are nationals or permanent residents of the Contracting Party concerned, *who are*

not also nationals of the other Contracting Party . . . "[130] That kind of limitation is perfectly straightforward to formulate and to apply. Also, it is consistent with Georgia's nationality policy, pursuant to which the acquisition of a foreign nationality is a ground for the withdrawal of Georgian nationality (as discussed in sub-section 3 below). Yet such a limitation is absent from Article 1(c) of the Treaty.

112. The Tribunal is unable in these circumstances to read into Article 1(c) a tacit, but far-reaching, limitation whereby the nationality of one Contracting Party would in effect be subject to the other Contracting Party's nationality law. That is indeed the kind of *renvoi* to domestic law for which the Respondent contends, but Article 1(c) makes a *renvoi* only to the law of the Contracting Party which granted nationality, not to that of the other Contracting Party. Indeed, the Respondent's single-nationality policy makes its thesis all the more difficult to accept: if that policy is consistently applied, a British national will not be at the same time a Georgian national. The Respondent may achieve that outcome without any *renvoi* to domestic law of the sort it contends for, but merely by consistent application of its domestic law.

113. The Respondent has also put its case on the footing that the limitation it contends for flows inexorably from Article 8 of the Treaty. This provides for ICSID arbitration (or conciliation) but not for arbitration in other arbitral fora. A Georgian-British national would be unable to have access to ICSID arbitration, by virtue of Article 25(2)(a) of the ICSID Convention, and thus—so the argument goes—the intention in Article 1(c) must have been to exclude such nationals from the scope of the Treaty altogether.

114. The Tribunal agrees with the Respondent that the provisions of a treaty must be read harmoniously with each other, such that they can all develop *effet utile*.[131] That is an uncontroversial proposition, derived from Article 31(1) of the Vienna

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130 Agreement between the Government of the State of Israel and the Government of the Republic of Georgia for the Promotion and Reciprocal Protection of Investments (done in Jerusalem on 19 June 1995; entered into force on 18 February 1997), **Exhibit C-64**, Article 1(3)(a) (emphasis added).

131 Respondent's Objections, ¶ 17.

Convention on the Law of Treaties.[132] But the Tribunal is unable to share the conclusion that Article 1(c) must exclude dual Georgian-British nationals lest the Treaty be deprived of *effet utile*.

115. On its own terms, the Respondent's argument may be viable only if the Respondent succeeds in establishing that ICSID arbitration is an exclusive forum such that a protected "national" may not resort to other fora by invoking most-favoured-nation treatment pursuant to Article 3 of the Treaty. For reasons given in sub-section V.B below, the Respondent does not succeed in that argument. Indeed, as explained in that sub-section, the UK's negotiating objective from the early 1990s was to ensure that Article 3(3) of its model negotiating text (which found its way into Article 3(3) of the Treaty) would be included in the UK's BITs, to make it clear that investor-State dispute resolution would be covered by most-favoured-nation treatment. That objective was perfectly compatible of course with the UK's "preferred" version of the Article 8 text, which provides only for access to ICSID.[133]

116. The Respondent's argument also fails on a broader ground. Important as the ability to resort to an international, neutral forum undeniably is for an investor, it is not the only manner in which the Treaty may be relied upon. It may be relied upon before domestic authorities, as it may be relied upon in diplomatic démarches in favour of the national concerned. It goes too far to say that a BIT has no *effet utile* at all without access to international arbitration.

117. As the Tribunal thus considers that dual Georgian-British nationals do come within the scope of Article 1(c) of the Treaty, it now turns to consider whether the Claimant's naturalization as a British national was tainted by fraud or error.

2. Whether the Claimant can be regarded as a UK national

118. The Respondent contends that the Claimant's acquisition of British nationality was vitiated by fraud or material error in the UK immigration and naturalization

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132 "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."

133 *See also below*, ¶¶ 190, 210-212.

process.[134] While the Respondent does not contest that the Claimant acquired British nationality in 2011 and the UK authorities have never challenged his nationality,[135] the Respondent contends that:

(i) The Claimant deceived the UK immigration authorities when he entered the country under the HSMP;[136]

(ii) Deceit of the UK authorities violated the "good character requirement" under the British Nationality Act 1981;[137] and

(iii) The Claimant repeatedly concealed his Russian nationality in dealings with the UK immigration authorities.[138]

119. The Claimant rejects all these allegations, in fact and law.[139]

120. The Tribunal observes that it is rightly common ground between the parties that it does not have the power to withdraw nationality, any more than it has the power to confer nationality. These are matters exclusively for the Contracting Parties—as Article 1(c) says, by application of their respective national laws. Rather, the Tribunal's power is confined to assessing whether the conferment or preservation of nationality by a Contracting Party results from manifest fraud or serious error. The tribunal in the *Soufraki* case put the matter as follows:

> It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the [UAE-Italy] BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged,

134 Respondent's Reply, ¶ 11.

135 *See* Certificate of Naturalisation of Zaza Okuashvili, 22 February 2011, **Exhibit C-278**; United Kingdom Passport of Zaza Okuashvili, issued 30 March 2011, **Exhibit C-14**. *See also* Claimant's Rejoinder, ¶¶ 14-19; Hearing Tr., Day 3, 34:16-36:24 (Tribunal/Banifatemi).

136 Respondent's Reply, ¶¶ 20, 25-37.

137 Respondent's Reply, ¶¶ 21-24.

138 Respondent's Reply, ¶¶ 38-44.

139 *See* Claimant's Response, ¶¶ 46-61; Claimant's Rejoinder, ¶¶ 7-19, 39-50.

> the international tribunal is competent to pass upon that challenge.[140]

The Tribunal agrees with the Respondent in that regard.[141]

121. An international tribunal has the power to assess nationality from the perspective of fraud or error if the respondent State has raised an objection to that effect. And if the tribunal considers that fraud or error have been established on the evidence, the relevant nationality is not opposable to the respondent State, *ie* it may not be invoked against that State. The reason is that international law does not require a State to recognize a nationality that has been granted or is being preserved through manifest fraud or as the result of a serious error. *Fraud* means a knowing misrepresentation or concealment of facts, with the intent to obtain something which, absent that misrepresentation or concealment, the victim of the fraud would not have granted. *Error* is a mistake, whether clerical or substantive; for example, in the *Soufraki* case, it was held that the Italian authorities continued to regard Mr Soufraki as an Italian citizen in error, as he had lost his Italian nationality by automatic operation of Italian law upon being naturalized a Canadian citizen, and the Canadian naturalization had not been brought to the Italian authorities' attention.[142]

122. The adjectives *manifest* and *serious* refer both to the applicable evidential standard and to the substantive gravity of the issue. They indicate that the function of an international tribunal is not to consider matters of nationality afresh in their minutiae—again, these are matters within the exclusive sphere of the authorities of the granting State, by application of their national law—but rather to assess whether the conferment or preservation of nationality was clearly compromised to a serious degree.[143]

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140 *See Hussein Nuaman Soufraki v the United Arab Emirates*, ICSID Case No ARB/02/7/ Award, 7 July 2004, **Exhibit RL-122**, ¶ 55.

141 *See* Respondent's Reply, ¶ 14. *See also Flutie Cases (1903-1905)*, 9 RIAA 148, **Exhibit RL-120**, p 152.

142 *See Hussein Nuaman Soufraki v the United Arab Emirates*, ICSID Case No ARB/02/7/ Award, 7 July 2004, **Exhibit RL-122**, ¶¶ 52, 66-84.

143 *See, eg*, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume 1 - Peace* (9th ed 2008), p 855 ("this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only manifestly groundless but are also of such gravity as to

123. Other tribunals have expressed the same point as one of a degree of deference to the authorities of the State of nationality. As put by the tribunal in *Micula v Romania (I)*, "there exists a presumption in favour of the validity of a State's conferment of nationality. The threshold to overcome this presumption is high."[144] The tribunal went on to say that an international tribunal should revisit the decision of a domestic authority regarding a claimant's nationality only where there are "reasons of real importance to doubt the accuracy and thoroughness of the enquiry that was made by the . . . authorities at the time" or where there is "convincing and decisive evidence" that the claimant's acquisition of nationality "was fraudulent or at least resulted from a material error."[145]

124. In short, therefore, *error* and *fraud* are notions of international law, rather than technical terms of domestic law, although in matters affecting nationality, an international tribunal will in the nature of things have to consider how the granting State applied the provisions of its nationality law in the light of certain facts. In practical terms, the inquiry is whether there has been fraud or error as a matter of established fact; and if so, whether that fraud or error, had it been known to the authorities of the State of nationality, would clearly have impeded the grant of nationality or led to its withdrawal.

125. On the facts of the present case, the Tribunal considers that the Claimant's British nationality is not assailable on grounds of either fraud (let alone manifest fraud) or serious error. The materials in the record establish that the Claimant acquired British nationality through the following sequence of events, which occurred over a period spanning more than five years:

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cause serious doubts with regard to the truth and reality of that nationality"). *See also Ioan Micula, Viorel Micula and Ors v Romania (I)*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RL-124**, ¶ 94.

144 *Ioan Micula, Viorel Micula and Ors v Romania (I)*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RL-124**, ¶¶ 86-87. *See also Hussein Nuaman Soufraki v the United Arab Emirates*, ICSID Case No ARB/02/7/ Award, 7 July 2004, **Exhibit RL-122**, ¶ 55.

145 *Ioan Micula, Viorel Micula and Ors v Romania (I)*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RL-124**, ¶¶ 94-95.

(i) The Claimant entered the UK on a multiple-entry tourist visa on or around 10 November 2005.[146]

(ii) At some point thereafter, the Claimant applied to emigrate to the UK under the HSMP.[147]

(iii) On 23 December 2005, the Home Office approved the Claimant's application to be recognized as a Highly Skilled Migrant.[148]

(iv) Relying on this status, the Claimant applied for Entry Clearance to the UK on 4 January 2006 at the British Consulate in Geneva.[149] This application is not in the record;[150] however, Entry Clearance appears to have been granted on 10 January 2006, for a period of one year.[151] The Claimant entered the UK that same day.[152]

(v) On 8 or 9 January 2007, the Claimant applied for an extension of stay (limited leave to remain) as an HSMP participant.[153] It is not clear whether the Claimant received a provisional grant of limited leave to remain following this application or other response from the UK authorities. In any event, the Claimant remained in the UK.

(vi) On 11 May 2007, the Claimant submitted an application to the Home Office, requesting to vary his application for Further Leave to Remain as

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146 Georgian Passport of Zaza Okuashvili (No 62N2269228), issued 4 November 2004, **Exhibit R-22**, p 4.

147 The Tribunal notes that the Claimant's HSMP application is not on record. However, from the remaining documentation that is on the record, it is clear that the Claimant did in fact apply under the HSMP.

148 Letter from the Home Office to Ferguson Snell & Associates Ltd, 23 December 2005, **Exhibit R-25**.

149 Application for United Kingdom Entry Clearance, 4 January 2006, **Exhibit R-26**.

150 *See* Respondent's Reply, ¶ 26.

151 *See* Application for an Initial Grant of Leave (Switching) or an Extension of Leave under Tier 1 (General Main Applicant), undated, **Exhibit R-18**, p 17.

152 Georgian Passport of Zaza Okuashvili (No 62N2269228), issued 4 November 2004, **Exhibit R-22**, p 4.

153 Application for Extension of Stay in the United Kingdom as an HSMP Participant, 8 January 2007, **Exhibit C-392**.

a Highly Skilled Migrant to an application for Further Leave to Remain in a Working Category.[154]

(vii) On 5 September 2007, the Home Office approved the Claimant's request to "waive the mandatory entry clearance requirement and allow [him] to switch status to engage in business."[155] The Home Office accordingly granted the Claimant an initial 24 months to remain in the UK in that capacity.[156]

(viii) At some point thereafter, the Claimant submitted an application to reinstate his status as a Highly Skilled Migrant.[157]

(ix) On 22 December 2009, the Claimant applied for indefinite leave to remain in the UK as a Highly Skilled Migrant.[158]

(x) On 24 December 2009, the Claimant was granted indefinite leave to remain in the UK. (The approval of the Claimant's application for indefinite leave to remain is not in the record, but it is recorded in other official documents.)[159]

(xi) On 19 March 2010, the Claimant passed the "Life in the UK Test".[160]

(xii) On 12 January 2011, the Claimant lodged an application for naturalization as a British citizen with the UK Border Agency.[161]

(xiii) On 22 February 2011, the Claimant was naturalized as a British citizen.[162]

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154 Request to Vary Application for Further Leave to Remain, 11 May 2007, **Exhibit C-393**.

155 Letter from the Home Office to John Snell, 5 September 2007, **Exhibit C-394**.

156 Letter from the Home Office to John Snell, 5 September 2007, **Exhibit C-394**.

157 Application for an Initial Grant of Leave (Switching) or an Extension of Leave under Tier 1 (General Main Applicant), undated, **Exhibit R-18**.

158 Application for Indefinite Leave to Remain in the United Kingdom, 22 December 2009, **Exhibit R-30**.

159 Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, p 2.

160 Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, p 1.

161 Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**.

162 Certificate of Naturalisation of Zaza Okuashvili, 22 February 2011, **Exhibit C-278**.

(xiv) On 30 March 2011, the Claimant was issued a UK passport.[163]

126. As noted, certain documents relevant to the Claimant's acquisition of British nationality are not in the record of this arbitration. However, the Tribunal considers these discrete gaps to be immaterial given the nature and content of the documents that are in the record. The documentary record bespeaks a nationalization process which followed ordinary rules of general application and afforded the UK authorities multiple opportunities to consider the Claimant's entitlement first to reside in and then to become a national of the UK.

127. Against this background, the Respondent's allegation is, in essence, that the Claimant intentionally filled out certain immigration forms incompletely or misleadingly during the early stages of his process of immigrating to the UK. Specifically, the Respondent alleges that:

(i) The Claimant misrepresented his employment relationship with the Omega Group in his 2006 application for UK Entry Clearance as part of his HSMP application and in his 2007 application for leave to remain as a business person; and

(ii) The Claimant's supporting documents for his HSMP application contained insufficient information regarding his relationship with the Omega Group.[164]

The Respondent also alleges that the Claimant failed to disclose his Russian nationality in his 2006 application for UK Entry Clearance, his later application for an extension of his resident status, and again in his 2009 application for indefinite leave to remain.[165] It is rightly conceded, however, that the Claimant disclosed his Russian nationality in his naturalization application in 2011.[166]

128. The Tribunal considers that none of the issues raised by the Respondent amounts to clear fraud or serious error in the Claimant's acquisition of British nationality.

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163 United Kingdom Passport of Zaza Okuashvili, 30 March 2011, **Exhibit C-14**.

164 Respondent's Reply, ¶¶ 30-36.

165 Respondent's Reply, ¶ 38.

166 *See* Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, pp 1, 3. *See also* Respondent's Reply, ¶ 44; Claimant's Rejoinder, ¶ 18.

First, the Tribunal accepts the Claimant's evidence that he listed his occupation as "consultant" for Omega-2 in his supporting documents for his 2006 HSMP application on the advice of his counsel and on his belief that there was a reasonable factual basis for doing so.[167] Namely, that, in addition to being the ultimate beneficial owner of the Omega Group companies,[168] the Claimant was employed both as a "sales/representative/consultant" for LLC OGT and a "sales consultant" for Omega-2 from 2005 until some time after he became a British citizen.[169] Accordingly, the Tribunal does not consider that the Claimant's listing his occupation as "consultant" in his supporting documents for his HSMP application evidences an intention to deceive the UK immigration authorities.

129. Secondly, the Tribunal is not persuaded by the Respondent's arguments regarding the alleged insufficiency of the supporting documents provided as part of the Claimant's HSMP application. The UK immigration authorities were themselves satisfied with the supporting documents and degree of detail provided by the Claimant, and the Respondent has made no allegation that the UK authorities failed to comply with their duties under UK law prior to approving the Claimant's HSMP application. In these circumstances, there is no basis for the Tribunal to say that the Claimant ought to have provided additional documentation to the UK authorities. Accordingly, the present case stands in contrast to the circumstances in *Soufraki*, where the tribunal noted that there was no evidence that the Italian authorities had, in fact, undertaken inquiries to confirm that Mr Soufraki had not acquired a nationality other than Italian prior to issuing certificates of Italian nationality to him.[170]

130. Thirdly, the Tribunal considers the Respondent's arguments in respect of the tardy disclosure of the Claimant's Russian nationality to be unavailing. As highlighted by counsel for the Respondent in cross-examining Mr Okuashvili at the hearing,

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167 Third Witness Statement of Zaza Okuashvili, 18 June 2021 (***Third Okuashvili Witness Statement***), ¶¶ 10-14.

168 *See* RfA, ¶ 8.

169 *See* Contract between OGT and Zaza Okuashvili, 1 January 2005, **Exhibit R-20**; Contract between Omega-2 and Mr Okuashvili, 3 January 2005, **Exhibit C-381**; Bank Payment Orders in relation to Omega-2, Exhibit C-382; Bank Payment Orders in relation to OGT, **Exhibit C-383**.

170 *Hussein Nuaman Soufraki v the United Arab Emirates*, ICSID Case No ARB/02/7/ Award, 7 July 2004, **Exhibit RL-122**, ¶¶ 66-68.

it appears that between 2005 and 2011, the Claimant did not disclose his Russian nationality in his application for a highly skilled migrant visa, despite a question in the application form plainly asking whether "the applicant currently hold[s] any additional nationalities."[171] That omission is factually uncontroverted. The question is whether it had any influence in the Claimant's naturalization in 2011. The Tribunal has no basis to conclude that it did. As a matter of fact, it is common ground that the Claimant provided his Russian passport to the UK authorities as part of his naturalization application.[172] The UK authorities were evidently satisfied with the Claimant's disclosure of his Russian nationality at that critical stage, as there is no evidence that they considered the Claimant's failure to disclose his Russian nationality in previous applications to be prejudicial to his naturalization application.[173] Again, the Respondent has made no allegation that in so doing the UK authorities failed to comply with their duties under UK law. This is significant in the light of the requirement of "good character" for naturalization as a British citizen, discussed at paragraph 133 below.

131. Finally, the Tribunal is unconvinced by the Respondent's arguments in respect of an alleged lack of sincerity (or, at the very least, lack of accuracy) in the Claimant's immigration applications. As noted, it is incumbent on the Respondent to establish that such deficiencies are regarded as fatal to nationality as a matter of UK law.[174] The Respondent is correct that the Claimant's January 2006 application for Entry Clearance to the UK as part of his HSMP application required him to affirm that "the information given on this form is correct to the

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171 *See* Application for an Initial Grant of Leave (Switching) or an Extension of Leave under Tier 1 (General Main Applicant), undated, **Exhibit R-18**, p 14; Hearing Tr., Day 2, 101:18-105:15 (Banitafemi/Okuashvili/Tribunal).

172 *See* Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, p 3. *See also* Respondent's Reply, ¶ 44; Claimant's Rejoinder, ¶ 18; Hearing Tr., Day 2, 110:6-16 (Banitafemi).

173 *See* Hearing Tr., Day 2, 175:2-18 (Okuashvili/Tribunal) ("MR MANDELLI: Do you recall, did the Home Office, when they reviewed that application , did they come back to you and say: can you tell us a little bit more about these Russian passports, we have never heard of this before? A. Not, not, not. It was not ever they came back, because this was – – my lawyer . . . following their request and satisfied them always and there was not any more questions from Home Office. They are satisfied, they like what we provide and they get me as a citizen.").

174 *See*, *eg*, *Ioan Micula, Viorel Micula and Ors v Romania (I)*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RL-124**, ¶ 87 ("The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality. In that respect, there exists a presumption in favour of the validity of a State's conferment of nationality."). *See also* Hearing Tr., Day 3, 171:8-173:20 (Tribunal/Bastin).

best of my knowledge and belief,"[175] and that he made a similar declaration as part of subsequent UK immigration applications.[176] However, the Respondent has failed to explain or demonstrate specifically how the Claimant has failed in this duty in the first place, still less that such a failure would have sealed the fate of his naturalization prospects. The Tribunal turns to consider each of the discrete deficiencies relied upon by the Respondent.

132. In its pleadings and at the hearing, the Respondent pointed to various apparent discrepancies in the Claimant's Entry Clearance Application, principally that he gave the address of his business associate Mr Heath as his own address, in response to Question 36;[177] and that he listed "consultant" for Omega-2 Ltd as his "proposed occupation in the UK" in response to Questions 91 and 92.[178] Even if one were to assume in the Respondent's favour that these answers were in fact incorrect and they were not innocent, their import remains a matter of conjecture. Aside from recalling the Immigration Directorate's instructions for interviewing HSMP applicants,[179] the Respondent has not provided legal authority to establish its argument that such discrepancies are to be regarded as violations of an applicant's duty of truthfulness under UK law.

133. The Respondent points out that Schedule 1, Section 1(1) of the UK Nationality Act 1981 provides that an applicant must be a person of "good character".[180] As the Respondent concedes, however, the relevant Home Office Guidelines note that

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175 Application for United Kingdom Entry Clearance, 4 January 2006, **Exhibit R-26**, p 5. The declaration page also required the Claimant to declare that "I am aware that it is an offence under the Immigration Act 1971, as amended by the Immigration and Asylum Act 1998, to make to a person acting in execution of the act a statement or representation which the maker knows to be false or does not believe to be true, and to obtain or seek to obtain leave to enter in the United Kingdom by means which include deception." *See also* Hearing Tr., Day 2, 57:14-58:6 (Banifatemi/Okuashvili).

176 *See* Application for Extension of Stay in the United Kingdom as an HSMP Participant, 8 January 2007, **Exhibit C-392**, p 2; Application for an Initial Grant of Leave (Switching) or an Extension of Leave under Tier 1 (General Main Applicant), undated, **Exhibit R-18**, p 42. *See also* Hearing Tr., Day 2, 85:19-87:6 (Banifatemi/Okuashvili) and 92:19-93:14 (Banifatemi/Okuashvili).

177 Application for United Kingdom Entry Clearance, 4 January 2006, **Exhibit R-26**, p 2. *See also* Hearing Tr., Day 2, 59:12-60:18 (Banifatemi/Okuashvili).

178 Respondent's Reply, ¶¶ 27-33.

179 Respondent's Reply, ¶ 33; Immigration Directorate's Instructions, "Chapter 5: Section 11: Highly Skilled Migrant Programme", March 2002, **Exhibit RL-112**, ¶ 3.1. *Cf Hussein Nuaman Soufraki v the United Arab Emirates*, ICSID Case No ARB/02/7/ Award, 7 July 2004, **Exhibit RL-122**.

180 Respondent's Reply, ¶¶ 20-21, 45; Hearing Tr., Day 2, 92:19-93:14 (Banifatemi/Okuashvili); Application for Naturalisation as a British Citizen, 12 January 2011, **Exhibit R-32**, p 18; British Nationality Act 1981, as in force on 22 February 2011, **Exhibit RL-114**.

"there is no definition of Good Character in the British Nationality Act 1981 and therefore no statutory guidance as to how this requirement should be interpreted or applied."[181] Nevertheless, the Respondent contends that the Home Office Guidelines "provide instruction for their part on how the good character requirement is to be interpreted and applied", and "specify that acts of deception violate the good character requirement, including insofar as they involve fraud at any stage in the immigration and naturalisation process."[182]

134. The Home Office Guidelines cited by the Respondent advise that "deception" "should count heavily against an applicant". The Respondent says that "any attempt to lie or conceal the truth" amounts to deception; and this suffices to violate the good-character requirement. The Tribunal is prepared to accept the first limb of the Respondent's argument but—absent authority in UK law—not the second. The Tribunal may not without more assume that any lie or concealment would of itself preclude naturalization. More importantly, in the Tribunal's assessment, no deceit is made out on the facts. The Claimant's characterization of his occupation as a "consultant" for Omega-2 has been dealt with above. As to Mr Heath's address wrongly having been given as the Claimant's address, it is difficult to see how that fact alone would suffice to establish deceit.

135. The Tribunal thus considers that, on the facts, it has not been established that the Claimant's conduct in the course of his naturalization failed to meet the "good character" requirement under Schedule 1, Section 1 of the Nationality Act 1981. Further, as noted above, the Respondent has not alleged the UK authorities failed to comply with their duties under UK law when granting the Claimant British citizenship.

136. In conclusion, the Tribunal is satisfied that the Claimant was naturalized as a British citizen in February 2011 in a way that was not tainted by either manifest fraud or serious error.

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181 Respondent's Reply, ¶ 21; Home Office Guidelines, "The Good Character Requirement", 2010, **Exhibit RL-116**, ¶ 1.1.

182 Respondent's Reply, ¶ 22.

3. Whether the Claimant's "dominant and effective" nationality is Georgian

137. The Respondent contends that the Tribunal must determine the Claimant's "dominant and effective" nationality to be Georgian, not British;[183] and that such a determination disentitles him from relying on the Treaty as–

> [i]t is a fundamental principle of customary international law that, in the absence of explicit language to the contrary, individuals cannot bring claims under international law against the State party to a dispute if their dominant and effective nationality is of that State.[184]

In so arguing, the Respondent principally relies on the International Court of Justice (***ICJ***)'s decision in the *Nottebohm* case, as well as the decisions of the Iran-United States Claims Tribunal (***IUSCT***) in *Esphahanian v Bank Tejarat* and *Case No A/18*.[185]

138. The Claimant, in contrast, contends that, while the proposition that an individual cannot bring a claim against the State of their "dominant and effective" nationality may hold true in diplomatic-protection claims, no such rule applies in BIT claims, where the text of the relevant treaty controls.[186] The Claimant further contends that Article 1(c) of the Treaty is *lex specialis* and it does not import (or require for its application) a "dominant and effective" nationality test from customary international law.[187] Finally, the Claimant contends that, in any event, his British nationality satisfies the "dominant and effective" nationality test.[188]

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183 *See* Respondent's Objections, ¶¶ 81-95; Respondent's Reply, ¶¶ 124-141.

184 Respondent's Objections, ¶ 82.

185 Respondent's Objections, ¶¶ 85-87. *See also Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**; *Nasser Esphahanian v Bank Tejarat (Iran-United States Claims Tribunal)*, Final Award (Award No 31-157-2), 29 March 1983, 2 IUSCT Reports 157, **Exhibit RL-48**; *Iran v United States (Case No A/18)*, 6 April 1984, 5 IUSCT Rep 251, **Exhibit RL-49**.

186 Claimant's Response, ¶¶ 33-45; Claimant's Rejoinder, ¶¶ 31-38.

187 Claimant's Response, ¶¶ 42-43.

188 Claimant's Response, ¶¶ 46-62; Claimant's Rejoinder, ¶¶ 39-51.

139. It is helpful to address the Respondent's arguments in two steps, as the authorities relied upon by the Respondent and debated between the parties concern two separate legal tests.

(i) Whether the Claimant must and does have a "genuine" link to the UK

140. As just noted, the Claimant maintains that his British nationality is "genuine" in its own right, as well as "dominant" and "effective" compared to his Georgian nationality (and perforce his Russian nationality too), such that the Respondent is required to recognize it.[189] The Tribunal understands the former contention to refer to the "genuine link" test applied by the ICJ in the *Nottebohm* case, where the Court observed:[190]

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, *a genuine connection of existence, interests and sentiments*, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

141. Mr Nottebohm had been naturalized a citizen of Liechtenstein in October 1939, in what the Court characterized as "exceptional circumstances of speed and accommodation."[191] His main or exclusive purpose was thereby to be divested of German nationality, in the light of then-prevailing circumstances and policies in Germany. The Court considered that nationality thus obtained and conferred did not entitle Liechtenstein to exercise diplomatic protection vis-à-vis Guatemala,

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189 Claimant's Response, ¶¶ 46-62; Claimant's Rejoinder, ¶¶ 7-19, 39-51.

190 *Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 23 (emphasis added).

191 *Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 26.

which was in fact the epicentre of Mr Nottebohm's personal and economic life (although not a State of nationality), both before and after his naturalization as a Liechtenstein national.

142. In the circumstances of the present case, it is not necessary for the Tribunal to pronounce on the legal question whether a person meeting the requirement of being a "national" of a Contracting Party within the meaning of Article 1(c) of the Treaty may nevertheless not avail himself/herself of Treaty protection in the absence of a "genuine link" with that Contracting Party. Assuming (without deciding) that the absence of a genuine link disentitles a person from Treaty protection, Georgia's objection cannot prosper on the facts.

143. In contrast to the situation in *Nottebohm*, there is no evidence that the Claimant acquired British nationality for instrumental purposes, without genuine links to the UK.[192] In particular, while the Respondent alleges that the Claimant's claim amounts to an abuse of right in other respects,[193] and, as discussed above, seeks to impugn the Claimant's British nationality on other grounds, it has not alleged that the Claimant acquired British nationality so as to mount the present claim.

144. Moreover, and consistent with the foregoing, the Claimant's connection with the UK is far from "tenuous".[194] The Claimant obtained British citizenship in 2011 after residing in the UK, apparently for at least the majority of each year, since 2006.[195] The Claimant owns real estate and other property, pays taxes, and votes in the UK.[196] His sons also live in London, and his former spouse (recently divorced)[197] regularly visits them there from Georgia.[198]

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192 *Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 25.

193 *See* Section V.E, below.

194 *See Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 25.

195 Second Okuashvili Witness Statement, ¶ 6.

196 *See* Knightsbridge Property Leave, 3 January 2014, **Exhibit C-279**; Knightsbridge Property Leasehold Land Registry Title, 11 November 2019, **Exhibit C-281**; Hearing Tr., Day 2, 5:15-7:11 (Bastin/Okuashvili). *See also* First Okuashvili Witness Statement, ¶ 9; Second Okuashvili Witness Statement, ¶ 6; Third Okuashvili Witness Statement, ¶ 38.

197 *See* Email from the Claimant to the Tribunal, 5 April 2022.

198 *See* First Okuashvili Witness Statement, ¶ 9; Second Okuashvili Witness Statement, ¶ 8.

145. Accordingly, the Claimant's situation stands in stark contrast to Mr Nottebohm's. As the Court observed, in Liechtenstein, Mr Nottebohm had–

> [n]o settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years – on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him.[199]

146. The Tribunal therefore considers that the Claimant has a genuine link with the UK as a matter of fact.

(ii) Whether the Claimant's British nationality must be and is "dominant and effective" compared to his Georgian nationality

147. The parties have devoted lengthy and erudite pleadings on the question whether or not the Claimant may avail himself of his British nationality vis-à-vis Georgia only if his British nationality is dominant and effective compared to his Georgian nationality.

148. The Tribunal notes that the Respondent has not invoked the Claimant's Russian nationality in the context of this objection: the comparison the Respondent invites the Tribunal to make is between the Claimant's Georgian and British nationalities. The Tribunal simply recalls that it has no evidence about how the Claimant came to have Russian nationality, nor how such a nationality, however obtained, would be treated under Georgian nationality law.[200] The Tribunal therefore makes no factual or other findings in respect of these matters.

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199 *Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 25.

200 *See above*, ¶ 55.

149. It is well-established and indeed common ground between the parties that in the customary international law of diplomatic protection, an individual may bring a claim against one of their States of nationality only when the nationality being asserted is the individual's "dominant and effective" nationality. This rule was developed over time in the course of the 20th century. The Hague Nationality Convention of 1930 enunciated a more restrictive rule in its Article 4:

> A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.[201]

150. However, on the whole, the jurisprudence of pre- and post-war mixed arbitral tribunals did allow for claims of dual nationals against a State of their nationality, provided that the nationality being asserted was predominant and thus effective vis-à-vis the respondent State's nationality.[202] The IUSCT decisions in *Esphahanian* and *Case No A/18* were seminal in establishing this rule. The contemporary position in the law of diplomatic protection[203] is codified in Article 7 of the International Law Commission (***ILC***)'s Draft Articles on Diplomatic Protection (2006), in the following terms:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.[204]

151. It is an extremely delicate question whether and, if so, to what extent BITs are to be seen as incorporating rules of diplomatic-protection law regarding nationality of claims, such as dominant nationality, continuing nationality, etc. So far as

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201 *See* The Hague Convention (note 129 above); and International Law Commission, Draft Articles on Diplomatic Protection, **Exhibit CL-124**, Article 7, Comment 2, p 34.

202 *See*, *eg*, *Flegenheimer Case (Italy-United States Claims Commission) - Decision No 182*, 20 September 1958, XIV RIAA 327, **Exhibit RL-121**, ¶ 62; *Nasser Esphahanian v Bank Tejarat (Iran-United States Claims Tribunal)*, Final Award (Award No 31-157-2), 29 March 1983, 2 IUSCT Reports 157, **Exhibit RL-48**, ¶¶ 18-37; *Iran v United States (Case No A/18)*, 6 April 1984, 5 IUSCT Rep 251, **Exhibit RL-49**, p 260; International Law Commission, Draft Articles on Diplomatic Protection, **Exhibit CL-124**, Article 7, Comment 3, p 34. *See also* Respondent's Objections, ¶¶ 86-88.

203 *See*, *eg*, James Dugard, "The Implementation of International Responsibility: Diplomatic Protection", in *The Law of International Responsibility* (2010), pp 1056-1057.

204 International Law Commission, Draft Articles on Diplomatic Protection, **Exhibit CL-124**.

dominant nationality is concerned, a number of tribunals have held that this test does not apply in investment-treaty disputes, taking the approach that the relevant instrument (whether a BIT or otherwise) constitutes a *lex specialis* that displaces the general international law of diplomatic protection.[205] At the same time, as the Respondent stresses, other tribunals have held that a BIT (or other applicable instrument) does not operate as a *lex specialis* in that regard, and rather that the general international law of diplomatic protection forms part of the fabric of international law against the background of which a tribunal must consider questions of dual nationality.[206]

152. The Tribunal acknowledges with gratitude the parties' extensive and learned treatment of this important question. However, the Tribunal is conscious that answering it in the context of one case may have far-reaching implications for other cases and other BITs. Reasons of judicial economy, therefore, compel the Tribunal to resolve the Respondent's objection on the facts of the case—that is to say, by assuming without deciding that the Claimant must clear the "dominant and effective nationality" test as formulated in Article 7 of the ILC Draft Articles on Diplomatic Protection.

153. The parties are in agreement that this test requires a case-specific weighing of the factual evidence, with a view to concluding which nationality is predominant compared to the other.[207] As indicated in the official Commentary to Article 7 of the ILC Draft Articles, such relevant factual evidence includes–

> habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place,

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205 *See*, *eg*, *Armas v Venezuela*, PCA Case No 2013-3, Decisión sobre Jurisdicción, 15 December 2014, **Exhibit CL-24**, ¶ 173; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award dated 8 May 2008, **Exhibit CL-110**, ¶ 415; *Mohamed Abdel Raouf Baghat v Egypt*, PCA Case No 2012-07, Decision on Jurisdiction, 30 November 2017, **Exhibit CL-120**, ¶¶ 222 and 224; *Cem Cenzig Uzan v The Republic of Turkey*, SCC Arbitration V 2014/023, Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, **Exhibit RL-80**, ¶¶ 141 and 144. *See also* Claimant's Response, ¶ 43.

206 *Manuel García Armas et al v The Bolivarian Republic of Venezuela*, PCA Case No 2016-08, Award on Jurisdiction, 13 December 2019, **Exhibit RL-91**, ¶¶ 675-696. *See also Enrique Heemsen and Jorge Heemsen v The Bolivarian Republic of Venezuela*, PCA Case No 2017-18, Award on Jurisdiction, 29 October 2019, **Exhibit RL-89**, ¶ 420-439. *See also* Respondent's Reply, ¶¶ 142-146.

207 *See* Respondent's Objections, ¶ 96; Claimant's Response, ¶ 46.

> curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation; bank account; social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service.[208]

As the ILC Commentary also indicates, "[n]one of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case."[209]

154. Having considered the totality of the evidence put forward by both parties, including the testimony of the Claimant, the Tribunal concludes that, from the time it was acquired in 2011, the Claimant's British nationality has been "dominant and effective" compared to his Georgian nationality. In reaching that conclusion, the Tribunal stresses that it has not lost sight of the fact that the Claimant's investments in Georgia were first made well before 2011, and also that a number of significant events relating to these investments occurred in 2004 and in any event before 2011. The Claimant's pleaded case for breach of the Treaty, however, concerns events after 2011. It is on that footing—whatever its ultimate merits—that the Tribunal must approach the Claimant's jurisdictional case.

155. The Tribunal considers the following circumstances, taken in the round, to indicate the predominance of the Claimant's British nationality:

(i) The Claimant left Georgia in 2004, apparently following events said to involve the Georgian government (summarized in Section III.C.1 above).[210] The Claimant did not visit Georgia again until 2007.[211] It is true that the Claimant did maintain his businesses in Georgia, which he managed from the UK during that period and thereafter.

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208 International Law Commission, Draft Articles on Diplomatic Protection, **Exhibit CL-124**, Article 7, Comment 5, p 35. *See also Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, 1955 ICJ Reports 4, **Exhibit RL-45**, p 22.

209 International Law Commission, Draft Articles on Diplomatic Protection, **Exhibit CL-124**, Article 7, Comment 5, p 35.

210 First Okuashvili Witness Statement, ¶¶ 8, 24-42.

211 First Okuashvili Witness Statement, ¶ 42.

(ii) The Claimant chose to take residence in the UK, not Russia, which already was a State of nationality for him. He has resided in the UK, for what he estimates (without challenge by the Respondent) to be at least 70% of each year, since 2006.[212] Since that time, therefore, the Claimant has spent no more than 30% of his time in Georgia.[213]

(iii) The Claimant owns real estate and other property in the UK. This includes his primary residence, which he acquired in 2013 or 2014, where he lives with his youngest son, who was born in the UK and is a British citizen.[214]

(iv) The Claimant's older sons, who were granted Indefinite Leave to Remain in the UK in November 2019, also live and study in London.[215] It is of some significance that throughout the period after 2006, the Claimant's spouse continued to reside in Georgia, where she is a member of the national Parliament.[216] The Claimant and his wife were divorced only very recently, in April 2022.

(v) In the relevant period, the Claimant has paid taxes in both Georgia and, since 2006, the UK. The amounts he has paid in UK taxes are not insignificant.[217]

(vi) While the majority of the Claimant's business activities, including those of the Omega Group, are located in Georgia,[218] the Claimant owns two UK

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212 First Okuashvili Witness Statement, ¶¶ 6-8; Second Okuashvili Witness Statement, ¶ 6.

213 The Tribunal derives this figure from **Exhibit C-364** ("Border Crossing Information from the Information Agency of the Analytical Department of the Ministry of Internal Affairs", as of 20 October 2020), which provides the dates on which Mr. Okuashvili entered and exited Georgia between obtaining British citizenship in February 2011 and the filing of the Claimant's December 2018 Notice of Dispute. The Tribunal notes that the Claimant estimated that between 2006 and 2018 he had spent approximately 10-15% of his time in Georgia. *See* First Okuashvili Witness Statement, ¶ 6.

214 First Okuashvili Witness Statement, ¶ 9(a); Knightsbridge Property Leave, 3 January 2014, **Exhibit C-279**; Knightsbridge Property Leasehold Land Registry Title, 11 November 2019, **Exhibit C-281**; Second Okuashvili Witness Statement, ¶¶ 6, 8; Hearing Tr., Day 2, 5:15-7:11 (Bastin/Okuashvili). *See also* Claimant's Response, ¶ 50.

215 *See* First Okuashvili Witness Statement, ¶ 9(c)-(d); Second Okuashvili Witness Statement, ¶ 8. Hearing Tr., Day 2, 3:13-4:6 (Bastin/Okuashvili).

216 First Okuashvili Witness Statement, ¶ 9(c); Email from the Claimant to the Tribunal, 5 April 2022.

217 First Okuashvili Witness Statement, ¶ 9(b); Hearing Tr., Day 2, 5:23-6:11 (Bastin/Okuashvili).

218 First Okuashvili Witness Statement, ¶¶ 10-11; Hearing Tr., Day 2, 135:11-136:3 (Banifatemi/Okuashvili). *See also* Claimant's Rejoinder, ¶ 44.

companies and operates another UK company as a sole trader.[219] On balance, given that the Claimant's UK companies have a connection to his Georgian businesses, the Tribunal considers this individual factor to weigh more in favour of Georgia than the UK.

(vii) The Claimant has voted in three of the four national elections that have taken place in the UK between February 2011 and June 2021.[220]

(viii) While the Claimant remained politically active in Georgia and became a member of the Supreme Council of the Autonomous Republic of Adjara in 2017,[221] he resigned this position in December 2018.[222]

(ix) The Claimant obtained British citizenship on 22 February 2011[223]—two years before the Claimant alleges the Respondent's Treaty breaches began, and eight years before he filed the RfA in this case. It is true that the underlying investments—made at the time by a Georgian national in Georgia—well predate the start of the alleged Treaty breach. The Tribunal does not regard this as a feature detracting from the Claimant's links to and attachment with the UK but rather a feature of his pleaded case on the merits of his claims.

(x) Since becoming a British citizen, the Claimant has travelled to Georgia on both his UK and Georgian passports.[224]

156. The most critical factor for present purposes, in the Tribunal's view, is this: the Claimant was aware that, according to Georgian law, he stood to lose his Georgian nationality by act of the Georgian State when he was naturalized as a British

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219 Second Okuashvili Witness Statement, ¶ 11.

220 Third Okuashvili Witness Statement, ¶ 38; Hearing Tr., Day 2, 6:12-13 (Bastin/Okuashvili).

221 *See* Resolution No 17 of the Supreme Council of the Autonomous Republic of Adjara, "On recognizing the authority of Zaza Okuashvili as the replacement of the former member of the Supreme Council of the Autonomous Republic of Adjara David Tarkhan-Mouravi", 27 December 2016, **Exhibit R-11**; Hearing Tr., Day 2, 115:17-116:20 (Banifatemi/Okuashvili). *See also* Respondent's Objections, ¶ 100.

222 Second Okuashvili Witness Statement, ¶ 25; Hearing Tr., Day 2, 6:14-17 (Bastin/Okuashvili).

223 Certificate of Naturalisation of Zaza Okuashvili, 22 February 2011, **Exhibit C-278**. *See also* First Okuashvili Witness Statement, ¶ 7.

224 Border Crossing Information from the Information Agency of the Analytical Department of the Ministry of Internal Affairs, 20 October 2020, **Exhibit C-364**; Hearing Tr., Day 2, 150:22-154:19 (Banifatemi/Okuashvili/Tribunal).

citizen in 2011.[225] A nationality one countenances to lose as a necessary and, in principle, inevitable sacrifice for obtaining another nationality cannot be regarded as predominant compared to the latter.

157. This is a critical factor in assessing the Claimant's disposition towards the UK as a State of nationality: he completed the naturalization process with the understanding that it would entrain the loss of his Georgian nationality. And there is no evidence that the Claimant withheld his British nationality from Georgia's authorities. Indeed, the opposite is true: the Claimant gave evidence of various interactions with Georgian authorities since 2011 in which he alerted them to his British citizenship or which show that the Georgian authorities, of their own motion, were aware of his British citizenship.[226]

158. In the event, the Georgian authorities have not acted—at least not yet—to remove the Claimant from the records of Georgian nationals. The Tribunal does not have evidence of the reasons why. At any rate, they do not matter. It is common ground that, at the time the Claimant acquired British nationality, Georgian law permitted only a single citizenship and that, "acquisition of foreign nationality was a ground for the loss of Georgian nationality."[227] The Claimant accordingly accepted that he would lose his Georgian nationality as early as 2011. He is in fact yet to lose his Georgian nationality, but there is no suggestion that he can cause Georgia's authorities to withdraw it (or to preserve it for that matter). The matter is entirely within the Georgian authorities' sphere of control. To be clear, the Claimant does not allege that the Georgian authorities have not taken action to withdraw the Claimant's nationality in order to prevent him from mounting this case; nor does the Tribunal make any finding in that regard.

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225 Second Okuashvili Witness Statement, ¶ 15; Hearing Tr., Day 2, 170:20-171:1 (Banifatemi/Okuashvili); 175:22-179:20 (Okuashvili/Tribunal).

226 Hearing Tr., Day 2, 177:12-179:20 (Okuashvili/Tribunal); Second Okuashvili Witness Statement, ¶¶ 15-27.

227 *See* Respondent's Objections, ¶ 54; Expert Report of Nato Gagnidze, 19 November 2020 (***First Gagnidze Report***), ¶¶ 4.2-4.3; Claimant's Rejoinder, ¶ 27. *See also* Law of the Republic of Georgia on Citizenship of Georgia dated 25 March 1993, amended 24 June 1993, **Exhibit RL-1**, Articles 1, 32(D); Organic Law of Georgia on Georgian Citizenship dated 1 October 1997, amended 17 December 2010, **Exhibit RL-3**, Articles 32, 33, 35, 36, 37, 42; Organic Law on Citizenship of Georgia, valid at 22 February 2011, **Exhibit NG-4**, Article 1; Constitution of Georgia, valid at 22 February 2011, **Exhibit NG-3**, Article 12.

159. The Claimant further contends that Georgia's authorities in fact had a legal duty to withdraw his Georgian citizenship upon becoming aware, as in fact they did, of his British citizenship, for example through the presentation of a foreign passport at customs or border control.[228] According to the Claimant's expert, Ms Gagnidze:

> [I]n a matter related to the loss of the citizenship of Georgia, state authorities do not have any discretionary power. The Georgian state is obliged to apply the procedure set out in the law and to make a decision against the violation of the legal prohibition on dual nationality.[229]

160. The Respondent, for its part, contests the Claimant's characterization of withdrawal of nationality as "compulsory."[230] It says that Georgian law allows the Georgian President a degree of discretion in respect of final decisions on Georgian citizenship.[231] Indeed, the Respondent contends that it was the Claimant who was obligated to renounce its Georgian nationality under the Nationality Law.[232] The Respondent further contends that the Claimant's interpretation of the Georgian Nationality Law as entraining non-discretionary withdrawal of citizenship cannot be right, since this would violate Georgia's obligations in respect of loss of nationality under Article 8 of the European Convention on Human Rights.[233]

161. In the Tribunal's view, this debate is of little moment. The question for the Tribunal is whether the Claimant's British nationality is or is not predominant compared to his Georgian nationality. For that question, a critical consideration is the Claimant's readiness to forfeit his Georgian citizenship for the sake of being naturalized as a British citizen. It is common ground that, upon naturalization as a British citizen, the Claimant stood to lose his Georgian nationality by act of Georgia's authorities, of their own motion. The absence of influence on the part of the Claimant in this decision by the Georgian authorities is the decisive factor.

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228 *See* Claimant's Response, ¶ 31; First Gagnidze Report, ¶¶ 4.22-4.24; Second Expert Report of Nato Gagnidze, 17 June 2021 (***Second Gagnidze Report***), ¶¶ 3.2-3.6.

229 First Gagnidze Report, ¶ 4.23.

230 Respondent's Reply, ¶¶ 105-112.

231 Respondent's Reply, ¶¶ 106-109.

232 Respondent's Reply, ¶ 110.

233 Respondent's Reply, ¶¶ 114-123.

162. In conclusion, the Claimant's British nationality can be characterized as satisfying the "dominant and effective" test for purposes relevant to the Claimant's pleaded claim for breach of the Treaty. The Tribunal is therefore able to dispose of the Respondent's objection on this score on the facts alone, without deciding whether Article 1(c) of the Treaty may only apply subject to the "dominant and effective nationality" test.

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163. In accordance with the foregoing, the Tribunal dismisses the Respondent's first preliminary objection.

B. WHETHER THE CLAIMANT CAN RESORT TO SCC ARBITRATION BY VIRTUE OF ARTICLE 3 OF THE TREATY

164. To commence this arbitration under the SCC Rules the Claimant contends that Article 3(2) of the Treaty, concerning most-favoured-nation treatment to be given to "nationals or companies of the other Contracting Party", applies also in respect of what the Claimant characterizes as "the procedural rules" for investor-State dispute resolution,[234] a matter governed by Article 8 of the Treaty.[235] The Claimant's thesis is that the treatment afforded to investors under Article 10(3) of the Georgia-BLEU BIT is more favourable than that which is afforded under Article 8 of the Treaty, in that the latter provides only for ICSID arbitration or conciliation while the former provides for ICSID, ICC, or SCC arbitration at the investor's election; and the Claimant may launch an arbitration under the SCC Rules while he is unable to do so under the ICSID Convention because he also holds the nationality of the Respondent State.[236]

165. The Respondent rejects the notion that the Claimant may rely upon Article 3(2) of the Treaty in that manner. In outline, the Respondent's position is that:

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234 Claimant's Response, ¶ 76.

235 SOC, ¶ 94.

236 Article 25(2)(a) of the ICSID Convention excludes arbitration between a Contracting State and "any person who . . . also has the nationality of the Contracting State party to the dispute". *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done in Washington, D.C. on 18 March 1965; entered into force 14 October 1966) (***ICSID Convention***), **Exhibit RL-40**.

(i) The Respondent "did not consent to submit the Claimant's dispute to SCC arbitration".[237]

(ii) "[T]he Claimant's reliance on the MFN clause at Article 3 of the Treaty cannot cure the Tribunal's lack of jurisdiction":[238] Article 3 of the Treaty, properly construed, does not detract from the Contracting Parties' exclusive choice of ICSID arbitration/conciliation by adding other fora.[239]

(iii) In any event, Article 10 of the Georgia-BLEU BIT does not grant treatment more favourable than that of Article 8 of the Treaty.[240]

166. The Tribunal considers that the Respondent's objection raises three discrete questions, which the Tribunal proposes to address in turn. Before doing so, it may be helpful to set out again the text of Articles 3 and 8 of the Treaty, as well as Article 10 of the Georgia-BLEU BIT.

167. Article 3 of the Treaty provides as follows:[241]

> **National Treatment and Most-favoured-nation Provisions**
>
> (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

237 Respondent's Objections, ¶¶ 131-139.
238 Respondent's Objections, ¶ 130.
239 Respondent's Objections, ¶¶ 145-175.
240 Respondent's Objections, ¶¶ 176-192.
241 Treaty, **Exhibit C-1**, Article 3.

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

168. Article 8 of the Treaty provides in material part as follows:[242]

Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

. . .

(4) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

242 Treaty, **Exhibit C-1**, Article 8.

169. Article 10 of the Georgia-BLEU BIT reads in material part as follows:[243]

> 1. Any investment dispute between an investor of one Contracting Party and the other Contracting Party shall be notified in writing by the first party to take action. The notification shall be accompanied by a sufficiently detailed memorandum. As far as possible, such dispute shall be settled amicably between the parties to the dispute or otherwise by conciliation between the Contracting Parties through diplomatic channels.
>
> 2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the receipt of the notification, the dispute shall be submitted to international arbitration, any other legal remedy being excluded.
>
> To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration. Such consent implies that both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted.
>
> 3. In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter mentioned organisations, at the option of the investor:
>
> - the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965, when each State party to this Agreement has become a party to the said Convention. As long as this requirement is not met, each Contracting Party agrees that the dispute shall be submitted to arbitration pursuant to the provisions of the additional facility of the I.C.S.I.D.;
>
> - the Arbitral Court of the International Chamber of Commerce in Paris;
>
> - the Arbitration Institute of the Chamber of Commerce in Stockholm.
>
> If the arbitration procedure has been introduced upon the initiative of a Contracting Party, this Party

[243] Georgia-BLEU BIT, **Exhibit C-3**, Article 10.

> shall request the investor involved in writing to designate the arbitration organisation to which the dispute shall be referred.

170. The parties agree that these provisions are to be interpreted in accordance with the rules of the VCLT,[244] namely Articles 31-32, which reflect customary law.[245] Also, it seems to be common ground between the parties that Article 3 of the Treaty may be engaged when more-favourable treatment is available through another BIT (such as the Georgia-BLEU BIT), whether or not such treatment has been accorded or availed of in actual fact. The Tribunal proceeds accordingly.

171. The Tribunal's reasoning in regard to this second objection to jurisdiction (paragraphs 172-225) reflects the views of the majority of its members. A Concurring and Dissenting Opinion by Professor Knieper is appended to this award.

1. Whether Article 3(2) "treatment" covers matters regulated by Article 8

172. The threshold question is whether the notion of "treatment", referred to in Article 3(2), encompasses consent by the Contracting Parties to an international arbitration forum to which a national or company protected under the Treaty may resort. That question has given rise to considerable debate in arbitral practice and scholarly analysis.[246] To an extent, the question is answered by the express terms of Article 3(3) of the Treaty, which states that "the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement". As Article 8 is within the range of provisions referred to in Article 3(3), at first blush there can be little doubt that the entitlements given to protected nationals and companies, and the obligations undertaken by the Contracting Parties, by virtue of Article 8, are regarded as "treatment" for the purposes of Article 3(2). Again at first blush, there seems to be little doubt that nationals and companies protected under the Treaty are, in respect of rights and

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244 Vienna Convention on the Law of Treaties (done in Vienna on 22 May 1969; entered into force 27 January 1980) (***VCLT***), **Exhibit CL-131**.

245 *See* Respondent's Objections, ¶ 89; Claimant's Response, ¶¶ 39-40.

246 Addressed authoritatively by an ILC Study Group. *See* International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, 29 May 2015, **Exhibit CL-183**, ¶¶ 93-140.

obligations covered by Article 8, entitled to treatment no less favourable than that which nationals and companies of "any third State" are entitled to receive.

173. In sum, on its face, Article 3(3) appears to "confirm[]" that the rights and obligations covered by Article 8 constitute "treatment" for the purposes of Article 3(2); but, again on its face, it goes no further. It is thus a separate, sequent issue to determine whether "treatment no less favourable than that which [Georgia] accords to . . . nationals or companies of any third State" extends to granting access to international arbitral fora other than ICSID. The Tribunal addresses this question in sub-section 2 below.

174. The Respondent fairly points out that there are difficulties with Articles 3(2) and (3) which, in the Respondent's submission, mean that Article 3(2) cannot be "decontextualized" and applied to matters governed by Article 8 in a "straightforward process".[247]

– The first difficulty is that Article 3(2) refers to treatment "in [a Contracting Party's] territory . . . as regards . . . management, maintenance, use, enjoyment or disposal of their investments". None of these terms is obviously apposite to granting access to an international arbitral forum (or to the present arbitration, seated in Sweden) except insofar as compliance with awards is concerned.[248]

– The second difficulty is that a number of Treaty provisions within the range of Articles 1-11, as referred to by Article 3(3), appear not to be susceptible to most-favoured-nation treatment. Article 7 lays out exceptions to Article 3 itself, while Articles 1 ("Definitions") and 9 ("Disputes between the Contracting Parties") do not concern treatment due to investors and investments at all.

In the Respondent's submission, these difficulties demonstrate that a textual approach to Article 3(3) leads to results which (to use the terms of the VCLT) are

247 Respondent's Objections, ¶ 151.

248 *Cf Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, **Exhibit CL-38**, ¶ 231, characterising investor-State dispute-resolution as "extra-territorial".

manifestly absurd or unreasonable.[249] Such an approach should therefore be eschewed and Article 8 should be excluded from the scope of Article 3(2).

175. The Tribunal acknowledges the difficulties identified by the Respondent but does not share the conclusion it draws from them. These difficulties, while real, may be resolved through basic rules of treaty interpretation.

176. The primary rule of treaty interpretation, that 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",[250] comprises the principle of effectiveness (*ut res magis valeat quam pereat*), namely that:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[251]

Further, in elucidating textually ambiguous or obscure treaty provisions, it is legitimate to have recourse to "the preparatory work of the treaty and the circumstances of its conclusion".[252]

177. Starting with the principle of effectiveness, this compels, in the Tribunal's view, the conclusion that the purpose of Article 3(3) is to extend most-favoured-nation treatment in the broadest possible manner. That is evident in the firm, unqualified wording—Article 3(1)-(2) treatment "shall apply"—followed by the blanket reference to Articles 1-11 of the Treaty. This serves to exclude only the final provisions of the Treaty (Articles 12-14) regarding territorial extension, entry into force, and duration and termination.

178. While it is true that Articles 1, 7, and 9 do not appear susceptible to most-favoured-nation treatment, it is equally true that Article 8 is so susceptible; and the Respondent rightly does not suggest otherwise. It would violate the principle of

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249 VCLT, **Exhibit CL-131**, Article 32(b).

250 VCLT, **Exhibit CL-131**, Article 31(1).

251 International Law Commission, 1966 Yearbook of the International Law Commission, vol II, p 219, ¶ (6).

252 VCLT, **Exhibit CL-131**, Article 32.

effectiveness for the Tribunal to decline to give effect to Article 3(3) in the part that it can be given effect to, on grounds that it cannot be given effect to in other part.

179. The principle of effectiveness provides an answer also to the references in Article 3(2) to "management, maintenance", etc of investments "in the territory" of a Contracting Party, which seem inapposite or only marginally apposite to investor-State dispute resolution. The use of these terms may be explained by the fact that the Treaty aims to promote investment in the territory of the Contracting Parties (as the preamble memorializes), and key provisions of it are directed to the substantive treatment of investors and investments in the territory of the host State.[253] But the provisions regarding repatriation of investments and returns (Article 6) and subrogation of a Contracting Party to the rights of a protected national or company (Article 10) are not obviously or exclusively referable to treatment "in the territory" of the host State. Yet there appears to be no good reason for excepting these two Articles from the ambit of Article 3(1) or (2). The same approach applies to Article 8.

180. Ultimately, to cavil with the wording of Article 3(2) is to ignore both the text and the preparatory history of Article 3(3). As to the text, Article 3(3) starts with the words "For the avoidance of doubt": this all but concedes that there can be reasonable doubt whether certain Articles of the Treaty come within the terms of Article 3(2). And it is to resolve such doubt at the threshold that Article 3(3) provides that Article 3(1)-(2) "shall apply to the provisions of Articles 1 and 11 of this Agreement".[254]

181. Turning to the preparatory history of Article 3(3), a key point is that it is a bolt-on to the UK model negotiating text (the Model Investment Promotion and Protection

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253 *See* Treaty, **Exhibit C-1**, Article 2 (promotion and protection of investments; fair and equitable treatment), Article 4 (compensation for losses due to war etc), Article 5 (expropriation).

254 *See* Chester Brown and Audley Sheppard, "United Kingdom", in EDS, *Commentaries on Selected Model Investment Treaties* (2013), **Exhibit CL-136**, pp 728-730.

Agreement (***IPPA***)), which first emerged in 1972[255] and was revised in 1991.[256] As recounted by Professor Chester Brown and Mr Audley Sheppard QC, while paragraphs (1) and (2) of Article 3 are "almost identical to the draft Model IPPA of 1972", paragraph (3) first emerged as an added element to Article 3 in the 1990 UK-Burundi BIT.[257] In other words, the UK drafters added a paragraph (3) to Article 3 without comprehensively revising the wording of paragraphs (1) and (2). One might perhaps criticize this drafting choice but the history is beyond doubt.

182. The main purpose of the new paragraph (3) was to cover investor-State dispute resolution. The tribunal in *National Grid v Argentina*, established under the 1990 UK-Argentina BIT (which does not include a provision equivalent to Article 3(3)), had occasion to consider the UK's treaty practice of the period. It found that "it is possible to conclude from the UK investment treaty practice contemporaneous with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution."[258] Absent Article 3(3), that would have been a unilateral, and perhaps tenable, but doubtful-to-prevail understanding. Article 3(3) of the Treaty makes that the common understanding of both Contracting Parties.

183. The Tribunal derives comfort for its conclusion from decisions of other tribunals and scholarly authority. In addition to the *National Grid* tribunal, the tribunal in *Wintershall v Argentina* also regarded the text of Article 3(3) as encompassing investor-State dispute resolution "clearly and unambiguously". Significantly, the tribunal started from the premise that "[o]rdinarily, an MFN Clause would not operate so as to replace one means of dispute settlement with another." The tribunal went on to say:

> This is (presumably) why the drafters of the UK Model BIT had provided (in Article 3(3)) that "for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the

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255 *See* Chester Brown and Audley Sheppard, "United Kingdom", in EDS, *Commentaries on Selected Model Investment Treaties* (2013), **Exhibit CL-136**, p 703.

256 *See* Chester Brown and Audley Sheppard, "United Kingdom", in EDS, *Commentaries on Selected Model Investment Treaties* (2013), **Exhibit CL-136**, pp 728-730. *See also* 1991 UK Model Investment Promotion and Protection Agreement, **Exhibit R-8**.

257 Chester Brown and Audley Sheppard, "United Kingdom", in EDS, *Commentaries on Selected Model Investment Treaties* (2013), **Exhibit CL-136**, pp 728-730.

258 *National Grid plc v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, **Exhibit CL-132**, ¶ 85.

> dispute settlement provision." Because, ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted . . . .*[259]

184. Brown and Sheppard have also come to the same conclusion, observing: "Where Article 3(3) is included, it . . . provides an answer to the controversial question whether the MFN provision also applies to procedural issues such as an investor-State dispute settlement."[260] Professor Douglas QC also regards Article 3(3) as unambiguous.[261]

185. The Tribunal has carefully considered the decision in *Garanti Koza v Turkmenistan*, on which the Respondent relies. The tribunal there dealt with Article 3(3) of the UK-Turkmenistan BIT, a provision identical to Article 3(3) of the Treaty. As the Respondent points out, the *Garanti Koza* tribunal noted that Article 3(3) "indisputably presents some interpretative difficulties"; and, referring to Article 7 of that BIT (also identical to Article 7 of the present Treaty), that it would be "challenging to apply a guarantee of most favored nation treatment to an article enumerating the exceptions to most favored nation treatment."[262] The tribunal went on to acknowledge the potential difficulty of applying Article 3 to "all of the first eleven articles of the BIT",[263] as this Tribunal indicated above.

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259 *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, **Exhibit CL-36**, ¶ 167 (emphasis added). *See also Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, **Exhibit CL-56**, ¶ 204; Claimant's Response, ¶ 103(d)(i).

260 Chester Brown and Audley Sheppard, "United Kingdom", in EDS, *Commentaries on Selected Model Investment Treaties* (2013), **Exhibit CL-136**, p 728.

261 *See* Zachary Douglas, *The International Law of Investment Claims*, **Exhibit CL-134**, p 362.

262 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶ 58.

263 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶ 58.

186. Ultimately, however, the *Garanti Koza* tribunal accepted that Article 3 must be applied to the dispute-resolution provision in Article 8. A majority of the tribunal held:

> Article 3(3) of the U.K.-Turkmenistan BIT states that the treatment provided for in Articles 3(1) and 3(2) shall apply to a range of articles that includes Article 8. The treatment provided for in Articles 3(1) and 3(2) includes most favored nation treatment. . . . [T]he words "shall apply" appear to the majority of this Tribunal to be intended to require the application of the one to the other, not merely to permit it. These terms of the BIT, like all terms of a treaty, are to be given effect.[264]

2. Whether Article 3(2) treatment extends to arbitration other than at ICSID

187. The Respondent has not directly taken issue with the proposition that States may provide consent to an international arbitral forum (and the conditions governing access to it) by way of most-favoured-nation clause in an investment treaty. This proposition is established as a matter of principle in arbitral practice and scholarship[265] and has been endorsed by the ILC.[266] The question which may arise, then, is whether the contracting States have done so in a given treaty; and this of course is a question of treaty interpretation.

188. In that regard, the Respondent accepts that if Article 3(2), read in the light of Article 3(3), indeed covers matters of Article 8—as the Tribunal concluded it does, in sub-section 1 above—then the Claimant may avail himself of more-favourable dispute-resolution treatment to which investors covered by other treaties are entitled. But, the Respondent argues, such treatment must be within the confines of ICSID arbitration, because that is the only consent to arbitration

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264 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶ 59 (emphasis added).

265 *See Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, **Exhibit CL-36**, ¶ 167; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, **Exhibit CL-56**, ¶ 204. *See also* Campbell McLachlan, *Treatment of Investors*, in International Investment Arbitration: Substantive Principles (2nd ed), **Exhibit CL-138**, ¶¶ 7.323 and 7.325; Zachary Douglas, *The International Law of Investment Claims*, **Exhibit CL-134**, pp 344, 357, 362.

266 *See* International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, 29 May 2015, **Exhibit CL-183**; ¶¶ 162-163.

the Respondent has given, as evidenced by the title of Article 8: "Reference to International Centre for Settlement of Investment Disputes". As the Respondent puts it, "an MFN clause cannot be relied upon to create consent where none exists"[267] nor, conversely, to displace the exclusivity of the consent to ICSID arbitration which has been given. The Respondent says that Article 8 of the Treaty is "materially different" from provisions considered by other tribunals, which accepted jurisdiction on the basis that the relevant treaties contained "unconditional" consent to jurisdiction.[268]

189. In short, the Respondent's thesis is that the parameters of the more-favourable treatment to which the Claimant is entitled are dictated by the Contracting Parties' exclusive consent to ICSID arbitration in the terms of Article 8. On the Respondent's case, therefore, the Claimant may avail himself of better treatment within the confines of ICSID, namely as to pre-arbitration requirements such as fork-in-the-road provisions, the form and content in which a dispute must be notified to the respondent State, and the cooling-off period thereafter.[269]

190. It is significant in the Respondent's submission that the Treaty adopts the UK's so-called "preferred" version of Article 8, providing only for ICSID arbitration, rather than the "alternate" version, providing for ICSID, ICC, or ad hoc arbitration at the investor's choice. The Respondent's argument is that Article 3 operates differently depending on the version adopted: on the preferred version, ICSID remains the exclusive forum, and most-favoured-nation treatment operates within the confines of that forum; on the alternate version, other arbitral fora may be elected, given that the Contracting Parties have given broad consent to arbitration in the first place.[270] On this basis, the Respondent distinguishes the *Garanti Koza* case, Article 8(1) of the UK-Turkmenistan BIT applicable in that case being the "alternate" version of Article 8. That text, says the Respondent–

> establish[ed] unequivocally Turkmenistan's consent to submit disputes with U.K. investors to international arbitration. That consent satisfies the fundamental

267 Respondent's Objections, ¶ 164.

268 Respondent's Reply, ¶¶ 250-274.

269 *See, eg*, Respondent's Objections, ¶¶ 185-191; Respondent's Reply, ¶¶ 234-235.

270 *See* Respondent's Reply, ¶¶ 201-223.

> condition that the State must have consented to participate in arbitration before it may be required to do so.[271]
>
> Because it found that Turkmenistan's consent to international arbitration was "establish[ed] unequivocally" in Article 8(1), the *Garanti Koza* tribunal held that the investor could rely on the treaty's MFN clause to access ICSID arbitration, which otherwise would have been unavailable to the investor under the basic treaty.[272]

191. The Claimant's position is that the proper characterization of his invocation of Article 3(2) of the Treaty is that he seeks to "rely on the procedural rules of a different forum" than ICSID,[273] rather than to create consent to arbitration which has not been provided by the Respondent.[274] As the Claimant puts it, in seeking to rely on Article 10(3) of the Georgia-BLEU BIT, he merely seeks "to apply Articles 3 and 8 of the [Treaty] in accordance with their ordinary meaning," including the ordinary meaning of the term "national".[275] In particular, the Claimant contends that "the ordinary meaning of the terms of [Article] 8" must be "interpreted in their context"—that is, by reference to Articles 3(3) and 3(2).[276] The consequence of this, in the Claimant's submission, is that "even though the Respondent did not expressly consent in [Article] 8 to arbitration using a procedure other than ICSID, it did not exclude usage of another procedure."[277]

192. The Tribunal accepts that (as both parties appear to accept) the provisions of a treaty must be read harmoniously in the context of the overall treaty text, so they can develop *effet utile*. This follows directly from Article 31(1) of the VCLT, referred to above. It follows that Articles 3 and 8 of the Treaty must be read

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271 *See Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶¶ 29, 31.

272 Respondent's Reply, ¶ 268. *See also* Respondent's Reply, ¶ 274 (contending that in *Krederi v Ukraine*, the tribunal (also considering the "alternate" version of Article 8), "allowed the investor to access a different arbitral forum because it found that the basic treaty already contained general consent to international arbitration"). *See also Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17, Award, 2 July 2018, **Exhibit RL-85**, ¶ 334.

273 Claimant's Response, ¶ 76.

274 Claimant's Response, ¶¶ 78, 95-105.

275 Claimant's Response, ¶¶ 79, 86.

276 Claimant's Response, ¶ 96.

277 Claimant's Response, ¶ 96.

together in that manner, to arrive at an interpretation which gives effect to each of these Articles without doing violence to the other.

193. Further, the Tribunal considers it important to bear in mind that the main purpose of Article 3(3) is to extend most-favoured-nation treatment to the matters governed by Article 8, and, what is more, to leave no doubt on this score. A practical effect of some significance has to follow.

194. In that context, the Tribunal considers it unhelpful to characterize the Claimant's proposed addition of arbitral fora as a displacement of ICSID arbitration from Article 8. It is in the nature of most-favoured-nation clauses that the beneficiary State (or its nationals, as is the case here) stand to receive additional benefits compared to those they have specifically agreed upon with the granting State. If (say) a customs treaty provides for certain formalities at import or export but also provides that the signatory States will extend to each other any less-burdensome formalities agreed upon with third States, it would defeat the purpose of the latter provision to say that the treaty's formalities regime may not be displaced by one that is less burdensome. The two States may of course perfectly well agree to except the treaty's formalities regime from the most-favoured-nation clause in the treaty.

195. It also seems unhelpful to the Tribunal to proceed on an axiomatic premise that a most-favoured-nation clause cannot incorporate consent to a form of dispute settlement set out in another investment treaty. This premise seems to be based on the notion that most-favoured-nation clauses are not capable of applying to matters of dispute resolution at all, which as the ILC has observed appears to be a misinterpretation of the 1956 decision of the Commission of Arbitrators in the *Ambatielos* case.[278] There is no obstacle in principle to providing consent to international arbitration in one treaty by incorporation of or reference to the terms of another treaty.[279] Whether a particular treaty has this effect or not is of course

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278 *See* International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, 29 May 2015, **Exhibit CL-183**, ¶ 162. The *Ambatielos Case* (*Greece v United Kingdom)* may be found at 12 RIAA 83 (1956).

279 *See Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, **Exhibit CL-36**, ¶ 167.

a matter of interpretation of its terms. And in interpreting jurisdictional provisions, "there is no principle either of extensive or restrictive interpretation".[280]

196. Further, the Tribunal is unable to accept that international law requires a State to have given, in the relevant BIT, "unconditional consent" to arbitration writ large, for an investor then to avail itself of additional arbitral fora by way of most-favoured-nation treatment.[281] The Respondent has relied on *Venezuela US v Venezuela* as authority for that proposition.[282] However, the Tribunal does not share the Respondent's reading of that decision. The tribunal in that case "agree[d] with the Respondent that the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT between Barbados and Venezuela".[283] It went on to hold that Venezuela had given such consent through a clause (Article 8(4)) which provided that "[e]ach Contracting Party hereby gives its unconditional consent to submission of disputes as referred to in paragraph 1 of this article to international arbitration in accordance with the provisions of this article", after having listed ICSID, ICSID Additional Facility, and UNCITRAL arbitration:[284] this, the tribunal held, was "one consent to international arbitration, not three different consents".[285] Naturally, the *Venezuela US* tribunal had to apply the terms of the BIT that applied in that case, and these included the terms (relied upon by the present Respondent) that the consent Venezuela and Barbados had given to ICSID, ICSID Additional Facility, and UNCITRAL arbitration was "unconditional". Article 8(4) of the Venezuela-Barbados BIT was directed to the unconditionality of consent. And the tribunal did not say that a form of words such as that used in that provision would, in its view, be the only form of words that

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280 *Mondev International Ltd v USA*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, ¶ 43 (citing to ICJ and other jurisprudence).

281 Respondent's Reply, ¶ 254.

282 *Venezuela US SRL v the Bolivarian Republic of Venezuela*, PCA Case No 2013-34, Interim Award on Jurisdiction, 26 July 2016, **Exhibit CL-30**, ¶ 107.

283 *Venezuela US SRL v the Bolivarian Republic of Venezuela*, PCA Case No 2013-34, Interim Award on Jurisdiction, 26 July 2016, **Exhibit CL-30**, ¶ 105.

284 *See* Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed 15 July 1994, **Exhibit RL-32**, Article 8(4), ("Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.").

285 *Venezuela US SRL v the Bolivarian Republic of Venezuela*, PCA Case No 2013-34, Interim Award on Jurisdiction, 26 July 2016, **Exhibit CL-30**, ¶ 109.

would permit additional arbitral fora to be invoked by way of most-favoured-nation treatment. Generally, it is not the function of tribunals to lecture States on how to write their treaties, but rather to give effect to the treaty terms States have settled upon.

197. That portion of the *Venezuela US* decision does not therefore assist the Respondent's objection. The Tribunal further notes that the *Venezuela US* decision did accept that a form of words such as those used in Article 3(3) of the present Treaty must be given *effet utile*.[286] Again, determining the precise *effet utile* to be given is an exercise of treaty interpretation rather than a matter to resolve by an *a priori* principle.

198. It also seems unhelpful to the Tribunal to characterize the various arbitral fora which the Claimant contends are available to him under Article 10(3) of the Georgia-BLEU BIT as mere sets of procedural rules. To be sure, each of these arbitral fora—ICSID, ICC, and SCC—has its own procedural rules. But there are more far-reaching consequences, including the fact that under the ICC and SCC Rules the proceedings will be subject to a national law as the *lex arbitri* and to the supervisory jurisdiction of the relevant courts; that in ICC proceedings there will be a scrutiny of the tribunal's decisions by the ICC Court; that natural persons cannot have access to ICSID arbitration vis-à-vis a State of their nationality (but companies incorporated in the host State may be agreed to be treated as foreign); and that ICSID awards are subject to the exclusive remedy of annulment before an ad hoc Committee.[287] The enumeration can go on to include matters of applicable law, the selection and nationality of arbitrators, and so forth. In the light of this, a fair characterization of the Claimant's proposed reliance on Article 10(3) of the Georgia-BLEU BIT is that it seeks to add an arbitral forum to ICSID arbitration, which is available under Article 8 of the Treaty.

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286 *Venezuela US SRL v the Bolivarian Republic of Venezuela*, PCA Case No 2013-34, Interim Award on Jurisdiction, 26 July 2016 **Exhibit CL-30**. ¶ 108 ("Article 3(3) . . . requires the Tribunal to apply "the treatment provided for in paragraph […] (2) […] to the provisions of" Article 8 of the BIT. The principle of effectiveness calls for giving effect to Article 3(2).").

287 *See* ICSID Convention, **Exhibit RL-40**, Article 52.

199. In the Tribunal's view, the question before it has to be addressed as a matter of treaty interpretation. The ILC has put it thus:

> The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.[288]

200. Accordingly, the Tribunal is to decide whether the "treatment" set out in Article 8 of the Treaty, *ie* access to ICSID arbitration (or conciliation), is of the same nature or category (*ejusdem generis*) as ICC or SCC arbitration under Article 10(3) of the Georgia-BLEU BIT. The Tribunal considers that it is, for five main reasons.

201. First, Article 3(3) is broad and unqualified. Consent to arbitration under Article 8 is to be regarded as a form of "treatment". The subject-matter of Article 8 is consent to arbitration.

202. Secondly, access to ICC or SCC arbitration serves the same fundamental purpose as ICSID arbitration, namely access to an international, neutral, non-State forum in which the parties will have input in the constitution of the tribunal, which will resolve their dispute by application of legal rules, leading to a final and binding award. Indeed, ICSID, ICC, and SCC arbitration are offered alongside each other under Article 10(3) of the Georgia-BLEU BIT.

203. Thirdly, if the availability of other arbitral fora were considered not to come within the terms of Article 3(2)-(3) of the Treaty, the only potential benefit one can readily see arising from these provisions is a dispensation from giving advance notice of the dispute or a shortening of the three-month waiting period provided for in Article 8(4). That would be a benefit of course, but scarcely one of much substance: as noted at paragraph 261 below, the relevant requirements under Article 8(4) are not demanding. What is more, these are pre-arbitration requirements that attach to a protected national's entitlement to have resort to a dispute-resolution forum: they are conditions to asserting an entitlement, rather

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288 International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, 29 May 2015, **Exhibit CL-183**, ¶ 214.

than entitlements in their own right. It is not reasonable, in the Tribunal's view, to confine the combined *effet utile* of Articles 3(3) and 8 to such requirements alone. A narrow effect of that sort would hardly explain the UK's deliberate insertion of Article 3(3) in its BITs, starting in the 1990s, to ensure Article 3 covers dispute-resolution matters, as recounted above.

204. Fourthly, it offends no fundamental rule of international law to extend to UK/Georgian nationals or companies access to arbitral fora to which Georgia or the UK has already given access for protected investors of third States. (In the case of the Georgia-BLEU BIT, such consent pre-dates the Treaty by over a year and a half.) Such consent may be extended because it has in fact been provided to others; and it is the purpose of Article 3(3) to extend it.

205. Finally, and in a related vein, granting access to SCC arbitration under Article 3 of the Treaty does not affect the Treaty's scope of application, contrary to the Respondent's suggestion otherwise.[289] For a person or company to avail themselves of Article 3 treatment, they must first come within the scope of the Treaty, as set out notably in Articles 1 and 12-14.

206. The Tribunal must now address the Respondent's separate but related argument that Article 3(2)-(3) cannot have the effect of granting access to other arbitral fora without violating the Contracting Parties' exclusive choice of ICSID arbitration. The argument proceeds on a sound premise as a matter of principle, as it is consistent with the rule of harmonious interpretation referred to above. It amounts to saying that the broad and unqualified wording of Article 3(2)-(3) is restricted by a necessary implication from Article 8, which is said to provide exclusive and invariable consent to ICSID arbitration.

207. The Tribunal is unable to agree with this argument, for three reasons.

208. In the first place, the more natural place for a limitation or qualification to the terms of Article 3(2)-(3) would be those provisions themselves, especially Article 3(3). The scope and effect of a most-favoured-nation clause are normally defined in the clause itself, as the passage from the ILC's work quoted at paragraph 199

[289] Respondent's Objections, ¶ 153.

above suggests. As also noted above, other UK BITs based on the UK Model IPPA do not include Article 3(3), thereby making it unlikely that Article 8 would be covered at all by Article 3. The Treaty here has included Article 3(3).

209. In the second place, Article 8 does not say that it is not subject to Article 3. It would have been straightforward as a matter of drafting to write into Article 8 that it provides for ICSID arbitration notwithstanding anything to the contrary in Article 3. Article 8 does say that ICSID arbitration is available (and diplomatic channels should not be pursued except in limited circumstances), and that is of course what one would expect it to say. One would not expect it to refer to ICSID arbitration "or any other forum available under Article 3", for that is what Article 3, in particular 3(3), serves to do.

210. Finally, the Tribunal does not consider it a significant factor that Article 8 follows the "preferred" UK version. The Respondent argues that this reflects "the Contracting Parties' conscious decision to seek the resolution of investor-State disputes under the aegis of ICSID, and ICSID alone".[290] The Tribunal is unable to draw such an inference. The UK had two negotiating versions of Article 8, and there is no reason of principle why additional arbitral fora could be added to one but not the other. SCC arbitration in particular is an additional option compared to either the "preferred" or the "alternate" version of Article 8. If anything, under the "preferred" version of Article 8, Article 3(3) has greater potential to be relied upon to add an arbitral forum. And given that interplay between Article 3(3) and Article 8, it stands to reason that the ICSID-only version of the UK IPPA would be the UK's "preferred" version.

211. For the same reasons, the Tribunal does not consider it significant (contrary to the Respondent's submission[291]) that the UK-Turkmenistan BIT at issue in *Garanti Koza* contained the "alternate" version of Article 8.[292] The tribunal there accepted jurisdiction so as to give effect to a most-favoured-nation-clause that is identical to the one found in the Treaty.[293] There is no indication in its decision that the

290 Respondent's Objections, ¶ 58.

291 Respondent's Reply, ¶ 265.

292 *See also above*, ¶ 190.

293 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶¶ 59, 64, 79.

tribunal would have come to a different outcome had the applicable dispute resolution provision followed the "preferred" version.[294]

212. All things being equal, therefore, in a BIT concluded by the UK which includes Article 3(3), a protected national or company of a Contracting Party would have the same fora available to them, whether the BIT adopts the "preferred" or "alternate" version of Article 8. That, the Tribunal considers, is a more coherent and plausible outcome than that for which the Respondent contends (as described at paragraph 190 above).

3. Whether SCC arbitration can be said to be more favourable than ICSID

213. The last question to be addressed here is the Respondent's argument that ICSID arbitration is incomparable with other arbitral fora, such as the SCC, and thus there can be no comparison in terms of more or less "favourable" treatment in the sense of Article 3(2).[295] The Respondent goes on to argue that even if a comparison could be made, it would have to be on a holistic approach:

> [T]he assessment of whether the treatment provided under the comparator treaty is more favourable than that under the basic treaty must take into account the entirety of that treatment and the terms under which it is granted under the comparator treaty. For example, an ISDS provision that grants investors direct access to arbitration (without subjecting the investor's right to initiate arbitration to a cooling-off period) but at the same time imposes a fork-in-the-road condition will not provide more favourable treatment than an ISDS provision that contains a cooling-off period but no fork-in-the-road clause.[296]

214. On that approach, the Respondent argues that "the ISDS treatment granted to Belgium and Luxembourgish investors under Article 10 of the Georgia-BLEU

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294 *See Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exhibit CL-18**, ¶ 46 ("The selection of the alternative version, rather than the preferred version, is indeed suggestive of a reluctance to agree in advance to ICSID Arbitration. But as we have already stated, we do not find the meaning of Article 8 of the U.K.-Turkmenistan BIT to be uncertain, *and the choice of one version of Article 8 in preference to another does not appear to us to provide any sound basis for failing to apply Article 3(3)*.") (emphasis added).

295 *See* Respondent's Reply, ¶ 216.

296 Respondent's Objections, ¶ 182.

BIT is not more favourable than the ISDS treatment granted to UK investors under Article 8 of the Treaty",[297] notably because of more-demanding pre-arbitration requirements (that is, a sufficiently detailed written memorandum regarding the dispute and a six-month cooling-off period).[298]

215. In response, the Claimant contends that MFN provisions may be "used to obviate or replace conditions set out in an arbitration provision", and that the Tribunal need not compare the two dispute resolution provisions "as a whole".[299] Rather, the Claimant asserts, the proper enquiry is to ask "if access to SCC procedure instead of ICSID procedure is more favourable where the latter excludes the Claimant altogether, and the former allows him to bring his claim."[300]

216. The Tribunal takes the two limbs of the Respondent's argument in turn.

217. The contention that ICSID is incomparable to other forms of arbitration is difficult to accept. Granted, the ICSID system is self-contained, instituted as it is by an international treaty, being governed exclusively by international law, and providing for an annulment remedy under the auspices of ICSID. The Respondent's description is hard to improve upon:

> [D]eciding to refer a dispute to ICSID for resolution under the ICSID Convention implies consenting to a fully autonomous, self-standing and truly international adjudicative system, which has its own jurisdictional requirements, functions independently from any domestic legal framework and does not allow the review of awards by national courts.[301]

218. Other forms of arbitration, be they institutional or ad hoc, do not have these characteristics. But important as these characteristics undeniably are, they do not make ICSID arbitration a different dispute-resolution genus altogether: it remains an arbitral forum. The defining characteristics of arbitration are its neutrality from the parties, the parties' ability (at least as a matter of principle) to have input in

297 Respondent's Objections, ¶ 144.
298 Respondent's Objections, ¶¶ 186-190.
299 Claimant's Response, ¶ 108.
300 Claimant's Response, ¶ 108.
301 Respondent's Reply, ¶ 216.

the composition of the tribunal, that an arbitral tribunal is not a judicial organ of a State, and the tribunal's awards are final and binding on the parties. SCC and ICC arbitration—to name the two options alongside ICSID under the Georgia-BLEU BIT—have all these characteristics. And that is why ICSID arbitration is listed alongside SCC and ICC arbitration under that BIT, as many other such treaties.[302]

219. The Tribunal further observes that the Respondent's argument regarding ICSID's incomparability appears to cut across its own thesis (discussed in sub-section 2 above) that if Article 8 embodied broad consent to international arbitration, notably in the form of the "alternate" UK model text, then SCC arbitration could be regarded as more-favourable treatment to be availed of through Article 3(2)-(3).[303]

220. The second limb of the Respondent's argument rejects the characterization of Article 8 of the Treaty as less-favourable to an investor than Article 10 of the Georgia-BLEU BIT.

221. The first thing to note is that the Respondent compares the entirety of these treaty provisions, including pre-arbitration requirements. By contrast, in the Claimant's submission, the object of comparison is a very discrete one—that on account of his Georgian nationality, the Claimant is unable to institute ICSID arbitration while he is able to commence arbitration proceedings under the SCC Rules. As noted at paragraphs 265-266 below in the context of the Respondent's fourth preliminary objection, the Tribunal does see force in the Respondent's argument that pre-arbitration requirements set out in a treaty have to be complied with if the treaty is being invoked by way of most-favoured-nation treatment in order to gain access to an arbitral forum provided for in that treaty. But both in the context of the fourth objection and the present, second objection, the point need not be decided.

222. As other tribunals have remarked, if one compares arbitral systems, it is impossible to characterize one as more or less favourable than the other in the

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302 The Respondent does acknowledge this point, using the term "alternative venues"; *cf* Respondent's Objections, ¶¶ 66-67.

303 *See* Respondent's Reply, ¶¶ 201-208.

abstract or objectively.[304] Arbitral systems—rules, institutions, practices—are designed to operate as comprehensive dispute-resolution mechanisms. Each system has its discrete characteristics and an internal cohesion. One system may, for example, be said to be procedurally more cogent or efficient compared to another, but the question which one is more favourable than the other immediately begs the questions, From whose perspective and for what purpose? To illustrate: in the abstract, it is meaningless to ask whether the ICC's *ad valorem* methodology is more or less favourable than ICSID's daily rate; but the question can meaningfully be asked if a party's objective is to reduce costs or costs-advances in the course of the proceedings.

223. Much the same applies to pre-arbitration requirements such as notification of the dispute in writing, an invitation to discuss a consensual settlement, a cooling-off period, etc. A formal, detailed, and lengthy notification/cooling-off process may be favourable to a serious claimant whose intention is to persuade the host State to discuss seriously with a view to avoiding escalating to arbitration; but unfavourable to an equally serious claimant whose situation is perfectly well-known to the host State already and whose priority is to seek interim protection from an arbitral tribunal as soon as possible.

224. In the result, the Tribunal considers that the Claimant's approach is correct. The appropriate perspective to adopt is that of the specific investor. From the Claimant's perspective, SCC arbitration has a critical advantage compared to ICSID arbitration: he is eligible for the former, ineligible for the latter. The comparison need go no further than that, because the Claimant has in fact assessed the overall situation. Being able to institute proceedings was so critical in his assessment that he undertook to comply with the SCC Rules and the *lex arbitri* which, absent agreement with the Respondent on the arbitral seat, would result from the SCC Board's determination of the seat.[305] On balance, SCC arbitration with all its legal and other consequences was more favourable to the Claimant than non-arbitration.

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304 *See*, *eg*, *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, **Exhibit CL-7**, ¶¶108-109.

305 *See below*, ¶ 237.

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225. The Tribunal therefore concludes, by majority, that Article 3(2) of the Treaty entitled the Claimant to resort to SCC arbitration and in consequence rejects the Respondent's second preliminary objection.

C. WHETHER THE RELEVANT ARBITRATION CLAUSES ARE CONTRARY TO EU LAW

226. The Respondent's third preliminary objection alleges that Article 8 of the Treaty and Article 10 of the Georgia-BLEU BIT violate EU law, which is part of Swedish law and must be given effect to accordingly.[306] The objection rests on the following propositions:

(i) An arbitration agreement that is contrary to EU law is invalid or unenforceable as a matter of Swedish law, because the relevant rules of EU law are part of the Swedish legal order.[307]

(ii) Article 8 of the Treaty and Article 10 of the Georgia-BLEU BIT have the effect of allowing the Tribunal to interpret or apply EU law,[308] and more generally may lead to awards that have the effect of preventing EU institutions and EU Member States from operating in accordance with EU law.[309]

(iii) Accordingly, Article 8 of the Treaty and Article 10 of the Georgia-BLEU BIT have "an adverse effect on the autonomy of EU law",[310] in contravention of the Court of Justice of the European Union (***CJEU***) *Opinion 1/17* of 30 April 2019 (which the Tribunal summarizes below).

306 Respondent's Objections, ¶ 193.

307 Respondent's Objections, ¶¶ 202-210.

308 Respondent's Objections, ¶¶ 223-239.

309 Respondent's Objections, ¶¶ 240-253.

310 Respondent's Objections, 17 July 2020, ¶ 208 (citing *Slovak Republic v Achmea*, CJEU Case C-284/16, Judgment, 6 March 2018, **Exhibit RL-19**, ¶ 59).

(iv) An arbitration agreement formed on the basis of consent to arbitration given in Article 8 of the Treaty and Article 10 of the Georgia-BLEU BIT is invalid under Swedish law.[311]

227. The Respondent further contends that such arbitration agreements are invalid because they "do not satisfy the requirements of the right of access to an independent tribunal enshrined in Article 47 of the EU Charter of Fundamental Rights."[312]

228. The Respondent emphasizes that its objection is predicated exclusively on EU and Swedish law and that it "does not argue that the ISDS provisions of its BITs with EU Member States are invalid as a matter of international law."[313] (The Tribunal observes that on the Respondent's own case, ICSID arbitration, as provided for in Article 8 of the Treaty, is a self-contained system governed exclusively by international law, not domestic law.)[314]

229. In response, the Claimant argues that the parties' arbitration agreement is governed by international law, not Swedish/EU law, and thus the Respondent's reliance on the CJEU's *Opinion 1/17* is misplaced.[315] The Claimant also rejects the relevance of the CJEU judgment in *Slovak Republic v Achmea BV* on the basis that:

(i) EU Regulation 1219/2012[316] preserves in full the validity and effect of bilateral investment treaties concluded before 2009 between EU Member States and third States;[317] and

311 Respondent's Objections, ¶¶ 211-239.

312 Respondent's Objections, ¶ 254 (header).

313 Respondent's Objections, ¶ 195.

314 Respondent's Objections, ¶ 195; Respondent's Reply, ¶ 320.

315 Claimant's Response, ¶ 116.

316 *See* Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012, **Exhibit CL-151**.

317 Claimant's Response, ¶¶ 137-143.

(ii) *Achmea* concerned an intra-EU investment treaty between two EU Member States, unlike either the Treaty or the Georgia-BLEU BIT.[318]

Lastly, the Claimant contends that, in any event, neither Article 8 of the Treaty nor Article 10 of the Georgia-BLEU BIT conflicts with EU law.[319]

230. The Tribunal's analysis proceeds in three steps.

231. The first step is to determine whether EU law is relevant at all, given that the UK ceased being an EU Member State after this arbitration was commenced and the so-called implementation period for EU law in the UK expired on 31 December 2020. Both parties appear to have approached this issue on the basis that the critical date for the assessment of jurisdiction and admissibility is when proceedings were commenced.[320] That date here is the 1st of May 2019, when the UK was an EU Member State. At that time, Regulation 1219/2012 applied fully.

232. Sweden was in 2019, and remains now, an EU Member State. Insofar as EU law is being pleaded as part of Swedish law, the position remains as it was at the time proceedings were commenced.

233. The second step is to determine in what specific respects EU law, as part of Swedish law, may have a bearing on the Tribunal's jurisdiction. There are two possible respects, namely validity of the arbitration agreement and subject-matter arbitrability.

234. Starting with validity, if the parties' arbitration agreement is governed by Swedish law, its validity would fall to be assessed by reference to Swedish law. In that regard the parties appear to agree that an arbitration agreement between an investor and a State under a bilateral investment treaty is formed by the claimant investor's consent to arbitration (typically in the request for arbitration) and the respondent State's advance consent contained in the relevant treaty provision.[321] Here, the relevant provisions are Article 8 of the Treaty (on the Respondent's case

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318 Claimant's Response, ¶ 118.

319 Claimant's Response, ¶¶ 144-165.

320 *See* Respondent's Objections, ¶ 228; Claimant's Response, ¶¶ 118, 120.

321 *Cf* Respondent's Objections, ¶¶ 56, 131 *and* Claimant's Response, ¶¶ 96, 126.

that this is the only provision of which the Claimant may avail himself) and Article 10 of the Georgia-BLEU BIT (on the Claimant's case based on Article 3 of the Treaty).

235. The Treaty is of course an agreement between two States, governed by international law, not domestic law. An arbitration agreement formed on the basis of advance consent given in the Treaty is, however, a separate agreement between a national of one Contracting Party and the other Contracting Party. It is therefore possible—though by no means necessary—that it may be governed by a different law. While Article 8 of the Treaty is silent in that regard, section 48 of the Swedish Arbitration Act 2019 (titled "International Matters") provides as follows:

> If an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. If the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country where, in accordance with the parties' agreement, the arbitration had its seat.[322]

236. The Tribunal regards the principle of autonomy in the choice of law, enshrined in section 48, as a general principle of international law. That principle would therefore apply as a matter of international law, as it applies under Swedish law.

237. The parties have not expressly agreed upon the law governing their arbitration agreement. It is possible to argue (as does the Claimant[323]) that they have impliedly agreed upon international law or (as does the Respondent[324]) upon Swedish law. It is also possible to argue that Swedish law applies by virtue of the fact that Sweden is the seat of the arbitration.[325] This is a delicate question, but ultimately one that need not be answered. Even if the arbitration agreement is to be regarded as governed by international law, as the Claimant argues, it is common ground that Swedish law governs subject-matter arbitrability, *ie* the

322 Swedish Arbitration Act, as amended on 1 March 2019, **Exhibit CL-35**, Section 48.

323 *See* Claimant's Response, ¶ 126.

324 *See* Respondent's Objections, ¶ 205.

325 The parties proposed different seats. Sweden was fixed as the seat by decision of the SCC Board pursuant to Article 25(1) of the SCC Rules. *See above*, ¶¶ 13-16.

question whether the subject-matter of the dispute is capable of being resolved by arbitration.

238. Arbitrability is indeed the second respect to which Swedish law may have a bearing on the Tribunal's jurisdiction. Section 33(1) of the Swedish Arbitration Act 2019 provides:

> An award is invalid:
>
> 1. if it includes determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators; . . .
>
> The invalidity may apply to a certain part of the award.[326]

239. The Claimant rightly agrees that subject-matter arbitrability is governed by Swedish law[327] and that Swedish law incorporates EU law.[328] The latter point is indeed not open to doubt: as the Svea Court of Appeal has held, "EU law forms part of the Swedish legal system."[329] And as a recent award illustrates, the EU law rules for which the Respondent contends may lead to dismissal of jurisdiction for lack of subject-matter arbitrability.[330]

240. The third step of the Tribunal's analysis is to consider whether the resolution by arbitration of a claim under an investment treaty between an EU Member State (the UK or Belgium/Luxembourg) and a third State (Georgia) is contrary to EU law. It is helpful to start with EU Regulation 1219/2012. As its full title indicates, the Regulation "establish[es] transitional arrangements for bilateral investment agreements between Member States and third countries". The transitional arrangements consist in maintaining in force such agreements. As recorded in its recitals, the Regulation was adopted following the EU's gaining exclusive

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326 Swedish Arbitration Act, as amended on 1 March 2019, **Exhibit CL-35**, Section 33.

327 *See* Claimant's Response, ¶ 125; Claimant's Closing Outline, ¶¶ 46 and 54.

328 Claimant's Rejoinder, ¶ 99.

329 *Republic of Poland v PL Holdings Sarl*, Case Nos T 8538-17 and T 12033-17, Judgment by the Svea Court of Appeal, 22 February 2019, **Exhibit RL-6**, p 36.

330 *See Green Power Partners K/S SCE and SCE Solar Don Benito APS v the Kingdom of Spain*, SCC Arbitration V 2016/135, Award, 16 June 2022, ¶¶ 477-478, 493.

competence over Member States' foreign direct investment.[331] The recitals also specifically refer to "dispute settlement" as an aspect of bilateral investment agreements necessary to "maintain in force."[332]

241. The key provisions of the Regulation for present purposes are Articles 2 and 3. They read as follows:[333]

Article 2

Notification to the Commission

> By 8 February 2013 or within 30 days of the date of their accession to the Union, the Member States shall notify the Commission of all bilateral investment agreements with third countries signed before 1 December 2009 or before the date of their accession, whichever is later, that they either wish to maintain in force or permit to enter into force under this Chapter. The notification shall include a copy of those bilateral investment agreements. Member States shall also notify the Commission of any subsequent changes to the status of those agreements.

Article 3

Maintenance in force

> Without prejudice to other obligations of the Member States under Union law, bilateral investment agreements notified pursuant to Article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the [Treaty on the Function of the European Union (***TFEU***)] and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force.

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331 Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012, **Exhibit CL-151**, Recital 1. Claimant's Response, ¶ 138.

332 Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012, **Exhibit CL-151**, Recital 16.

333 Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012, **Exhibit CL-151**, Articles 2 and 3. *See also* Claimant's Response, ¶ 139.

242. It is common ground that both the Treaty and the Georgia-BLEU BIT have been notified to the Commission pursuant to Article 2.[334] The effect of this notification is that these two treaties are maintained in force, in accordance with Article 3. There is no basis for excepting the provisions relating to investor-State arbitration from the maintenance in force under Article 3. Indeed, the opposite is true: as noted above, Recital 16 of the Regulation expressly refers to "dispute settlement".

243. As the Tribunal understands it, the Respondent contends that, notwithstanding Article 3 of Regulation 1219/2012, superior principles of EU law nevertheless compel the conclusion that effect cannot be given to the provisions regarding investor-State arbitration in treaties that have been maintained in force. These are the principle of mutual trust between Member States (Article 2 of the TEU[335]) and the principle of autonomy of the EU legal order with the CJEU as the ultimate judicial authority (Articles 267 and 344 of the TFEU[336]).

244. The Tribunal is unable to accept the Respondent's contention, for two separate but interrelated reasons. The first is that doing so would amount to casting doubt (to put it at its lowest) on the validity of Article 3 of Regulation 1219/2012, while EU Regulations may only be challenged in the CJEU[337] and Regulation 1219/2012 has not been challenged let alone invalidated. The second is that the Tribunal sees no basis in *Opinion 1/17* or *Achmea* on which to cast doubt on Article 3 of the Regulation.

245. *Achmea* concerned the investor-State dispute-settlement provisions in a BIT between two EU Member States, the Netherlands and Slovakia. The CJEU held that arbitration of such disputes was incompatible with EU law, on grounds that this was contrary to the EU law principles of mutual trust and sincere cooperation

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334 *See* List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union (C 131/2), 8 May 2013, **Exhibit CL-150**.

335 Treaty on European Union (signed 7 February 1992; amended 13 December 2007; entered into force on 1 December 2009) (***TEU***), 2012 OJ C 326/13, 26 October 2012, Article 2. *See also Slovak Republic v Achmea*, CJEU Case C-284/16, Judgment, 6 March 2018, **Exhibit RL-19**, ¶ 34.

336 Treaty on the Functioning of the European Union (signed 25 March 1957; amended 13 December 2007; entered into force on 1 December 2009) (***TFEU***), 2016 OJ C 202/47, 7 June 2016, **Exhibit RL-13**, Articles 267, 344.

337 *See* TFEU, 2016 OJ C 202/47, 7 June 2016, **Exhibit RL-13**, Article 263(1).

and thus had an adverse effect on the autonomy of EU law.[338] By contrast, *Opinion 1/17* concerned an agreement between the EU and a third State, the Comprehensive Economic and Trade Agreement between Canada and the European Union (***CETA***).[339] The CJEU's Opinion answered a request by Belgium inquiring about the compatibility with EU law of the CETA dispute-settlement provisions.

246. The CJEU recalled first that "an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law."[340] However, in respect of international agreements entered into by EU Member States, the CJEU opined that–

> a process of submitting to judicial adjudication the resolution of disputes between investors and States . . . may be compatible with EU law only if it has no adverse effect on the autonomy of the EU legal order.[341]

The CJEU further advised that an investor-State arbitral tribunal under CETA "cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework."[342] The Court ultimately concluded that these requirements were met in the case of CETA.[343]

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338 *Slovak Republic v Achmea*, CJEU Case C-284/16, Judgment, 6 March 2018, **Exhibit RL-19**, ¶¶ 58-59.

339 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶ 1.

340 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶ 106.

341 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶ 108.

342 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶ 118. *See also* Respondent's Objections to Jurisdiction and Admissibility, 17 July 2020, ¶ 221.

343 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶ 126.

247. Also of direct relevance here is how the CJEU distinguished an EU agreement with a third State (as CETA) from an agreement between two EU Member States (as the Netherlands-Slovakia BIT in *Achmea*):

> The question of the compatibility, with EU law, of the creation or preservation of an investment tribunal by means of such an agreement [between EU Member States] must be distinguished from the question of the compatibility, with EU law, of the creation of such a tribunal by means of an agreement between the Union and a non-Member State.
>
> The Member States are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust. That principle obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights, such as the right to an effective remedy before an independent tribunal laid down in Article 47 of the Charter.
>
> However, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, *is not applicable in relations between the Union and a non-Member State*.[344]

248. A subsequent decision of the CJEU, *Komstroy* (formerly *Energoalians*) *v Moldova*, also confirms that the principle of autonomy of the EU legal order enunciated in *Achmea* is applicable in relations between EU Member States, rather than with third States.[345]

249. The Tribunal is also unaware of any dictum in *Achmea*, *Opinion 1/17*, or *Komstroy* suggesting that the investor-State dispute-resolution provisions in bilateral investment agreements are not to be maintained in force under Article 3 of Regulation 1219/2012.

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344 *Opinion 1/17 (EU-Canada CET Agreement)*, Court of Justice of the European Union, EU:C:2019:341, 30 April 2019, **Exhibit RL-20**, ¶¶ 127-129 (emphasis added) (internal citations omitted).

345 *See Komstroy LLC v Republic of Moldova*, CJEU Case C-741/19, 2 September 2021, ¶¶ 42-45, 63, 66. The CJEU's judgment was handed down after pleadings had closed. Neither party has sought an opportunity to submit observations on it. The Tribunal refers to it for completeness.

250. To conclude on the Tribunal's third step: Regulation 1219/2012 is dispositive of the continuing effect of Article 8 of the Treaty and Article 10 of the Georgia-BLEU BIT. Even if it were not, the Tribunal is satisfied that resolution of a claim under the Treaty need not involve interpreting or applying EU law. The Tribunal is aware that the Respondent contends the contrary, but the Tribunal can see no basis for this assertion, either on the Claimant's pleaded case regarding the Respondent's alleged Treaty breaches (summarized in Section III) or as a matter of principle.

251. The Tribunal accordingly concludes that there is no contrariety between EU law and either Article 8 of the Treaty or Article 10 of the Georgia-BLEU BIT, and accordingly rejects the Respondent's third preliminary objection.

D. WHETHER THE CLAIMANT HAS SATISFIED PRE-ARBITRATION REQUIREMENTS

252. The Respondent's fourth preliminary objection concerns various notification requirements which are to be met before launching arbitration proceedings under the Treaty and the Georgia-BLEU BIT. The objection concerns in the main the Claimant's claim that Georgia failed to investigate the 2004 events. This claim, says the Respondent, cannot be heard by the Tribunal, as the Claimant failed to give notice of it in the manner required by the Treaty and the Georgia-BLEU BIT.[346]

253. In respect of the Treaty, the Respondent contends that the Claimant's Notice of Dispute of 13 December 2018 does not satisfy the requirements of Article 8(4) on grounds that it does not–

> cover alleged breaches of the Georgia–UK BIT concerning the 2004 investigation into the Omega Group's overdue tax liability, and does not include several allegations advanced in the Claimant's Request for Arbitration which appear to have been abandoned in his Statement of Claim, including those pertaining to the enforcement of tax arrears, the cancellation of a patent and the "*lawfulness under the*

346 Respondent's Objections, ¶¶ 273-274.

Treaty of that element of the tax liability that is made up of fines and penalties for late payment".[347]

As for the Georgia-BLEU BIT, the Respondent says that the Claimant failed to satisfy both the requirement under Article 10(1) to accompany a notice of dispute with a "sufficiently detailed memorandum" and the requirement under Article 10(2) of a six-month waiting period following the filing of a memorandum regarding the dispute.[348]

254. The Claimant retorts that Article 8(4) of the Treaty provides that arbitration may be commenced if, following the emergence of a dispute, "agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise."[349] In the Claimant's submission, Article 8(4) consists of two elements—the notification of the dispute through the "pursuit of local remedies or otherwise", and a three-month waiting period—both of which the Claimant contends have been satisfied.[350] In particular, the Claimant says that, to the extent that any claims were not mentioned in his Notice of Dispute, these were notified through the local remedies the Claimant has pursued since 2018,[351] notably written requests that Georgia's Chief Prosecutor launch criminal investigations into the events of 2004, and a claim filed at the Tbilisi City Court also relating to an alleged failure to investigate those events.[352] The parties thus had, the Claimant says, an opportunity to reach consensual closure in respect of all of the Claimant's claims.[353]

255. As for the Georgia-BLEU BIT, the Claimant rejects the notion that the requirements of Articles 10(1)-(2) must be satisfied when Article 10(3) is invoked

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347 Respondent's Objections, ¶ 273.

348 Respondent's Objections, ¶ 277.

349 Claimant's Response, ¶ 169.

350 Claimant's Response, ¶ 169.

351 Claimant's Response, ¶ 173.

352 *See* Letter from Omega Group Companies to Minister of Justice and Chief Prosecutor's Office, 7 November 2018, **Exhibit C-69**; Letter from Omega Group Companies to Chief Prosecutor's Office dated 17 December 2018, **Exhibit C-70**; Collective Application of OGT, Omega 2, Omega Motors and Ilioni to Chief Prosecutor, 25 December 2018, **Exhibit C-228**; Complaint of OGT, Omega 2, Ilioni and Omega Motors to Tbilisi City Court, 17 January 2019, **Exhibit C-71**; Claim to Prosecutor General [redacted], 7 February 2019, **Exhibit C-272**; Complaint of OGT, Omega 2, Ilioni and Omega Motors to Tbilisi City Court, 22 February 2019, **Exhibit C-274**. *See also below*, ¶ 262.

353 Claimant's Response, ¶ 173.

by way of most-favoured-nation treatment.[354] Nevertheless, if these requirements may be said to apply, the Claimant submits that he has substantially complied with them.[355]

256. The Tribunal makes two observations at the outset.

257. First, it agrees with the parties that the Respondent's objection is in the nature of an objection to the admissibility of the Claimant's claims.[356] Unlike the Respondent's other objections, this does not contest the Claimant's entitlement to resort to arbitration under the SCC Rules but rather that the Tribunal has been properly seised of the claims articulated in the Claimant's RfA and SoC. This is therefore not an objection to the Tribunal's jurisdiction within the meaning of section 2 of the Swedish Arbitration Act 2019.

258. Secondly, to the extent that the Respondent's objection concerns claims or allegations which were made in the RfA but dropped in the SoC, the Tribunal is unable to see how the Claimant's conduct can give rise to an objection for lack of pre-arbitration notice. Such an objection may only concern claims or allegations of which a party failed to give notice to the respondent State and thus the State had no opportunity to resolve them consensually without needing to defend against them in arbitration proceedings. Such an objection may not concern claims or allegations which (whether notified or not) have been dropped and to which the State will not have to answer. The Tribunal will therefore focus on the Respondent's objection so far as it concerns notification of the Claimant's claim that Georgia failed to investigate the 2004 events.

259. The Respondent's objection has two limbs, respectively under the Treaty and the Georgia-BLEU BIT, and the Tribunal will address them in turn.

260. To recall, Article 8(4) of the Treaty provides as follows in material part:

> If any [legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the

354 Claimant's Response, ¶¶ 176, 177.

355 Claimant's Response, ¶ 178.

356 *See* Respondent's Objections, ¶¶ 274, 278; Claimant's Response, ¶ 166.

> latter in the territory of the former] should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. . . .

261. The text is plainly and broadly worded. Its requirements are not particularly exigent in form or substance. An opportunity must be given to reach agreement on the resolution of a dispute that has arisen; for that purpose the host State must receive notice of the dispute either "through pursuit of local remedies" or in some other way ("otherwise"), such as a notice of dispute; and the State must have at least three months to react and, if it wishes, seek to reach agreement before the complaining investor ("national or company affected") may commence conciliation or arbitration proceedings. If the three-month window is not seised upon to reach agreement, then the requirement amounts to a simple waiting period.

262. It is true, indeed conceded by the Claimant, that the December 2018 Notice of Dispute does not mention the claim for failure to investigate the 2004 events.[357] It is also true, however, that the directors of the Omega Group companies wrote to the Respondent's Minister of Justice and Chief Prosecutor, and requested that they "use their best endeavors to immediately bring charges against those former officials who in 2004 committed illegal actions against OGT LLC, Omega-2 LLC and Omega Motors LLC in order to enable us to proceed to getting remedies for damages caused to us."[358] This was in November 2018, some five months before the Claimant filed his RfA on 1 May 2019.[359] A December 2018 letter from the Office of the Chief Prosecutor to the Omega Group directors states plainly that

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357 *See* Notice of Dispute, 13 December 2018, **Exhibit C-53**, pp 1-3.

358 *See* Letter from Omega Group Companies to Minister of Justice and Chief Prosecutor's Office, 7 November 2018, **Exhibit C-69**, pp 1-2.

359 *See* Letter from Omega Group Companies to Minister of Justice and Chief Prosecutor's Office, 7 November 2018, **Exhibit C-69**; Letter from Omega Group Companies to Chief Prosecutor's Office dated 17 December 2018, **Exhibit C-70**; Collective Application of OGT, Omega 2, Omega Motors and Ilioni to Chief Prosecutor, 25 December 2018, **Exhibit C-228**; Complaint of OGT, Omega 2, Ilioni and Omega Motors to Tbilisi City Court, 17 January 2019, **Exhibit C-71**; Claim to Prosecutor General [redacted], 7 February 2019, **Exhibit C-272**; Complaint of OGT, Omega 2, Ilioni and Omega Motors to Tbilisi City Court, 22 February 2019, **Exhibit C-274**.

Office's understanding that the request sought "the commencement of a criminal prosecution against those officials of the former government, who ordered the raiding of Omega Group's offices and warehouses by special units in 2004 that eventually resulted in paralyzing the activities of the companies, misappropriation, and significant damage."[360]

263. Whether the Claimant's démarches amount to a "local remedy" under Georgian law (as a judicial or administrative procedure would) is immaterial, given the very broad terms "or otherwise" in Article 8(4). What is material is that the Respondent was in fact made aware of this particular dispute and had an opportunity to come to an agreement with the Claimant or the Omega Group more than three months before the commencement of this arbitration. Accordingly, the Tribunal concludes that the Claimant has satisfied the requirement of Article 8(4) of the Treaty in respect of this particular dispute.

264. Turning now to Article 10(1)-(2) of the Georgia-BLEU BIT, these provisions read as follows:[361]

> 1. Any investment dispute between an investor of one Contracting Party and the other Contracting Party shall be notified in writing by the first party to take action. The notification shall be accompanied by a sufficiently detailed memorandum.
>
> As far as possible, such dispute shall be settled amicably between the parties to the dispute or otherwise by conciliation between the Contracting Parties through diplomatic channels.
>
> 2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the receipt of the notification, the dispute shall be submitted to international arbitration, any other legal remedy being excluded.

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360 Letter of Office of Main Prosecutor to OGT, Omega 2, Omega Motors, 10 December 2018, **Exhibit C-227**, pp 1-2. *See also* Letter of Office of General Prosecutor to OGT, Omega 2, Ilioni and Omega Motors, 9 January 2019, **Exhibit C-57**; Letter (13/10371) from the General Prosecutor's Office to OGT, 13 February 2019, **Exhibit C-273**.

361 Georgia-BLEU BIT, **Exhibit C-3**, Article 10(1) and (2).

> To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration. Such consent implies that both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted.

265. It is a finely balanced point whether the pre-arbitration requirements set out in a BIT are part and parcel of the investor's entitlement to select a forum available under that BIT, such that an investor cannot avail itself of the latter by way of most-favour-nation treatment without complying with the former.[362] The Claimant characterizes the pre-arbitration requirements in Article 10(1)-(2) of the Georgia-BLEU BIT as more burdensome compared to Article 8(4)—that is to say, less-favourable treatment compared to the Treaty—which accordingly does not come within Article 3(2) of the Treaty.[363] The Respondent, for its part, argues that the pre-arbitration requirements set out in Article 10(1)-(2) are inseparable from one's entitlement to resort to one of the arbitral fora made available in Article 10(3).[364]

266. Whether one characterizes pre-arbitration requirements as going to jurisdiction or admissibility, a point on which prior tribunals have taken contrasting views,[365] there is considerable force in the Respondent's position. Ultimately, however, the Tribunal need not pronounce on the issue. Assuming (without deciding) that the Respondent is right, the Claimant's claim regarding a failure to investigate the 2004 events cannot be dismissed on grounds of insufficiency of notice. The central purpose of the process set out in Articles 10(1)-(2) is for the host State to have sufficient information regarding a dispute to allow it "to take action", and to have at least six months to reach consensual settlement of the dispute. In the present case, this purpose has been met:

– Georgia received information in writing about the dispute, in part through the Notice of Dispute and in part through the Claimant's démarches

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362 *Cf Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, **Exhibit CL-135**, ¶¶ 95 to 108; *and Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011, **Exhibit CL-37**, ¶ 12

363 Claimant's Response, ¶¶ 166-180.

364 Respondent's Objections, ¶¶ 275-278.

365 *See* International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, 29 May 2015, **Exhibit CL-183**, ¶¶ 104-114.

starting in November 2018. These documents contain enough information to be regarded as "sufficiently detailed memorand[a]" for the purposes of Article 10(1).

– While it is true that the Claimant commenced proceedings less than six months after the November-December 2018 memoranda, the procedural record (recounted in Section II above) also shows that Georgia had every intention of firmly contesting each aspect of the Claimant's claims, starting with jurisdiction. As other tribunals have held in similar circumstances, the Tribunal is unwilling to hold the Claimant to the full extent of a settlement period which would have been futile—*ie* a period in which the Respondent State would not have "take[n] action" to resolve the dispute consensually.[366] Swedish law is to the same effect.[367]

267. Accordingly, the Tribunal rejects the Respondent's fourth preliminary objection.

E. WHETHER THE CLAIM IS AN ABUSE OF RIGHT OR PROCESS

268. In the context of its objection to the Tribunal's jurisdiction *ratione personæ*, the Respondent contends that the Claimant's claim constitutes an "abuse of rights" or "abuse of process".[368] The Tribunal proposes to address this contention separately because, as pleaded, it is predicated on the Tribunal's dismissing the Respondent's objection to *ratione personæ* jurisdiction.

269. The Respondent argues as follows:

> Even if the Claimant would otherwise be covered by the Georgia–UK BIT (which is denied), he falls outside the personal scope of the Treaty insofar as his claims pertain to investments which were made prior to his acquisition of UK nationality. The Tribunal has

366 *See, eg*, *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, **Exhibit CL-101**, ¶¶ 343-345; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exhibit CL-108**, ¶ 102; *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003, **Exhibit CL-106**, ¶ 184; *Ronald S. Lauder v Czech Republic*, Ad Hoc Arbitration, Award, 3 September 2001, **Exhibit CL-105**, ¶ 190.

367 *See* Court of Appeal of Svea, Judgment of 9 December 2016, *Kazakhstan v Ascom Group SA and ors* (Case T 2675-14), section 5.3.2, pp 52-53 (available on the SCC website).

368 Respondent's Objections, ¶¶ 105, 113-118; Respondent's Reply, ¶¶ 172-178.

> no jurisdiction over domestic disputes, and the Claimant's attempt to internationalise his dispute with the Respondent constitutes an abuse of right. Given that the investments at issue in the present dispute were established and grown when the Claimant was exclusively a Georgian national, the Claimant must properly be categorised as a domestic investor who is not entitled to invoke the protections afforded by the Treaty.[369]

270. The Claimant rejects the Respondent's allegations, contending primarily that the Respondent has failed to "give[] legal content to this argument of rhetoric."[370] In particular:

> [The Respondent] never states what right exists, how it has been abused, what the legal standard for abuse of rights is, or what legal consequence it has. Absent an actual argument on the point, there remains nothing for the Claimant to answer.[371]

271. The Tribunal understands the Respondent's argument to be that in seeking Treaty protections as a British national in respect of investments he made in Georgia as a Georgian national, the Claimant is deploying the Treaty in a manner contrary to its object and purpose. In that regard, the Respondent draws attention to the Treaty's preamble, which memorializes the Contracting Parties' "[d]esir[e] to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State."[372]

272. The Tribunal accepts that the notion of abuse of right is a generally accepted principle of general international law, both in its substantive aspect and in its procedural/jurisdictional aspect (abuse of process).[373] The Tribunal further accepts that abuse, if made out on the facts, would compel it to decline to accept

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369 Respondent's Objections, ¶ 105. *See also* Respondent's Reply, ¶ 172.

370 Claimant's Rejoinder, ¶ 55.

371 Claimant's Rejoinder, ¶ 55.

372 Treaty, **Exhibit C-1**, Preamble. *See also* Respondent's Objections, ¶ 74.

373 Its existence is well-documented in the Respondent's pleadings. *See* Respondent's Objections, ¶¶ 114-117. *See also Mobil Corporation, Venezuela Holdings, BV et al v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010, **Exhibit RL-63**, ¶ 169; *Philip Morris Asia Limited v the Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, **Exhibit RL-77**, ¶ 554; *Transglobal Green Energy, LLC and Transglobal Green Panama, SA v Republic of Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016, **Exhibit RL-81**, ¶ 103. .

or to exercise jurisdiction. That would require establishing that the Claimant's invocation of the Treaty does violence to its object and purpose in a manner that is manifest, both on the evidence and in the degree.

273. The preambular recitals of an international treaty, being part of the treaty's context, are to be taken into account in interpreting its provisions.[374] And the Tribunal has no difficulty in accepting that such recitals are also to be taken into account in identifying a treaty's object and purpose, again for the purpose of interpreting its provisions. In either case, the objective is to interpret the treaty's operative provisions rather than to divine rights and obligations without a foothold in these provisions.

274. The Respondent invites the Tribunal to accept that the Treaty as a whole, including its gateway provisions regarding the nationality of protected investors in Article 1(c), was not meant to apply to investments initially made by host-State nationals who later come to acquire the nationality of the other Contracting Party. Such a limitation to the scope of the Treaty is on any possible view significant. The Respondent does not suggest that it is a limitation under general international law and that the Treaty must be interpreted in that light. Rather, the Respondent suggests that it is a limitation which flows from the Treaty's specific object and purpose. The Respondent therefore accepts that it was for Georgia and the UK to decide whether or not to import such a limitation into the Treaty.

275. The limitation for which the Respondent contends is one that might have been written into it by appropriate express wording referring (for example) to investments "made" by qualifying investors. Such formulations may be found in investment-treaty practice.[375] But as the Claimant rightly points out, the present Treaty does not "define 'nationals' [or] 'investment' by reference to the 'making' of an investment or by reference to the latter being an 'investment of' a claimant."[376] Given the plain, unqualified formulation of the express provisions of the Treaty regarding its scope of application—namely Article 1(a)

374 *See* VCLT, **Exhibit CL-131**, Article 31(1)-(2).

375 *Cf Westmoreland Mining Holdings LLC v Government of Canada*, ICSID Case No UNCT/20/3, Final Award, 31 January 2022, ¶ 114.

376 Claimant's Response, ¶ 65.

("investment"), 1(c) ("nationals"), and 1(d) ("companies")—the Tribunal is unable to agree with the Respondent that its proposed limitation may be derived from a single, boilerplate preambular recital which refers to "creat[ing] favourable conditions for greater investment by nationals . . . of one State in the territory of the other State".[377] The Treaty's relevant provisions do not indicate that it is confined to protecting investments made from the outset by nationals or companies of the other Contracting Party.

276. Furthermore, the Treaty expressly provides that "the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement".[378] This strongly indicates the Contracting Parties' intention to cover investments that were not made on the strength of its protections.

277. The Respondent also points to Article 8(1), which refers to "legal dispute[s] arising between [a] Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former".[379] On this footing, the Respondent contends that the Treaty "make[s] clear that it is intended to cover investments made by a national of one of the Contracting Parties in the territory of the other, thereby drawing a direct parallel to the jurisdictional requirements of the [Energy Charter Treaty]."[380] The Respondent envisages Article 26(1) of the ECT, which in material part refers to "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former". The Respondent then goes on to rely upon the *Uzan v Turkey* case, which applied Article 26(1) of the ECT.[381]

278. The Tribunal considers that the *Uzan* tribunal's reading of Article 26(1) of the ECT does not assist the Respondent's case. In *Uzan*, it was held that the claimant's nationality or permanent residence at the time the investment was made is one of

377 *See* Treaty, **Exhibit C-1**, Preamble.
378 Treaty, **Exhibit C-1**, Article 1(a).
379 Treaty, **Exhibit C-1**, 8(1).
380 Respondent's Reply, ¶ 177.
381 Respondent's Objections, ¶¶ 109-112; Respondent's Reply, ¶¶ 176-178.

several factors—not the only factor—relevant to jurisdiction *ratione personæ*.[382] Considerably more emphasis was placed on the claimant's Turkish nationality and permanent residence at the time of the alleged breach; and it was on that basis that the tribunal concluded that the claimant did not qualify as an "Investor of another Contracting Party" under the ECT.[383] And while the tribunal did reject the claim on this jurisdictional ground, it also rejected the respondent's contention that in relying upon Article 26(1) of the ECT the claimant had "committed an abuse of process in bringing his claims before this Tribunal". It noted that "[t]he questions presented before the Tribunal involved complex and often conflated issues of international and domestic law" and that "the resolution of these issues sheds much needed light on previously unresolved or unanswered questions of law."[384]

279. In contrast to the facts in *Uzan*, the Claimant here has formulated a claim which alleges a breach that is said to have crystallized after he acquired British nationality in 2011, culminating in an alleged expropriation in mid-2018.[385] It is of course an unusual feature of this case that the underlying investment and a number of significant events (outlined in Section III.C.1 above) occurred by 2004, well before the Claimant's naturalization in 2011. But the Claimant's pleaded case does not invoke those earlier events as Treaty breaches, and—whatever the ultimate merits of that pleaded case may be—the Tribunal has been given no reason not to rely upon the Claimant's case as pleaded for the purpose of determining whether to exercise jurisdiction.

280. This brings the Tribunal to consider a separate but related argument under the rubric of abuse of rights. The Respondent contends that the Claimant "could foresee" "confrontations" with the Respondent when he acquired British nationality, this being conduct broadly similar to "chang[ing] nationality in order to secure jurisdiction under a BIT."[386]

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382 *Cem Cenzing Uzan v the Republic of Turkey*, SCC Arbitration V 2014/023, Award on Respondent's Bifurcated Preliminary Objection dated 20 April 2016, **Exhibit RL-80**, ¶ 172.

383 *Cem Cenzing Uzan v the Republic of Turkey*, SCC Arbitration V 2014/023, Award on Respondent's Bifurcated Preliminary Objection dated 20 April 2016, **Exhibit RL-80**, ¶ 172.

384 *Cem Cenzing Uzan v the Republic of Turkey*, SCC Arbitration V 2014/023, Award on Respondent's Bifurcated Preliminary Objection dated 20 April 2016, **Exhibit RL-80**, ¶ 203.

385 *See* Claimant's Opening Outline, ¶ 54; Claimant's Closing Outline, ¶ 7.

386 Respondent's Objections, ¶¶ 115, 124.

281. On the facts of this case, the Tribunal is unable to see BIT-shopping of the type castigated in cases such as *Phoenix Action v Czech Republic*[387] and *Philip Morris v Australia*.[388] On the Claimant's pleaded case, the alleged Treaty breaches had not arisen, let alone crystallized, before he became a UK national (unlike in *Phoenix*). Nor does the Tribunal have evidence establishing that the events which occurred from 2015 onwards were foreseen by the Claimant in a calculated decision to be naturalized as a British citizen (unlike in *Philip Morris*). The Claimant's approach to British nationality was, in the Tribunal's assessment, more straightforward and broader in its import. The Claimant left Georgia in the wake of the 2004 events and resolved to base himself in the UK and go through the lengthy process of becoming a British citizen. One may reasonably assume that in so doing, the Claimant expected to be able to approach Georgia's authorities as a British citizen if he succeeded in being naturalized; and also, in the ordinary course of Georgian law, eschew all rights pertaining to Georgian citizens. The Tribunal can see nothing per se improper in these decisions of the Claimant, concerning as they do fundamental life choices by an individual who perceives (rightly or wrongly) to be persecuted in his country of birth. Nor does the Tribunal see anything improper or unusual in the fact that the Claimant retained business interests in Georgia.

282. In short, the circumstances in which the Claimant elected to reside in the UK and sought to be naturalized as a British citizen indicate no impropriety or a desire to serve the instrumental purpose of mounting a Treaty claim. Therefore, it is either the case that the Treaty permits the Claimant to invoke its protections or that it does not. The Tribunal has concluded that the Treaty provisions do permit the Claimant to invoke its protections.

283. The Tribunal reiterates that it has not lost sight of the unusual feature of the case that both the initial investments and significant events pre-date 2011 and were at that time purely domestic, Georgian affairs. The Claimant's pleaded case, however, is that, notwithstanding this, Georgia's post-2011 actions and omissions

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387 *Phoenix Action, Ltd v the Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, ¶ 144.

388 *Philip Morris Asia Limited v the Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, **Exhibit RL-77**, ¶ 554.

of themselves suffice to establish Treaty breaches. These are matters to be debated and determined in the merits phase of the case.

VI. COSTS

284. Section 37 of the Swedish Arbitration Act 1999 (as amended on 1 March 2019) provides as follows:

> The parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. However, if the arbitrators have stated in the award that they lack jurisdiction to determine the dispute, the party that did not request arbitration shall be liable to make payment only insofar as required due to special circumstances.
>
> In a final award, the arbitrators may order the parties to pay compensation to them, together with interest from the date occurring one month following the date of the announcement of the award. The compensation shall be stated separately for each arbitrator.

285. Article 49 of the SCC Rules similarly provides that "[t]he parties are jointly and severally liable to the arbitrator(s) and to the SCC for the Costs of the Arbitration", and that–

> Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expediency of the arbitration and any other relevant circumstances.

286. Article 49 of the SCC Rules further defines the costs of the arbitration as follows:

> (1) The Costs of the Arbitration consist of:
> (i) the Fees of the Arbitral Tribunal;
> (ii) the Administrative Fee;
> (iii) the expenses of the Arbitral Tribunal and the SCC.

287. As for the parties' legal fees and expenses, Article 50 of the SCC Rules provides:

> Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and

> expeditiousness of the arbitration and any other relevant circumstances.

288. By virtue of the foregoing provisions, the Tribunal has the power, but not the duty, to assess and allocate the costs of the arbitration and the parties in an award that precedes the final award.[389] The Tribunal considers that in exercising the discretion it has in that respect, it ought to have regard to when it will be able to form a view on all the considerations that inform the allocation of costs pursuant to Article 50 of the SCC Rules. While there have been to date two clear outcomes, respectively through the Tribunal's Decision on Interim Measures and the present Partial Final Award, the Tribunal considers it appropriate to reserve its decision on costs until its determination of the Claimant's claims on the merits.

[389] *See also* ToA, ¶¶ 11, 16 and PO1, ¶¶ 33, 44, 57 (referring to the Tribunal's power to apportion costs between the parties).

VII. DECISION

289. For the reasons set forth above, the Tribunal, rejecting all contrary claims and allegations:

(i) DISMISSES the Respondent's objections to its jurisdiction and the admissibility of the Claimant's claims;

(ii) RESERVES its decision on costs; and

(iii) DIRECTS the parties to propose a schedule, if at all possible agreed, for the briefing and hearing of the issues to be decided in the Final Award.

Seat of arbitration: Stockholm, Sweden

Date: 31 August 2022

Giorgio Mandelli

Professor Rolf Knieper

Georgios Petrochilos QC