Bilaga K-1B

Littop Enterprises Limited

Bridgemont Ventures Limited

Bordo Management Limited

v.

Ukraine

SCC Arbitration V 2015/092

Final Award

Members of the Arbitral Tribunal

Professor Julian D M Lew QC, Chairperson

The Honorable L. Yves Fortier PC CC QC

Mr. Rodrigo Oreamuno

Secretary to the Arbitral Tribunal

Ms Emilie Gonin

Date of the Award: 4 February 2021

Seat of the Arbitration: Stockholm, Sweden

GLOSSARY

Answer to the Request	Answer to the Request for Arbitration
Arbitration	SCC Arbitration V2015/092
Award	The arbitral award in the Arbitration
Bakunenko Agreement	Agreement between the Minority Shareholders and Michael Bakunenko, dated 30 March 2011
Ballioti	Ballioti Enterprises Ltd, a company registered in the West Indies
bcm	Billion cubic meters
Board	Board of Directors of the SCC
Bordo	Bordo Management Limited, a company incorporated in Cyprus
Bridgemont	Bridgemont Ventures Limited, a company incorporated in Cyprus
Brotstone	Brotstone Ltd, a legal entity registered in the British Virgin Islands
Business-Invest	Business-Invest Ltd, a legal entity registered in Ukraine
CAFTA	Dominican Republic-Central America-United States Free Trade Agreement
Capital Standard	Capital Standard LLC, a company registered in Ukraine
Claimants	Bordo, Bridgemont, and Littop
cm	Cubic meters

CPHB1	Claimants' First Post-Hearing Brief
CPHB2	Claimants' Second Post-Hearing Brief
Croydon	Croydon Trading Group Ltd, a company registered in the British Virgin Islands
December 2013 NESR Resolution	NESR Resolution No 1853 of 30 December 2013
Decree No 421	Cabinet of Ministers Decree No 421, dated 25 April 2008
DniproAZOT	OJSC DniproAZOT, a company incorporated in Ukraine
DOB Letter	Letter from Respondent to Claimants dated 18 December 2015
ECT	The Energy Charter Treaty, dated 17 December 1994
Edmore	Edmore Equities Ltd, a legal entity registered in Belize
Executive Agreements	The Vanhecke Agreements, the Bakunenko Agreement and the Sutton Agreement
Firtash Agreement	Agreement between Mr Firtash and Mr Kolomoisky, dated 23 November 2006
Fresno	Fresno Capital Corp., a legal entity registered in Belize
Gleslon	Gleslon Commercial Ltd, a legal entity registered in the British Virgin Islands
GTS	Ukrainian gas transportation system
IBA Rules	The 2010 IBA Rules on the Taking of Evidence in International Arbitration

IDRC	International Dispute Resolution Centre
ILC Articles	International Law Commission Articles on State Responsibility
Institute	The Arbitration Institute of the SCC
JIA	Joint Venture Activity
July 2010 Gas Market Law	Law No 2467-VI "On Principles of the Natural Gas Market", dated 8 July 2010
July 2010 NERC Resolution	NERC Resolution No 889, dated 27 July 2010
Kolomoisky-Pinchuk-Kuchma Arrangement	The Ukrnafta Agreement and the Option Agreement
LCIA Arbitration	LCIA arbitration No 153083
List of Assets	List of assets of Mr Kolomoisky's and Mr Bogoliubov's holdings in the oil and gas businesses
Littop	Littop Enterprises Limited, a company incorporated in Cyprus
main UBOs	Main ultimate beneficial owners of Claimants, i.e. Messrs Kolomoisky and Bogoliubov
mcm	Million cubic meters
Minority Shareholders	Claimants, Ballioti and Renalda
NABU	National Anti-Corruption Bureau of Ukraine
Naftogaz	NJSC Naftogaz Ukrainy, a Ukrainian public joint stock company wholly owned by Respondent and the majority shareholder of Ukrnafta
NEPURC	National Commission Responsible for State Regulation in the Area of Energy and Utility Services

NERC	National Commission for Regulation of the Electricity Sector of Ukraine
NESR	National Commission for State Regulation in the Sphere of Energy
Option Agreement	Agreement on the Right to Exercise the Option between Mr Kolomoisky and Mr Bogoliubov and Mr Pinchuk, dated 25 January 2003
Opus	Opus 2 Magnum
Oversize Tyres	LLC "Ukrainian Plant for Oversize Tires", a legal entity located in Dnipropetrovsk, Ukraine
Palytsia Option	Option described in paragraph 4 of Mr Palytsia correction witness statement
Parties	Bordo, Bridgemont, Littop and Ukraine
PHB	Post Hearing Brief
Pinchuk Proceedings	English High Court Proceedings, Claim No 2013, Folio 354, *Victor Mikhaylovich Pinchuk v Gennadiy Borisovich Bogolyibov and Igor Valeryevich Kolomoisky*
Plan of Measures	Document received by Mr Rollins' assistant from an anonymous source on 16 February 2016
PrivatBank	One of Ukraine largest private banks
Privat Group	Group of companies in which Mr Kolomoisky and Mr Bogoliubov own a beneficial stake which is reported to encompass in addition to banking, media, energy, petrochemicals, aviation and mining interests

Protocol No 54	Protocol No 54 issued by Naftogaz's board of directors on 14 April 2006
Ravenscroft	Ravenscroft Holdings Limited, a legal entity registered in the British Virgin Islands
Realiz Oil	LLC "Rializ Oil" ", a legal entity located in Dnipropetrovsk, Ukraine
Renalda	Renalda Investments Limited, a company registered in Cyprus
Rental Fee	The rental fee for the extraction of oil
Reply	Statement of Reply on the Merits and Defence on Jurisdiction
Reply to Contested Submissions	Respondent's submission responding to those submissions that fell outside the scope of the RoJ
Request	Request for Arbitration
Resolution No 155	NERC Resolution No 155, dated 31 January 2008
Resolution No 315	NERC Resolution No 315, dated 28 February 2008
Resolution No 813	Cabinet of Ministers Resolution No 813 of 9 June 2006
Respondent	Ukraine
RoJ	Rejoinder on Jurisdiction
RoMRoJ	Rejoinder on the Merits and Reply on Jurisdiction
RPHB1	Respondent's First Post Hearing Brief
RPHB2	Respondent's Second Post Hearing Brief

SCC	Stockholm Chamber of Commerce
SCC Arbitration Rules	The 2010 Arbitration Rules of the Arbitration Institute of the SCC
Settlement Agreement	Settlement Agreement concluded between President Poroshenko, Prime Minister Yatsenyuk, Mr Kolomoisky and Mr Bogoliubov on 29 April 2015
SoC	Statement of Claim
SoD	Statement of Defence
Stakhanov Ferroalloy Plant	PJSC "Stahanovsk Ferroalloy Plant" Kadiivka, a legal entity located in Luhansk Oblast, Ukraine
Sutton Agreement	Agreement between the Minority Shareholders and Mr Alan Sutton, dated 16 May 2011
Transcript	Verbatim transcript of the evidentiary hearing of 1 to 18 April 2019
Tribunal	The arbitral tribunal in the Arbitration
UGS	Underground gas storage facilities
Ukrnafta	PSJC Ukrnafta, a company incorporated in Ukraine
Ukrnafta's Articles of Association	Ukrnafta's Articles of Association of 20 December 2005
Ukrnafta's 2011 Articles of Association	Ukrnafta's Articles of Association of 2 March 2011
Ukrnafta Agreement	Agreement on Cooperation relating to the Attainment of Operational Control over Ukrnafta OJSC between Mr Kolomoisky and Mr Bogoliubov and Mr Pinchuk, dated 25 January 2003

Ukrtransgaz	PJSC Ukrtransgaz, a company incorporated in Ukraine, which is a subsidiary of Naftogaz
Updated Reports	Claimants' updated expert reports of Dr Leitzinger, Mr Rogers and Ms Revill
Vanhecke Agreements	Agreement and a supplemental agreement between Minority Shareholders and Mr Peter Vanhecke, dated 24 February 2011 and August 2011, respectively
VCLT	Vienna Convention on the Law of Treaties, 1969
Verkhovna Rada	Ukrainian Parliament
Zero Profit Prices	Claimants refer to "Zero Profit Prices" as prices which would enable Ukrnafta to recover (1) its costs of production, (2) the amounts which it was obliged to pay to the State budget and (3) a sum sufficient to enable it to implement its capital investment programme.
1999 NERC Resolution	NERC Resolution No 337 of 18 March 1999
2001 Cabinet Decree	Cabinet Decree No 1729 of 27 December 2001
2006 Budget Law	Law No 3235-IV "On the State Budget of Ukraine for 2006", dated 20 December 2005
2007 Budget Law	Law No 489-V "On the State Budget of Ukraine for 2007", dated 19 December 2006
2008 Budget Law	Law No 107-IV "On the State Budget of Ukraine for 2008", dated 28 December 2007
2008 JIA NERC Resolutions	NERC Resolutions Nos 1534 to 1539 of 25 December 2008

2009 Budget Law	Law No. 835-VI "On the State Budget of Ukraine for 2009", dated 26 December 2008
2009 NERC Gas Pricing Procedure	Gas pricing procedure approved by NERC Resolution No 35 of 22 January 2009
2009 NERC Resolution	NERC Resolution No 35 of 22 January 2009
2010 Budget Law	Law No 2154-VI "On the State Budget of Ukraine for 2010", dated 27 April 2010
2010 Cooperation Agreement	Cooperation Agreement between Naftogaz, Ukrnafta, the Ministry of Energy and the Minority Shareholders, dated 23 December 2010
2010 Shareholders Agreement	Agreement between Natftogaz, Ukrnafta and the Minority Shareholders, dated 25 January 2010
2012 Law on Prices and Price Formation	Law No. 5007-VI "On Prices and Pricing", dated 21 June 2012
2012 NESR Gas Pricing Procedure	Gas price procedure adopted by NESR Resolution No 1177 of 13 September 2012

I. INTRODUCTION

1. This case concerns a dispute submitted to the Institute, on the basis of Article 26 ECT and Article 2 of the SCC Arbitration Rules.

II. PARTIES

2. The Claimants are Littop, Bridgemont, and Bordo. They are companies incorporated on 8 September 2005, under the laws of Cyprus. Claimants have been represented in the Arbitration by Fieldfisher, Riverbank House, 2 Swan Lane, London EC4R 3TT, United Kingdom; Messrs Joe Smouha QC (until 13 June 2017), Graham Dunning QC (from 13 June 2017), Lucas Bastin and Damien Walker of Essex Court Chambers; Mr Stephen Fietta QC of Fietta LLP (from 21 May 2018); Mr Richard Boulton QC of One Essex Court (from 31 May 2018).

3. The Respondent is Ukraine. Respondent has been represented in the Arbitration by the Ministry of Justice of Ukraine, 13, Horodeskogo str. Kyiv, 01001, Ukraine; Latham & Watkins LLP, Warburgestrasse 50, 20354 Hamburg, Germany and 99 Bishopsgate London EC2M 3XF, United Kingdom (from 11 December 2015); Messrs Bankim Thanki QC, James Duffy and Giles Robertson of Fountain Court Chambers (from 4 October 2017); Professor Guglielmo Verdirame QC of 20 Essex Street Chambers (from 4 October 2017); Ms Tatyana Slipachuk (from 4 October 2017 and until 3 October 2018) and Mr Olexander Droug of Sayenko Kharenko, Kiev, Ukraine (from 4 October 2017); and Mr Tim Otty QC of Blackstone Chambers (from 27 June 2018).

III. PROCEDURAL HISTORY

A. Initial phase

4. This section records the principal steps taken in the Arbitration. This is not intended to be, nor should be read as, a comprehensive list of every procedural step taken in the Arbitration.

5. On 30 June 2015, Claimants submitted the Request to the Institute accompanied by 18 Annexes. In the Request, Claimants proposed that the Tribunal consist of three arbitrators, that the seat of arbitration be Stockholm, and that the language of the Arbitration be English. They sought the following preliminary relief:

"33. The Claimants seek reparation for the losses they have suffered as a result of Ukraine's breaches of the ECT, consistent with Ukraine's obligations under the ECT and customary international law. At this stage, it is too early to specify the precise relief that the Claimants will seek in the arbitration. The Claimants reserve all their rights as to the form and size of relief that they will eventually seek, including but not limited to compensation for the losses they have suffered, interest on that amount, injunctive relief, declaratory relief, an order for specific performance, and/or the costs involved in obtaining relief.

34. Without prejudice to that reservation of rights or to the elaboration of the relief the Claimants may seek in this arbitration in their future written and oral pleadings, the Claimants anticipate that a form of relief they will seek is the payment of compensation for the losses they have suffered as a result of Ukraine's breaches of the ECT. Although the amount of compensation the Claimants seek will be quantified in the arbitration, the Claimants confirm that the amount is likely to exceed the highest limit currently applied by the Institute for the purposes of its calculation of its advance on costs, in accordance with Article 45 of, and Appendix III to, the Rules."

6. On 9 July 2015, the Institute informed Respondent that it was requested to submit the Answer to the Request by 6 August 2015, pursuant to Article 5 of the SCC Arbitration Rules.

7. Exchange of correspondence ensued between the Parties and the Institute on the timing of the Answer to the Request and the procedure for the appointment the Tribunal.

8. On 7 August 2015, the Institute recorded the Parties' agreement regarding the number of arbitrators on the Tribunal, the seat of arbitration and the language of the Arbitration.

9. On 14 August 2015, the Institute recorded the Parties' failure to reach an agreement as to the procedure to appoint the Tribunal and stated that the appointment would be made in accordance with the default procedure contained in Article 13 of the SCC Arbitration Rules. It directed that Claimants jointly appoint an arbitrator by 4 September 2015 and that Respondent file its Answer to the Request and appoint its arbitrator in the same submission by 25 September 2015. It indicated that it would proceed with the appointment of the Chairperson unless otherwise instructed by the Parties.

10. On 4 September 2015, Claimants jointly appointed The Honorable L. Yves Fortier PC CC QC, c/o IMK s.e.n.c.r.l./LLP, Place Alexis Nihon / Tour 2, 3500, Boulevard De Maisonneuve Ouest, Bureau 1400, Montréal, (Québec) H3Z 3C1, Canada, a national of Canada, as arbitrator. Mr Fortier signed a confirmation of acceptance, availability and independence on 10 September 2015.

11. On 25 September 2015, Respondent appointed Mr Rodrigo Oreamuno, Condominio Villa

Fontana, Apto. Uno-A. 600 oeste del Monumento a la Bandera, San Pedro de Montes de Oca, San José 1000, Costa Rica, a national of Costa Rica, as arbitrator. Mr Oreamuno signed a confirmation of acceptance, availability and independence on the same day.

12. On the same day, Respondent filed its Answer to the Request in which it sought the following relief:

> *"(a) to declare that it has no jurisdiction over Claimants' claims, or that they are inadmissible; and*
>
> *(b) to compensate Respondent, that is also a shareholder of Ukrnafta, losses caused by Ukrnafta's failure to pay out dividends resulting from Claimants' inequitable behaviour; and*
>
> *(c) to order that Claimants pay all costs, fees and expenses in connection with these arbitration proceedings, including (without limitation) the costs of the arbitrators, Respondent's costs of legal representation and all other assistance (including, but not limited to, costs on experts and consultants) and costs of any other legal or administrative proceedings arising out of or in connection with the subject matter of this dispute."*

13. Exchange of correspondence between the Parties and the Institute as to the procedure to appoint a Chairperson ensued. On 23 October 2015, the Institute wrote to the Parties noting the limited agreement between the Parties that the Institute supply a list of three names to be considered for appointment as Chairperson and proposing three names for the Parties to rank and supply brief comments about those three names by 30 October 2015.

14. On 10 November 2015, after comments from both Parties had been received, the Institute informed the Parties that the Board of the SCC had appointed Professor Julian D M Lew QC, 20 Essex Street, London WC2R 3A, a UK national, as Chairperson. Professor Lew had signed a confirmation of acceptance, availability and independence on 9 November 2015.

15. Following a preliminary case management conference, which was held by telephone on 21 January 2016 and further exchange of correspondence between the Parties and the Tribunal, the Tribunal issued Procedural Order No 1 on 5 February 2016. It recorded *inter alia* that the SCC Arbitration Rules applied to the Arbitration, that the seat of arbitration was Stockholm, Sweden, that the language of the Arbitration was English, and that the Tribunal would also be guided by the IBA Rules. It further recorded the Parties' confirmation that the Tribunal had been validly constituted and set out the procedural

timetable for the Arbitration, including different scenarios depending on whether or not bifurcation was sought and if sought, whether or not it was granted.

16. On 18 April 2016, in light of the procedural timetable for the Arbitration, the Tribunal requested from the Institute that the date for issuing the Award be postponed from 11 May 2016 to 31 March 2018. This was approved on the same day by the Institute.

B. Written phase

17. On 12 May 2016, following a request by Claimants for an extension of time to file their SoC and a related request by Respondent for an extension of time to file their SoD, the procedural timetable for the Arbitration was amended.

18. On 28 May 2016, Claimants filed their SoC[1] and its annexes together with six witness statements, four expert reports, as well as exhibits and legal authorities.

19. On 12 December 2016, after comments from both Parties had been received on the application for extension of time for the filing of the SoD by Respondent, the Tribunal issued a decision further amending the procedural timetable.

20. On 20 February 2017, Respondent filed its SoD together with one witness statement and three expert reports, as well as accompanying exhibits and legal authorities[2] and a Request for Bifurcation.

21. On 14 March 2017, after comments from both Parties had been received, the procedural timetable was further amended following an application by Claimants for an extension of time to file their Response to Respondent's Request for Bifurcation.

22. On 20 March 2017, Claimants filed their Response to Respondent's Request for Bifurcation accompanied by exhibits and legal authorities.

23. On 21 March 2017, Respondent recorded its objection to the nature and extent of Claimants' submission.

24. On 10 April 2017, the Tribunal rejected Respondent's Request for Bifurcation essentially on the basis that it considered it to be more procedurally efficient not to bifurcate the

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1 See Annex setting out supporting evidence to SoC.

2 *Ibid.* setting out supporting evidence to SoD.

case.

25. On 30 June 2017, the Tribunal issued Procedural Order No 2 in which it recorded its decision in respect of the Parties' respective requests for production of documents. On 13 July 2017, the Tribunal made further clarifications in respect of document production.

26. On 27 July 2017, the Tribunal approved the Parties' joint suggested amendments to the procedural timetable for the Arbitration.

27. On 14 August 2017, the procedural timetable for the Arbitration was further amended following the Tribunal granting Claimants' request for an extension of time for their Reply.

28. On 28 August 2017, Claimants filed their Reply and its annexes together with seven witness statements, five expert reports, as well as exhibits and legal authorities. [3]

29. On 7 September 2017, following the concerns expressed by Respondent as to its ability to comply with the deadline for the filing of its RoMRoJ, the Tribunal offered alternative hearing dates for the Parties to consider.

30. On 24 October 2017, after comments from both Parties had been received, the Tribunal decided to vacate the hearing dates and to hold a case management conference with counsel by telephone on 1 November 2017, so as to fix a new hearing date.

31. On 7 November 2017, following the case management conference of 1 November 2017, the Tribunal decided that the hearing should take place during the weeks commencing 8 and 22 October 2018 at the IDRC in London.

32. On 16 January 2018, following exchange of correspondence between the Parties and the Tribunal, the Tribunal issued an amended procedural timetable for the remainder of the written phase of the Arbitration.

33. On 16 February 2018, the Tribunal issued its decision on Respondent's document production requests dated 2 February 2018.

34. On 20 February 2018, in light of the amended procedural timetable, the Tribunal requested from the Institute that the date for issuing the Award be postponed from 31 March 2018 to 30 April 2019. On 2 March 2018 this was approved by the Institute.

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[3] *Ibid.* setting out supporting evidence to Reply.

35. On 16 April 2018, further to the request for extension granted by the Tribunal on 27 March 2018, Respondent filed its RoMRoJ[4] with accompanying exhibits and legal authorities together with as three witness statements and eight expert reports.

36. On 6 June 2018, following exchanges of correspondence between the Parties and the Tribunal on various procedural issues and on an application by Claimants to exclude new evidence and allegations in the RoMRoJ, the Tribunal decided *inter alia*: (1) that the hearing venue would remain London, as agreed between the Parties at the case management conference of 1 November 2017; (2) that the Tribunal would hear the evidence of Mr Kolomoisky and Mr Bogoliubov by video-link with appropriate arrangements to be made in this respect; and (3) to reject Claimants' application to exclude new evidence and allegations in the RoMRoJ.

37. On 20 June 2018, the Tribunal issued its decision on Claimants' document production requests of 10 May 2018.

38. On 10 July 2018, after comments from both Parties had been received, the Tribunal decided *inter alia*: (1) to grant Claimants' request for a time extension to file their RoJ; (2) to invite the Parties to consider whether they would agree to the appointment of Ms Emilie Gonin as Tribunal Secretary.

39. On 25 July 2018, the Institute advised that the Parties had consented to the appointment of Ms Gonin as Tribunal Secretary.

40. On 31 July 2018, following several exchanges of correspondence between the Parties and the Tribunal and the case management conference of 25 July 2018 during which each Party made submissions, on a number of procedural issues, the Tribunal issued Procedural Order No 3 in which *inter alia* it: (1) recorded Ms Gonin's responsibilities; (2) rejected Respondent's application to adjourn the hearing but agreed to hold the week of 26 November 2018 as failsafe, if necessary; (3) made procedural directions for the hearing (including timetable, translations, skeleton arguments, opening statements, post-hearing submissions, etc); and (4) recorded that Opus would be used instead of hard copy bundles at the hearing.

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[4] *Ibid.* setting out supporting evidence to RoMRoJ.

41. On 6 August 2018, Claimants filed their RoJ[5] and its annex accompanied by exhibits and legal authorities together with five witness statements and four expert reports.

42. On 9 September 2018, having received comments from both Parties, the Tribunal decided: (1) to adjourn the October 2018 hearing and release the week commencing on 26 November 2018, which was held in reserve; (2) to re-fix the hearing in April 2019 (weeks commencing 1 and 8 April with 15-18 April held in reserve if needed); and (3) to allow Respondent to file a submission responding to those submissions that fell outside the scope of the RoJ by no later than 5 November 2018, i.e. the Reply to Contested Submissions. The Tribunal recorded its decisions in this respect in Procedural Order No 4 dated 18 September 2018.

43. On 5 November 2018, Respondent filed its Reply to Contested Submissions together with exhibits and legal authorities as well as three witness statements and three expert reports.[6]

44. On 21 January 2019, the Parties filed an agreed *Dramatis Personae*.

45. On 26 February 2019, the Tribunal granted permission that Ms Debbie Revill give evidence in Mr Philip Haberman's stead, given his ill health.

46. On 8 March 2019, having heard submissions from both Parties during the pre-hearing telephone case management conference of 4 March 2019, the Tribunal issued Procedural Order No 5 which *inter alia*: (1) set out the provisional timetable for the hearing and the hearing times; (2) refused Claimants' application that Mr Kolomoisky give evidence by video-link from Tel Aviv and ordered that he do so from Paris or in person in London; (3) decided that the Tribunal would disregard the witness statement of Mr Bakunenko, pursuant to Article 4(7) of the IBA Rules; and (4) directed that Claimants' quantum experts may file a short document describing their areas of agreement and disagreement with the Respondent's quantum expert by 22 March 2019 and that they may update their calculations.

47. On 22 March 2019, both Parties filed their respective Skeleton Arguments.

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[5] *Ibid.* setting out supporting evidence to RoJ.

[6] *Ibid.* setting out supporting evidence to Claimants' Reply to Contested Submission.

48. On 27 March 2019, the Tribunal issued a ruling *inter alia* on the admission of further documents to the record and directed Claimants to advise the Tribunal and Respondent if there were any changes to the arrangements made for Mr Kolomoisky to give evidence by video-link from Paris.

49. On the same day, Claimants informed the Tribunal that Mr Kolomoisky was unable to give testimony from Paris but was willing to do so from Tel Aviv.

50. On 28 March 2019, Claimants made a formal application for Mr Kolomoisky to give evidence by video link from Tel Aviv. This application was opposed by Respondent.

51. Having heard from both Parties, through an oral ruling made on 1 April 2019, the first day of the hearing, the Tribunal granted Claimants' application that Mr Kolomoisky give evidence by video link from Tel Aviv.

C. Evidentiary hearing

52. The hearing took place from 1 to 18 April 2019 at the IDRC in London. In addition to the Members of the Tribunal and the Tribunal Secretary, the following persons attended the hearing:

1. On behalf of Claimants:

- Mr Graham Dunning QC, Essex Court Chambers
- Mr Richard Boulton QC, One Essex Court
- Mr Stephen Fietta QC, Fietta LLP
- Mr Damien Walker, Essex Court Chambers
- Mr Lucas Bastin, Essex Court Chambers
- Ms Naomi Hart, Essex Court Chambers
- Ms Miglena Angelova, Fietta LLP
- Mr Simon Sloane, Fieldfisher LLP
- Mr Arik Aslanyan, Fieldfisher LLP
- Mr Andrew Sanderson, Fieldfisher LLP
- Mr Mikhail Basisty, Fieldfisher LLP
- Mr Toby Redgrave, Fieldfisher LLP
- Ms Reeta Gill, Fieldfisher LLP

- Mr Joshua Fellenbaum, Fieldfisher LLP
- Mr Sergey Okoev, Fieldfisher LLP
- Ms Sonia Morton, Fieldfisher LLP
- Ms Alesia Tsiabus, Fieldfisher LLP
- Mr Oleksandr Zelenyi, Fieldfisher LLP
- Ms Mila Kovalenko, Fieldfisher LLP
- Ms Galina Rivkina, Fieldfisher LLP

2. On behalf of Respondent:

- Mr Bankim Thanki QC, Fountain Court Chambers
- Mr Tim Otty QC, Blackstone Chambers
- Professor Guglielmo Verdirame QC, 20 Essex Street Chambers
- Mr Giles Robertson, Fountain Court Chambers
- Mr Sebastian Seelmann-Eggebert, Latham & Watkins
- Mr Charles Claypoole, Latham & Watkins
- Mr Daniel Harrison, Latham & Watkins
- Mr Thomas Lane, Latham & Watkins
- Ms Olivia Featherston, Latham & Watkins
- Mr Olexander Droug, Sayenko Kharenko
- Mr Olesia Gontar, Sayenko Kharenko
- Mr Volodymyr Yaremko, Sayenko Kharenko
- Mr Ivan Lishchina, Ministry of Justice of Ukraine
- Mr Maksym Kodunov, Ministry of Justice of Ukraine
- Mr Michael Siroyezhko, Ministry of Justice of Ukraine

53. The following fact and expert witnesses were examined at the hearing:

3. Claimants' fact witnesses :

- Mr Vyacheslav Kartashov (Day 2-3 / 2-3 April 2019)
- Mr Igor Palytsia (Day 3 / 3 April 2019)
- Mr Vladimir Pustovarov (Day 3 and 5 / 3 and 5 April)

- Mr Igor Kolomoisky (Day 4 / 4 April 2019)
- Mr Mark Rollins (Day 5 / 5 April 2019)
- Mr Andriy Mas'ko (Day 5 / 5 April 2019)
- Mr Uriel Tzvi Laber (Day 6 / 8 April 2019)

4. Respondent's fact witnesses:

- Mr Andriy Kobolyev (Day 6-7 / 8-9 April 2019)
- Mr Pavlo Rizanenko (Day 7 / 9 April 2019)
- Ms Tatiana Fedorova (Day 7 / 9 April 2019)

5. Claimants' expert witnesses:

- Professor Vyacheslav Navrotsky (Day 7-8 / 9-10 April 2019)
- Mr Mikhail Ilyashev (Day 8-9 / 10-11 April 2019)
- Dr Jeffrey Leitzinger (Day 11 / 15 April 2019)
- Ms Deborah Revill (Day 11-12 / 15-16 April 2019)
- Mr Stephen Rogers (Day 12-13 / 16-17 April 2019)

6. Respondent's expert witnesses:

- Mr Nazar Kulchytskyy (Day 8 / 10 April 2019)
- Dr Irina Paliashvili (Day 9-10 / 11-12 April 2019)
- Mr Yuriy Katser (Day 9-10 / 11-12 April 2019)
- Professor Evgen Kubko (Day 10 / 12 April 2019)
- Mr Sergey Kuyun (Day 10 / 12 April 2019)
- Mr Michael Radcliffe (Day 10-11 / 12-13 April 2019)
- Mr Simon Pirani (Day 13 / 17 April 2019)
- Mr Tim Giles and Ms Jessica Resch (Day 13-14 / 17-18 April 2019)

54. An audio-recording and the Transcript were made and later distributed to the Tribunal and the Parties.[7]

D. Post-hearing phase

55. On 7 May 2019, the Tribunal issued Procedural Order No 6 ordering Claimants to produce

[7] All references to the Transcript in the Award are referred to as follows: T, day, page, lines.

the Palytsia Option and the List of Assets, subject to an appropriate confidentiality agreement between the Parties.

56. On the same day, the Tribunal issued Procedural Order No 7 ordering *inter alia* that the evidence be closed and that two rounds of PHBs be filed simultaneously on 31 July 2019 and 18 October 2019, respectively.

57. On 22 and 23 May 2019, the Parties entered into a confidentiality agreement relating to the disclosure of documents relating to the Palytsia Option and the List of Assets.

58. On 5 June 2019, the Parties communicated to Opus their joint agreed amendments to the Transcript.

59. On 14 June 2019, Claimants disclosed to Respondent documents responsive to the Tribunal's Procedural Order No 6. Respondent argued that this was an inadequate disclosure and asked the Tribunal to draw adverse inferences in this respect.

60. On 29 July 2019, Claimants filed the Updated Reports. On 20 August 2019, having heard from both Parties, the Tribunal issued Procedural Order No 8 ordering *inter alia* that Respondent be permitted to respond to the Updated Reports and postponed the deadline for the filing of the PHBs to 30 September 2019 and 15 November 2019, for the first and second rounds, respectively.

61. On 27 September 2019, the Tribunal approved the extension of time agreed between the Parties for the filing of the first round of the PHBs to 7 October 2019.

62. On 7 October 2019, the Parties exchanged the first round of their respective PHBs.

63. On 18 November 2019, having heard from both Parties, the Tribunal refused Claimants' filing, without prior permission, of Ms Revill's Supplemental Report dated 13 November 2019 but accepted for the record the updated models set out in the report. The Tribunal further ordered that the second round of PHBs be filed on 19 November 2019.

64. On 19 November 2019, the Parties filed their respective second round of PHBs.

65. In light of the extensions sought by the Parties and the Tribunal's need to deliberate in person, on 10 January 2020, the Tribunal requested from the Institute that the date for issuing the Award be postponed from 31 March 2020 to 30 September 2020. This was

approved on 13 January 2020 by the Institute.

66. On 10 and 20 August 2020, the Parties exchanged correspondence regarding a settlement concluded between Ukrtransgaz and Ukrnafta in respect of 2.061 bcm of natural gas produced in 2006 that were at issue in Case No 6/521.

67. Further to the disruption caused by the Covid-19 pandemics, on 7 September 2020, the Tribunal requested from the Institute that the date for issuing the Award be postponed from 30 September 2020 to 31 December 2020. On 14 September 2020, the Institute extended the deadline for issuance of the Award to 4 January 2021.

68. On 30 November 2020, the Tribunal asked the Parties to send their respective Statement of Costs and formally closed the record, pursuant to Article 37 of the SCC Arbitration Rules.

69. On 11 December 2020, further to an application for a time extension by Claimants, both Parties filed their respective Statement of Costs.

70. On 17 December 2020, at the Tribunal's request, the Institute extended the deadline for issuance of the Award to 4 February 2021.

71. On 29 December 2020, the Institute sent a letter to the Parties fixing a new and final advance on costs.

IV. FACTUAL BACKGROUND

72. This section summarises the main facts of the dispute. It is meant to give a general overview of the present dispute and does not include all facts which will later turn out to be of relevance. The latter will be discussed, insofar as relevant, in the context of the Tribunal's analysis of the disputed issues.

A. Claimants' acquisition of their interest in Ukrnafta

1. Main players

73. Ukrnafta is one of the largest producers of oil and gas in Ukraine. It is a public joint stock company constituted under the laws of Ukraine of which the majority shareholding (50% plus one share) is owned by Naftogaz, a public joint stock company wholly owned by Respondent.

74. In 1999, Claimants' two main UBOs, Messrs Igor Valeryevich Kolomoisky and Gennadiy

Bogoliubov[8] began acquiring shares in Ukrnafta through various companies, including 10.95% from the State property fund of Ukraine during a privatisation auction in February 2000 and a 10% shareholding which Mr Uri Laber (a US businessman who later became a business partner of Mr Kolomoisky), and his then business partners had accumulated through a US investment fund. As at late 2002, Mr Kolomoisky and Mr Bogoliubov were amongst the beneficial owners of a more than 40% minority shareholding in Ukrnafta.

75. Mr Kolomoisky and Mr Bologliubov are business partners. They are well-known figures in Ukraine *inter alia* for being amongst those who established one of Ukraine's first private lenders, PrivatBank, now reportedly one of the country's largest. They are still shareholders in PrivatBank.[9]

76. The expression "Privat Group," which is reported to encompass in addition to banking, media, energy, petrochemicals, aviation and mining interests, has been extensively referred to in the Arbitration. Respondent describes it as an "*industrial and banking conglomerate*" which controls Claimants[10] and has acquired and controls shares in Ukrnafta. Respondent also contends that other companies involved in one way or another in the matters subject to the Arbitration are part of the Privat Group.[11] Respondent states that the Privat Group is controlled by Mr Kolomoisky and Mr Bogoliubov.

77. Claimants and Mr Kolomoisky deny that a legal entity such as the Privat Group exists. For instance, Mr Kolomoisky noted "*although the media often use the expression 'the Privat Group' to describe businesses which are said to be owned by Mr Bogolyubov and/or me, and that the State has used this expression throughout its Defence, there is in fact no such legal entity as 'Privat Group'*".[12] However, Mr Kolomoisky recognised that the "Privat Group" is a group of companies, including Claimants, without a clear structure, in which he, Mr Bogoliubov and his partners own a beneficial stake.[13]

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8 SoC, para. 52.
9 Transcript, Day 4, pp. 147-148.
10 See e.g. SoD, para. 42.
11 Respondent submits that PrivatBank, Capital Standard, Ballioti, Renalda, Realiz Oil, The Stakhanov Ferroalloy Plant, Oversize Tyres and others form part of the Privat Group (see e.g. SoD, paras. 128, 508; RoMRoJ, para. 97).
12 Kolomoisky, 1st witness statement, para. 11.
13 Transcript, Day 4, pp. 147-150.

78. The minority shareholding in Ukrnafta ultimately owned by Mr Kolomoisky and Mr Bogoliubov and others was sufficient to allow them to have influence over the quorum at the meetings of the shareholders. They could prevent shareholders meetings from being held because of their ability to veto meetings and decisions unless supported by 60% of shareholder participation. However, their shareholding was not sufficient to enable them to appoint the chairman and members of the management board or to appoint a sufficient number of members of the supervisory board to have an impact on the running of the company.

2. The Kolomoisky-Kuchma-Pinchuk Arrangement

79. In late November 2002, Mr Kolomoisky was approached by Mr Victor Pinchuk, the son-in-law of the then Ukrainian President Kuchma, who offered him a "deal" aimed at giving Mr Kolomoisky and Mr Bogoliubov control over the majority voting rights that Naftogaz had in Ukrnafta. Mr Pinchuk explained that through his relationship with President Kuchma, he could ensure that Naftogaz would exercise its voting rights in respect of its Ukrnafta shares in accordance with the wishes of Mr Kolomoisky and Mr Bologliubov and that the Ukrainian State's representatives on the supervisory board of Ukrnafta would also act in accordance with the wishes of Mr Kolomoisky and Mr Bologliubov.

80. On 25 January 2003, Mr Kolomoisky and Mr Bologliubov (referred to as Party 1) entered into two written agreements with Mr Pinchuk (referred to as Party 2), namely the Ukrnafta Agreement and the Option Agreement.

81. The Ukrnafta Agreement provided *inter alia*: (1) that Mr Pinchuk would procure that the preferred candidates of Mr Kolomoisky and Mr Bologliubov were elected as chairman of the management board and to membership of the supervisory board of Ukrnafta; (2) that Mr Pinchuk would receive from Mr Kolomoisky and Mr Bologliubov the Option Agreement; (3) that upon the appointment of their representative as chairman of Ukrnafta's management board, Mr Kolomoisky and Mr Bologliubov would arrange for the management of the day-to-day activities of Ukrnafta to be such that the level of payments to the Ukrainian State would be at least equal to that which had occurred previously; (4) that Mr Kolomoisky and Mr Bologliubov would make payments to a "*special fund*" (details to be provided by Mr Pinchuk) of not less than US$5 million per month until November 2004, those funds to be used for the next presidential election campaign due to be held in

October/November 2004; and (5) that Mr Kolomoisky and Mr Bologliubov would pay 50% of the profits received by them from Ukrnafta (after deduction of the sums paid to the special fund) to Mr Pinchuk.

82. The Option Agreement set out the terms of the option of Mr Pinchuk. It provided for the option to be exercisable until the end of November 2004 or until the privatisation of the Naftogaz 51% shareholding in Ukrnafta, whichever was earlier.

83. Steps were then taken to implement these agreements. In early 2003, Mr Igor Palytsia, who was the head of another company in which Mr Kolomoisky and Mr Bologliubov had an interest, was asked by Mr Kolomoisky whether he would take the role of chairman of the management board of Ukrnafta.

84. On 30 January 2003, Mr Palytsia, with the support of Naftogaz procured by Mr Pinchuk, was appointed acting chairman of the management board of Ukrnafta.

85. On 21 March 2003, at a general meeting of Ukrnafta shareholders, the candidates proposed by Mr Kolomoisky and Mr Bologliubov were elected to Ukrnafta's supervisory board with the support of Naftogaz.

86. Between April 2003 and September 2004, the main UBOs paid US$100 million in total, at an average of US$5 million per month, corresponding to the payments to be made to the special presidential election fund provided for in the Ukrnafta Agreement. However, Mr Kolomoisky and Mr Bologliubov arranged for *"the payments to look as if they were payments based on commercial agreements,"* so as not to make it obvious that the funds were intended for the presidential election campaign.[14] These commercial agreements *"were merely a paper trail designed to explain the payments which actually were supposed to go to the 'special fund'"*.[15] Another US$10 million were paid in October 2004, pursuant to the Ukrnafta Agreement.

3. Claimants' acquisition of shares in Ukrnafta

87. Claimants acquired their Ukrnafta shares from entities owned or controlled by the two main UBOs as part of a restructuring that was commenced at the end of 2006 and finalised

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[14] Exhibit C-2196, para. 62.

[15] *Ibid.*

in March 2007.

88. One of the purposes of this restructuring was to arrange for the potential sale of half of the Ukrnafta shares acquired by Claimants to Mr Dmitri Firtash, a Ukrainian businessman. He was a key backer of Prime Minister Yanukovych and a business partner of Mr Yuriy Boyko, the then Minister of Energy.

89. On 23 November 2006, Mr Firtash entered into the Firtash Agreement with Mr Kolomoisky. Mr Firtash represented that he controlled three appointees to Ukrnafta's supervisory board and Mr Kolomoisky represented that he controlled five such appointees. They agreed *inter alia* that Mr Firtash would pay a total price of US$1 billion to Mr Kolomoisky to acquire *inter alia* 50% of Claimants' Ukrnafta shares; that they would coordinate their votes at Ukrnafta's general meetings; and that their appointees at Ukrnafta's supervisory board would be rearranged with a split of four appointees each.

90. Mr Firtash paid two deposits towards the US$1 billion, amounting to US$100 million and US$150 million, respectively. The Firtash Agreement was, however, never completed, apparently because Mr Yanukovych's party had no chance of winning the "snap elections", which were called for the autumn 2007.

91. The transfer of shares to each of the three Claimants nonetheless took place, on Claimants' case, between 11 December 2006 and 16 March 2007, in the following manner:

1) In December 2006, Littop issued and allotted 3,199,000 shares in itself to Fresno, a Belizean company, in return for 7,238,613 shares in Ukrnafta. This constituted a 13.3483% shareholding in Ukrnafta. Fresno had in turn purchased this shareholding in Ukrnafta from Ravenscroft, a British Virgin Island company, for US$3,329,761.98, pursuant to an agreement on securities purchase and sale of 23 January 2007.

2) In December 2006, Bridgemont issued and allotted 3,199,000 shares in itself to Edmore, a Belizean company, in return for 7,238,613 shares in Ukrnafta, which constituted a 13.3483% shareholding in Ukrnafta. Edmore had in turn purchased this shareholding in Ukrnafta from Brotstone, a British Virgin Island company, for US$3,329,761.98, pursuant to an agreement on securities purchase and sale of 23 January 2007, with the share transfer taking place on 1 March 2007.

3) In December 2006, Bordo issued and allotted 3,199,000 shares in itself to Croydon, a

British Virgin Islands company, in return for 7,238,614 shares in Ukrnafta, which constituted a 13.3483% shareholding in Ukrnafta. Croydon had in turn purchased this shareholding in Ukrnafta from Gleslon, a British Virgin Island company, for US$3,402,148.58, pursuant to an agreement on securities purchase and sale of 23 January 2007, with the share transfer taking place on 1 March 2007.

92. By 16 March 2007, Claimants had acquired a total of 40.0449% of shares in Ukrnafta, through their respective acquisition of 13.3483% shareholding from their respective parents.

93. From 30 October 2008 until 20 March 2009, Claimants did not directly hold nominal title in the shareholding in Ukrnafta but were beneficial owners of these shares. The transactions underlying Claimants' temporary beneficial ownership and their background are discussed in paragraphs 342 to 346 below.

94. In 2011, Claimants acquired a further 0.78% of Ukrnafta shares bringing their total shareholding in Ukrnafta to 40.8249% as follows:

1) Littop purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding in Ukrnafta) for US$13,391,645 from Business-Invest, a company incorporated in Ukraine, pursuant to an agreement on securities purchase and sale of 18 February 2011.

2) Bridgemont purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding in Ukrnafta) for US$13,391,645 from Business-Invest pursuant to an agreement on securities purchase and sale of 18 February 2011.

3) Bordo purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding in Ukrnafta) for US$13,391,645 from Business-Invest pursuant to an agreement on securities purchase and sale of 18 February 2011.

95. Later in 2011, Claimants' collective shareholding in Ukrnafta settled at 40.1009% when Bordo, disposed of and acquired a small percentage of shares on 10 May 2011 and 25 November 2011, respectively.

96. Claimants contend that their shareholding has since remained the same.[16] As discussed

[16] SoC, para. 52.

further below, Respondent denies this allegation.

B. The origin of the present dispute

97. In essence, the present dispute relates to the price and possession of the gas Ukrnafta pumped into the GTS as well as certain other measures which are said to have been targeted at Ukrnafta and/or its minority shareholders. These include tax increases in relation to the extraction of oil, condensate and gas from the subsoil, as well as legislative amendments pertaining to the quorum rules in joint stock companies.

1. The Ukranian regulatory regime relating to natural gas

98. The Ukrainian regulatory regime relating to natural gas is governed by different bodies and instruments. These include laws passed by the Verkhovna Rada, particularly budget laws, decrees issued by the Cabinet of Ministers and resolutions issued by the NERC, Respondent's regulatory authority that oversees its energy sector, including pricing in the natural gas sector. The NERC was succeeded by the NESR and, later, by the NEPURC.

99. A number of NERC Resolutions are at the heart of this dispute. They are discussed in more detail below. This section sets out the overall framework regulating the gas sector to the extent it is necessary context to the dispute.

100. On 18 March 1999, the NERC issued the 1999 NERC Resolution. By this Resolution, it set the "*threshold level*" (i.e. the maximum or ceiling level) of "*bulk prices*" for natural gas "of *domestic use*" at UAH 185 per 1,000 cm.

101. On 27 December 2001, the Cabinet of Ministers issued the 2001 Cabinet Decree, which took effect on 1 January 2002. This provided, *inter alia*, that the public's needs were to be satisfied "*from resources of National Joint Stock Company 'Naftogaz of Ukraine', consisting of own-produced gas, gas received as payment for services for the transit of Russian gas through Ukraine, and gas purchased from National Joint Stock Company 'Nadra Ukrayny.'*"[17] The 2001 Cabinet Decree further stipulated that the NERC "*on the proposal of National Joint Stock Company 'Naftogaz of Ukraine', shall, according to its competencies, approve economically reasonable prices for natural gas for population,*

[17] Exhibit C-311.

budgetary institutions, and organizations." [18] The 2001 Cabinet Decree was subsequently amended on a number of occasions.

102. On 21 January 2003, Cabinet of Ministers Decree No 104 stipulated that "*the demand for natural gas ...by population, institutions, and organizations that are financed from the state and local budgets, shall be satisfied from gas resources produced by gas producing enterprises subordinated to... 'Naftogaz of Ukraine'... 'Ukrnafta', and other gas producing enterprises, the state share in the authorized capital of which is over 50 percent*".[19]

103. On 20 December 2005, the Verkhovna Rada passed the 2006 Budget Law, which applied to Naftogaz and Ukrnafta. It provided *inter alia* that the sale of equity natural gas (i.e. gas produced by such entities) was to be made in the manner prescribed by the Ukrainian Cabinet of Ministers.

104. On 2 March 2006, Cabinet of Ministers Decree No 244 amended the 2001 Cabinet Decree to stipulate, *inter alia*, that the gas needs of the population should be met from the gas resources of Naftogaz, Ukrnafta and any other majority (i.e. over 50%) State-owned businesses.

105. It was followed on 9 June 2006, by Cabinet of Ministers Resolution No 813 which provided, *inter alia*, that the price of gas sold by (*inter alia*) Ukrnafta to meet the needs of the population would be sold "*at prices calculated based (sic) on the maximum level of wholesale prices for natural gas used for the needs of the population, which is set by the National Electricity Regulation Commission excluding transportation tariffs, supply and distribution of natural gas and collection as a surcharge to the existing tariff on natural gas.*"[20]

106. On 8 December 2006, Cabinet of Minister Decree No 1697 further amended the 2001 Cabinet Decree. The Parties are not agreed as to the effect of Cabinet of Minister Decree No 1697 and the obligations imposed on Ukrnafta with respect to the sale of gas to Naftogaz.

107. On 19 December 2006, the Verkhovna Rada passed the 2007 Budget Law, which provided

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18 Exhibit C-311.
19 Exhibit C-314.
20 Exhibit R-97.

inter alia that companies such as Ukrnafta shall sell on a monthly basis *"all natural gas (including equity petroleum (associated) gas (produced on the basis of special subsoil licenses), towards the pool of natural gas for household use, directly to the entity authorized by the Ukrainian Cabinet of Ministers to build such pool, at a price not to exceed the maximum wholesale price for the natural gas for household use, as determined in the prescribed manner, less the transportation, distribution tariffs, and the special purpose increment to the natural gas tariff applicable to consumers of all forms of ownership."*[21]

108. On 16 January 2007, the 2001 Cabinet Decree was further amended. The amendment provided, *inter alia,* that Naftogaz was authorised to build and manage the pool of gas for use by the population. Sales were to be to Naftogaz at prices agreed with (according to Respondent)/approved by (according to Claimants) NERC at a price that *"does not exceed the limit wholesale price for natural gas that is used to satisfy the demand of the population, not including tariffs for natural gas transportation and supply, and a surcharge to the effective natural gas tariff."* [22]

109. On 28 December 2007, the Verkhovna Rada passed the 2008 Budget Law, which provided *inter alia* that Ukrnafta was to sell all natural gas directly to the entity authorised by the Cabinet of Ministers to build the pool of natural gas for household use (i.e. Naftogaz). The 2008 Budget Law provided that these sales were to be made at a price approved by the NERC for each business entity.

110. On 25 April 2008, the Cabinet of Ministers issued Decree No 421, in which it stated, *inter alia*, that Naftogas was: *"to ensure the registration of the natural gas volumes received in January 2007 and January-March 2008 from Open joint Stock Company 'Ukrnafta' into the gas transportation system and sold to the population..."*.[23]

111. On 26 December 2008, the Verkhovna Rada passed the 2009 Budget Law. Article 3 of the 2009 Budget Law provided *inter alia* that the price that was to be approved by NERC *"shall assure coverage of economically reasonable production costs and a margin"*.[24]

112. On 27 April 2010, the Verkhovna Rada passed the 2010 Budget Law, Article 3 of which was

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21 Exhibit C-340.
22 Exhibit C-344.
23 Exhibit C-366.
24 Exhibit C-373.

in the same terms as Article 3 of the 2009 Budget Law. It provided that Ukrnafta (and other similar companies where the State owned more than 50% of the shares), could sell all gas of its own production, to create a natural gas resource to satisfy the demand of the population, *"at the price (that should cover economically reasonable expenses for production and provide for gaining profit) approved by the* [*NERC*]".[25]

113. On 8 July 2010, the Verkhovna Rada passed the July 2010 Gas Market Law, which came into effect on 24 July 2010. Article 10(1) of the July 2010 Gas Market Law provided that the sale price would be "*established*" on an annual basis by the NERC for each entity where the State owned more than 50% of its statutory capital and "*according to the Procedure approved by* [the NERC] *for establishment and calculation of natural gas prices for gas mining companies*".[26] The July 2010 Gas Market Law was in effect until it was repealed in 2015.

114. On 21 June 2012, the Verkhovna Rada passed the 2012 Law on Prices and Price Formation, Article 12(2) of which provided that State regulated prices shall be economically justified in that they were to ensure conformity between (on the one hand) the price and (on the other hand) the costs of production, the costs of sale and profits from such sale.

2. The GTS

115. The GTS is owned, controlled and operated by Ukrtransgaz. It consists of (1) a series of high pressure pipelines, and (2) a series of UGS, which are disused gas fields. Gas can be transferred into the GTS *inter alia* by gas producers, including Ukrnafta. The gas producers have their own pipelines which are connected to the GTS pipelines. They use these to pump their gas into those pipelines.

116. The volume of gas entering the GTS is measured at the connection point and recorded by the producer and Ukrtransgaz in a deed of transfer and acceptance at the end of each month. Once the gas of a particular producer enters the GTS pipelines, it is mixed with gas which was pumped in by other parties. It is therefore impossible to keep track of the location of particular molecules of specific origin. Ukrtransgaz keeps records of the volumes of gas in the GTS and the UGS to which each party is entitled in a ledger system.

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[25] Exhibit C-399.
[26] Exhibit C-409.

117. Ukrnafta does not have any storage facilities of its own. It therefore pumped into the GTS all of the gas which it produced, save for small volumes which it used for its own technological needs.

3. The measures pertaining to the price at which Ukrnafta could sell its gas

118. Claimants contend that Naftogaz, supported by other State organs, has been attempting to acquire Ukrnafta's gas, at loss-making prices. The key events in this respect are set out in this section.

i. Key 2003/2004 events

119. On 18 April and 29 December 2003, Ukrnafta entered into agreements to sell volumes of gas it produced in 2003/2004 to Naftogaz at a price of UAH 122.52 (including VAT) per 1,000 cm.

120. A number of Ukrnafta's shareholders sought, in Case No 2-7608/2004, to have the agreements declared null and void, on the basis that the price was loss-making for Ukrnafta. On 13 September 2004, the claim was upheld by the Shevchenko District Court and subsequently confirmed by the appellate courts.

121. Later, in Case No 18/49, the Kiev Commercial Court held that Naftogaz was obliged to return 1.390 bcm of 2003/2004 gas to Ukrnafta, and enforcement proceedings ensued. In 2007, in Case No 30/557, Ukrnafta's entitlement to the gas was confirmed, which led Ukrnafta, Naftogaz and Ukrtransgaz to enter into a settlement agreement in April 2009.

ii. Key 2005 events

122. In August 2005, Naftogaz sought to compel Ukrnafta to enter into a sale and purchase agreement, in respect of the gas it produced in 2005. This led Naftogaz to commence Case No 42/717, in December 2005, in which Ukrnafta argued amongst others things that the sale and purchase agreement constituted a breach of the 2001 Cabinet Decree and of the 1999 NERC Regulation. The Kiev Commercial Court ordered Ukrnafta to enter into the contract, "*except for clause 1.1 of the agreement concerning sale of natural gas for the supply to organizations funded from budgets of any levels*".[27] The judgment was eventually found to be unenforceable because the terms of the proposed agreement had

[27] Exhibit R-64 upheld in appeal Exhibit R-65.

expired.

iii. Key 2006 events

123. In 2006, Naftogaz commenced proceedings in Case No 18/228 to compel Ukrnafta to enter into a contract for the sale of gas produced by Ukrnafta in 2006. The Kiev Commercial Court dismissed Naftogaz' claims holding *inter alia* that the 1999 NERC Resolution only regulated the price for sales to the population, and not the price for sales by Ukrnafta to Naftogaz. Appeals were all dismissed.

124. During the same year, Ukrnafta sued the Cabinet of Ministers in Case No 18/342-a over Resolution No 813 essentially arguing that it forced Ukrnafta to sell gas at a price below the costs of production. The case was ultimately discharged on 20 April 2007 after other measures superseded Resolution No 813.

iv. Key 2007 events

125. In 2008, Naftogaz attempted to compel Ukrnafta to enter into a contract for the sale of some of gas it produced in 2007 at a price of UAH 338.58 per 1,000 cm, but it was held by the courts that Naftogaz was not entitled to do so in Case No 29/192.

v. Key 2008 events

126. On 31 January 2008, the NERC issued Resolution No 155, by which it set a price of UAH 272.6 (excluding VAT) per 1,000 cm for the gas produced by Ukrnafta in 2008, and decided to apply this price with retrospective effect from 1 January 2008.

127. On 28 February 2008, the NERC issued Resolution No 315, by which it cancelled Resolution No 155 and set a price of UAH 199.20 (excluding VAT) per 1,000 cm for gas produced by Ukrnafta in 2008 to apply from 1 March 2008.

128. Ukrnafta challenged Resolutions Nos 155 and 315 in Case No 8/137. Resolutions Nos 155 and No 315 were first suspended and ultimately cancelled as of the date of their adoption.

129. In the meantime, Ukrnafta refused to sign any of the draft contracts sent to it by Naftogaz. Consequently, Naftogaz commenced Case No 29/192 (regarding gas produced by Ukrnafta in 2007), Case No 29/193 (regarding gas produced by Ukrnafta in January to February 2008), Case No 29/194 (regarding gas produced by Ukrnafta in 2006) and Case No 29/195

(regarding gas produced by Ukrnafta from March to December 2008) seeking to compel Ukrnafta to enter into contracts in the terms it had proposed. Naftogaz lost all these cases.

130. On 25 December 2008, the NERC issued the 2008 JIA NERC Resolutions setting prices between UAH278 and 292 (exclusive of VAT) per 1,000 cm for gas produced pursuant to a JIA in which Ukrnafta participated. These Resolutions were successfully challenged by Ukrnafta in Case No 2a-713/09/2670.

vi. Key 2009 events

131. On 22 January 2009, the NERC passed the 2009 NERC Resolution, which approved the 2009 NERC Gas Pricing Procedure. It defined terms, set out a pricing formula, and made detailed provision as to what is and is not to be included in each element of that formula. However, it was subsequently held that the 2009 NERC Gas Pricing Procedure had no effect *vis-à-vis* Ukrnafta in Case No 2a-11259/11/2670.

vii. Key 2010 events

132. After the July 2010 Gas Market Law was passed, the NERC issued the July 2010 NERC Resolution setting a price of UAH 458 (ex VAT) per 1000 cm for Ukrnafta's gas with effect from 1 August 2010. UKrnafta later successfully challenged the Resolution in Case No 2a-899/11/2670 and Case No 2a-10541/12/2670. In the meantime, Ukrnafta refused to enter into agreements at the price set by the Resolution.

viii. 2011 events

133. In March 2011, Naftogaz commenced Case No 31/101 and Case No 8/88 against Ukrnafta in the Kiev Commercial Court, seeking orders compelling Ukrnafta to conclude a contract with it for the sale of gas Ukrnafta produced in 2010 at the price set by the July 2010 NERC Resolution. These cases were stayed.

134. On 29 December 2011, the NESR, which had succeeded the NERC the previous month, issued NESR Resolution No 255 setting a price of UAH 458 (excluding VAT) per 1,000 cm for gas produced by Ukrnafta, effective from 1 January 2012. Ukrnafta challenged this resolution successfully in Case No 2a-3293/12/2670.

ix. Key 2012 events

135. On 13 September 2012, the NESR passed Resolution No 1177 adopting the 2012 NESR Gas Pricing Procedure. The 2012 NESR Gas Pricing Procedure was ultimately declared invalid in Case No 826/6130/13-a.

136. On 27 December 2012, the NESR passed Resolution No 1832 by which it set a price of UAH 492.60 (excluding VAT) per 1,000 cm for gas produced by Ukrnafta with effect from 1 January 2013. This resolution was ultimately declared invalid in Case No 826/4350/13-a.

137. In July 2012, Naftogaz commenced Case No 5011-69/9686-2012 against Ukrnafta seeking an order compelling Ukrnafta to sell it 1,48 bcm of gas it produced in 2012 at the price established by NESR Resolution No 255 (UAH 458 excluding VAT). Ukrtransgaz was joined as a third party, and the proceedings were stayed pending the determination of Case No 2a-3293/12/2670.

x. Key 2013 events

138. In March 2013, Naftogaz commenced Case No 910/5082/13 against Ukrnafta in the Kiev Commercial Court, seeking an order compelling Ukrnafta to enter into a contract to supply gas it produced in 2013 at the price of UAH 492.60 (excluding VAT). On 5 November 2013, the Kiev Commercial Court stayed these proceedings pending the determination of Ukrnafta's claim in Case No 826/4350/13-a. The proceedings were temporarily resumed, but were stayed again in November 2015, and remain stayed today.

139. On 30 December 2013, the NESR passed the December 2013 NESR Resolution by which it set a price of UAH 562.50 (excluding VAT) for Ukrnafta's gas with effect from 1 January 2014. Ukrnafta successfully challenged the December 2013 NESR Resolution in Case No 826/9050/14. Pending the outcome of that challenge, it refused to enter into agreements at that price.

140. On 31 December 2013, NESR also passed Resolution No 1910 in which it made amendments to the 2012 NESR Gas Pricing Procedure providing that each gas producing entity was to approve an investment programme by 1 September of each year according to the procedure set out in its statutory documents. This investment programme was to be submitted for approval to the central executive body which was responsible for the creation of State policy in the oil and gas sector; and the entity had to submit this approved

investment programme with its application for the fixing or review of the price of its gas. It further provided that the NESR could set a lower price than the entity sought if it found that the entity had *inter alia* allocated funds to costs in a way not envisaged, failed to substantiate components of costs in the manner specified, or failed to submit additional documents as requested.

xi. Key 2014 events

141. On 16 April 2014, Naftogaz sent to Ukrnafta a draft contract pursuant to which Ukrnafta would be obliged to supply Naftogaz with 1 bcm of gas produced in 2014 at the price of UAH 562.50 (excluding VAT) set by the December 2013 NESR Resolution. In July 2014, Naftogaz commenced Case No 910/15003/14 against Ukrnafta in the Kiev Commercial Court, seeking an order compelling Ukrnafta to enter into a contract on those terms. On 1 October 2014, the Court stayed those proceedings pending the determination of Case No 826/9050/14, in which the December 2013 NESR Resolution was being challenged.

xii. Key 2015 events

142. Further to meetings between senior officials of Respondent and representatives of Claimants, the Settlement Agreement was concluded on 29 April 2015 between President Poroshenko, Prime Minister Yatsenyuk, Mr Kolomoisky and Mr Bogoliubov. The Parties disagree as to the effect of this agreement.

4. The measures relating to the gas stored in the GTS

143. Claimants contend that Naftogaz, supported by other State organs, has taken large quantities of Ukrnafta's gas without paying for it and ignored numerous Ukrainian court judgments issued in favour of Ukrnafta in this respect. The key events relating to this contention are set out in this section.

i. Key 2005 events

144. In June 2005, Ukrtransgaz and Ukrnafta disagreed as to the terms of a new draft gas storage agreement. This resulted in Ukrnafta commencing Case No 6/631, in which it was successful. As result, the term of the previous gas storage contract was extended to 31 December 2006.

ii. Key 2006 events

145. On 14 April 2006, Naftogaz' board of directors issued Protocol No 54. This provided that from April 2006, the gas required to satisfy the needs of the population in certain regions would be taken from Ukrnafta's gas, and that Ukrnafta was to enter into agreements to sell gas to named entities for the supply of gas for public needs. Urknafta considered Protocol No 54 to be unlawful while Ukrtransgaz insisted that the deeds of transfer and acceptance in respect of Ukrnafta's gas needed to comply with Protocol No 54. As a result, Ukrtransgaz refused to sign deeds of transfer and acceptance in respect of gas that Ukrnafta had been pumping into the GTS, on the basis that they did not clearly state that the gas was intended for the needs of the population.

146. In June 2006, Ukrnafta commenced Case No 32/290 seeking orders to compel Ukrtransgaz to sign the deeds of transfer and acceptance without insisting on compliance with Protocol No 54. Ukrnafta was ultimately successful in December 2006. The enforcement proceedings related to this case were concluded in February 2016.

147. In July 2006, Ukrtransgaz initiated Case No 25/360 in an attempt to compel Ukrnafta to enter into an agreement for the storage of gas in the 2006/2007 storage season. This claim was unsuccessful at all levels of jurisdiction.

iii. Key 2007 events

148. In late 2007, Ukrnafta complained that Ukrtransgaz persisted in refusing to sign deeds of transfer and acceptance in respect of the gas pumped into the GTS despite the:

> *"requirement of the decision of the Commercial Court of Kyiv city No. 32/290 dated 10.08 .06 SC 'Ukrtransgaz' has not concluded and provided to OJSC 'Ukrnafta' by up to this day, starting from April 2006 to October 2007, the deeds of transfer and acceptance of natural gas to the gas transportation system (GTS), for the reason of which gas production and its transfer to GTS by the Company in April-December 2006 and January-October 2007 have not been documented yet ..."* [28]

iv. Key 2008 events

149. In January 2008, the Cabinet of Ministers issued Instruction No 57-r, which approved a forecast balance of acquisition and distribution of gas for 2008 recording that in 2008 the State expected to receive 3.12 bcm of gas produced by Ukrnafta in 2008, as well as the

[28] Exhibit C-919.

2006 and 2007 gas which was held in the GTS.

150. On 12 March 2008, Naftogaz wrote to the Cabinet of Ministers seeking the Cabinet's help to compel Ukrnafta to enter into contracts for the sale of its gas noting that it had already withdrawn 2.72 bcm of Ukrnafta's gas from the GTS in respect of which there was no contract.

151. On the following day, Ukrtransgaz wrote to Ukrnafta to inform it that 1.566 bcm of gas produced in 2007 had been transmitted to the GTS as "*not documented*".

152. On 20 March 2008, Naftogaz sent Ukrnafta draft agreements for the sale of volumes of gas produced in 2006, 2007 and 2008. Ukrnafta refused to enter into these agreements. Naftogaz sought to compel Ukrnafta to do so by commencing a number of cases before the Ukrainian courts.

153. On 25 April 2008, the Cabinet of Ministers issued Decree No 421, which instructed Naftogaz "*to ensure the registration of the natural gas volumes received in January 2007 and January-March 2008 from Open joint Stock Company 'Ukrnafta' into the gas transportation system and sold to the population...*".[29]

154. On 26 April 2008, the question of Ukrnafta's "undocumented" gas was discussed at a Naftogaz' board meeting. On the same day, documents were created to record the gas discussed in the board meeting as "*undocumented*".

155. In September 2008, Ukrtransgaz refused to enter into a draft storage contract sent to it by Ukrnafta.

156. On 20 November 2008, Ukrnafta commenced Case No 6/489 seeking to compel Ukrtransgaz to enter into the contract. Ukrnafta was eventually successful.

v. Key 2009 events

157. On 28 January 2009, Naftogaz sent the Cabinet of Ministers a gas balance recording that it had received 3.327 bcm of gas from Ukrnafta in 2007 and 3.168 bcm in 2008.

158. On 16 February 2009, Naftogaz' board resolved that 215 mcm of gas which had been received in the period from April to October 2008 gas ought to be considered as gas of an

[29] Exhibit C-366.

"undeterminable owner".

159. On 16 March 2009, a similar resolution was passed in relation to up to 190 mcm of gas received into the GTS in February 2009.

160. On 17 July 2009, Naftogaz sent the Cabinet of Minister another balance recording that it had received 1.562 bcm of gas from Ukrnafta from January to June 2008 and 1.531 bcm in January to June 2009.

vi. Key 2010 events

161. On 22 April 2010, Ukrnafta requested that Ukrtransgaz extract 1.051 bcm of gas from the GTS in instalments for onward supply to industrial consumers.

162. On 6 May 2010, Ukrtransgaz informed Ukrnafta that it would not comply with its request because the effect of the 2009 Budget Law, the 2010 Budget Law and the 2001 Cabinet Decree was that Ukrnafta was obliged to sell this 1.051 bcm of gas to Naftogaz for onward supply to the population. It was therefore not permitted to sell it to industrial consumers. As a result, in late May 2010, Ukrnafta commenced Case No 32/296 against Ukrtransgaz and Naftogaz, in which Ukrnafta was successful.

163. In September and October 2010, Ukrnafta made attempts to withdraw gas from the GTS and sell it to industrial consumers but Ukrtransgaz did not comply with Ukrnafta's requests. This gave rise to a series of new court cases in which Ukrnafta sought the release of gas. Ukrnafta was successful, including in Case No 42/392 where it sought release of 157 mcm of gas, and Case No 46/480 where it sought the release of 156 mcm of gas. Ukrtransgaz complied with the judgments in Case No 46/480 and Case No 42/392 by releasing the relevant volumes to Ukrnafta.

164. Ukrnafta was also eventually successful in Case No 6/521 relating to 2.061 bcm of gas. However, the final judgment gave rise to an enforcement saga, including appeals against the bailiff's execution orders as well as fines and criminal investigations linked to Ukrtransgaz failure to comply. The Parties informed the Tribunal in the course of August 2020 that this case had been settled.

vii. Key 2011 events

165. On 9 March 2011, Ukrnafta requested Uktransgaz to extract 111 mcm of gas from the GTS.

Uktransgaz' refusal to comply with this request gave rise to Case No 35/63.

166. Naftogaz then commenced two cases against Ukrnafta in the Ukrainian courts, i.e. Case No 31/101 and Case No 8/88 seeking orders compelling Ukrnafta to conclude agreements with it for the sale of volumes of 1.672 bcm and 2.1 bcm of gas, respectively. Case No 35/63 was stayed pending the outcome of Case No 31/101 and Case No 8/88.

viii. Key 2012 events

167. In March 2012, Ukrtransgaz commenced Case No 5011-35/4141-2012 seeking a declaration that Ukrnafta was not the owner of the 2.061 bcm of gas produced in 2006. The Kiev Commercial Court rejected the claim on 27 June 2012, and its decision was upheld at both levels of appeal.

5. The increase in the fees for the extraction of oil, condensate and gas

168. In early 2014, Russia invaded and annexed Crimea creating a major political and economic crisis in Ukraine. This led to a number of emergency tax increases, including on oil and gas products. In particular, between 31 July 2014 and early 2016, the Rental Fee for the extraction of oil was increased.

169. On 31 July 2014, it was increased through Law of Ukraine No 1621-VII, "*On changes to the Tax Code of Ukraine and some other legislative acts of Ukraine*" which implemented a temporary increase of the Rental Fee.

170. Later, Law of Ukraine No 71-VIII "*On Amending the Tax Code of Ukraine and certain legislative acts of Ukraine concerning Tax Reform*", introduced permanently into Ukrainian law the same increased Rental Fee that Law No 1621-VII had introduced temporarily.

171. On 2 March 2015, Law No 211-VIII "*On Amending the Tax Code of Ukraine*" increased the Rental Fee on gas produced at less than 5,000 metres from 20% to 70%.

172. In early 2016, the law was amended again and the Rental Fee went back to levels similar to those before the 2014 increase.

173. Claimants contend that the Rental Fee increase substantially inflated Ukrnafta's tax liabilities to the extent it was unable to discharge them.

6. Amendments to the laws on corporate governance

174. From 2000 onwards, there were a number of attempts to change the quorum law in Ukraine. Respondent contends that such attempts were meant to prevent companies from being subject to blocking conduct by minority shareholders (e.g. preventing companies being quorate for shareholders meetings, and issuing dividends). They were blocked by powerful political factions allied to the interests of certain oligarchs. The legislative change only came about in 2015 after the 2014 Revolution, which ousted President Yanukovych.

175. In early 2015, Law No 91-VIII and Law No 272-VIII amended the quorum requirement for a general meeting of the shareholders and of the supervisory board for joint stock companies.

176. The quorum requirement for a general meeting was reduced from at least 60% to more than 50%, and for the supervisory board from 60% to at least 50%. Law 272-VIII also eliminated the possibility that bespoke arrangements for the election of the members of the management bodies could be established.

177. Claimants contend that these laws were a targeted action which dismantled their corporate governance rights. In particular:

1) Claimants' rights as set out in the Ukrnafta's Articles of Association, which provided that general meetings of shareholders and of the supervisory board meetings would only be quorate and could only pass decisions with 60% shareholders' attendance.

2) Claimants' rights as established by the 2010 Shareholders Agreement which *inter alia* provided that five members of the supervisory board and the chair of the management board would be appointed from candidates proposed by the minority shareholders.

3) Claimants' rights as established by the 2010 Cooperation Agreement, which provided *inter alia* that the chair of the management board would be appointed from candidates proposed by the minority shareholders.

7. The Plan of Measures

178. On 16 February 2016, the assistant of the chair of the management board of Ukrnafta (i.e.

Mr Rollins' assistant) received an email from an anonymous source attaching a document setting out a "Plan of Measures".

179. Claimants contend that this document demonstrates that Respondent's highest official prepared a "plan" to attack Ukrnafta's and Claimants' interests therein. Respondent disputes the authenticity and the relevance of the document.

C. Dispute as to the conduct of Ukrnafta's business by Claimants and the main UBOs following Claimants' investment

180. Respondent makes a number of allegations pertaining to the manner in which Claimants and the main UBOs dishonestly reinforced their control over Ukrnafta through "secret agreements" with Ukrnafta senior executives and used their control over Ukrnafta to defraud the company for the benefit of Privat Group companies. These allegations are denied by Claimants.

1. The Executive Agreements

181. In 2011, a number of agreements were entered into between the Minority Shareholders on the one hand, and three senior Ukrnafta executives on the other hand. Specifically these were: (1) the Vanhecke Agreements consisting of an agreement and a supplemental agreement with Mr Peter Vanhecke, Uknafta's chairman and chief executive officer, dated 24 February 2011 and August 2011, respectively; (2) the Bakunenko Agreement consisting of an agreement with Michael Bakunenko, one of Ukrnafta's Deputy Chairmen and the Director of Corporate Development and Strategy, dated 30 March 2011; and (3) the Sutton Agreement consisting of an agreement with Mr Alan Sutton, one of Ukrnafta's Deputy Chairmen and the Director of Economy and Planning, dated 16 May 2011.

182. Respondent contends that the Executive Agreements involved the fixing of Ukrnafta officers with serial conflicts of interest, control over their remuneration and duration of employment, the payment of substantial sums in exchange for control over key Ukrnafta decision-making, the obtaining of influence inconsistent with Claimants' shareholding culminating with Claimants paying Mr Vanhecke not to be in the office, so their chosen delegates could control the management of the company. Claimants deny these allegations and contend that the Executive Agreements were meant to bring in international managers with suitable experience to enable an Initial Public Offering to be

agreed for Ukrnafta.

2. The fraud allegations

183. There are four core fraud allegations. First, Respondent alleges that between 2003 and 2015, Ukrnafta's oil production was sold chiefly to Privat Group-controlled refineries, at a discount to import prices through rigged auctions.

184. Second, Respondent alleges that from 2011, Ukrnafta converted its gas into ammonia at a facility leased from DniproAZOT (also owned by the Privat Group/Mr Kolomoisky), on terms where in practice it had no alternative but to sell the ammonia to DniproAzot at whatever price DniproAzot fixed.

185. Third, Respondent contends that a number of transactions identified in Ukrnafta's 2014 Audit Report benefited Claimants and the main UBOs at the expense of Ukrnafta.

186. Fourth, Respondent contends that, in 2015, Ukrnafta (under the authority of Mr Kushch deputising for Mr Vanhecke) sold oil and petrol products at prices which caused significant loss to Ukrnafta but appear to have benefitted Mr Kolomoisky and his associates.

187. Claimants deny these allegations, which they say are unfounded and unproven.

D. The LCIA Arbitration

188. On 16 July 2015, Claimants commenced the LCIA Arbitration against Naftogaz under the 2010 Shareholders Agreement. They initially sought an injunction preventing Naftogaz from breaching the provisions of the 2010 Shareholders Agreement which gave them control and protected their position as minority shareholders. This included those provisions which authorised Claimants to nominate the chairman of the management board and through the chairman of the management board to appoint other members of the management board, and protected Claimants by the quorum requirements.

189. Claimants amended the relief they sought a number of times. In particular, they sought permission to amend their Statement of Claim to include claims for damages for breach of Articles 1, 2, 3, 4, 8 and 12 of the 2010 Shareholders Agreement. The Claimants stated that permission was sought on a protective basis, i.e. depending on the outcome of their claims against Ukraine in the Arbitration, and was stayed pending the outcome of these proceedings. Permission was granted to amend the Statement of Claim to include the

pecuniary claims by procedural order on 5 April 2017 but the same order also stayed the pecuniary claims.

190. Before the hearing in the LCIA Arbitration, Claimants indicated that they sought a declaration in that proceeding that their rights under the 2010 Shareholders Agreement were valid and subsisting, and that such rights needed not to be founded on Article 9 of the 2010 Shareholders Agreement (i.e. the key article on corporate governance including provisions concerning the appointment and termination of the chairmen of the supervisory board, the audit commission, the executive board and the confirmation of the executive board).

191. Naftogaz sought a declaration to the effect that Ukrainian law was the law applicable to the arbitration agreement and the 2010 Shareholders Agreement. Naftogaz also argued that the arbitration agreement was invalid under Ukrainian law and that the 2010 Shareholders Agreement was void and unenforceable and further and in any event, that Article 9 of the 2010 Shareholders Agreement was in conflict with mandatory provisions of Ukrainian law.

192. On 26 April 2018, the tribunal issued a partial final award holding that it had jurisdiction over the claims made by Claimants. It further found that the second and third sentences of Article 9 of the 2010 Shareholders Agreement (referring to the modalities of the election, resignation or removal of members, including the heads of Ukrnafta's supervisory board, the audit commission as well as of the head of the board during the general meetings of shareholders), were not enforceable against Ukrnafta. This was because they were contrary to the mandatory rules of Ukrainian law. The award concluded that this did not affect the enforceability of the 2010 Shareholders Agreement as a whole.

V. SUMMARY OF THE PARTIES' POSITIONS

193. The Parties' positions on jurisdiction, attribution and liability as set forth in written and oral submissions are summarised in this section. They are further referred to in more details in the course of the Tribunal's analysis.

A. Parties' positions on jurisdiction/admissibility

1. Summary of Respondent's case

194. Respondent contends that this Tribunal should decline to hear Claimants' claim for lack of jurisdiction or alternatively lack of admissibility. It argues that, contrary to Claimants' suggestion, it is not estopped from disputing the Tribunal's jurisdiction by virtue of purported representations made to the main UBOs during settlement discussions. It puts forward eight key objections in this respect, which are set out below in the order in which they have been argued in RPHB1.

195. First, Respondent contends that this Tribunal lacks jurisdiction *ratione materiae* because Claimants have not made an investment for the purposes of Articles 26 and 1(6) ECT. Respondent argues that Claimants have failed to prove that they actually acquired legal title to the Ukrnafta shares in March 2007. Further and in any event, assuming that they did acquire ownership in March 2007, Claimants did not remain owners of these shares at the date of the alleged breaches of the ECT or at the time when they initiated the Arbitration. Respondent also contends that Claimants never made an investment in any meaningful way in that *inter alia* they were shell companies, which never made any contributions in relation to their shares.

196. Second, Respondent contends that the Tribunal lacks jurisdiction *ratione temporis* over certain aspects of the dispute because they pre-date Claimants' acquisition of shares in Ukrnafta. Specifically, Respondent complains that while Claimants conceded that they could not claim in respect of alleged breaches that occurred prior to March 2007, they have failed to reflect this concession in their quantum case.

197. Third, Respondent argues that the Tribunal should decline jurisdiction over Claimants' claims or declare them inadmissible because Claimants' restructuring of their investment

in March 2007 constituted an abusive restructuring conducted at a time when the dispute was foreseeable.

198. Fourth, Respondent contends that the Tribunal should decline jurisdiction over Claimants' claims or declare them inadmissible as a matter of international public policy, because Claimants' investments (or more accurately, those of the main UBOs) were characterised by corruption and illegality. This included the Kolomoisky-Pinchuk-Kuchma Arrangement, the Firtash Agreement, the Executive Agreements, and the various fraudulent transactions entered into at the expense of Ukrnafta and for the benefit of companies in which the main UBOs held interests.

199. Fifth, Respondent argues that the Tribunal should decline jurisdiction over or declare inadmissible Claimants' claims under the 2010 Shareholders Agreement.

200. Sixth, Respondent submits that the Tribunal lacks jurisdiction over Claimants' claim in respect of the increase in Rental Fee. This is because such fee is a taxation measure for the purposes of Article 21 ECT and accordingly falls outside the scope of the protection afforded by the ECT.

201. Seventh, Respondent contends that this Tribunal lacks jurisdiction because Respondent denied the advantages of Part III of the ECT to Claimants under Article 17 ECT.

202. Eighth, Respondent argues that the Tribunal should decline jurisdiction over Claimants' claims in their entirety in that Claimants failed to make a *bona fide* attempt to reach an amicable settlement of this dispute, under Article 26(1) and (2) ECT.

2. Summary of Claimants' case

203. Claimants submit that Respondent is precluded from raising objections to the jurisdiction of this Tribunal and to the admissibility of their claims as Respondent expressly agreed/accepted that the substantive disputes between the Parties should be determined by a neutral international arbitration tribunal during settlement discussions in 2015. Claimants argue that, in any event, the eight jurisdictional grounds raised by Respondent are meritless and should be rejected.

204. First, Claimants argue that the Tribunal has jurisdiction *ratione materiae*, in that they have submitted sufficient evidence that they had an investment for the purposes of Articles 1(6)

and 26 ECT at all material times. They further argue that the allegation that they did not make a contribution for the acquisition of the Ukrnafta shares is both factually incorrect and legally irrelevant. They also claim that the 2010 Shareholders Agreement and the 2010 Cooperation Agreement, as well as their rights to dividends are investments for the purposes of Article 1(6) ECT.

205. Second, Claimants argue that the Tribunal has jurisdiction *ratione temporis* in respect of gas produced by Ukrnafta in 2006 because the breaches alleged in relation to that gas occurred after Claimants acquired their investment.

206. Third, Claimants submit that Respondent's abusive restructuring objection should be rejected as Respondent did not discharge its burden of meeting the high standard of proof applicable to allegations of abuse of process. In particular, Respondent has failed to prove that the current dispute was foreseen in March 2007 and that Claimants' investment amounted to bad faith or abuse.

207. Fourth, Claimants deny the allegations of corruption and bribery made by Respondent and argue that, on any view, they are irrelevant to the Tribunal's jurisdiction. They further contend that the fraud allegations in connection with the conduct of Ukrnafta's business following Claimants' investment are inadmissible and in any event, cannot serve as a ground for dismissal of Claimants' ECT claims. They finally argue that, in any event, Respondent's allegations of bribery, corruption and fraud could only impact Claimants' quantum claims insofar as they relate to their corporate governance rights.

208. Fifth, Claimants argue that Respondent is liable for breach of the 2010 Shareholders Agreement under the umbrella clause contained in the ECT and that the jurisdictional clause in the 2010 Shareholders Agreement does not exclude this Tribunal's jurisdiction.

209. Sixth, Claimants contend that Article 21 ECT regarding taxation measures is not engaged in this case. It only applies to *bona fide* taxation measures. The targeted measures taken by Respondent against Claimants were not *bona fide*.

210. Seventh, Claimants argue that Respondent has not validly denied the benefits of Part III of the ECT under Article 17. Specifically, Claimants argue the purported denial involves a retrospective invocation of Article 17, which is impermissible as a matter of law. In any event, Respondent's purported denial was made too late and Respondent is estopped

from making such argument. On any view, Respondent has failed to meet the two limbs of the test necessary for the application of Article 17(1), namely that Claimants had no substantial business activities in Cyprus and that Mr Kolomoisky and Mr Bogoliubov were not citizens or nationals of a "third state" for the purposes of Article 17(1).

211. Eighth, Claimants argue that contrary to Respondent's assertion, there was no failure to engage in amicable negotiations, and the argument is in any event without legal merit.

B. Parties' position on attribution

1. Summary of Claimants' case

212. Claimants' primary case is that there is no need for the Tribunal to decide the issue of attribution as a finding of breach of the ECT is not necessarily dependent upon the conduct of Naftogaz and Ukrtransgaz. The conduct of the Cabinet of Ministers, the NERC, and senior individual State officials is sufficient to prove breaches of the ECT and there is no dispute that these are organs of the State.

213. Claimants contend, in any event, that the conduct of Naftogaz and Ukrtransgaz is attributable to Respondent under Article 22 ECT, and under ILC Articles 4, 5, 8 and 11.

2. Summary of Respondent's case

214. Respondent contends that Claimants' case on attribution fails under ILC Articles 4, 5, 8 and 11 as well as under Article 22 ECT.

C. Parties' positions on liability

1. Summary of Claimants' case

215. Claimants contend that by virtue of its conduct Respondent has breached a number of standards of protection set out in the ECT.

216. First, Claimants contend that Respondent acted in violation of its fair and equitable treatment obligation under Article 10(1) ECT, specifically its obligation not to act arbitrarily, to act with transparency and consistency and not to subvert an investor's legitimate expectations.

217. Claimants contend that there are five core breaches of these aspects of the fair and equitable treatment.

218. The first alleged core breach is Respondent's violation of its laws in its treatment of Claimants' investment and its changing of such laws to subvert the decisions of its own courts that had held it to have acted unlawfully. In these respects, Claimants rely *inter alia* on the following allegations:

1) The repeated setting of regulated prices below prices that permitted Ukrnafta to recover what Claimants refer to as "Zero Profit Prices" (i.e. prices which would enable it to recover (1) its costs of production, (2) the amounts which it was obliged to pay to the State budget and (3) a sum sufficient to enable it to implement its capital investment programme) by the NERC (and its successors) with the support of other institutions, including the Verkhovna Rada;

2) The repeated violations by the NERC (and its successors), Ukrtransgaz and Naftogaz of courts' decisions in favour of Ukrnafta;

3) The appropriation of Ukrnafta's gas at an undervalue or for no value at all through actions of the Cabinet of Ministers, the Verkhovna Rada, as well as the NERC (and its successors); and

4) The taking of 10.5 bcm of Ukrnafta's gas without contract or payment as facilitated by Decree No 421 and in breach of Respondent's courts decisions.

219. The second alleged core breach is Respondent's setting of prices for the sale of gas by Ukrnafta to Naftogaz at a level that, contrary to the law, did not allow Ukrnafta to recover its Zero Profit Prices.

220. The third alleged core breach is Respondent's refusal to comply with adverse rulings of its own courts, including in relation to the price purportedly set for the gas by the NERC and in relation to its taking of some 10.5 bcm of Ukrnafta's gas without contract or payment.

221. The fourth alleged core breach is Respondent's destruction of Claimants' corporate governance rights in Ukrnafta in a targeted manner.

222. The fifth alleged core breach is Respondent's imposition of enormous financial burdens on the sector in which Ukrnafta operated, specifically targeting Ukrnafta, through the imposition of the Rental Fee.

223. Second, Claimants submit that Respondent has breached the non-impairment standard

under Article 10(1) ECT. In this respect, Claimants rely on the same five core breaches as they rely on for the breaches of the fair and equitable treatment.

224. Third, Claimants submit that Respondent has breached its most constant protection and security duty under Article 10(1) ECT. In this respect, Claimants rely on the same five core breaches as they rely on for the breaches of fair and equitable treatment.

225. Fourth, Claimants argue that Respondent has breached its duty of observance of obligations under Article 10(1) ECT, by virtue of its breaches of:

1) The 2010 Shareholders Agreement, specifically Article 1 (obligation to act jointly, as mutually agreed to ensure the development of the Company, and its attractiveness throughout the whole period of activities), Article 4 (obligation to take all the necessary measures to ensure sale of the Company's products at economically reasonable market prices) and Article 12 (obligation to act in good faith, fairly and reasonably).

2) The 2010 Cooperation Agreement, specifically Article 1 (duty to act jointly and in a mutually agreed way and in observance of the Ukrnafta Articles of Association); Article 4 (duty to undertake the necessary joint decisions according to the procedure set by the legislation in force, the charter of Ukrnafta, and the joint understandings of the parties set out in the 2010 Cooperation Agreement in order to achieve the aim set by such agreement); and Article 14 (duty to perform that contract in full, with respect for the interests of other shareholders, and to act in good faith, fairly and reasonably in that performance).

226. Fifth, Claimants contend that Respondent has breached its obligation to ensure that the domestic law provides effective means for assertion of claims and for the enforcement of rights, under Article 10(12) ECT by failing to comply with the courts' judgments against it.

227. Sixth, Claimants argue that Respondent failed to permit Claimants to employ key persons of their choice, regardless of nationality, and citizenship, provided that such key person has been permitted to enter, stay and work in Ukraine, in breach of Article 11(2) ECT. This occured when Naftogaz removed from management positions in Ukrnafta individuals Claimants had nominated in accordance with their right to do so under the 2010 Shareholders Agreement and Ukrnafta's 2011 Articles of Association.

228. Seventh, Claimants contend that Respondent has expropriated, or subjected to measures with equivalent effect, Claimants' investments, in breach of Article 13 ECT. This was because Respondent interfered with Claimants' use of their shareholdings in Ukrnafta in a way that had the effect of depriving them in significant part of the use and reasonably-to-be-expected economic benefit of those shareholdings.

229. Eighth, Claimants argue that contrary to Respondent's argument, there is no preclusion of liability based on Article 24 ECT, in that the measures Claimants are taking issue with do not fall within any of the exception for liability set out in Article 24.

2. Summary of Respondent's case

230. Respondent makes the preliminary point that Claimants' allegations need to be considered in light of the object and purpose of the ECT. Further, Claimants' objections regarding the prices at which Ukrnafta's gas were regulated need to be analysed in light of Article 24 ECT. Claimants' further claims must to be considered in light of the conduct of Claimants and the main UBOs, whose involvement was characterised by illegality and corruption.

231. Respondent further denies liability in respect of all the breaches alleged by Claimants.

232. First, Respondent argues that it has not failed to accord fair and equitable treatment to Claimants' investment under Article 10(1) ECT. In this respect, Respondent submits in essence: (1) that Claimants have failed to demonstrate that they possessed any legitimate expectations that are protected under the ECT; and (2) that Claimants have failed to demonstrate, to the required standard, that Respondent acted arbitrarily or in a non-transparent or inconsistent manner in breach of Article 10(1) ECT. The five core breaches relied upon by Claimants fail to evidence any breach of the required standard.

233. Second, Respondent argues that Claimants' allegations that Respondent impaired by adopting unreasonable measures Claimants' use or enjoyment of their alleged investment largely duplicate their claim related to the fair and equitable treatment and must be similarly rejected. Claimants' additional submission that Respondent refused to permit Ukrnafta to invest in capital is incorrect as a matter of fact.

234. Third, Respondent argues that Claimants' allegations that Respondent failed to accord Claimants' investment the most constant protection and security must fail. Claimants do

not argue that their alleged investment suffered any form of physical impairment. In any event, such allegations are largely duplicative of Claimants' claim related to the fair and equitable treatment standard and must be rejected for the same reasons.

235. Fourth, Respondent submits that Claimants' claim for failure to observe obligations it had entered into vis-à-vis Claimants or their investment must fail because Claimants have failed to establish that the alleged contractual breaches of the 2010 Shareholders Agreement and 2010 Cooperation Agreement constitute breaches of international law.

236. In any case, Respondent contends that Claimants' claims regarding the alleged breaches of the 2010 Shareholders Agreement must be rejected because (1) Respondent has not entered into any obligation under such agreements; (2) such obligations would, in any event, be governed by the exclusive jurisdiction clause at Article 17 of the 2010 Shareholders Agreement; and (3) the Tribunal needs to respect the parallel pending LCIA Arbitration.

237. In any event, Respondent has neither breached Articles 1, 4 or 12 of the 2010 Shareholders Agreement, nor Articles 1 and 4 of the 2010 Cooperation Agreement.

238. Fifth, Respondent submits that Claimants' contention that Respondent has breached its obligation to ensure that the domestic law provides effective means for the assertion of claims and the enforcement of rights, under Article 10(12) ECT must be rejected. According to Respondent, Claimants' claim does not meet the threshold for denial of justice and it should thus similarly be found that it does not meet the standard for effective means. In any event, when assessed as whole, it is clear that the Ukrainian legal system allowed Ukrnafta successfully to enforce its rights.

239. Sixth, Respondent argues that it did not fail to permit Claimants to employ key persons of their choice regardless of nationality in breach of Article 11(2) ECT. It contends that Claimants' claim distorts the plain meaning of Article 11(2) and in any event, is wrong as a matter of fact.

240. Seventh, Respondent contends that Claimants' expropriation claim should be rejected. In essence, Respondent argues that Claimants do not even allege that they have lost control over their supposed shareholding in Ukrnafta and are unable to demonstrate that Respondent's alleged unlawful conduct caused a loss of value to Claimants' shareholding

in Ukrnafta.

VI. RELIEFS SOUGHT

A. Claimants' request for relief

241. Claimants have amended their request for relief several times. The latest iteration of such relief is contained at paragraph 934 of CPHB1 in which Claimants request the Tribunal to:

> *"a. **DECLARE** that it has jurisdiction over the Claimants' claims, and that those claims are admissible;*
>
> *b. **DECLARE** that the Respondent has breached Articles 10(1), 10(12), 11(2) and 13 of the ECT;*
>
> *c. **ORDER** the Respondent to pay the Claimants the sum of US$6.108 billion (alternatively, the sum of US$4.180 billion) in reparation for its breach of the ECT;*
>
> *d. **ORDER** the Respondent to pay the Claimants a further sum (to be calculated) in respect of their Pre-Award Interest Claim which covers the period from 1 January 2020 to the date of the Award;*
>
> *e. **ORDER** the Respondent to pay the Claimants post-award interest on the sums awarded pursuant to prayers (c) and (d) at the same rate as the Pre-Award Interest Claim, covering the period from the date of the Award until the date of payment; and*
>
> *f. **ORDER** the Respondent to pay the Claimants' costs of this arbitration, including the costs which they incur in respect of the costs of the Tribunal, and to pay the Claimants interest on such costs at the same rate as the Pre-Award Interest Claim, covering the period from the date of the Award until the date of payment."*[30]

B. Respondent's request for relief

242. Respondent has amended its request for relief several times. The latest iteration of such relief is contained at paragraph 1052 of RPHB1 in which Respondent requests the Tribunal to:

> *"(i) dismiss all of the Claimants' claims for lack of jurisdiction and / or as inadmissible;*
>
> *(ii) in the alternative, dismiss all of the Claimants' claims as unfounded;*
>
> *(iii) in the alternative, reject the Claimants' claim for damages and compensation; and*

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[30] Claimants maintain this prayer for relief in CPHB2, except for the amounts claimed under (c). In CPHB2, para. 198, Claimants have amended such amounts and now requests the Tribunal to order Respondent to pay Claimant *"the sum of $6.035 billion which they seek pursuant to their Primary Case, alternatively the sum of $4.174 billion which they seek pursuant to their Alternative Case, together with further pre-award interest covering the period from 31 December 2019 to the actual date of the Award (which will have to be calculated)."*

(iv) order the Claimants to bear the costs of this arbitration, including all fees and expenses of the Arbitration Institute of the Stockholm Chamber of Commerce, the Tribunal, assistants and secretary to the Tribunal and the arbitrators, as well as the Respondent's costs (including but not limited to its legal fees and expenses), with interest, payable forthwith."[31]

VII. TRIBUNAL ANALYSIS OF PRELIMINARY, JURISDICTIONAL AND ADMISSIBILITY ISSUES

243. The issues in dispute in the Arbitration are divided into two categories: the jurisdiction of the Tribunal, in the alternative, the admissibility of Claimants' claims, and assuming these issues are decided positively, Respondent's liability in respect of Respondent's alleged breaches of the ECT, and the consequential damages for such breaches, if any.[32] If the Tribunal decides that it does not have jurisdiction or that Claimants' claims are inadmissible, it will not need to deal with liability and quantum.

A. Preliminary issues

244. Respondent has made several challenges to the jurisdiction of the Tribunal and in the alternative to the admissibility of Claimants' claims. The challenges relate to the timeliness of and the pre-conditions for bringing this Arbitration, the subject matter of the dispute and other factors affecting the relationship between the Parties.

245. Before it addresses these grounds, the Tribunal considers the applicable law and Claimants' contention that Ukraine has waived its right to or is estopped from challenging this Tribunal's jurisdiction because of its conduct prior to the commencement of this proceeding.

1. Applicable law

246. It is common ground between the Parties that the ECT applies to the determination of the Tribunal's jurisdiction and the assessment of the merits of Claimants' claim.

247. The key provision of the ECT for the purposes of determining the Tribunal's jurisdiction is

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31 Respondent maintains this request for relief in RPHB2, para. 167.

32 The Tribunal invited the Parties to agree a list of issues for consideration. As they were unable to agree, both Parties provided their own list of issues. There was substantial overlap between the two lists.

Article 26 ECT. This provides in pertinent part:

> *"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
> *(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*
> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
> *(c) in accordance with the following paragraphs of this Article.*
> *3. (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.*
> ...
> *4. In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*
> ...
> *(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.*
> *5. (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*
> ...
> *(ii) an 'agreement in writing' for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the 'New York Convention');*
> ...
> *6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*

248. There are other provisions of the ECT relevant to the specific challenges raised by Respondent. These are directly quoted and analysed in the relevant sub-sections below.

249. The Parties have also made references to and/or submitted expert reports in respect of Cypriot and Ukrainian law, to which the Tribunal has referred to the extent such laws are relevant to its analysis.

250. This Arbitration is conducted in accordance with the SCC Arbitration Rules, and the procedural orders of the Tribunal. As Stockholm is the seat of arbitration, it is also subject to mandatory rules of Swedish law.

2. Is Ukraine precluded from raising jurisdictional objections?

251. The question here is whether by its actions and statements, Respondent waived the right to raise, or is estopped from raising, jurisdictional objections in connection with the Arbitration.

i. Claimants' position

252. A key issue or "core fact" in Claimants' case is "*that the Respondent took 10.5 bcm of gas from* [Ukrnafta] *without contract and without payment*".[33] Respondent's officials have acknowledged on various occasions that this gas had been taken and not paid for. The issue has been raised in the Ukrainian courts numerous times and there have been several meetings between Mr Kolomoisky and Mr Bogoliubov and senior government officials to try to resolve the issue during which Respondent proposed that the dispute be resolved by a neutral tribunal.

253. Against this background, Claimants argue that Respondent is precluded from raising jurisdictional objections in this dispute on the basis of the doctrine of waiver or estoppel under international law. Claimants further allege that Respondent is precluded from making its belated admissibility objection based on allegations of fraud.

254. The first argument is essentially founded on the contention that in March-April 2015, discussions took place between the main UBOs and Respondent's officials regarding Respondent's failure to pay Ukrnafta for the gas it had taken. During these discussions, Respondent represented that an international tribunal should hear the merits of Claimants' claims and that "*reparation would only be made as a result thereof*".[34]

255. Claimants contend that this representation is reflected in the evidence, including:

1) The evidence of Mr Kolomoisky and Mr Kartashov, Ukrnafta's Executive Vice-President for Legal Affairs/Director of the Legal Procurement Department, regarding a meeting that took place at the Presidential administration on the evening of 24 March 2015 *inter alia* between them, Ukraine's then President, Mr Poroshenko, and

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[33] CPHB1, para. 2.
[34] Reply, para. 139.

other government officials, where a possible settlement agreement was discussed.[35] According to Mr Kolomoisky, a further meeting took place the day after, the purpose of which was the discussion of the *"Ukrnafta gas expropriation issue"* and Prime Minister Yatsenyuk suggested that this dispute be resolved outside Ukraine.[36] Mr Kartashov, who also attended the meeting on 25 March 2017, confirmed Mr Kolomoisky's recollection.

2) The evidence of the negotiations held between these initial meetings through to 29 April 2015, including the meetings held on 9 April 2015 and on 16 April 2015, respectively.

3) The Settlement Agreement in which President Poroshenko and Prime Minister Yatsenyuk and his government (identified as "Party 1") and Mr Kolomoisky and Mr Bogoliubov (identified as Party 2) agreed that:

"1.3. The private shareholders of Ukrnafta shall have the right to file a claim against Ukraine and / or Naftogaz in the Ukrainian and / or international courts to resolve the dispute in relation to 10.5 billion m3 of gas received from Ukrnafta (the "Gas Volume").
1.4. Claims of private shareholders of Ukrnafta against Ukraine and / or Naftogaz in the Ukrainian and / or international courts in relation to the Gas Volume shall be settled by entering into an amicable agreement on the terms pursuant to which private shareholders will be entitled to receive the Gas Volume from Ukrnafta over the period of no more than 15 years in equal instalments annually. This right shall be documented in a legal instrument which will allow to use it as collateral for PrivatBank's obligations in accordance with NBU normative standards. The valuation of the collateral shall be performed by an international independent reputable appraiser.
1.5. Naftogaz shall properly document the Gas Volume in accordance with the terms of the amicable agreement."[37]

256. Claimants also place particular emphasis on the minutes of the Ukrnafta supervisory board meeting of 26 November 2015 during which Mr Kobolyev, the CEO of Naftogaz, is recorded to have asked whether a *"third party mitigation mechanism"*, *"[a]rbitration procedure, whatsoever, outside of Ukraine"* has been considered.[38] Mr Kobolyev explained that resolving the gas price valuation issue outside Ukraine was *"the key element"* because *"inside Ukraine there [was] too much political influences, potential risks of inefficient legal*

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35 At that meeting, a brief document recording the settlement terms called "Annex 1" was prepared (see Exhibit C-2102).
36 Kolomoisky, 1st witness statement, para. 134.
37 Exhibit C-2107. (Emphasis added).
38 Exhibit C-2194, para. 27.

system..."[39]

257. Claimants insist that Respondent's evidence to the contrary, given by Mr Kobolyev, as to the representations made (further discussed below) does not accord with the evidence on the record and the facts of the case.

258. On the basis of the above contentions, Claimants submit that Respondent is precluded from raising jurisdictional objections by virtue of either the doctrine of waiver or estoppel under international law. Claimants submit that both waiver and estoppel have the effect that a right which existed at a certain time can no longer be relied upon or enforced by the holder of that right. They allege that a waiver or estoppel arises where (i) a party makes a statement of fact which is clear and unambiguous; (ii) the statement is voluntary, unconditional and authorised; and (iii) another party relies in good faith upon the statement either to its detriment or to the advantage of the party making the statement.

259. Claimants argue that Respondent's conduct meets the relevant test and accordingly, Respondent is now estopped from challenging the Tribunal's jurisdiction. In this respect, Claimants further submit that contrary to Respondent's counter-argument, for representations to be valid and effective they do not need to be contained in a binding domestic law contract amounting to a waiver or estoppel under international law. Claimants maintain that Respondent's analysis of the legal authorities does not question the test set out by Claimants and the fact that it is met in this case.

260. Claimants contend that, in any event, Respondent is precluded from raising its admissibility objections on the basis of its allegations of fraud, which were first raised in the RoMRoJ. This is on the basis of Article 24.2 of the SCC Arbitration Rules and Section 34.2 of the Swedish Arbitration Act, which both require any jurisdictional objections to be raised at the latest in the SoD.

ii. Respondent's position

261. Respondent argues that Claimants' contention that it has waived the right to or is estopped from raising jurisdictional objections is wrong as a matter of fact and law.

262. As a matter of fact, Respondent submits that the Settlement Agreement was never

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[39] Exhibit C-2194, para. 27.

entered into, which is accepted by Claimants. Respondent insists that it was always plain that it would challenge the jurisdiction of any tribunal. It highlights that the specific context during which the Settlement Agreement was negotiated undermines the weight that Claimants seeks to put on it.

263. Furthermore, Respondent denies Claimants' contention that the Settlement Agreement acknowledged that 10.5 bcm of Ukrnafta's gas was expropriated and that it provided for compensation. Rather, the Settlement Agreement referred to "*gas received from Ukrnafta and to a return of the gas over a period of no more than 15 years*".[40] This is not the gas subject to the Arbitration.

264. Respondent also contends that Mr Kobolyev's recollection of the relevant meetings is materially different from that put forward by Claimants' witnesses. In particular, he recalls suggesting an "*independent third-party evaluation or expert determination*" which matches the Ukrnafta supervisory board meeting minutes of November 2015.[41] He indicated that while the Ukrainian Government encouraged Naftogaz and Ukrnafta to resolve their issue concerning the gas price to be paid by Naftogaz, it did not invite this (or any) arbitration, or admit any liability on the part of Ukraine.

265. As a matter of law, Respondent contends that even if Claimants' version of events is accepted as correct, the legal authorities on which they rely are not on point and/or do not support their case.

266. In *Chevron v Ecuador,* the tribunal discussed estoppel and waiver in the different context of abuse of a substantive right. In any event, it established that "*it is only in 'very exceptional circumstances' and subject to a 'high threshold', that the holder of a right can be barred from enforcing it*".[42]

267. The *Aguas del Tunari v Bolivia* case concerned the question whether an exclusive forum selection clause constituted an implied waiver of ICSID jurisdiction.[43] The tribunal held

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40 RoMRoJ, para. 388.

41 *Ibid.*, para. 400.

42 *Ibid.*, para. 403 referring to Exhibit CLA-85, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. AA 277, Interim Award, 1 December 2008, para. 149.

43 *Ibid.*, para. 404 referring to Exhibit CLA-75, *Aguas del Tunari SA (AdT) v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 119.

that a waiver could not be implied and that there needed to be evidence of specific and clear intention for a waiver to be effective.

268. In *Cargill v Poland* the parties had entered into a binding agreement making it clear that *"[t]he Republic of Poland agrees that it will not raise objections to the jurisdiction of the UNCITRAL tribunal and the arbitration will proceed to the merits phase."*[44] This renders the case clearly distinguishable from this Arbitration.

269. *Pope v Talbot* confirms that estoppel is a high-threshold doctrine including the following requirements: (1) a *"clear and unambiguous statement of fact"*; (2) *"voluntary, unconditional and authorised"* statements; and (3) good faith reliance by the other party.[45]

270. Respondent thus submits that the test is not met in this case, in that neither the terms of Clause 1.3 of the Settlement Agreement, nor the verbal statements attributed to Mr Kobolyev, were clear and unambiguous; and in any event, Mr Kobolyev's statements were not authorised.

iii. Tribunal's analysis and decision

271. The issue here is whether Respondent is precluded from raising jurisdictional objections in this Arbitration. The question is: did Respondent agree, through express language or actions, not to challenge jurisdiction in proceedings brought in respect of Claimants' claims?

272. It is generally recognised that for a waiver to be effective and estoppel to apply, the exclusion must be clear and unambiguous, voluntarily and unconditional. Also, the waiver or agreement must have been authorised, and the party relying on it must have relied on that agreement in good faith and to its disadvantage or to the advantage of the party making the statement. In *Pope & Talbot v The Government of Canada,* the tribunal stated:

> *"In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or*

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44 *Ibid.*, para. 405 referring to Exhibit CLA-146, *Cargill, Incorporated v. Republic of Poland,* UNCITRAL, Final Award, 5 March 2008, para. 247.

45 *Ibid.*, para. 406 referring to Exhibit RLA-87, *Pope & Talbot Inc. v. The Government of Canada,* UNCITRAL, Interim Award, 26 June 2000, para. 111.

to the advantage of the party making the statement." [46]

273. In *Pope & Talbot*, Canada argued that the investor was estopped from raising its claims because it had agreed not to do so both in a letter and through representations about this letter. The tribunal stated that the language in the letter was not sufficiently specific to constitute a clear and unambiguous statement, including because it did neither refer to NAFTA nor to the waiver of any rights to compensation under it. The tribunal further did *"not consider that simple presence of an officer of the company at a meeting constitute[d] a representation of any sort."*[47]

274. The ICSID tribunal in *Aguas del Tunari SA (AdT) v Republic of Bolivia* took the same approach stating that only a *"clear waiver"* would be effective.[48] It further explained:

> *"A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. As stated above, an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties."*[49]

275. An example of what constitutes a clear waiver was given in *Cargill Inc v Republic of Poland.* There, the Republic of Poland had explicitly agreed that *"it [would] not raise objections to the jurisdiction of the UNCITRAL tribunal and the arbitration [would] proceed to the merits phase."*[50] The tribunal found the wording of the waiver to be *"unambiguous and... not limited by any exceptions"*.[51] It further observed that at the time when Poland waived its rights, it knew the nature of Cargill's claims and was in a position to assess its possible defences. The tribunal concluded that Poland had waived its right to challenge jurisdiction and was thus estopped from raising jurisdictional defences before it.

276. The Tribunal finds the test set out by the tribunal in *Pope & Talbot* to be helpful and relevant. The question is whether Claimants have met their burden of proving that Respondent made a clear, explicit and unambiguous (i.e. first factor), voluntary,

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46 Exhibit RLA-87, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 111.

47 *Ibid.* para. 112.

48 Exhibit CLA-75, *Aguas del Tunari SA (AdT) v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 118.

49 *Ibid.*, para. 119.

50 Exhibit CLA-146, *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, Final Award, 5 March 2008, para. 247.

51 *Ibid.*, para. 250.

unconditional and authorised (i.e. second factor) commitment not to challenge the jurisdiction of any arbitration tribunal before which Claimants introduced their claims, as well as whether Claimants have shown that their reliance on this alleged waiver resulted in their detriment (i.e. third factor). The Tribunal finds that Claimants have failed to meet their burden.

277. Claimants' position is that Respondent has waived its right to challenge the Tribunal's jurisdiction by virtue of (1) the representations given by different government officials, and (2) Clause 1.3 of the Settlement Agreement, both of which allegedly provided that Claimants could bring their claims before an international tribunal.

278. With regard to the first and second factors, the Tribunal notes that Claimants adduced the testimony of several witnesses who participated in different meetings between the main UBOs, Ukrnafta, Naftogaz and Respondent. These witnesses confirmed that different government officials made suggestions for the dispute to be decided by an international court. In contrast, Respondent provided only Mr Kobolyev's testimony who denied having made any such representations. Rather, he simply suggested that the parties should resort to an independent third party valuation or expert determination as a way of resolving their dispute.

279. In the Tribunal's view, based on the evidence and witness testimony in the record, all involved in the various meetings accepted that the dispute needed to be resolved, if possible, in an appropriate forum. This was the purpose of the several meetings between *inter alia* Prime Minister Yatsenyuk, senior Ukrainian officials and Privat Group representatives. The Tribunal also understands in this context that there may have been political advantages for a private arbitration rather than a public discussion in the Ukrainian Parliament, courts and media. This explains the discussion of settling the matter by an international court and Clause 1.3 of the Settlement Agreement.

280. However, there was no clear, unambiguous and explicit representation given by the Government officials that Ukraine would not challenge the jurisdiction of the tribunal to which the matter was referred. Even if the individuals concerned had the authority to make such representations on behalf of Respondent, the representations would have been too generic to constitute a proper renunciation of the State to its right to challenge jurisdiction.

281. Likewise, the Settlement Agreement does not contain clear and unambiguous language excluding or limiting the jurisdiction of this Tribunal. Clause 1.3 is not in mandatory language requiring all disputes between the parties to be resolved by arbitration. In any event, the Parties agree that the Settlement Agreement was not contractually binding as a settlement of this dispute.[52]

282. Those who participated in the meetings surrounding the Settlement Agreement seem to have understood that it was referring to a forum outside Ukraine without any further specifics being discussed or agreed. No details are given as to the international court nor the specific disputes to be referred to that court for determination. The wording of the Settlement Agreement and the fact that it was not signed and executed, coupled with the witness statements of those present at the meetings discussing this issue, support the conclusion that the Settlement Agreement, at best, recorded an understanding between the parties for the resolution of a dispute by international courts. There was no mention of international arbitration as such.

283. Even if by *"international court"* the parties intended to refer to international arbitration, the only specificity to the subject-matter to be referred to arbitration was to the 10.5 bcm gas claim. This is just one of many issues and claims subject to this Arbitration, rather than the only one. There was also no agreement as to the form, the applicable rules of arbitration, seat of arbitration, or number of arbitrators.

284. A dispute resolution clause should only affect the jurisdiction of a tribunal *"if it clearly is intended to modify the jurisdiction otherwise granted"* to that tribunal.[53] No such language is present in Clause 1.3 of the Settlement Agreement. In the Tribunal's view, Clause 1.3 does not suffice to conclude that Respondent waived its right to challenge the jurisdiction of a tribunal to which Claimants may have decided to refer the issues in dispute and to estop Respondent from raising jurisdictional challenges in this Arbitration.

285. This Arbitration has been brought under the ECT on the basis of Claimants' alleged investment in Ukraine, and concerns Respondent's alleged breaches of the ECT. Respondent could not have waived all jurisdictional challenges without knowing the forum

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52 See e.g. Reply, para. 3; RoMRoJ, para. 382.

53 Exhibit CLA-75, *Aguas del Tunari SA (AdT) v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 119.

in which this Arbitration would be brought, nor the specific claims which Claimants would seek the arbitral tribunal to determine.[54]

286. Further, in the Tribunal's view, it is not possible to exclude issues from or limit the jurisdiction of an international tribunal without knowing exactly the nature and basis of the jurisdictional issues raised and the relief sought. It would be equally impossible to exclude issues which concern fundamental issues affecting the State including arbitrability, illegality and public policy. To be effective the nature of the claims being waived must be known to the party making the waiver. Neither the representations given at the meetings described above, nor the Settlement Agreement, contain such specificity.

287. Claimants have therefore failed to persuade the Tribunal that there was an explicit, unambiguous, clear, voluntary and authorized waiver by Respondent of its right to raise jurisdictional objections against potential claims brought by Claimants in a then unknown arbitral forum.

288. As to the third factor, the Tribunal considers that Claimants have not shown that they relied upon Respondent's purported waiver and suffered any prejudice from such reliance.

289. Accordingly, the Tribunal has concluded that Respondent is not precluded from raising, and the Tribunal is not precluded from determining, jurisdictional objections and admissibility arguments raised by Respondent in this Arbitration.

290. Moreover, Claimants argue that Article 24(2) of the SCC Arbitration Rules and Section 34.2 of the Swedish Arbitration Act preclude Respondent from raising issues of fraud after its SoD. Article 24(2) of the SCC Arbitration Rules provides in pertinent part:

> *"The Respondent shall, within the period of time determined by the Arbitral Tribunal, submit a Statement of Defence which shall include, unless previously submitted:*
> *(i) any objections concerning the existence, validity or applicability of the arbitration agreement..."*

291. Section 34.2 of the Swedish Arbitration Act does not contain any such restriction; rather it deals with arbitrators exceeding their mandate.

292. Accordingly, the Tribunal retains the discretion to allow issues to be raised at a later time

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[54] Also, Respondent would have needed to know who the Claimants would be in such arbitration. Claimants are not the only shareholders in Ukrnafta; there are other minority shareholders.

where a party either was unable to raise the issue earlier or where in the circumstances it would be unfair not to allow a relevant matter to be raised and evidence presented in answer to a claim.

293. In the Tribunal's view, Respondent validly raised its objections in the circumstances of this case. In any event, the fraud issues raised by Respondent only became apparent during the preparation of Respondent's evidence in this case. Also, this evidence ties in with the allegations of bribery and corruption on the part of Mr Kolomoisky and Mr Bogoliubov in connection with their control of Ukrnafta, which were raised in the SoD.

B. Jurisdiction and admissibility

294. As already explained above, the challenges to the Tribunal's jurisdiction raised by Respondent are brought under eight different heads. The Tribunal has decided that Respondent succeeds on three of these challenges, each of which is itself finally dispositive of the case. The Tribunal's discussion and analysis below accordingly focusses on these three challenges, that is to say:

1) Do Claimants have an "Investment" for the purposes of Article 1(6) ECT?

2) Does the Tribunal lack jurisdiction or are Claimants' claims inadmissible by reason of fraud/corruption/bribery/illegality?

3) Did Respondent deny Claimants the benefits of Part III of the ECT in accordance with Article 17(1) ECT?

1. Do Claimants have an "Investment" for the purposes of Article 1(6) ECT?

i. Respondent's position

295. Respondent contends that Claimants have not made an "Investment" in Ukraine which is protected under Article 1(6) ECT and accordingly this Tribunal lacks jurisdiction *ratione materiae*. This contention is articulated around a number of key arguments.

296. First, Respondent argues that Claimants failed to discharge their burden of proving that they held an investment in Ukraine in the relevant period. Specifically, Respondent maintains that Claimants failed to prove: (1) that they actually acquired legal title to the Ukrnafta shares in March 2007; (2) assuming that they did acquire ownership in March 2007, that they remained owners of these shares at the date of the alleged breaches of

the ECT or at the time when they initiated the Arbitration (which Respondent insist is the relevant time for the purposes of jurisdiction). This is essentially founded on Respondent's contention that the evidence provided by Claimants in this respect is incomplete and/or inconsistent, including:

> *"(i) The inadequacy of the 'evidence' of custodianship given that such evidence has been created by or controlled by the Privat Group;*
>
> *(ii) The Claimants' failure to produce original versions of key documents;*
>
> *(iii) The unexplained redactions in the Claimants' new documentation, particularly as regards the share purchase agreements relating to the trust arrangements between 30 October 2008 and 20 March 2009;*
>
> *(iv) The Claimants' failure to disclose documents relating to the Claimants' alleged investment is especially unjustifiable given that documents they did produce contain typos and drafting errors indicating that these were not proper and genuine commercial transactions."*[55]

297. As to Claimants' alleged acquisition of their Ukrnafta shares on 16 March 2007, Respondent specifically contends that Claimants have not provided evidence as to when or how they allegedly received their Ukrnafta shareholdings from their parent companies and why the agreements with the parent companies were executed after the execution of the corporate documents relating to the contribution of these same shares by Fresno, Edmore and Croydon to Claimants.

298. Respondent further argues that even if Claimants acquired the Ukrnafta shares on 16 March 2007, those shares have not been owned or controlled by Claimants continuously since 2007. In the period between October 2008 and March 2009, Claimants did not hold any legal title to the shares and therefore did not own or control an investment in Ukraine. Claimants could not have retained a beneficial interest in the shares during these months, because such rights could not have been created as a matter of Ukrainian law, which is the relevant law.

299. Respondent also contends that Claimants did not own their Ukrnafta shares when they commenced the Arbitration. Respondent alleges that Littop and Bridgemont transferred the full amount of their Ukrnafta shares on 12 October 2013. As for Bordo, Respondent alleges that it disposed of 719,788 shares on 12 May 2011 and transferred the balance of

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[55] RoMRoJ, para. 414.

6,657,997 on 12 October 2013.

300. Respondent insists that the evidence relating to ownership of the shares at different times should not be accorded much weight by the Tribunal because it has been issued by companies which are part of the Privat Group.

301. Second, Respondent argues that Claimants have not demonstrated that their investment involved any contribution. Respondent submits that such contribution is required, pursuant to the correct interpretation of the definition of investment in the ECT and *"the now settled approach in investment arbitration requiring positive conduct as evidence of investment rather than mere passive holding"*.[56] Respondent says that there are *"three interrelated core elements of the legal analysis"* supporting its position: first, an investment in terms of Articles 1(6) and 26 ECT must be associated with some form of international conduct and economic activity; second, ECT Understanding 3 requires an examination of the actual circumstances to determine the economic and financial reality behind the control of an investment; and third, and following from the first two, the investment *"must involve: a) contribution; b) returns: and c) the assumption of risk."*[57]

302. Respondent argues that Claimants have failed to demonstrate that they made an investment satisfying this test, specifically because Claimants have failed to show the following:

> *"(i) First: the transaction by which the Claimants purport to have made the investment was an intra-group transfer that involved no consideration of value at all by the Claimants.*
> *(ii) Second: the legal title obtained as a result of the intra-group transfer was disposed of between October 2008 and March 2009. The reason for that was an attempt to frustrate potential legal claims in relation to the dispute that the Claimants' beneficial owners had with Mr. Firtash.*
> *(iii) Third: following this disposition of the title, the Claimants received different shares in a manner that remains entirely opaque. Over 30 intermediaries were involved and the Claimants – again – gave no consideration.*
> *(iv) Fourth: there is no evidence of any substantial business activity in Cyprus – or indeed elsewhere.*
> *(v) Fifth: there is no evidence that the Claimants' directors ever exercised any substantive decision-making."*[58]

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56 RPHB1, para. 310.
57 *Ibid.*, para. 311.
58 *Ibid.*, para. 312.

303. Respondent further contends that Claimants' attempt to show that they made a contribution through the subscription process by which they originally acquired their Ukrnafta shares failed. This is because the subscription process cannot be described as a meaningful contribution, given that the allotment of shares to Claimants is riddled with inconsistencies, which call into question their authenticity; and, in any event, Claimants had no assets.

304. Respondent contends that dividends cannot qualify as an investment for the purposes of the ECT because Claimants "*were mere conduits*" whereby "*dividends were passed on to Claimants' shareholders, and any undistributed dividend remaining in Ukrnafta belonged to the Claimants' shareholders*".[59] These could only qualify as an investment if Claimants could demonstrate title to the underlying Ukrnafta shares upon which the dividends depend.

305. Respondent takes issue with Claimants' reliance on the 2010 Shareholders Agreement and 2010 Cooperation Agreement as an investment. Respondent argues that as Claimants have not been able to demonstrate that their interest in Ukrnafta shares is an investment, they cannot invoke any claimed performance associated with or derived from that investment. Further, Respondent notes that Ukrnafta entered into these agreements in 2010, after the dispute the subject of this Arbitration had arisen.[60]

ii. Claimants' position

306. Claimants contend that their assets in Ukrnafta are an investment "*under the generally-phrased chapeau*" to Article1(6) ECT, and under the specific examples of such assets given in Article 1(6)(b), (c), (e) and (f) ECT as well as the last paragraph of Article 1(6) ECT.[61]

307. Claimants contend that they have provided sufficient evidence to prove that they have an investment in Ukraine for the purposes of Article 1(6) ECT. They argue that they have evidenced the acquisition and maintenance of their shares in Ukrnafta in three ways.

308. First, Claimants claim to have evidenced the acquisition of 40.05% of Ukrnafta shares by way of subscription applications on 16 March 2007, which allowed each Claimants' parent

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[59] RPHB1, para. 315.
[60] SoD, para. 526.
[61] *Ibid.*, para. 292.

company to acquire additional new shares in each Claimant in return for each Claimant obtaining from its parent 13.3483% of the Ukrnafta shares.

309. Second, Claimants contend to have evidenced that they remained beneficial owners of their shares during the temporary transfer of the nominal title in their shareholdings for about four and half months from October 2008 until March 2009 after which the shares were transferred back to Claimants. According to Claimants, investment treaty jurisprudence has recognised that property owned beneficially is an asset that can be the subject of protection on the international legal plane. This arrangement is also valid under Cypriot and Ukrainian law.

310. For completeness, the Tribunal notes that this temporary transfer is alleged to have occurred pursuant to the Firtash Agreement entered into in November 2006, already described at paragraphs 88 to 91 above. In accordance with this agreement, Mr Firtash paid two deposits towards the US$1 billion, amounting to US$100 million and US$150 million, respectively. However, in 2007, this arrangement unravelled as Mr Firtash stopped paying the instalments due. By 2008, it became clear that Mr Firtash *"was not going to pay the balance of the price and the deal would therefore not complete."*[62]

311. There was nonetheless concern that Mr Firtash could attempt to gain control of the shares. Claimants therefore transferred the shares to a procession of companies, and placed the shares in a trust.[63] During this period while Claimants were not the legal owners of the shares, they claim to have been, at all times, the beneficial owners of the shares. In addition, whilst there were further dealings with the nominal title to the shares by the companies that received them, Claimants submit that they had the right, at any time, to request that the Ukrnafta shares be returned to them.

312. In March 2009, a supplemental document was signed between Claimants and Mr Firtash whereby it was agreed that Mr Firtash had a 12.5% interest in Claimants.[64] Claimants contend that at this stage, issues had been resolved, so that the shares could be transferred back to Claimants.

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62 Kolomoisky, 1st witness statement, para 65.

63 This arrangement is discussed in greater detail at paragraphs 342 to 346 below.

64 The deal was eventually cancelled in the spring of 2010 and Claimants claim to have returned the sums previously paid, together with an agreed amount of interest. See Kolomoisky, 1st witness statement, para. 66.

313. Third, Claimants contend to have evidenced that their total Ukrnafta shareholding was increased to 40.1009% in 2011 until well after the initiation of this Arbitration.

314. Furthermore, Claimants argue that their investment also includes the 2010 Shareholders Agreement and the 2010 Cooperation Agreements, which are claims to performance of contracts having an economic value, pursuant to Article 1(6)(c) ECT.

315. Finally, Claimants contend that they had rights to returns on their Ukrnafta shares, including dividends, which qualify as an investment pursuant to Article 1(6)(e) ECT.

316. In respect of all these alleged investments, Claimants argue that the requirement that they constitute an investment "*associated with an Economic Activity in the Energy Sector*" under the last paragraph of Article 1(6) is fulfilled. According to Claimants, their claimed investments relate to natural gas, which is covered by the ECT.

317. Claimants resist Respondent's challenge to the validity of the share purchase agreements and statements of securities submitted by Claimants as evidence in support of their Ukrnafta shareholding ownership on the basis of various inconsistencies and errors.

318. In respect of their acquisition of the Ukrnafta shares, Claimants submit that the "typographical errors" have been addressed by Mr Mas'ko who explained that those were drafting errors. Claimants also rely on the extracts from the registry and a copy of the files maintained by the Cypriot Companies Register for Littop and Bridgemont; written resolutions of Littop's and Bridgemont's sole shareholders; contemporaneous annual reports of the two companies; as well as their own corporate registers.

319. Claimants further contend that the evidence they have provided as to the period from 30 October 2008 to 20 March 2009 records the temporary transfer of the nominal title in their Ukrnafta shareholding for a period of some four and a half months, their retention of the beneficial interest in the shares throughout that period and the return of the nominal title in the shares back to Claimants at the end of that period.

320. In respect of the period between 2011 to date, Claimants contend that they have set out in detail the evidence and its meaning as to the small changes that resulted in a total shareholding not of 40.05% but of 40.1009%. Claimants contend that Dr Ilyashev confirms that they held the shareholdings at issue in this Arbitration as at 31 December 2014 (the date of the "trigger letter") and 30 June 2015 (the date of the Request), consistent with

the definitive proof of this fact contained in the abstracts from the relevant securities accounts.

321. As to Respondent's allegation that Claimants have never made any active and meaningful contribution, Claimants contend it is factually wrong, and legally irrelevant. As a matter of fact, Claimants contend that they purchased the shares pursuant to a subscription process which entailed the passing of something of value, in this case *"equity in their own capital which the investment in the form of [Ukrnafta] shares was held"*.[65] Claimants also gave consideration by leaving dividends in the Ukrnafta business which could otherwise have been paid to them.

322. As to legal relevance, Claimants state that there is no ECT provision that shares or other investments are only protected if acquired by paying a contribution.

323. Claimants also reject, as factually wrong and legally irrelevant, Respondent's argument that Claimants did not engage in any substantial business activity and that there is no evidence of any formally appointed officers of Claimants ever exercising a substantive decision-making role. They deny that the existence of an investment under Article 1(6) ECT requires a certain level of business activity or officers exercising a particular category of decision-making authority on behalf of a shareholder or Claimants.

324. Further, Claimants reject Respondent's legal assertion, based on Understanding 3 ECT, that an investment is preconditioned on some economic activity, which they say is wrong in law and has been rejected many times by arbitral tribunals. Claimants note that the Secretariat commentary stated that Understanding 3 ECT was prepared *"for convenience and must not be read as part of any official document or as an interpretation of any provisions of the ECT."*[66] Claimants add that authorities supporting Respondent's position in this respect are isolated.

iii. Tribunal's analysis

325. The burden of proof on all of the above issues falls on Claimants. This principle has been followed by tribunals in several investment treaty arbitrations. In *Europe Cement v Turkey* the tribunal stated that *"*[t]*he burden to prove ownership of the shares at the relevant time*

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65 CPHB1, para. 441(a).

66 *Ibid.*, para. 445.

was on the Claimant".[67] Similarly, in *Libananco* the tribunal stated that "*the Claimant bears the burden of proof on the main issue of whether it acquired timely ownership of the shares in question*".[68] This was followed again in *Von Pezold v Zimbabwe,* where the tribunal discussed the burden of proof generally and stated that the burden of proof is on the party asserting a claim in the following terms:

> *"The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists."*[69]

326. In the circumstances of this case, the Tribunal is of the opinion that to benefit from the arbitration system under the ECT, Claimants must show that they have an investment that satisfies the requirements of Article 1(6) ECT. However, Respondent can challenge, as it has in this case, the existence and lawfulness of the investment. In those circumstances, the burden may be on the Respondent to show that the claimed investment does not come within the terms of the ECT.

327. The question is whether Claimants' shareholdings in Ukrnafta, their rights under the 2010 Shareholders Agreement and the 2010 Cooperation Agreement, and their rights to dividends, constitute an investment for the purposes of Article 1(6) ECT.[70] A further key question is whether Claimants owned their claimed Investment at the relevant dates.

328. Article 1(6) ECT provides in pertinent part:

> *"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or*

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67 Exhibit RLA-114, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 166.

68 Exhibit RLA-100, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 438.

69 Exhibit CLA-148, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 174.

70 In this respect, the Tribunal looks first and foremost at the provisions of the ECT. The parties have referred the Tribunal to other investment treaty cases which have been considered to the extent relevant.

business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. (Emphasis added)

...

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat."

329. The Energy Charter Secretariat's introduction to the ECT provides that the Treaty *"obliges Contracting Parties to accord non-discriminatory treatment only to existing investments made by investors of other Contracting Parties"*.[71]

330. In this case Claimants claim to have three qualifying investments in Ukraine: (1) shares in Ukrnafta, (2) rights to performance under the 2010 Shareholders Agreement and the 2010 Cooperation Agreement, and (3) the right to revenues/dividends from the Ukrnafta shares. In the Tribunal's view Claimants have shown that they have been at times the owners of these investments. On their face, these investments come clearly within the description of *"every kind of asset, owned or controlled directly or indirectly by an Investor"*, pursuant to Article 1(6) ECT.

331. Under the ECT *"Investment"* is *"every kind of asset"* and this includes specifically shares. Further, the ECT contains no express obligations or minimum value or form of the investment, nor any requirement for the payment of capital or other specific contribution when acquiring the investment.

332. In this case, it seems that Claimants were the registered legal owners of the Ukrnafta shares. This is supported by the statements of securities transactions which evidence Claimants' shareholding and dealing in Ukraine.[72]

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[71] Exhibit CLA-1, Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.

[72] Claimants provided lengthy (but opaque) details in footnotes 84 to 90 of their SoC as to how they acquired the Ukrnafta's shares. All share acquisitions have been evidenced by statements of securities transactions which have not be countermanded by Respondent. Under Ukrainian law, statements of security are a recognised valid proof for such transactions taking place. Thus, all share acquisition transactions supported by the relevant statements of security appear to be valid and legal under Ukrainian law (see Ilyashev, 1st expert report, para. 66).

333. The provenance of these shares would appear to be as follows. In 1994, Ukraine privatised Ukrnafta "*converting* [it] *into its current incarnation as a joint-stock company*" in the same year.[73] Since 1998, Naftogaz has owned "*a bare majority*" (50% plus 1 share) of Ukrnafta's share capital.[74] In late 1999, Mr Kolomoisky and Mr Bogoliubov began acquiring Ukrnafta shares "*through various companies*".[75]

334. On 16 March 2007, Claimants acquired a total of 40.05% of Ukrnafta shares by way of subscription applications, whereby *"each Claimant's parent company acquired newly issued and allotted shares in each respective Claimant in return for 'in kind contribution' in the form of the shareholdings in Ukrnafta*".[76] In December 2006, three events of issuing and allotment of shares took place:

1) First, on 11 December 2006, Littop issued and allotted 3,199,000 shares in itself to Fresno in exchange for 7,238,613 shares in Ukrnafta. This constituted a 13.3483% shareholding in Ukrnafta. Fresno had in turn purchased this shareholding in Ukrnafta from Ravenscroft for US$3,329,761.98, pursuant to an agreement on securities purchase and sale of 23 January 2007.[77]

2) Second, also on 11 December 2006, Bridgemont issued and allotted 3,199,000 shares in itself to Edmore in return for 7,238,613 shares in Ukrnafta, which constituted a 13.3483% shareholding in Ukrnafta. Edmore had in turn purchased this shareholding in Ukrnafta from Brotstone for US$3,329,761.98, pursuant to an agreement on securities purchase and sale of 23 January 2007, with the share transfer taking place on 1 March 2007. [78]

3) Third, on 27 December 2006, Bordo issued and allotted 3,199,000 shares in itself to Croydon in return for 7,238,614 shares in Ukrnafta, which constituted a 13.3483% shareholding in Ukrnafta. Croydon had in turn purchased this shareholding in Ukrnafta from Gleslon for US$3,402,148.58, pursuant to an agreement on securities

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73 SoC, para. 48.
74 *Ibid.*, para. 3.
75 Kolomoisky, 1st witness statement, para. 17.
76 SoC, footnote 84.
77 *Ibid.*; Exhibit C-929; Exhibit C-857; Exhibit C-858; Exhibit C-860; Exhibit C-859; Exhibit C-861; Exhibit C-862; Exhibit C-871; Exhibit C-1493; Exhibit C-1439; Exhibit C-1444.
78 *Ibid.*; Exhibit C-927; Exhibit C-852; Exhibit C-928; Exhibit C-855; Exhibit C-853; Exhibit C-854; Exhibit C-856; Exhibit C-872; Exhibit C-1492; Exhibit C-1443; Exhibit C-1437.

purchase and sale of 23 January 2007, with the share transfer taking place on 1 March 2007. [79]

335. Additionally, on 24 February 2011, Claimants acquired a further 0.78% of Ukrnafta shares bringing their total shareholding in Ukrnafta to 40.8249% as follows:

1) Littop purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding) for US$13,391,645 from Business-Invest, pursuant to an agreement on securities purchase and sale of 18 February 2011. [80]

2) Bridgemont purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding) for US$13,391,645 from Business-Invest, pursuant to an agreement on securities purchase and sale of 18 February 2011. [81]

3) Bordo purchased 139,171 shares in Ukrnafta (which constituted a 0.26% shareholding) for US$13,391,645 from Business-Invest pursuant to an agreement on securities purchase and sale of 18 February 2011. [82]

336. In 2011, Claimants' collective shareholding in Ukrnafta therefore settled at 40.1009% when Bordo disposed of and then acquired a small percentage of shares on 10 May 2011 and 25 November 2011, respectively.[83]

337. In light of Respondent's challenge to these shareholdings being an investment under Article 1(6) ECT, the following questions are considered below:

1) Did Claimants pay consideration in exchange for the shares received or make any active and meaningful contribution when they acquired their shares in Ukrnafta? Did they need to?

2) What is the effect, if any, of the fact that the Ukrnafta shares were held for four and half months from October 2008 to March 2009 in separate trusts with Claimants as beneficial owners?

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79 *Ibid.*; Exhibit C-863; Exhibit C-864; Exhibit C-865; Exhibit C-866; Exhibit C-868; Exhibit C-867; Exhibit C-869; Exhibit C-873; Exhibit C-1491; Exhibit C-1442; Exhibit C-1438.

80 SoC, footnote 89; Exhibit C-1168.

81 *Ibid.*; Exhibit C-1167.

82 *Ibid.*; Exhibit C-1166.

83 SoC, para. 52; Exhibit C-1919; Exhibit C-1920; Exhibit C-1921.

3) Did Claimants own shares at the time when this Arbitration was commenced?

a. Did Claimants pay consideration or make any other contribution to acquire the Ukrnafta shares? Was such contribution necessary?

338. Respondent has argued that for an investment to be qualifying under the ECT there must have been a paid consideration or some other active and meaningful contribution.

339. As stated above, in the Tribunal's view there is no basis under the ECT to condition a qualifying investment on the investor having made some kind of financial or other value contribution. The language of Article 1(6) is clear; it does neither require an active contribution nor for the investment to be held for a certain duration. There is no requirement for shares or any other investments to have been paid for to benefit from the protection of the ECT. This is supported, for instance, by *Stati/Ascom v Kazakhstan* where the tribunal stated that the definition of investment in Article 1(6) ECT is *"extremely broad"* as opposed to the ICSID Convention which contains no definition of investment and needs further interpretation.[84]

340. The Tribunal does not consider it necessary to refer to or apply any other legal tests to determine what constitutes an investment. Accordingly, the Tribunal concludes that there is no requirement for Claimants to have paid consideration or made some other valuable contribution in respect of the Ukrnafta shares (and the other alleged investments) to constitute an investment for the purposes of the ECT.

341. In any event, if the demonstration of a "contribution" were required, Claimants have met this test. A contribution does not need to be monetary.[85] The existence of a nominal price is not a bar to finding that there exists an investment.[86] When the Ukrnafta shares were acquired Claimants allotted their own specially issued shares, which must have had

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[84] Exhibit CLA-8, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 806.

[85] See e.g. Exhibit CLA-102, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 297; Exhibit CLA-151, *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, para. 61; Exhibit CLA-152, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 131; Exhibit RLA-23, *LESI S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73(i).

[86] Exhibit RLA-2, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 119.

some, albeit nominal, value, for the transaction to take place and be valid. Further, the Tribunal accepts that undistributed dividends left in Ukrnafta, which should have otherwise been paid to Claimants, were also a contribution. Thus, Claimants' ownership of Ukrnafta's shares would have constituted an investment both under the jurisprudence on "contribution", if considered relevant, and under Article 1(6) ECT.

b. What is the effect, if any, of the fact that the Ukrnafta shares were held from October 2008 until March 2009 in separate trusts with Claimants as beneficial owners?

342. Respondent argues that Claimants have not owned the Ukrnafta shares continuously since they were first acquired on 16 March 2007. Respondent submits that according to the statements of securities transactions provided by Claimants, they did not own the Ukrnafta shares for the period from 30 October 2008 until 20 March 2009, and therefore did not *"possess an investment in Ukraine throughout the relevant time"*.[87]

343. Claimants contend to have been the legal owners of the Ukrnafta shares since 16 March 2007 except for the period between 30 October 2008 and 20 March 2009. Claimants explain that in that period they had transferred their Ukrnafta shareholdings to nominee holders due to a concern that a third party might target their assets. However, Claimants contend that during that period they remained the beneficial owners of the shares and were entitled to direct that the shareholding be returned to them at any time.

344. The operation was conducted through the conclusion of several share purchase agreements and deeds of trust. Twenty-three transfers of the shares, together with a deed of trust with each transfer in respect of the beneficial ownership of the shares, occurred in the four and a half months. The purpose was to insulate the shares in case of an attack from Mr Firtash. According to Dr Clerides, Claimants' legal expert, this arrangement was legally effective and maintained the ownership of the real owners of the shares. The shares were transferred back to Claimants on 20 March 2009.

345. The question before the Tribunal is whether the four and a half months in which Claimants did not hold legal title to Ukrnafta's shares had any impact, and if so what, on Claimants' alleged investment in Ukraine. Claimants contend that despite this perambulating

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[87] SoD, para. 83.

ownership of the Ukrnafta shares, they remained at all times the beneficial owners of the shares and could request the shares to be returned to them at any time. They contend that they have owned Ukrnafta shares at all relevant times.

346. In contrast, Respondent argues that Claimants' beneficial ownership rights over the Ukrnafta shares during the period of 30 October 2008 to 20 March 2009 could not have been created under Ukrainian law because Ukrainian law *"does not recognise any split of ownership of property... into legal and beneficial title"*.[88] Accordingly, Respondent argues that Claimants have not owned their investment continuously for the relevant period. Respondent does not explain where the requirement that the investment be held continuously comes from. It also fails to explain how non-compliance with this requirement would affect the existence of an investment under the ECT.

347. The Tribunal does not consider that it should read such requirement into the ECT in the absence of any specific provision. It therefore finds that, for the purpose of establishing jurisdiction, there is no requirement that an investment be held continuously. The Tribunal accordingly need not determine whether Claimants' beneficial ownership of the Ukrnafta shares constituted an Investment for the purposes of determining whether it has jurisdiction over this claim.

c. Did Claimants own shares at the time when this Arbitration was commenced?

348. Respondent says that Claimants did not own any Ukrnafta shares at the time of the trigger letter dated 31 December 2014 and when the Arbitration was formally commenced on 30 June 2015 with the filing of the Request.

349. Claimants deny Respondent's contention stating that they have held the *"shares at all relevant times for the purpose of this arbitration"*.[89] Specifically, Claimants state that they owned the Ukrnafta shares as at 16 March 2007 (when they first acquired the shares), at 31 December 20 (the date of Claimants' "trigger letter"), and at 30 June 2015 (when the Request was filed and this Arbitration was initiated).

350. Further, Claimants rely on the expert evidence of Dr Ilyashev who confirms that Claimants owned the Ukrnafta shares at the relevant times and that the evidence produced by them

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88 RoMRoJ, para. 165.

89 Reply, para. 155.

in this arbitration establishes this fact. After reviewing the exhibits submitted by Claimants with their SoC, Dr Ilyashev confirmed that Claimants owned Ukrnafta shares at 16 March 2007, at 31 December 2014 and at 30 June 2015. He stated specifically that: at 16 March 2007 both Littop and Bridgemont held 7,238,613 shares each, while Bordo held 7,238,614 shares;[90] at 31 December 2014 both Littop and Bridgemont held 7,377,784 shares each, while Bordo held 6,990,549 shares;[91] and at 30 June 2015 both Littop and Bridgemont held 7,377,784 shares, while Bordo held 6,990,549 shares.[92]

351. Dr Ilyashev further states that "[u]*nder Ukrainian law, the title document that provides primary evidence of share ownership is a statement of securities account*" and is "*definitive proof of ownership under*".[93] This was not challenged.

352. However, it should be noted that all of the exhibits proving Claimants' ownership of Ukrnafta shares were created/issued by entities part of and/or controlled by the Privat Group. Hence, Respondent argues that Claimants have provided no independent confirmation of their ownership.

353. Further and as illustrated below, the exhibits filed with the SoC showed that but for a small number of shares owned by Bordo, at 12 October 2013 Claimants did not hold any Ukrnafta shares:

1) As to Littop, Exhibit C-1439 (Statement of Securities Transactions issued by LLC "Capital-Standard" for Littop for the period from 21/04/2005 to 12/10/2013, drawn on 12/10/2013) provides (to the extent relevant) as follows:

"1. 20/3/2009	*PJSC Ukrnafta*	*+ 7,238,613*
2. 24/02/2011	*PJSC Ukrnafta*	*+ 139171*
3. 12/10/2013	*PJSC Ukrnafta*	*- 7,377,784*
4. 12/10/13	*PJSC Ukrnafta*	*0*";

and

Exhibit C-1444 (Statement of Securities Transactions issued by PJSC CB "PrivatBank" for Littop for the period from 15/01/2007 to 15/03/2016 drawn on 22/03/2016)

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90 Ilyashev, 1st expert report, para. 69 reviewing Exhibit C-1933, Exhibit C-1934 and Exhibit C-1935.
91 *Ibid.*, para. 70 reviewing Exhibit C-1937, Exhibit C-1938, Exhibit C-1939 and Exhibit C-1940.
92 *Ibid.*, para. 71 reviewing Exhibit C-1945, Exhibit C-1946, Exhibit C-1947 and Exhibit C-1948.
93 *Ibid.*, para. 66.

provides (to the extent relevant) as follows:

"1. 16/03/2007	*PJSC Ukrnafta*	*+ 7,238,613*
2. 30/10/2008	*PJSC Ukrnafta*	*- 7,238,613*
3. 12/10/2013	*PJSC Ukrnafta*	*0."*

2) As to Bridgemont, Exhibit C-1443 (Statement of Securities Transactions issued by PJSC CB "PrivatBank" for Bridgemont for the period from 15.01.2007 to 15.03.2016 drawn on 22/03/2016) provides (to the extent relevant) as follows:

"1. 16/03/2007	PJSC Ukrnafta	+ 7,238,613
2. 30/10/2008	PJSC Ukrnafta	– 7,238,613
3. 12/10/2013	PJSC Ukrnafta	0"

and

Exhibit C-1437 (Statement of Securities Transactions issued by LLC "Capital-Standard" for Bridgemont for the period from 21.04.2005 to 12.10.2013 drawn on 12/10/2013) provides (to the extent relevant) as follows:

"1. 20/03/2009	*PJSC Ukrnafta*	*+ 7,238,613*
2. 24/02/2011	*PJSC Ukrnafta*	*+ 139,171*
3. 12/10/2013	*PJSC Ukrnafta*	*– 7,377,784*
4. 12/10/2013	*PJSC Ukrnafta*	*0."*

3) As to Bordo, Exhibit C-1442 (Statement of Securities Transactions issued by PJSC CB "PrivatBank" for Bordo for the period from 21.04.2005 to 12.10.2013 drawn on 12/10/2013) provides (to the extent relevant) as follows:

"1. 16/03/2007	*PJSC Ukrnafta*	*+ 7,238,614*
2. 30/10/2008	*PJSC Ukrnafta*	*– 7,238,614*
3. 23/12/2011	*PJSC Ukrnafta*	*+332,552*
4. 15/03/2016	*PJSC Ukrnafta*	*-332,552"*

and

Exhibit C-1438 (Statement of Securities Transactions issued by LLC "Capital-Standard" for Bordo for the period from 21.04.2005 to 12.10.2013 drawn on 12/10/2013) provides (to the extent relevant) as follows:

"1. 20/03/2009	*PJSC Ukrnafta*	*+ 7,238,614*
2. 24/02/2011	*PJSC Ukrnafta*	*+ 139,171*
3. 12/05/2011	*PJSC Ukrnafta*	*– 206,788 and – 513,000*
4. 12/10/2013	*PJSC Ukrnafta*	*– 6,657,997*

5. 12/10/2013 PJSC Ukrnafta 0."

354. However, other exhibits also submitted with the SoC, show that Claimants (other than the 332,552 shares owned by Bordo) went from owning *"0"* Ukrnafta shares in October 2013 to having significant holdings by December 2014.[94] No explanation as to how and when those shares were reacquired is provided, if that is what happened.

355. The Tribunal has set this out at some length as this is a crucial issue for the Tribunal's jurisdiction in this case. Although different numbers have been given in the documents filed with its SoC, and with Mr Ilyashev's expert reports, no clear evidence has been provided that Claimants owned Ukrnafta shares on 31 December 2014 and 30 June 2015, respectively the dates of the trigger letter and of the Request. What is clear from Exhibits C-1439, C-1444, C-1443 and C-1437 is that on 12 October 2013 Littop and Bridgemont owned 0 Ukrnafta shares. No evidence was given to show that Littop and Bridgemont had acquired new Ukrnafta shares in 2014 and when/how they did so. The Tribunal's concern is due to the fact that there was such a large and opaque transfer of shares by Claimants and Mr Kolomoisky and Mr Bogoliubov as illustrated at the time of the original investment and when the shares were transferred in trust between October 2008 and March 2009. The Tribunal is thus not persuaded that Littop and Bridgemont owned the Ukrnafta shares at the time of the Request.

356. The Tribunal considers that for jurisdiction purposes, at the commencement of this Arbitration all three Claimants must have owned Ukrnafta shares. The ECT is silent as to whether for the purpose of jurisdiction a claimant must own its investment at the time it commences the arbitration. However, it appears to be generally *"an accepted principle of international adjudication that, in the absence of treaty provisions to the contrary, the relevant date for purposes of jurisdiction is the date of the institution of proceedings."*[95] Although not expressly accepted by Claimants, both Claimants and Respondent made submissions on the basis that the Ukrnafta shares should have been owned by Claimants

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[94] Both Littop and Bridgemont held 7,377,784 shares each, while Bordo held 6,990,549 shares (see Exhibit C-1937, Exhibit C-1938, Exhibit C-1939, Exhibit C-1940).

[95] See e.g. Exhibit RLA-3, Dolzer R. and Schreuer C. (2012), *Principles of International Investment Law*, 2nd edition (Oxford, OUP), pp. 38-39; See also Exhibit RLA-4, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 31: *"it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted."*

at both the time of the trigger letter and the time of the Request.

357. Having examined very carefully all the documents provided by Claimants and recalling the Tribunal's earlier conclusion that no explanations were given as to how Littop and Bridgemont went from owning no Ukrnafta shares in October 2013 to having significant holdings by December 2014 and June 2015, the Tribunal finds that Littop and Bridgemont did not have any Ukrnafta shares on the date when the Request was filed. The Tribunal acknowledges that Dr Illashev has endorsed the exhibits filed by Claimants as evidence of ownership of shares. Having conducted its own review of the exhibits, the Tribunal nonetheless concludes that there is no sufficient evidence that as at the date of the Request Littop and Bridgemont owned Ukrnafta shares.

358. As Littop and Bridgemont have not proven to the Tribunal's satisfaction that, when the present Arbitration was commenced on 30 June 2015 they owned any Ukrnafta shares, the Tribunal has no jurisdiction to entertain their claims.

359. As for Claimant Bordo however, the Tribunal, not without some hesitation, accepts that it owned 332,552 shares when the Request was filed and it thus has an investment under Article 1(6) ECT. Therefore, Respondent's objection in respect of Bordo is rejected.

360. The Tribunal does not consider that the 2010 Shareholders Agreement and 2010 Cooperation Agreements constitute an investment for the purposes of the ECT. These agreements were not trading or commercial agreements to generate income or profits in Ukraine. Further, both agreements were for specific purposes. The 2010 Shareholders Agreement was for the purpose of supporting and ensuring co-operation between the Minority Shareholders and Naftogaz in their conduct as shareholders in respect of the governing of Ukrnafta. The 2010 Cooperation Agreement was between the Ministry of Energy and Coal industry of Ukraine, the Minority Shareholders and Naftogaz to facilitate cooperation as to the conduct of Ukrnafta business.

361. It could be argued that rights to dividends constitute an investment under the ECT. As far as Littop and Bridgemont are concerned, the Tribunal concluded that they did not own any shares at the date of the Request and accordingly did not have rights to dividend at the critical date. Bordo had 352,552 shares and hence a right to dividends as at the date of the Request and thus held a further investment for the purposes of Article 1(6) ECT.

362. For the above reasons, the Tribunal has concluded that it does not have jurisdiction as provided for under Article 1(6) ECT in respect of the Ukrnafta shares held by Littop and Bridgemont, the 2010 Shareholders Agreement and the 2010 Cooperation Agreement, and in respect of the rights of Littop and Bridgemont to receive dividends paid from Ukrnafta. With respect to Bordo's 332,552 Ukrnafta shares and associated right to dividends, Respondent's objection is rejected.

2. Does the Tribunal lack jurisdiction or are Claimants' claims inadmissible by reason of fraud/corruption/bribery/illegality?

i. Respondent's position

363. Respondent contends that *"the Tribunal should decline jurisdiction over, or in the alternative declare inadmissible, the Claimants' claims in light of the bribes paid by the Claimants' ultimate beneficial owners in order to exercise control over Ukrnafta and the corruption and fraudulent conduct that generally characterised the Claimants' alleged 'investment' in Ukrnafta."*[96] It states that Claimants' *"so-called investment is tainted by corruption and illegality, and particularly since the ultimate beneficial owners of the Claimants, Mr Kolomoisky and Mr Bogoliubov, have openly admitted that they paid substantial bribes in order to exercise control over Ukrnafta"*.[97]

a. Key factual allegations relied on by Respondent

364. Respondent presents its corruption and bribery allegations under three main factual headings: (1) Mr Kolomoisky and Mr Bogoliubov obtained their control of Ukrnafta through bribery, corruption and fraud; (2) Mr Kolomoisky, Mr Bogoliubov and Claimants maintained control by corrupting Ukrnafta's management; and (3) Mr Kolomoisky, Mr Bogoliubov and Claimants abused their control to defraud Ukrnafta. These actions were to the benefit of Mr Kolomoisky and Mr Bogoliubov who are the ultimate beneficial owners of Claimants and would be the real beneficiaries if Claimants were successful in this Arbitration.

365. In respect of the acquisition of control over Ukrnafta, Respondent contends that it has demonstrated that the main UBOs paid substantial bribes in order to be able to exercise

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96 RoMRoJ, para. 454.

97 SoD, para. 528.

control over Ukrnafta. Respondent refers specifically to the payments totalling at least US$100 million in 2003 and 2004 destined to former President Kuchma.[98] The relevant arrangement was formalised through the Ukrnafta Agreement and the Option Agreement between Mr Kolomoisky, Mr Bogoliobov and Mr Pinchuk, the son in law of the then President Kuchma. Pursuant to these agreements, Mr Kolomoisky and Mr Bogoliobov agreed *inter alia* (1) to make payments to a so-called "special fund" intended for use by then-President Kuchma of not less than US$ 5 million per month between 25 January 2003 and November 2004; (2) to pay 50% of the profits received by them from Ukrnafta (after deduction of the sums paid to the special fund) to Mr Pinchuk; and (3) to provide Mr Pinchuk with an option to acquire a one-third interest in the companies which held the 40.1% shareholding in Ukrnafta.

366. Respondent states that on three separate occasions, Mr Kolomoisky and Mr Bogoliobov have admitted that they made these payments: in the Pinchuk Proceedings in 2013; in the Ukrainian Parliament, before the special control commission for privatization, on 4 March 2015; and to the special investigations office of the Ukrainian general prosecutor's office on 20 March 2015. In the Pinchuk Proceedings, Mr Kolomoisky said:

> *"Mr Pinchuk said he would be able to ensure that Naftogas' representatives on Ukrnafta's Supervisory Board acted in accordance with Mr Pinchuk's wishes, and that Naftogas would vote accordingly during the general meeting of the shareholders ... Mr Pinchuk suggested he would make sure that the candidates proposed by Mr Bogolyubov and me would be elected to the Supervisory Board and that the candidate suggested by us could be elected Chairman of the Management Board.*
>
> ...
>
> *In return, we would confer upon Mr Pinchuk an option to purchase a third of our shares in Ukrnafta. Also, Mr Bogolyubov and I would pay around US$5 million per month until November 2004 to a 'special fund'. Mr Pinchuk told me during our conversation in November 2002 that the 'special fund' would be used to finance the next Presidential election campaign in Ukraine.*
>
> ...
>
> *As regards the payments to the special fund, it was necessary to prepare documentation confirming the nature of these payments. However, Mr Pinchuk did not want to do this in a way that would make it obvious that they were intended for the Presidential election campaign, which would be contrary to Ukrainian law..."*[99]

367. In the hearing before the special control commission for privatization on 4 March 2015, Mr Kolomoisky acknowledged that he was a "*beneficiary of such unfair privatisation*" and

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98 SoD, para. 116.

99 Exhibit C-2196, paras. 54 and 62.

that he had paid monthly US$ 5 million as a bribe for the management of Ukrnafta in 2004. The following exchange is pertinent:

> *"S.A. LESHCHENKO: If possible, please answer several questions about the USD 5 million per month, which you paid in 2004. Do you think that it was a bribe or not? If it was a bribe then it is like you come with your voluntary confession?*
> *I.V. KOLOMOISKY: Well, we know that the one who gave a bribe, if he is the one to come and say that he did it, nothing will be done to him.*
> *(Laughter in the room)*
> *S.A. LESHCHENKO: So, do you admit that for management of Ukrnafta in 2004...*
> *I.V. KOLOMOISKY: Yes.*
> *S.A. LESHCHENKO: ...you paid USD 5 million as bribe?*
> *I.V. KOLOMOISKY: Yes. Per month.*
> *S.A. LESHCHENKO: Whom did you pay? To what accounts and what did it look like?*
> *I.V. KOLOMOISKY: Everything has been presented to the English courts. We can give it to you.*
> *S.A. LESHCHENKO: Can you send it us?*
> *I.V. KOLOMOISKY: Sure. These are accounts identified as belonging to Pinchuk and Kuchma.*
> *S.A. LESHCHENKO: Offshore?*
> *I.V. KOLOMOISKY: Yes.*
> *S.A. LESHCHENKO: So may I introduce a proposal, and what do you...*
> *I.V. KOLOMOISKY: But this is not regarding Ukrrudprom but it concerns Ukrnafta."*[100]

368. Before the general prosecutor's office on 20 March 2015, Mr Kolomoisky, seeking immunity from prosecution, reported:

> *"Starting from February 2003 to November 2004 the former President of Ukraine Kuchma L.D. jointly with Pinchuk V.M. and Franchuk O.L. demanded and received from me an unlawful benefit in the form of US$ 5 million per month, and in total US$ 110 million, for providing the possibility to manage the company 'Ukrnafta'."*[101]

369. Respondent also refers to further corroborating evidence of these payments.[102]

370. Respondent argues that Mr Kolomoisky and Mr Bogoliubov admitted to having made these payments so that *"(i) Naftogaz exercised its voting rights in respect of its Ukrnafta shares in accordance with their wishes; (ii) The Ukrainian State's representatives on the supervisory board of Ukrnafta also acted in accordance with their wishes; and (iii) Their preferred candidates would be elected to the office of chairman of the management board*

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[100] Exhibit R-196. The National Anticorruption Bureau investigated these payments by Mr Kolomoisky to President Kuchma. The investigation was terminated by a resolution of the General Prosecutor's Office of Ukraine which found there to be no evidence of a criminal offence.

[101] Exhibit R-207.

[102] See e.g. RoMRoJ, para. 41.

and to membership of the supervisory board of Ukrnafta."[103]

371. In respect of the maintaining of control over Ukrnafta, Respondent relies on the Firtash Agreement and the Executive Agreements to argue that these constituted corruption of the Ukrnafta management to maintain this control.

372. Respondent contends that the Firtash Agreement was "*a further corrupt step taken by Mr Kolomoisky to consolidate the illegitimate control of the Supervisory Board of Ukrnafta he had obtained through the bribery of President Kuchma*".[104] Mr Firtash represented that he controlled three appointees to Ukrnafta's supervisory board and Mr Kolomoisky represented that he controlled five such appointees. They agreed *inter alia* that Mr Firtash would pay a total price of US$1 billionto Mr Kolomoisky to acquire *inter alia* 50% of Claimants' Ukrnafta shares; they would coordinate their votes at Ukrnafta's general meetings; and their appointees at Ukrnafta's supervisory board would be rearranged with a split of four appointees each.

373. Although it is unclear in what capacity Mr Firtash was able to control the representatives of Naftogaz in appointing individuals to the Ukrnafta board of directors and supervisory board, Respondent contends "*it must be inferred that his control cannot have been acquired legitimately*" because there was no basis on which Mr Firtash could have been able to control representatives of Naftogaz. The political context of that period explains why Mr Kolomoisky and the Privat Group would have considered such agreement.

374. Respondent further relies on the Executive Agreements, which it calls "Secret Agreements" and contends that they were used further to maintain control of Ukrnafta.

375. Specifically, Respondent claims that the Vanhecke Agreements gave the Minority Shareholders the ability to control the work of Mr Vanhecke, Ukrnafta's CEO, and made him directly answerable to them rather than to the Ukrnafta shareholders as a whole.

376. Respondent relies *inter alia* the fact that Mr Vanhecke's compensation, described as "Collective Benefits", included fixed compensation of US$3 million per year and an annual bonus of US$2,250,000 payable if and only if the Minority Shareholders were satisfied that he had complied with his obligations. Respondent also refers to the requirements that

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[103] SoD, para. 118.
[104] RoMRoJ, para. 58.

certain steps (e.g. amending the business plan or appointing others to the management board) only be taken if consented to by the Minority Shareholders.

377. Respondent further highlights the fact that the Supplemental Vanhecke Agreement added a new clause 6.3(a) to the Vanhecke Agreement which provided, in pertinent part, as follows:

> *"In order to ensure uninterrupted and efficient day to day management of the business of the Company,* [Mr Vanhecke] *hereby acknowledges and agrees to take all the necessary steps ... to promptly transfer his powers and the authority to act as a CEO of the Company to either i) the current Deputy Chief Executive Officer - executive director V.N. Pustovarov, or ii) the current Deputy Chief Executive Officer - commercial director A.E. Kush in the following situations:*
> *(i) In the event circumstances arise whereby* [Mr Vanhecke] *feels that he is unable to continue the proper and efficient management of the Company in accordance with the Agreement and/or to properly discharge his duties and responsibilities as the CEO of the Company. Such circumstances may include (but are not limited to) personal and private circumstances affecting* [Mr Vanhecke], *third-party actions aimed at the disruption of the working arrangements of* [Mr Vanhecke] *and the Company... ."*[105]

378. Respondent concludes that in return for his US$3 million secret salary, Mr Vanhecke agreed to delegate his authority as chairman of the Ukrnafta management board to Mr Pustovarov and Mr Kushch who were associates of and took their directions from Mr Kolomoisky and Mr Bogoliubov.

379. Respondent contends that materially similar agreements were entered into between the Minority Shareholders and two other Ukrnafta executive officers, namely Mr Bakunenko and Mr Sutton.

380. Respondent submits that Claimants have failed to rebut Respondent's case in this respect. It contends that Mr Kolomoisky's evidence that the "Secret Agreements" did not aim at maintaining control of the management of Ukrnafta is unrealistic in the extreme. In particular, Respondent contends that the agreements themselves clearly demonstrate that the officers were not to act in the best interest of Ukrnafta but in the interest of the Minority Shareholders; that the explanations given for Mr Vanecke's prolonged absences when he left the company in the hands of Mr Kushch are belied by the evidence; that the allegation that the "Secret Agreements" were Respondent's idea is false.

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[105] Exhibit R-220.

381. In respect of its allegation that Mr Kolomoisky, Mr Bogoliubov and Claimants abused their control to defraud Ukrnafta, Respondent makes four core allegations.

382. First, Respondent alleges that Ukrnafta's oil was sold to refineries controlled by the Privat Group, at an undervalue, costing US$2.4 billion to Ukrnafta. Relying on the expert opinion of Mr Kuyun, Respondent contends that over the years from 2003 when Mr Palytsia was appointed CEO of Ukrnafta, having previously managed an oil refinery in which Mr Kolomoisky and Mr Bogoliubov had a controlling interest, through to 2010, the Ukrnafta management on several occasions changed the auction terms. These changes took the form of oil being offered for sale, to be transported by *"more expensive motor transport"*, rather than by pipeline; and the place of delivery not being specified and the oil sold as *"kept in storage"*.[106] This resulted in Ukrnafta's oil *"being diverted to a Privat-controlled refinery"*.[107] The Privat Group also purchased several refineries, including Ukrtatnafta, which were offered Ukrnafta oil at advantageous prices.

383. Second, Respondent alleges that ammonia produced by Ukrnafta was sold to DniproAZOT, a Privat Group company, at a loss of US$ 339 million. Respondent argues that the price for ammonia on the open market was consistently higher than the price DniproAZOT was paying. These losses suffered by Ukrnafta generated benefit to the Privat Group in like amount. Respondent concludes *inter alia "that the Claimants, as the Privat Group entities with control of Ukrnafta and Ukrnafta's management, bear responsibility for allowing these frauds to be perpetrated"*.[108]

384. Third, Respondent contends that the Privat Group sought to extract value from Ukrnafta from at least 2012 onwards.

385. It refers specifically to systematic irregular dealing documented in the 2014 Audit Report which *"discloses a remarkable story of mismanagement for the apparent benefit of the Privat Group"*.[109] The report shows that 2014 accounts were materially affected by provisions Ukrnafta had been forced to make in respect of contractual pre-payments where Ukrnafta did not expect to receive the benefit of the contracts. Ukrnafta had to

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106 RoMRoJ, para. 86(iv).
107 *Ibid.*, para. 86(v).
108 *Ibid.*, para. 93(i).
109 *Ibid.*, para. 95.

make a total provision of UAH2,117,922,000 (US$134 million approximately) in respect of three companies: Realiz Oil; Stakhanov Ferroalloy Plant; and Oversize Tyres. Respondent states that each of these three companies are part of the Privat Group. They were each involved in transactions which cost Ukrnafta UAH3.32 billion (US$281 million approximately) in aggregate:

1) The 2014 Audit Report shows that Ukrnafta entered into 52 separate contracts for the purchase of petroleum products from Realiz Oil on 26 and 30 October 2012. All of the contracts were for just under UAH50 million, which Ukrnafta's management board (headed by Mr Kushch and Mr Pustovarov in the absence of Mr Vanhecke) had authority to enter into. The contracts provided for the delivery of petroleum products by 31 December 2013 (i.e. more than a year after they were made); Ukrnafta paid UAH2,524,187,000 (approximately US$310 million) on 31 October 2012. Realiz Oil did not deliver the relevant products when due and the contracts were extended for delivery by the end of 2015. Ukrnafta had to purchase the petroleum products from Ukrtatnafta (another Privat Group Company) at an extra cost of UAH379 million.

2) Respondent contends that the position was similar in respect of the contracts with Oversize Tyres. Ukrnafta contracted to purchase *"rubber pneumatic giant tire"* for export for a value of UAH242 million to be delivered in 2013-2014. Ukrnafta paid for the goods which were never delivered. An agreement was reached to cancel the agreement but for the pre-payment to be returned by 31 December 2016. Respondent states that Ukrnafta is an oil company not an exporter of tyres. The effect of this transaction was therefore to give Oversize Tyres a three-year interest-free loan; another transaction that benefited a Privat Group company at Ukrnafta's expense.

3) Respondent finally contends that the contracts with the Stakhanov Ferroalloy Plant were even more surprising. Just before the war breakout with Russia in the Luhansk and Donetsk regions of Ukraine, Ukrnafta entered into nine contracts for the supply of ferroalloys with Stakhanov Ferroalloy Plant, located in the Luhansk region. Each contract was for just under UAH 50 million (i.e. it could avoid oversight of the supervisory board). Payment terms were 90 days from invoice, but Ukrnafta paid in full UAH420 million the day the contracts were concluded. As the war came, the

Stakhanov Ferroalloy Plant ceased production. Nevertheless, Ukrnafta continued to pay the Stakhanov Ferroalloy Plant, paying a total of UAH874 million to the plant's accounts at PrivatBank. Consequently, Ukrnafta had to take a UAH350 million provision in its 2014 accounts. Respondent contends there could be no legitimate explanation for this contract, as Ukrnafta is neither a ferroalloy company, nor did it have any reason to make prepayments to the Stakhanov Ferroalloy Plant. Respondent concludes *"... once the war had come, and production had stopped, it is inconceivable that the decision to* continue *to pay the Stakhanov Ferroalloy Plant was one taken honestly in Ukrnafta's interests. It can only have been a fraud on Ukrnafta, designed to advance the interests of the Privat Group."*[110]

386. Furthermore, Respondent argues that when the then management *"realised in early-mid 2015 that they would soon be deposed, they ramped up their corruption in order to strip yet further value from Ukrnafta"*[111] through two schemes the details of which are explained in an expert report of Mr Michael Radcliffe of Grant Thornton.

387. Under the first scheme *"Ukrnafta sold oil on delayed payment terms, and was in the main never paid for it"*.[112] Between March and August 2015, Ukrnafta entered into 286 oil sale and purchase contracts for a total value of UAH10.7 billion with five companies. Under those contracts, the oil was to be delivered within two months of the contract date and payment to be made four to nine months after delivery. As all the contracts were for a value of less than UAH50 million, they did not require supervisory board approval. They were approved after the contracts were entered into by the Ukrnafta's management board. The time for the counterparty to pay Ukrnafta was repeatedly extended. Ukrnafta delivered 99.9% of the oil to be supplied under the contracts but was only paid for a very small quantity of the oil. This resulted in a loss of around UAH7.5 billion (US$ 283 million) to Ukrnafta.

388. Respondent argues that such transactions defy commercial or honest explanation as: (1) it is not standard to sell oil on delayed payment terms; (2) there is no reason for the contracts to have been performed before management board approval; (3) there is no

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110 *Ibid.*, para. 111.
111 *Ibid.*, para. 115.
112 *Ibid.*, para. 115(i).

legitimate reason to change payment terms just after the contracts were concluded; (4) there is no legitimate explanation for splitting the transactions into separate contracts so as to evade supervisory Board review; and (5) payment dates were changed without changing dates for delivery, obtaining security for Ukrnafta or amending prices to reflect the difference between spot and forward pricing. Respondent contends that the likelihood must be that the sales scheme advanced the interests of the Privat Group deliberately at the expense of Ukrnafta and its majority shareholder, Naftogaz.

389. Under the second scheme Ukrnafta agreed to buy gasoline, paid for it immediately, and then extended delivery terms so the product is due by December 2018. Between 9 and 20 July 2015, Ukrnafta entered into a series of contracts to purchase oil from 28 different companies. Payment was to be made before 31 July 2015; delivery of the products was due between October 2015 and January 2016. Almost immediately after the contracts were concluded, the delivery dates for the oil were extended until 31 December 2018. Ukrnafta made payments in an amount in excess of UAH7 billion to 24 to these 28 companies. Ukrnafta had no previous trading relationship with the 24 companies to which these payments were made. The median value of the contracts was UAH49,500,356, so they were all approved by the Ukrnafta management board on 23 July 2015 (had the price been higher they would have required supervisory board approval). Part of the amounts paid by Ukrnafta (i.e. UAH5 billion) to the companies it contracted with appears to have been paid to a company controlled by the Privat Group after having been passed through 25 Ukrainian companies, all but one of which are now bankrupt. Respondent contends that most counterparties failed to provide the products in December 2018.

390. Respondent contends that *"these arrangements defy commercial explanation and bear the hallmarks of fraud"* and *"the conclusion must be that these transactions were used to advance the Privat Group's interests"*.[113]

b. Key legal arguments relied on by Respondent

391. Respondent argues that these facts should lead the Tribunal to deny jurisdiction or alternatively to find that Claimants' claim are inadmissible for the following reasons.

392. First, Respondent contends that there can be no doubt that bribery stands proven in this

[113] *Ibid.*, paras. 137-138.

case. Unlike many other cases where corruption has been raised, in the circumstances of this case, there is no need to connect the dots or infer corruption or decide on the balance of probabilities, as there is specific, direct and irrefutable evidence of corruption. Respondent summarises the relevant evidence as follows:

1) Mr Kolomoisky expressly admitted paying bribes on several occasions;

2) Mr Kolomoisky's admissions are confirmed by other evidence, including Mr Palytsia's evidence;

3) Mr Kolomoisky's attempts to back-track from or qualify his admissions are dishonest and must be rejected;

4) Almost uniquely in corruption cases in the investment treaty arbitration context, in this case there is also evidence of the actual payment; and

5) Claimants' attempts to provide a different explanation for this well documented and proven series of facts lack any credibility.

393. Second, Respondent argues that Claimants' bribery of the then-President and the subsequent fraudulent and corrupt conduct of Claimants and the main UBOs violated international public policy and Ukrainian law. Respondent therefore contends that the Tribunal should dismiss the case for lack of jurisdiction due to the bribes that Mr Kolomoisky and Mr Bogoliubov (the effective alter egos of Claimants) paid in order to obtain control over Ukrnafta. If the Tribunal does not do so on that ground, Respondent submits that the Tribunal should take into account the subsequent corrupt and fraudulent conduct that characterised the mis-management of Ukrnafta by Claimants and their main UBOs and decline jurisdiction, or in the alternative declare Claimants' claims inadmissible.

394. Respondent insists that bribery and corruption are a grave threat to a State's economic and social development and have been condemned by the international community. This is reflected in international instruments such as the 2003 United Nations Convention against Corruption and the 1996 OECD Convention on Combating Bribery of Foreign Officials. It also insists that the jurisprudence of investment tribunals is clear that claimants who have engaged in corrupt or fraudulent activities should be denied access to investment treaty arbitration.

395. Respondent further contends that the payment of bribes by Mr Kolomoisky and Mr Bogoliubov for the benefit of Mr Kuchma, violated Article 369 of the Ukrainian Criminal Code and, for the avoidance of doubt, Swedish law, which criminalises bribe taking and bribe giving.

396. Respondent also relies on the Executive Agreements as well as on the allegation of fraudulent conduct of Claimants in their management of Ukrnafta to support its case that the Tribunal should deny jurisdiction or alternatively find Claimants' claims inadmissible.

397. As to the consequences of its jurisdictional objection, Respondent denies the existence of any juridical barriers to it. However, for the sake of completeness it addresses each of Claimants' purported barriers:

1) Respondent contends that Claimants' statement that no violation of Ukrainian law has been found is incorrect since there is currently an ongoing criminal investigation by NABU. Respondent argues that the delay in the resolution of this investigation was largely caused by *"Mr Kolomoisky and his associates' refusal to cooperate"*.[114] Respondent further states that a criminal investigation regarding the Executive Agreements is currently ongoing. Thus, Respondent argues that Claimants' reliance on *Wena Hotels* is inapposite since in that case the tribunal proceeded on the basis that it did not know if an investigation was conducted at all.

2) Respondent contends that Claimants' argument about the timing of the bribes, paid years before Claimants acquired their investment, is an artificial attempt to ring-fence the shareholding which must fail. This is because Claimants' alleged investment in Ukrnafta was inextricably linked to the control that Claimants (or their ultimate beneficial owners) exercised over Ukrnafta.

3) Respondent recognises that in cases involving allegations of corruption the presence of a link between the bribe and the advantage obtained by the investor is required. Respondent contends however that such link is established in this case since there is no doubt that Claimants' ultimate beneficial owners did obtain an advantage *"through the payment of the bribe to the then-President and the Secret Agreements"*,

[114] *Ibid.*, para. 522.

i.e. control of Ukrnafta.[115] Respondent rejects Claimants' argument that this advantage resulted in Ukrnafta being *"run more efficiently and profitably"*.[116] Even if it were true, this does not undermine the fact that *"corruption is wrong and should be punished"*.[117]

4) Respondent disputes Claimants' argument that the payments cannot be considered "bribes" because they were not made to an "official" (President Kuchma), but to a family member of an "official" (Mr Pinchuk). Respondent contends that it is clear from Mr Kolomoisky's witness statement both in the Arbitration and in the Pinchuk Proceedings, that he and Mr Bogoliubov understood that the payment was being made to President Kuchma. Thus, Respondent submits that Claimants' reliance on the *Kim* case is wrong because there the payment was made to the President's daughter with no intention or understanding that this payment would reach the President.

5) Respondent contends that there is no basis for Claimants' contention that they paid the bribe under undue influence. Mr Kolomoisky and Mr Bogoliubov are *"powerful businessmen with important political connections and stood to make huge gains from their arrangement with President Kuchma"*.[118]

6) Respondent denies Claimants' argument that the State should be precluded from raising this jurisdictional objection because it had "overlooked" violations of its own laws. Respondent contends that the tribunal in *World Duty Free* found that *"a respondent is not estopped from raising an objection based on corruption because it was its official, indeed the President in that case too, to whom the bribe was paid"*.[119] Further, Respondent denies that it had any knowledge of the "Secret Agreements" concluded between Claimants and senior executives from Ukrnafta.

7) With regard to Claimants' argument that this allegation be discussed and determined as a matter of admissibility or in the merits stage, Respondent submits that in any event, the *"end result is the same and the Tribunal should dismiss the Claimants'*

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115 *Ibid.*, para. 525.
116 *Ibid.*.
117 *Ibid.*
118 RoMRoJ, para. 528.
119 *Ibid.*, para. 529.

claims".[120]

ii. Claimants' position

398. Claimants contend that Respondent's second jurisdictional objection *"falls far short of the legal standard it must meet to deprive the Tribunal of jurisdiction over Claimants' claims under the ECT"*[121] whether on jurisdiction or admissibility grounds, for four key reasons summarised in turn below.

399. Claimants deny that they acquired their shares or control over Ukrnafta by way of bribery or corruption, and argue that this itself is dispositive of Respondent's objection.

400. Claimants contend that the fact that Respondent's allegations of bribery and corruption relate to Claimants obtaining and maintaining management control over Ukrnafta rather than their investment acquisition is "fatal" to Respondent's jurisdictional objection. Claimants submit that both the *World Duty Free* and *Metal-Tech* cases establish *"beyond doubt" that "allegations of bribery or corruption are relevant to jurisdiction only where they concern investments that were acquired by bribery or corruption"*.[122] Claimants also rely on *Fraport v Philippines, where* the tribunal observed:

> *"... the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed* substantive *violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."*[123]

401. Claimants also refer to the same effect to *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*[124] and to the following quote from Professor Zachary Douglas QC:

> *"A related problem arises where the host state alleges that the claimant has violated its law in the acquisition of its investment. If that allegation is substantiated before the investment treaty tribunal, then that must be fatal to the jurisdiction of the tribunal. But the temporal limitations of such a plea must be recognised: it can only be raised in respect of the acquisition or establishment of the investment and not with*

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120 *Ibid.*, para. 531.

121 RoJ, para. 152.

122 *Ibid.*, para. 166. (Emphasis in the original).

123 Exhibit CLA-81, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 345.

124 RoJ, para. 171 referring to Exhibit CLA-40, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 127.

regard to the subsequent conduct of the claimant in the host state, even in relation to the expansion or development of the original investment."[125]

402. Consequently, Claimants submit that the Tribunal in this case should not deny jurisdiction because Claimants did not acquire their investments in Ukrnafta through bribery, corruption or fraud. The alleged bribery and corruption in 2003 and 2004 were more than three years before Claimants' acquisition of their Ukrnafta investment and was in any event made in connection with something else.

403. Claimants contend that Respondent's attempt to circumvent this fact by submitting that Mr Kolomoisky and Mr Bogoliubov are the "*effective* alter egos *of the Claimants*" and the "de facto *claimants in this dispute*"; and that as such "*Claimants' bribery of the then-President... violated international public policy*" must fail.[126] Claimants argue that these submissions ignore that under international law Mr Kolomoisky and Mr Bogoliubov each have separate legal personality from Claimants and from the Privat Group. Thus, even if the allegations of bribery and corruption were proven (which Claimants deny), they would not be relevant to the Tribunal's jurisdiction in respect of Claimants.

404. Claimants further argue that as Respondent has made bribery and corruption allegations against Claimants, Respondent bears the burden of proving those allegations under an elevated standard of proof applicable to corruption and bribery allegations under international law. Claimants refer to the tribunal's reasoning in *Chevron* quoting the separate Opinion of Judge Higgins in *Oil Platforms* that "*there is 'a general agreement that the graver the charge the more confidence must there be in the evidence relied on'*".[127] Similar conclusions have been expressed by other tribunals stating that "*the higher standard of 'clear and convincing' evidence should be adopted to assess allegations of fraud*".[128] As Respondent has failed to meet this burden of proof on this issue the Tribunal

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125 Exhibit RLA-119, Douglas Z., *The International Law of Investment Claims* (Cambridge University Press, 2009), pp. 53-54.

126 RoJ, para. 177.

127 Exhibit CLA-85, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

128 RoJ, para. 190. Claimants refer *inter alia* to Exhibit CLA-118, *Waguih Elie George Siag et al, v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras. 325-326; Exhibit RLA-133, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479; Exhibit RLA-26, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 244; Exhibit CLA-171, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22

should reject this second jurisdictional challenge.

405. Claimants contend that, in any event, it is not alleged that Mr Kolomoisky and Mr Bogoliubov acquired their Ukrnafta shares between 1999-2003 through bribery. Rather, Respondent states that "*Mr Kolomoisky exploited his political connections to ... acquire approximately 40% of the shares in Ukrnafta between 1999 and 2003*".[129] Claimants argue that the use of political connections does not amount to bribery or corruption.

406. More specifically, Claimants deny Respondent's assertion that Mr Kolomoisky and Mr Bogoliubov paid bribes to obtain control over Ukrnafta in 2003 and 2004[130] Claimants argue that these payments had "*nothing to do with the original acquisition of the shares by Mr Kolomoisky and Mr Bogolyubov*" as well as with Claimants' later acquisition of their 40.05% of Ukrnafta shares in 2007.[131] According to Claimants, the cases cited by Respondent are thus clearly distinguishable from the present case. Claimants' complaints under the ECT relate to shareholdings in Ukrnafta that were not, even on Respondent's case, obtained by corruption at any stage.

407. Furthermore Claimants maintain that there are several barriers to Respondent's objection.

408. First, Claimants submit that even if the 2003/2004 payments were somehow relevant to the Tribunal's jurisdiction (which is denied), Respondent's prosecutor has already concluded that those payments did not constitute a crime under Ukrainian law. Respondent attempts to mislead the Tribunal by presenting the investigation as "continuing" when in fact that investigation was only reopened and transferred to the NABU after Claimants filed their SoC and has not progressed. The investigation into the Executive Agreements similarly post-dates the SoC. Tribunals faced with similar situations where a respondent State does not properly investigate allegations of corruption, found that such State cannot be simultaneously immunised for its breaches of the applicable

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August 2017, para. 492; Exhibit RLA-56, *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para. 221; Exhibit RLA-137, Yves Fortier, "*Arbitrators, Corruption and the Poetic Experience*" Kaplan lecture, 20 November 2014, p. 374 citing Exhibit CLA-170, Cecily Rose, "*Questioning the Role of International Arbitration in the Fight Against Corruption*", (2014) 31 *Journal of International Arbitration* 183 and Exhibit RLA-126, Antonio Crivellaro, "*Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*" in *Transnational Dispute, Management*, 2005, Volume 2, Issue 3.

129 *Ibid.*, para. 194.

130 *Ibid.*, para. 195.

131 *Ibid.*, para. 196.

investment treaty.

409. Second, Claimants contend that the 2003/2004 payments were made years prior to when Claimants acquired their shares in Ukrnafta and were made neither so that Claimants would obtain those shares or any of its other investments in issue in the case. Accordingly, Claimants argue that these payments cannot affect the Tribunal's jurisdiction.

410. Third, Claimants argue that Respondent has failed to demonstrate any link between the alleged payments and any improper advantage whether for Claimants, Mr Kolomoisky or Mr Bogoliubov.

411. Investment tribunals have accepted that jurisdiction should *"not* [be] *vitiated in the absence of an improper advantage being conferred on the claimant investor in return for the payments"*.[132] In other words, as stated by the tribunal in *Sistem v Kyrgyz Republic*, *"one important element of the concept of bribery or corruption is the link between the advantage bestowed and the improper advantage obtained"*.[133] Claimants state that this conclusion has been followed by other tribunals emphasising that the establishment of a positive link is fundamental due to the severe consequences that would follow if the corruption allegation is confirmed.

412. According to Claimants, Respondent has failed to establish such link in the present case because Mr Kolomoisky and Mr Bogoliubov did not obtain any improper advantage for the payments made in 2003/2004, nor did the Executive Agreements accrue Claimants any improper advantage. There was no agreement for Naftogaz or the State's representatives on the supervisory board to exercise their voting rights or act in accordance with the instructions of Mr Kolomoisky or Mr Bogoliubov. Rather, what was proposed, as explained by Mr Kolomoisky was that:

> *"...Mr Pinchuk would procure that, in a General Meeting of Ukrnafta, Naftogaz would vote in such a way that a person nominated by Mr Bogolyubov and me would be elected as Chairman of the Executive Board and that other persons whom we nominated would be elected to the Supervisory Board. However, the majority of the Supervisory Board would still be appointed by the State so the State retained control over the Supervisory Board. ...*
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> ...

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132 *Ibid.*, para. 202.

133 Exhibit CLA-79, *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 43.

The agreement was confined to the election of our preferred candidate as Chairman of the Executive Board and the election of our preferred candidates to five (then four) of the eleven positions on the Supervisory Board.

....

At all times the State retained control over the Supervisory Board.

...

Neither the original agreement of 25 January 2003 nor the revised agreement of 20 March 2003 enabled us to actually pass Supervisory Board resolutions. Under both agreements, we would only have five of eleven votes."[134]

413. Claimants deny all of Respondent's contentions of improper behaviour or improperly obtained advantage on Claimants' part. Claimants contend that their ability to nominate management and supervisory board members *"was precisely what the Respondent contracted in due course to afford Claimants and other minority shareholders in the 2010 Shareholders Agreements"*,[135] the validity of which was confirmed by the LCIA Award. They allege that Respondent's own general prosecutor found that there was nothing criminal in the 2003/2004 payments and that the Executive Agreements were intended by Claimants to ensure that Ukrnafta was run more efficiently and profitably.

414. Fourth, Claimants argue that there is no destruction of the Tribunal's jurisdiction if the impugned payments are not made to an "official" of the host State but to one of his family members.

415. Fifth, Claimants argue that the payments were made pursuant to an "undue influence" over the payer, and that such case is not one in which an international tribunal ought to decline jurisdiction. Specifically, Claimants claim that the 2003/2004 payments to Mr Pinchuk were the result of the undue influence of Mr Pinchuk. Mr Kolomoisky stated that he and Mr Bogoliubov had to accept Mr Pinchuk's proposal given his *"powerful position as the President's son-in-law and the President's personal interest in the deal"* because they feared there would be *"reprisals in relation to [their] interests in Ukrnafta and [their] other businesses"*.[136] Mr Kolomoisky further explains that *"[t]he reality of doing business in Ukraine is that, if you make an enemy of the President, you will have investigations started against you by the criminal and tax authorities"*.[137] Claimants also claim that the general

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134 Kolomoisky, 1st witness statement, para. 35.
135 Reply, para. 206.
136 Kolomoisky, 1st witness statement, para. 42.
137 *Ibid.*, para. 42.

prosecutor described the payments as being *"the result of an 'extortion' of money"*.[138]

416. Sixth, Claimants contend that Respondent is precluded from arguing that Claimants' investment is tainted by corruption. Jurisprudence recognises that a State should not be able to base a jurisdictional objection on facts it knowingly overlooked.

417. Claimants submit this is the case in the present dispute where Respondent has not prosecuted anybody associated with the 2003/2004 payments, nor taken any meaningful action in relation to the Executive Agreements and payments. Respondent was fully aware of the Executive Agreements, including the additional compensation to be paid to the relevant executives. In fact, the appointment of Mr Vanhecke, Mr Bakunenko and Mr Sutton, and their respective remuneration, were endorsed by Respondent.

418. Claimants further argue that tribunals have considered the effect of the State's conduct when deciding on the consequences of corruption for investment claims. Thus, some tribunals have concluded that denial of treaty protections *"is a proportionate response* only *in the event of noncompliance with law that results in a compromise of a correspondingly significant interest in the Host State."* [139]

419. Seventh, Claimants submit that according to recent investment treaty tribunals' practice, allegations of bribery and corruption, if proven, are no longer treated as completely depriving a tribunal from its jurisdiction. Rather, the practice is to consider them in the merits or quantum stage of the proceedings.

420. Claimants refer to the *Yukos* arbitrations as an example of such recent practice where after the tribunal was satisfied that both jurisdiction *ratione personae* and *ratione materiae* were established by claimants, it upheld jurisdiction and considered the allegation of corruption (or "unclean hands" in that case) in the merits stage.[140] The tribunal in *Al-Warraq v Indonesia* followed a similar approach stating that the corruption and money

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138 RoJ, para. 208.

139 *Ibid.*, para. 212 referring to Exhibit CLA-78, *Vladislav Kim and Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 396.

140 Exhibit CLA-5, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436; Exhibit CLA-6, *Yukos Universal Limited (Isle of Man) v .The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436 and Exhibit CLA-7, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436.

laundering allegations were not a question of *"jurisdiction but of the merits"* and as such should be *"dealt with at the merits phase of this arbitration"*.[141]

421. Accordingly, Claimants submit that the Tribunal's only jurisdictional concern at this stage should be whether Claimants satisfy the *ratione personae* and *ratione materiae* criteria set out in the ECT. Claimants contend that they do. According to Claimants all other questions, including the bribery and corruption allegations, can only be properly dealt with at the merits stage of the analysis.

422. In any event, Claimants contend that even if the Tribunal were to find that Claimants' claim is affected by bribery, corruption and fraud, the alleged bribery and corruption would only affect Claimants' right to participate in the corporate governance of Ukrnafta, which is only one of three categories of investments on which Claimants' claims are based; the two other categories (i.e. shares in Ukrnafta and associated rights to returns) are not affected.

423. Claimants contend that only one of the eight ECT breaches claimed by Claimants *"depends exclusively on the mistreatment of the Claimants' investment in the form of its rights of participation in the corporate governance of Ukrnafta"*,[142] that is to say Respondent's breach of Article 10(1) ECT. Claimants contend that Respondent breached that provision by failing to observe the obligations owed to Claimants under the 2010 Shareholders Agreement and the 2010 Cooperation Agreement. However, Claimants argue that even in that case the bribery and corruption allegations (whether before or after the conclusion of those agreements), are not a ground for this Tribunal to decline jurisdiction because those agreements created contractual and self-standing rights.

424. Furthermore, Claimants argue that the Tribunal should dismiss Respondent's alternative objection to admissibility for four core reasons.

425. The first reason for dismissal is that Respondent's admissibility objection is nothing more than a repacking of its jurisdictional objection.

426. The second reason for dismissal is that Respondent's expanded admissibility arguments

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141 Exhibit CLA-83, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012, para. 99.

142 Reply, para. 219

based on international public policy are legally flawed.

427. Claimants contend that there is no doctrine of clean hands as a matter of general international law, as was established by the *Yukos* tribunals; and that Respondent's own legal authorities are ambivalent about the existence of such doctrine. Claimants insist that Respondent's reliance on *Churchill Mining* is inapposite because in that case fraud and forgery negated *ab initio* the concession contracts that constituted the claimant's entire investment. Similarly, the *Al Warraq v Indonesia* tribunal relied on a specific provision of the relevant treaty to deny the claimant protection, and found that the claimant was involved in six banking frauds in violation of Indonesian law.

428. In relation to the other cases relied on by Respondent, Claimants argue that they should be disregarded because, contrary to the present case, they related to circumstances where the investment itself was established through corruption. Furthermore, Respondent's case does not even rest on the premise that Claimants' merits claims are themselves based on any unlawful act.

429. The third reason for dismissal is that Respondent has failed to establish how Claimants' alleged misconduct under the Executive Agreements was illegal under Ukrainian criminal or civil law. As regards the legality of the Executive Agreements under Ukrainian criminal law, Claimants rely on the Expert Report of Professor Navrotsky who concluded that the execution of the Executive Agreements cannot be considered a bribe within the meaning of Ukrainian criminal law. They also rely on the fact, supported *inter alia* by Mr Kolomoisky's witness statement, that the Executive Agreements were known to Respondent. As regards the legality of the Executive Agreements under Ukrainian civil law, Claimants rely the Second Expert Report of Dr Illashev. Claimants further contend that Mr Vanhecke, Mr Bakunenko, and Mr Sutton undertook the obligation to act in Ukrnafta's best interest and to perform their administrative functions in good faith. Claimants conclude that the conclusion and performance of the said agreement cannot be regarded as a criminal offence.

430. In any event, the fourth reason for dismissal is that Respondent's allegations of *"serial fraud"* and *"egregious unlawful"* conduct following the conclusion of those agreements in

2011 are *"unproven as a matter of fact"*.[143] Claimants submit that Respondent has failed to discharge the burden of proof and substantiate *"its broad-brush allegations"* that Claimants' ultimate beneficial owners, Claimants, or the so-called Privat Group *"benefited considerably at the expense of the other shareholders of Ukrnafta and the Ukrainian people"*.[144] Claimants also consider Respondent's allegations of mismanagement of Ukrnafta to its detriment and to the benefit of other oil companies as inadequate. Further, Claimants deny to have manipulated auctions at which Ukrnafta's oil was sold so that Mr Kolomoisky's other companies obtained that oil at undervalue. Claimants explain that the price of the oil was set out by the auction committee which in turn was controlled by the Respondent's own officials. They highlight that the allegations of corruption have already been rejected by Respondent's own domestic courts and its own State audit service and insist on the fact that the allegations are virtually exclusively based on the opinions of Mr Kuyun who is neither unbiased nor independent.

431. For the above reasons, Claimants submit that the Tribunal should dismiss Respondent's second jurisdictional objection.

iii. Tribunal's analysis

432. At the outset, the Tribunal notes that Claimants' argument that Respondent has materially expanded its argument and its consequences have already been addressed at paragraphs 290 to 293 above. The Tribunal therefore does not repeat its findings in this section of its Award.

a. Applicable law and rules

433. Respondent requests that the Tribunal decline jurisdiction over Claimants' claims or, alternatively, declare them inadmissible because their investment is tainted with illegality, bribery and corruption. Respondent contends that the Tribunal has a *"duty as a matter of international public policy"*[145] and *"other principles of international law"*[146] to take evidence of illegality, bribery and corruption into account and rule accordingly. Respondent further specifies that the Tribunal should decline jurisdiction *"by reference to*

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143 RoJ, para. 232.
144 *Ibid.*
145 RPHB1, para. 355.
146 SoD, para. 16.

illegality and / or unclean hands and / or international public policy considerations against such background."[147]

434. Claimants do not dispute the fact that the Tribunal should decide the issue of jurisdiction by applying international law. However, Claimants contend that *"there is no 'clean hands' doctrine as a matter of general international law"* and that their contention is *inter alia* supported by the tribunals in *Yukos*.

435. In the present case, the Tribunal's jurisdiction is founded on the ECT. Article 26(6) ECT provides that this Tribunal *"shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."*[148]

436. The Tribunal does not consider that by expressly raising the *"doctrine of clean hands"* in its RoMRoJ Respondent has *"materially expanded its argument"* under this head.

437. The Tribunal notes that in its SoD, Respondent submitted:

> *"It would be inconsistent with transnational public policy and other principles of international law for the Tribunal to assume jurisdiction over the Claimants' claims based on this supposed investment."*[149]

438. It is correct, as Claimants contend, that the *Yukos* tribunals stated that Russia *"has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' in an inter-State or investor-State dispute"* and concluded that "unclean hands" does not exist as a general principle of international law, which would bar a claim by an investor such as Claimants in this case. [150] However, this

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147 Respondent's Skeleton Argument, para. 13.

148 This is a key difference between this case and *Vladislav Kim and Others v Republic of Uzbekistan,* on which Claimants rely. That case was decided under the Kazakhstan-Uzbekistan BIT which places central importance on the law of the host State. For example, Article 11(1) of that BIT, entitled "Applicable laws", provides *"Unless otherwise provided in this Agreement, all investments under this Agreement shall be regulated by the law in force in the State territory of the Contracting Party in which the investments were made;"* Article 2 ("Promotion and protection of investments"), which contains core substantive provisions, reads: "1. *Each Contracting Party shall, in accordance with its State law, admit and encourage in its State territory investments by investors from the State of the other Contracting Party and shall guarantee to these investments full and unconditional legal rights. 2. Under its State law, each Contracting Party shall support various forms of mutual investments, shall protect them in its State territory and shall not interfere with the functioning, use and disposal of these investments through arbitrary management measures."* (See Exhibit RLA-129, Kazakhstan-Uzbekistan bilateral investment treaty, dated 8 September 1997).

149 SoD, para. 16. (Emphasis added).

150 Exhibit CLA-65, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014, paras. 1362-1363; Exhibit CLA-66, *Yukos Universal Limited (Isle of*

Tribunal is not bound by those precedents and it finds that the doctrine of clean hands, just like the concept of good faith, is now a principle of international law.

439. In several cases tribunals have made clear that a party cannot come to investment arbitration with unclean hands. This has now been recognised in cases where there has been some illegality underlying the contract or the rights which a party is seeking to enforce. The doctrine has been recognised as a principle of general international law by arbitral tribunals[151] and a number of academic authorities.[152] In the same vein, in *Fraport II*, where the tribunal stated:

> *"Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect."*[153]

440. The tribunal in *Inceysa* also recognised and applied the principle of *nemo auditur propriam turpitudinem allegans* which essentially means that a party cannot benefit from its own wrongdoing. The tribunal there analysed the investment *"in light of the general principles of law which the Arbitral Tribunal considers to be applicable to the case"*.[154] The tribunal found:

> *"...the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes,*

Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, paras. 1362-1363; and Exhibit CLA-67, *Hulley Enterperises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, paras. 1362-1363.

151 See e.g. RLA-131, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 492.

152 Exhibit RLA-161, Dumberry P., *"State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the* Yukos *Award"*, (2016) Journal of World Investment & Trade, 17, p. 250; Exhibit RLA-162, Kreindler R., *"Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine"*, in Hober K., Magnusson A., Öhrström M. (eds), Between East and West: Essays in Honour of Ulf Franke (Juris Publishing, 2010), p. 318; Exhibit RLA-163, Lamm C.B., Pham H.T., and Moloo R., *"Fraud and Corruption in International Arbitration"*, Transnational Dispute Management, Volume 10, Issue 3; Exhibit RLA-164, Moloo R., "A *Comment on the Clean Hands Doctrine in International Law*" Transnational Dispute Management, Volume 10, Issue 3; Exhibit RLA-165, Moloo R., Khachaturian A., *"The Compliance with the Law Requirement in International Law"*, (2010) Fordham International Law Journal, 2011, Volume 34, Issue 6, pp. 1485–1486.

153 Exhibit RLA-133, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 328 and footnotes 386 and 387.

154 Exhibit RLA-26, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para 229.

> *because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud'".*[155]

441. The *Plama* tribunal, in addition to finding that the investment was made in violation of the domestic law of the State, also applied general principles of international law such as the principle of *nemo auditur propriam turpitudinem allegans*, finding that the investment in question was in violation of it.[156]

442. Further, and in any event, the Tribunal has the authority and duty to uphold international public policy. This would allow and may in fact mandate that a tribunal decline jurisdiction or dismiss the claims of an investor if its investment was acquired, effected or somehow tainted/permeated by bribery and/or corruption, illegality or other internationally unacceptable behaviour.

443. As stated by Judge Lagergren in 1963, the presence of bribery and corruption is *"such gross violation of good morals and international public policy, [that] can have no countenance in any court... or, for that matter, in any other civilised country, nor in any arbitral tribunal"*.[157] In cases of this kind jurisdiction must be declined. Judge Lagergren further explained:

> *"It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."*[158]

444. Judge Lagergren's reasoning and conclusion have been followed by other international tribunals as well, although in most cases tribunals have relied on illegality rather than international public policy to deny validity of a contract or enforcement of rights under a treaty.

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155 Exhibit RLA-26, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 242.

156 Exhibit RLA-19, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 140-146.

157 Exhibit RLA-15, ICC Case No. 1110 (1963) reprinted in: J. Gillis Wetter, *"Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case. No. 1110"*, (1994) 10 Arb. Int. 277, p. 294.

158 Exhibit RLA-15, ICC Case No. 1110 (1963) reprinted in: J. Gillis Wetter, *"Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case. No. 1110"*, (1994) 10 Arb. Int. 277, p. 294.

445. For instance, in *World Duty Free,* the investor was awarded the exclusive concession *inter alia* to run the duty-free operations at Kenya's international airports in Nairobi and Mombasa. However, respondent alleged that the investor had obtained his investment contract through the payment of money to the then President of Kenya. Although the investor acknowledged that a payment was made to the President, it argued that this was not a bribe but *"a gift of protocol"* or a *"personal donation"* to the President to be *"used for public purposes"*.[159] The tribunal dismissed the investor's claims in their entirety as the contract on the basis of which the investor had brought the arbitration was procured by the payment of bribe to the then Head of State of Kenya. The tribunal reasoned that:

> *"... bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."*[160]

446. The *World Duty Free* tribunal further added that granting claimant's relief in such case would be *"'an affront to public conscience'... because this Tribunal 'would thereby appear to assist and encourage the plaintiff in his illegal conduct'"*.[161]

447. In *Spentex v Uzbekistan* the tribunal held that *"corruption in the making of an investment constituted a core violation of the principle of good faith and a violation of the international* ordre public*, and that a claimant who comes with 'unclean hands' to a tribunal should not be heard."*[162] In that case, Spentex Industries Limited had an agreement with a state-owned company for the establishment of a manufacturing facility in Uzbekistan. It then won the tender process for several textile plants and established Spentex Netherlands BV, the claimant in the arbitration, as a vehicle for investing in Uzbekistan. Eventually, claimant defaulted on some payments owed to the State and went bankrupt. Claimant then initiated the arbitration alleging *inter alia* different breaches of the Netherlands-Uzbekistan bilateral investment treaty. In response, the State objected to claimant's claims arguing *inter alia* that it had obtained its investment

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159 Exhibit RLA-16, *World Duty Free Company limited v. Republic of Kenya,* ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 133.

160 *Ibid.*, para. 157.

161 *Ibid.*, para. 178.

162 *Spentex Netherlands, B.V. v Republic of Uzbekistan,* ICSID Case No. ARB/13/26, Award, 27 December 2016, para. 818, cited in Exhibit RLA-123, Betz K., Proving Bribery, Fraud and Money Laundering in International Arbitration (Cambridge University Press, 2017), p. 130.

by paying bribes.

448. In *Churchill Mining v Indonesia* the issue was whether the mining licenses and related approvals obtained by the investor were *"forged and fabricated"*, as argued by the respondent. The tribunal stated that the forgeries of the disputed documents were *"essential to the making and conduct of the EKCP from which all of the Claimants' claims arise"*. [163] The tribunal also stated that *"claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy"*.[164] Accordingly, the tribunal found, on the facts of the case, that *"the fraud taint[ed] the entirety of the Claimants' investments"*. [165] The tribunal dismissed the claim as a matter of admissibility stating:

> *"As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible."*[166]

449. In this case, when considering the consequences and effects of the bribery, corruption, illegality and fraud as alleged by Respondent the Tribunal will look to the applicable laws, including international law and the principles of international public policy.

b. Burden and standard of proof

450. Respondent submits that it is trite law that the party making the allegations bears the burden. However, once a party *"adduces some evidence which* prima facie *supports his allegation, the burden of proof shifts to his opponent."*[167]

451. As to the standard of proof, Respondent contends that the *"two standards most frequently applied by investment tribunals"* in cases of bribery and corruption are *"the balance of probabilities"* and *"clear and convincing evidence"*. [168] However, Respondent states that the former approach should be preferred because *"corruption is by essence difficult to establish"*, so the *"appropriate method would often involve connecting various dots of*

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163 Exhibit RLA-134, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 507.

164 *Ibid.*, para. 508.

165 *Ibid.*, para. 528.

166 *Ibid.*

167 RoMRoJ, para. 466 referring to Exhibit CLA-30, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 56.

168 *Ibid.*, para. 464.

'circumstantial evidence'".[169]

452. In contrast, Claimants deny Respondent's contention of *"burden-shifting"* arguing that since Respondent is the party making an assertion against Claimants, it bears the burden of proving it. Claimants submit that their position is also supported by case law[170] and contend that some tribunals applying this principle to jurisdictional issues have placed the burden of proof on the respondent State, including with regard to *"allegations of illegality in the making of the investment"*.[171]

453. Regarding the standard of proof, Claimants disagree that the balance of probabilities test is the one applied mostly by tribunals. Rather, both case law and academic commentary prefer to apply a heightened standard of proof *"in view of the consequences of corruption on the investor's ability to claim the BIT protection"*.[172] Claimants argue that this is confirmed even by the cases relied on by Respondent.[173]

454. Further, Claimants argue that the cases relied on by Respondent, in which the *"balance of probabilities"* standard was applied, must be distinguished from the present case. The reason being that in those cases the tribunals did not have to determine questions of bribery and corruption, rather *"more general allegations of fraud or other wrongdoings"*.[174] Accordingly, Claimants submit that this Tribunal should apply the higher standard of, clear and convincing evidence.

455. In the Tribunal's view, the determination of who bears the burden of proof and what standard of proof should apply when determining allegations of bribery and corruption is unwarranted in the circumstances of this case. It is undisputed that Mr Kolomoisky and

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169 *Ibid.*, para. 464 quoting *inter alia* Exhibit RLA-17, *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 243.

170 See e.g. RLA-133, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 299; Exhibit CLA-148, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 174-176.

171 RoJ, para. 185.

172 RLA-133, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479: *"in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport."*

173 See e.g. Exhibit RLA-56, *EDF (Services) Ltd v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para. 221.

174 RoJ, para. 192.

Mr Bogoliubov made payments and engaged in a number of activities to obtain and maintain control over the management of Ukrnafta. This was admitted by Mr Kolomoisky himself.

456. The Parties do not dispute the existence of the facts which give rise to the dispute on this issue; in fact, they acknowledge them. However, the Parties differ on the purpose of the actions and the events in question, as well as their implications.

c. No "juridical barriers" to Respondent's jurisdictional objection

457. Claimants contend that the Tribunal's jurisdiction should not be vitiated by this particular jurisdictional objection because of the following core "*juridical barriers*": (1) there are no violations of Ukrainian law, (2) there is no link to the payments made and the advantages obtained, (3) the payer was subject to undue influence, (4) Respondent "knowingly overlooked" the alleged bribery, and (5) the bribery and corruption allegations should be considered at the merits and quantum stage of the proceedings.

458. In the Tribunal's view, none of these factors is a "barrier" to Respondent's jurisdictional objections for the following reasons.

459. First, there has been no determination that the payments to President Kuchma and Mr Pinchuk did not violate Ukrainian law, as shown by the evidence on the record. The evidence further shows that the first investigation was initiated by the Verkhovna Rada alleging that Mr Kolomoisky had paid bribes to President Kuchma, supplemented by Mr Kolomoisky's confirmation of the conduct. However, due to "*lack of evidence of a criminal offence under Art. 368(4) of the Criminal Code of Ukraine*" the proceedings were terminated.[175] Although the specifics surrounding the lack of evidence are unknown, the Tribunal notes that it was recorded in the general prosecutor's resolution that when asked to verify the authenticity of certain documents and testify on the allegations he made, Mr Kolomoisky "*fail*[ed] *to appear before the investigator for over a year despite numerous summonses*".[176] Accordingly, the investigation was closed for lack of evidence not because the charges were found meritless or false.

460. On 14 June 2016, the deputy general prosecutor of Ukraine issued two other resolutions

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[175] Exhibit C-1954, p. 110.
[176] *Ibid.*, p. 108.

with which it "authorised" and "charged" another pre-trial investigative authority to conduct a pre-trial investigation into the bribery and corruption allegations, which were the subject of the previous investigation. That other body was the NABU. This investigation is still pending. In any event, for the reasons explained below, the bribery and corruption, which is central to this case, violates international public policy. Whether criminal proceedings have been conducted and/or sanctions imposed or not in the country in question (Ukraine in the present case) may be relevant and helpful, but is neither binding nor determinative for an international arbitration tribunal.

461. Accordingly, the Tribunal recognises that, as of today's date, Mr Kolomoisky has not been found to have violated the Ukrainian Criminal Code. However, this factor by itself is not determinative of the Tribunal's jurisdiction. A domestic failure or inability to investigate and prosecute does not dispose of illegality allegations and criminal actions without a final determination of the facts and/or allegations, and in particular, the ramifications in an international context. In fact, an international tribunal has a duty to investigate the facts of a case "*even sua sponte*" and take appropriate measures under the applicable principles of law when there are *prima facie* grounds for suspecting malfeasance.

462. Further, and in any event, the Tribunal's jurisdiction derives from the ECT. Article 26(6) ECT requires that this Tribunal decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law. Thus, as stated in paragraph 434 to 436 above, when determining whether Respondent's allegations of bribery and corruption are meritorious enough for the Tribunal to decline jurisdiction, the Tribunal will decide in compliance with the ECT and "*applicable rules and principles of international law*" as well as mandatory provisions of Swedish law, if relevant.

463. Moreover, the Tribunal has found a clear link between the payments made by Mr Kolomoisky and Mr Bogoliubov and the advantages obtained by them and by Claimants, i.e. the control of Ukrnafta.

464. Between April 2003 and September 2004 Mr Kolomoisky and Mr Bogoliubov paid US$ 100 million to President Kuchma and Mr Pinchuk in return for obtaining control over Ukrnafta's management. The said payments were transferred through the conclusion of a number of sham agreements where the sellers were controlled by Mr Pinchuk and the buyers by Mr Kolomoisky. As described by Mr Kolomoisky himself, these agreements "*were merely*

a paper trail designed to explain the payments which actually were supposed to go to the 'special fund'".[177]

465. Mr Kolomoisky described the agreement with Mr Pinchuk in the following way:

> *"During our discussions, Mr Pinchuk made me an offer that would allow Mr Bogolyubov and me to gain maximum benefit from the corporate rights stemming from our ownership in Ukrnafta shares, including the participation of our representatives on the Supervisory and Management Boards. Mr Pinchuk said he would be able to ensure that Naftogas' representatives on Ukrnafta's Supervisory Board acted in accordance with Mr Pinchuk's wishes, and that Naftogas would vote accordingly during the general meeting of the shareholders.*
>
> ...
>
> *Mr Pinchuk suggested he would make sure that the candidates proposed by Mr Bogolyubov and me would be elected to the Supervisory Board and that the candidate suggested by us could be elected Chairman of the Management board. This would effectively give us the opportunity to participate in the management of the company. In return, we would confer upon Mr Pinchuk an option to purchase a third of our shares in Ukrnafta. Also, Mr Bogolyubov and I would pay around US$5 million per month until November 2004 to a 'special fund'. Mr Pinchuk told me during our conversation in November 2002 that the 'special fund'" would be used to finance the next Presidential election campaign in Ukraine. In addition, up until November 2005, we would have to pay 50% of the profits we received from Ukrnafta (after deduction of the sums paid to the 'special fund') to Mr Pinchuk."*[178]

466. According to the evidence in the record and the factual circumstances of the case, it is clear to the Tribunal that everything happened according to Mr Pinchuk's proposal as described by Mr Kolomoisky. Following the agreement between Mr Kolomoisky, Mr Bogoliubov and Mr Pinchuk on 25 January 2003, Mr Palytsia was appointed as chairman of the Ukrnafta management board on 31 January 2003. Two months later, on 21 March 2003, *"five new members"* proposed by Mr Kolomoisky and Mr Bogoliubov were appointed to Ukrnafta's supervisory board.

467. Additionally, another corrupt agreement to a similar effect, the Firtash Agreement, was concluded between Mr Kolomoisky and Mr Firtash in 2006. It provided that Mr *"Palitsa shall be the General Director and the Chairman of the Board of directors of OAO Ukrnafta"*,[179] and that Mr Firtash *"shall not make any changes in the composition of the*

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177 Exhibit C-2196, para. 62.
178 *Ibid.*, para. 54.
179 Exhibit C-2110, Clause 5.3.

Supervisory Board of OAO Ukrnafta".[180] It further provided that after Mr Firtash's payment to Mr Kolomoisky of the price specified in Clause 3.2, "*the composition of the Supervisory Board will be reviewed so that* [Mr Firtash] *and* [Mr Kolomoisky] *will each appoint four representatives*".[181] This was possible because of Mr Firtash' relationship with Mr Boyko, at that time the Minister of Energy.

468. Mr Kolomoisky and Mr Bogoliubov also chose and hired Mr Palytsia's successor Mr Vanhecke in 2011, along with two other senior executives who were appointed to the Ukrnafta's management board.

469. The Tribunal further notes that Mr Palytsia's terms of employment and the Executive Agreements concluded with Messrs Vanhecke, Bakunenko and Sutton, show that those individuals were acting in a way that furthered the interest of the Minority Shareholders, including Claimants (see further paragraph 479 below).

470. Accordingly, the Tribunal has concluded, on the evidence, that the payments made in 2003/2004, coupled with the conclusion of the Firtash Agreement and the Executive Agreements, ensured that Mr Kolomoisky and Mr Bogoliubov not only obtain control over Ukrnafta's management board but also enabled them and Claimants to maintain that control.

471. Further, the Tribunal does not accept the contention that the payment did not constitute a "bribe" because it was not paid to an "official" but to a "family member of an official". It is clear that the money was intended to go to President Kuchma so he would exercise his authority, as a President, in favour of the interests of Mr Kolomoisky and Mr Bogoliubov. Mr Kolomoisky has confirmed this in his witness statements in this Arbitration and in the Pinchuk Proceedings. Further, as made clear by Mr Kolomoisky, he and Mr Bogoliubov received the advantage they paid for, i.e. control over Ukrnafta.

472. Moreover, Claimants have provided no evidence to show that Mr Pinchuk pressured Mr Kolomoisky and Mr Bogoliubov to make the payments. The Tribunal notes Mr Kolomoisky's testimony in this Arbitration and before the Verkhovna Rada's special commission which led to the opening of an investigation back in 2015. Claimants rely on

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[180] Exhibit C-2110, Clause 5.4.
[181] *Ibid.*, Clause 5.5.

the general prosecutor's characterisation of the payments as being *"the result of an 'extortion' of money"* to support their position. However, the Tribunal is not persuaded by this evidence that *"undue influence"* had been exercised over Mr Kolomoisky and Mr Bogoliubov for the following reasons.

473. Mr Kolomoisky's allegation before the Verkhovna Rada's special commission to have paid monthly bribes to Mr Pinchuk under his "pressure" and upon "demand" has never been confirmed. In fact, the general prosecutor suspended the first investigation for lack of evidence caused to some extent by Mr Kolomoisky's lack of cooperation and refusal to appear before the general prosecutor.

474. Further, the general prosecutor did not state that the payments were made *"as a result of an 'extortion' of money"*.[182] Rather, the evidence shows that Mr Pinchuk was asked to give testimony on *"charges of large-scale extortion by former President of Ukraine L. D. Kuchma from I. V. Kolomoysky in exchange for the management of PJSC 'Ukrnafta'"*.[183]

475. Finally, Claimants have not provided any independent evidence to substantiate Mr Kolomoisky's testimony in this Arbitration. In fact, the Tribunal is of the view that Mr Kolomoisky has contradicted himself on several occasions. On the one hand, Mr Kolomoisky states that he did not *"consider at the time"* that any of the payments made were bribes or that *"the agreements were otherwise unlawful"*.[184] Rather, Mr Kolomoisky considered those payments to be contributions to Mr Kuchma and later to Mr Yanukovych's presidential election campaigns.[185] With regard to the agreement with Mr Pinchuk, Mr Kolomoisky states that he *"regarded this as a business agreement under which we were agreeing to pay him a share of any profits for a period of time (until November 2004) and to give him an option to acquire shares in return for providing lobbying services."*[186] Mr Kolomoisky had also stated earlier in the Pinchuk Proceedings, that Mr Pinchuk *"made [him] an offer that would allow Mr Bogolyubov and [him] to gain maximum benefit from the corporate rights stemming from [their] ownership of Ukrnafta shares, including the participation of [their] representatives on the Supervisory and Management*

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182 Exhibit C-2108, pp. 1, 2 and 6.
183 *Ibid.*, pp. 1.
184 Kolomoisky, 1st witness statement, para. 36(a).
185 Exhibit C-2196, para. 66; Kolomoisky, 1st witness statement, para. 36(c) and (g).
186 Kolomoisky, 1st witness statement, para. 36(h).

Boards".[187] On the other hand, Mr Kolomoisky states that he and Mr Bogoliubov felt pressured by Mr Pinchuk to make the payments because of Mr Pinchuk's *"powerful position as the President's son-in-law and the President's personal interest in the deal."*[188] No details are given as to how this pressure was experienced or exercised.

476. The Tribunal is not persuaded that Mr Kolomoisky would have made the contributions in 2003/2004 even if he had not been approached by Mr Pinchunk, simply because Mr Kuchma was *"the only serious non-communist"* and thus the *"only realistic candidate"* without getting anything in return;[189] while at the same time they felt forced to pay Mr Pinchuk. As shown by the factual circumstances of this case and the evidence in the record, Mr Kolomoisky and Mr Bogoliubov are powerful businessmen with strong political connections. So strong that they managed to stand up to Mr Pinchuk and to refuse to pay him *"a share of any profits for a period of time (until November 2004)"* as agreed, despite their "fear" of him.[190] Mr Kolomoisky explains that this was due to the fact that Ukrnafta was not making any profit at that moment. Mr Kolomoisky and Mr Bogoliubov also managed to convince Mr Pinchuk not to exercise his option to acquire shares at that time.[191]

477. Additionally, the transcript of the special commission hearing records that when Mr Leshchenko asked Mr Kolomoisky whether he thought that the US$ 5 million paid monthly in 2004 were a "bribe", Mr Kolomoisky replied "[w]*e know that the one who gave a bribe, if he is the one to come and say that he did it, nothing will be done to him*".[192] Mr Kolomoisky also replied affirmatively[193] to Mr Leshchenko's follow up question, *"Do you admit that you paid USD 5 million as a bribe for management of Ukrnafta in 2004*".[194]

478. Consequently, the Tribunal does not consider that Claimants have proved that Mr Kolomoisky and Mr Bogoliubov were under *"undue influence"* to make the payments in 2003-2004.

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187 Exhibit C-2196, para. 54.
188 Kolomoisky, 1st witness statement, para. 42.
189 *Ibid.*, para. 36(c).
190 *Ibid.*, paras. 36(h) and 42.
191 *Ibid.*, para. 36(h).
192 *Ibid.*, para. 36(k).
193 Mr Kolomoisky confirmed this during the hearing as well, see Day 4, p. 47, ll. 2-7: *"I even clarified that $5 million was per month."*
194 Kolomoisky, 1st witness statement, para. 36(k).

479. Moreover, in the Tribunal's view, the allegation that Ukraine *"knowingly overlooked"* the bribery allegations for *"more than 14 years"* is not supported by the record. An investigation was initiated by the State's Prosecutor the moment Mr Kolomoisky made his admission to the Verkhovna Rada's Special Commission. While the first investigation was closed for lack of evidence, it was later on reopened and transferred to NABU.

480. The Tribunal notes that Respondent denies any knowledge of the Executive Agreements. Those Agreements were entered into between the Minority Shareholders, including Claimants, and executives of Ukrnafta, so as to enable Claimants to maintain control of Ukrnafta's management between 2011 and 2015. According to the terms of those Agreements, Mr Vanhecke, Mr Bakunenko and Mr Sutton , were required not only to act in the best interest of the company but also to take *"all steps that, in the reasonable and objective opinion of the Minority Shareholders, ensure that the best interests of the Company... are not compromised by any third parties"*.[195] The remuneration[196] was also subject to a decision by the Minority Shareholders. In the Tribunal's view, the terms of the Executive Agreements clearly show under whose "control/influence" these senior managers were acting, and whose interests those Agreements were furthering.

481. For the above reasons, the Tribunal does not consider that Respondent *"overlooked"* the bribery and corruption for years. However, even if it had, this would not preclude Respondent from raising this issue as a jurisdictional objection.

482. Furthermore, the Tribunal disagrees with Claimants' submission that the bribery and corruption allegations should be decided at the merits or quantum stage of this Arbitration rather than at the jurisdictional one. The Tribunal recognises that there is practice of some investment tribunals doing so.[197] However, the factual circumstances in those cases differ

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195 See e.g. Exhibit R-47, Schedule 1, Clause 2.

196 Exhibit R-47, Clause 4.2; Exhibit R-48, Clause 4.2; Exhibit R-49, Clause 4.2.

197 See e.g. Exhibit CLA-5, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436; Exhibit CLA-6, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436 and Exhibit CLA-7, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 435-436; Exhibit CLA-83, *Hesham Talaat Al-Warraq v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012, para. 99; Exhibit CLA-82, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, paras. 174-176.

from the ones in the present dispute. Further, and in any event, the doctrine of precedent is not present in international arbitration and this Tribunal is not bound by the decisions of other tribunals.

483. In the present case, the essence of Respondent's jurisdictional objection is that the Tribunal should decline jurisdiction because Claimants' alleged investment is tainted by corruption, bribery and fraudulent conduct. In other words, had it not been for the payments made by Mr Kolomoisky and Mr Bogoliubov in 2003-2004, and the ongoing arrangements with Mr Firtash, Claimants may not have obtained control over Ukrnafta's management, and may not have maintained that control for years resulting in the alleged defrauding of Ukrnafta.

484. In conclusion, for all the reasons described above, the Tribunal has concluded that Claimants' investments in Ukraine are tainted by bribery and corruption. The acts were originally done by Mr Kolomoisky and Mr Bogoliubov, the main UBOs, in 2003/2004, before Claimants were established by the main UBOs and received their Ukrnafta shares from other companies controlled by Mr Kolomoisky, Mr Bogoliubov and the Privat Group. The effects of the original corruption leading to Claimants' control of Ukrnafta through Mr Kolomoisky and Mr Bogoliubov, have continued through the years during which Claimants held their Ukrnafta shares.

485. Finally, it is recognised that in international investment transactions an investor with "*unclean hands*" should not benefit from the protections afforded under any treaty, and especially not under the ECT. As noted by other tribunals, "*the substantive protections of the ECT cannot apply to investments that are made contrary to law*" [198] or which violate international public policy. No State would ever give its consent under Article 26 ECT to international arbitration for the resolution of disputes relating to investments that are tainted by, obtained and/or managed through illegal and corrupt behaviour and which violate internationally recognized standards of international public policy.

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[198] See e.g. Exhibit RLA-19, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 139.

d. The Tribunal has no jurisdiction over Claimants' claims because corruption, fraud, dishonesty and illegality permeated the main UBOs' actions and their control over Ukrnafta

486. It is a generally established principle, both by case law and commentators, that when an investment is made by means of bribery and/or corruption, a tribunal should decline jurisdiction and not entertain the claims presented. As observed by Aloysius Llamzon:

> *"[T]he weight of the contemporary case law is unmistakable: investment arbitrators are coalescing in favor of treating corruption as an issue that affects their jurisdiction through the Legality Doctrine, grounded upon the idea that investors have no a priori right to investment arbitration and that sovereign consent to arbitration was premised on investors acting within the bounds of the host state's national laws when making their investments."*[199]

487. The reason for that is because such investment would not have been made in accordance with law. As explained by Professor Sacerdoti:

> *"[I]t can be safely concluded that the characterization of bribery in international business transactions in binding and non-binding international instruments as a serious crime and a matter of general concern for all States, to be tackled by them individually and jointly, renders such transactions illegal as being contrary to transnational public policy, irrespective of applicable law and of any devices that parties may have resorted to in order to hide the bribery and escape such a conclusion."*[200]

488. This is the case in the present dispute. The Tribunal recognises that there is no explicit language in the ECT that requires the conformity of an investment with a particular law in order to be protected by the Treaty. However, the protections under the ECT would not apply to investments tainted by or made in violation of and/or contrary to the rule of law, fundamental legal obligations or international public policy. This reading of the ECT is confirmed by other tribunals.[201]

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[199] Exhibit RLA-28, Llamzon A., *"Chapter 2: On Corruption's Peremptory Treatment in International Arbitration"* in Baizeau D. and Kreindler R. H. (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13, Kluwer Law International, (International Chamber of Commerce, 2015), p. 44.

[200] Exhibit RLA-14, Sacerdoti G., "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice", ICSID Review, Volume 24, Issue 2, Fall 2009, p. 578.

[201] Exhibit RLA-19, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 138: "[u]*nlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.*"

489. The tribunal in *Plama v Bulgaria* observed that according to Article 31 VCLT, the ECT must be read together with its Introductory Note, which provides that the *"[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues."*[202] Accordingly, the Tribunal concluded that the ECT should be interpreted *"with the aim of encouraging respect for the rule of law"* and that the *"ECT cannot apply to investments that are made contrary to law."*[203]

490. Similarly, the *Yukos* tribunals found:

> *"In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and* bona fide *investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the* Treaty."[204]

491. The Tribunal accepts that wrongful and illegal conduct are broad concepts the determination of which depends on a case by case basis. However, it is generally established that bribery and corruption constitute an illegal conduct.[205] As stated by Judge Lagergren *"...corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations... "*.[206] This is true in the present case, since both international and national (Ukrainian) law recognise bribery and corruption allegations, if proven, to be unlawful. This is equally the case in respect of

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202 Exhibit RLA-19, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 139 quoting: Exhibit CLA-1, Energy Charter Secretariat, The Energy Charter Treaty and Related Documents, A Legal Framework for International Energy Cooperation, An Introduction to the Energy Charter Treaty, p. 14.

203 *Ibid.*, para. 139.

204 Exhibit CLA-65, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014, para. 1352; Exhibit CLA-66, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1352; and Exhibit CLA-67, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, para. 1352. See also Exhibit RLA-21, *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Admissibility, 6 June 2012, para. 308.

205 Exhibit RLA-17, *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 165: *"...the subject-matter scope of the legality requirement covers: (i) non-trivial violations of the host State's legal order (Tokios Tokeles, LESI and Desert Line), (ii) violations of the host State's foreign investment regime (Saba Fakes), and (iii) fraud – for instance, to secure the investment (Inceysa, Plama, Hamester) or to secure profits. There is no doubt that corruption falls within one or more of these categories."*

206 Exhibit RLA-15, ICC Case No. 1110 (1963) reprinted in: J. Gillis Wetter, *"Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case. No. 1110"*, (1994) 10 Arb. Int. 277, p. 294.

international public policy. [207]

492. Bribery and corruption are illegal under international law and are contrary to international public policy, and in the Tribunal's view undermine the validity and legality of any arrangement in which they are found. In this case, even if bribery and corruption were not the basis on which the Ukrnafta shares were acquired by Mr Kolomoisky and Mr Bogoliubov, they were a direct and determinative factor in the Ukrnafta shares being transferred in March 2007 to Claimants from other companies owned or controlled by Mr Kolomoisky and Mr Bogoliubov. Before that time, Mr Kolomoisky and Mr Bogoliubov had owned and controlled the shares through other companies while they sought to influence and gain control of the management of Ukrnafta. This control was obtained through the arrangements with Mr Pinchuk and Mr Firtash.

493. It is clear on the facts of this case that corruption, fraud, dishonesty and illegality have permeated both the control obtained and exercised by the minority shareholders since 2003. This includes acquiring control of the activities of Ukrnafta's management and supervisory boards in 2003, the appointment of individuals to those corporate organs and the entering into transactions which were loss making for Ukrnafta and some of which resulted in the profits being transferred to entities controlled by the minority shareholders. These activities can be illustrated over 4 time periods: 2003-2004; 2006; 2011; and 2003-2015.

2003 – 2004 Gaining Control of Ukrnafta Management

494. In early 2003, three agreements were concluded between Mr Kolomoisky and Mr Bogoliubov, and Mr Pinchuk, the son-in-law of Mr Kuchma, the then President of Ukraine.

495. The first agreement was the Ukrnafta Agreement, dated 25 January 2003. Party 1 was identified in the witness statement of Mr Kolomoisky in the Pinchuk Proceedings as Mr Kolomoisky and Mr Bogoliubov and Party 2 as Mr Pinchuk.[208]

496. Mr Kolomoisky was interested in implementing staffing changes in Ukrnafta. Mr Pinchuk

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[207] Although made with reference to English law, the tribunal in the *World Duty Free* case stated: "*Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage.... Like any other contract, a state contract procured by bribing state officer is legally unenforceable, as an affront to the public conscience.*" In the Tribunal's view this is equally the case in international law as found by Judge Lagergren and others.

[208] Exhibit C-2196, para. 58.

undertook to arrange for the appointment of a candidate nominated by Mr Kolomoisky to the position of chairman of the management board of Ukrnafta, and to ensure that by 1 May 2003 five persons nominated by Party 1 would be elected as members of the supervisory board.

497. In return, Mr Kolomoisky agreed to the Option Agreement. Mr Kolomoisky also undertook to make monthly payments of US$ 5 million to a special fund details to be provided by Mr Pinchuk until November 2004. Over the next two years, over US$ 100 million were paid by Mr Kolomoisky and Mr Bogoliubov into this special fund. Mr Kolomoisky claims to have viewed the monies as paid towards the re-election of President Kuchma who in the end did not stand for re-election and in fact no formal election fund was created.

498. The second agreement was the Option Agreement, also dated 25 January 2003. It dealt with the option that was given to Mr Pinchuk to acquire a third of all the corporate rights in the companies which held the 40.1% shareholding in Ukrnafta.

499. The third agreement dated 20 March 2003 was entitled "*Supplemental Agreement to the Agreement on Cooperation relating to the Attainment of Operational Contract over [Ukrnafta] dated 25 January 2003*". [209] It provided that Mr Pinchuk "*shall where necessary ensure during voting the coordinated position of one member of the Supervisory Board of [Ukrnafta] from the number of the remaining seven members with the representatives of [Mr Kolomoisky and Bogoliubov] in this body, or the non-appearance at the meeting of the Supervisory Board of one member of the Board, does not constitute a representative of [Mr Kolomoisky and Bogoliubov].*" [210]

500. Steps were then taken to implement these agreements. In early 2003, Mr Igor Palytsia, who was the head of another company in which Mr Kolomoisky and Mr Bologliubov had an interest, was asked by Mr Kolomoisky whether he would take the role of chairman of the management board of Ukrnafta.[211]

501. On 30 January 2003, Mr Palytsia, with the support of Naftogaz procured by Mr Pinchuk, was appointed Acting chairman of the management board of Ukrnafta.[212]

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209 Exhibit C-2199.
210 *Ibid.*
211 Palytsia, 2nd witness statement, para. 63.
212 Exhibit R-200; Palytsia, 2nd witness statement, para. 13.

502. On 21 March 2003, at a general meeting of Ukrnafta shareholders, the five new supervisory board members proposed by Mr Kolomoisky and Mr Bologliubov were elected to Ukrnafta's supervisory board with the support of Naftogaz.[213]

503. There is no denying that payments were made by Mr Kolomoisky to Mr Pinchuk. This was admitted by Mr Kolomoisky on several occasions. For instance, in the Pinchuk Proceedings, Mr Kolomoisky wrote in his witness statement:

> *"On 25 January 2003, Mr Pinchuk, Mr Bogolyubov and I entered into a written agreement which reflected Mr Pinchuk's proposals (the Ukrnafta Agreement). This Agreement referred to Mr Bogolyubov and me as 'Party 1' and to Mr Pinchuk as 'Party 2'.*
>
> *We also entered into a separate Agreement on the Right to Exercise the Option. This concerned the terms of Mr Pinchuk's option to buy Ukrnafta shares. The option was exercisable during the period up to November 2004, i.e. the date when the Presidential election was expected to happen. This was not a coincidence: after the election of a new President, Mr Kuchma's protectorate could end, changing everything.*
>
> *On 31 January 2003, Mr Igor Palitsa was appointed as Chairman of the Management Board of Ukrnafta. This appointment was made with the support of Naftogas, which Mr Pinchuk had clearly been able to bring about.*
>
> *Then, at a joint meeting of Ukrnafta shareholders on 21 March 2003, Naftogaz voiced its support for the election to Ukrnafta's Supervisory Board of the five new members whom we had proposed.*
>
> *As regards the payments to the special fund, it was necessary to prepare documentation confirming the nature of these payments. However, Mr Pinchuk did not want to do this in a way that would make it obvious that they were intended for the Presidential election campaign, which would be contrary to Ukrainian law. At his suggestion, the payments had to look as if they were payments based on commercial agreements, and as a result, they were documented in the form of a series of agreements to buy and sell shares between companies that were not residents of Ukraine. The sellers under these agreements were legal entities controlled by Mr Pinchuk, and the buyers were companies under my control. The shares being 'bought' under these agreements were shares that I already owned. These agreements were merely a paper trail designed to explain the payments which actually were supposed to go to the 'special fund.'"*[214]

504. This was confirmed in Mr Kolomoisky's statement before the Ukrainian Parliament.[215] Mr Kolomoisly also confirmed this in cross-examination during the hearing in this Arbitration:

> *"1 Q. When you were asked the question: 'So, do you admit that for the management*

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213 Exhibit C-1843; Exhibit C-2196, para. 61.

214 Exhibit C-2196, paras. 58-62.

215 Exhibit R-196.

of Ukrnafta in 2004... you paid US$5 million as a bribe?' That is what you just told me you did not disagree with; correct?
A. No, no. I did not disagree with it. I even clarified that $5 million was per month."[216]

505. In the Tribunal's view the payments exceeding US$ 100 million to Mr Pinchuk were made with the sole objective to have President Kuchma exercise his authority to enable Mr Kolomoisky and Mr Bogoliubov to obtain management control of Ukrnafta. In fact, when explaining how the arrangements with Mr Pinchuk came into existence, Mr Kolomoisky emphasised several times how important it was for President Kuchma and *"in the best interests of the State for the existing Ukrnafta management to be removed and for the Minority Shareholders to take over the management of company"*.[217] Mr Kolomoisky further explained:

> *"Mr Pinchuk made me an offer that would allow Mr Bogoliubov and me to gain maximum benefit from the corporate rights stemming from our ownership of Ukrnafta shares, including the participation of our representatives on Supervisory and Management Boards. Mr Pinchuk said he would be able to ensure that Naftogas' representatives on Ukrnafta's Supervisory Board acted in accordance with Mr Pinchuk's wishes, and that Naftogas would vote accordingly during the general meeting of the shareholders. ... Mr Pinchuk suggested he would make sure that the candidates proposed by Mr Bogoliubov and me would be elected to the Supervisory Board and that the candidate suggested by us could be elected Chairman of the Management Board. This would effectively give us the opportunity to participate in the management of the company. In return, we would confer upon Mr Pinchuk an option to purchase a third of our shares in Ukrnafta. Also, Mr Bogolyubov and I would pay around US$5 million per month until November 2004 to a 'special fund'."*[218]

506. Mr Kolomoisky revealed that Mr Pinchuk was not the first one to contact him and Mr Bogoliubov regarding Ukrnafta. Rather, there were other lobbyists too, but *"none of them had the credibility of Mr Pinchuk"*, i.e. being the President's son-in-law.[219]

507. Obtaining control of Ukrnafta was the clear objective and intent of Mr Kolomoisky and Mr Bogoliubov. In fact, as described by Mr Kolomoisky, they *"were very keen to take control of the management of Ukrnafta"* because *"this would [have] enable[d]"* them *"to maximise the benefit of [their] investment in this enterprise"*.[220]

508. The importance of control was also indicated by the response given by Mr Kolomoisky,

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216 Transcript Day 4, p. 47, ll. 1-7.
217 Kolomoisky, 1st witness statement, para. 36(e).
218 Exhibit C-2196, para. 54.
219 Kolomoisky, 1st witness statement, para. 38.
220 Exhibit C-2196, para. 55.

when asked by Arbitrator Oreamuno at the hearing why the Minority Shareholders had not terminated the Vanhecke Agreements when he was ill and not attending to the Ukrnafta business. Mr Kolomoisky responded:

> *"I will explain. The risk of losing of complete control over the company and being embezzled, this equalled the investments to the company was zero and losing $3 million a year was an allowable loss minorities went for. It was not very nice to pay for a person who didn't work, but had the result of his sacking or he would resign himself, we have a new person, we had to elect a new person and if someone from Yanukovych's team would have been sent, from Mr Kurchenko's team or whatever the media is writing about, we would come back to the state of 2000-2002 when the level of control was zero. The company will be just still ... the investment would equal to zero. We would have to run to the arbitration sooner. That's why there was a necessary loss."*[221]

509. The same motivation, obtaining and maintaining control over the management of Ukrnafta, was at play with the appointment of Mr Palytsia as the chairman of Ukrnafta's management board. This happened on 30 January 2003[222] with the support of Naftogaz procured by Mr Pinchuk. Mr Palytsia had previously worked for another company within the Privat Group and controlled by Mr Kolomoisky. Mr Palytsia was incentivised by Mr Kolomoisky and Mr Bogoliubov with a right to receive a share in their oil and gas business, including the Ukrnafta shares, if he managed the Ukrnafta business successfully. Mr Palytsia stated:

> *"Messrs Kolomoisky and Bogolyubov did promise me that, if the company performed well under my management and the share value went up, I would be granted the option to acquire a 10% interest in Ukrnafta, with this interest being drawn from within their own stakes, which was exercised in 2012."*[223]

510. When questioned at the hearing, Mr Palytsia explained "*option*" as "*the rights, the option to become an owner of a large oil company, also including Ukrnafta shares*", whereas the reference to oil companies meant entities in which Mr Kolomoisky and Mr Bogoliubov had assets:

> *"I corrected my statement in order to explain in more detail what was meant by the word "option", and in my corrected statement, I explained that the rights, the option to become an owner of a large oil company, also including Ukrnafta shares, I had that right starting from 2002. Then it was not discussed, the figure, the percentage that was offered to me in the large oil company was not discussed. And the figure of 10%*

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221 Transcript Day 4, p. 95, l. 23- p.196, l. 12.

222 Exhibit R-200; Palytsia, 2nd witness statement, para. 13.

223 Palytsia, 2nd witness statement, para. 66.

was mentioned in the end of 2003, in October, when I have spent a year working as the chair of Ukrnafta, chair of the board and I have demonstrated the results of my work."[224]

511. Both Mr Palytsia and Mr Kolomoisky confirmed at the hearing that the Palytsia Option existed since 2003, but it was only documented formally in 2012.[225] The Tribunal understands that Mr Palytsia exercised the option after he had left his position at Ukrnafta. There was no evidence to suggest that either Ukrnafta or Naftogaz were advised or otherwise knew of this private arrangement between Mr Kolomoisky, Mr Bogoliubov and Mr Palytsia.

512. In the Tribunal's view this undisclosed Palytsia Option shows a clear conflict of interest. It is a further example that Mr Kolomoisky and Mr Bogoliubov's main purpose was to obtain and maintain management control over Ukrnafta. This was so important to them that they even offered 10% of the Ukrnafta shareholding they controlled and other oil and gas companies so Mr Palytsia could perform as per their wishes.

513. At the hearing, Mr Kolomoisky agreed to produce this option explaining its content. [226] Following the hearing, the Tribunal issued Procedural Order No 6 requiring Claimants to produce the Palytsia Option and the List of Assets subject to an agreement on confidentiality with Respondent. Claimants provided a number of share transfer documents,[227] but no documents recording the Palytsia Option irrespective of the Tribunal's order. Accordingly, Respondent did not receive and the Tribunal has neither seen nor has any knowledge about the exact terms of this agreement, except for the testimonies of Mr Palytsia and Mr Kolomoisky describing it.

514. In the circumstances, Respondent requested the Tribunal to draw adverse inferences from Claimants' failure to produce the Palytsia Option and the List of Assets, as agreed and as required by the Tribunal under Procedural Order No 6. Specifically, Respondent requested the Tribunal to declare that Claimants failed to comply with Procedural Order No 6, and to infer that the non-disclosed documents *"would have damaged the Claimants' case by providing further evidence for the corrupt means by which Mr. Kolomoisky and Mr.*

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224 Transcript, Day 3, p. 61, l. 16-p. 62, l. 2.
225 Transcript, Day 4, p. 151, l. 21-p. 152, l. 1; Transcript, Day 3, p. 65, ll. 9-11.
226 Transcript, Day 4, p. 152, ll. 2-10.
227 Claimants deny this; they state that they produced documents showing that Mr Palytsia's exercised the option: CPHB1, para. 114.

Bogoliubov established and maintained their operational control over Ukrnafta and its management, in this case Mr Palytsia".[228]

515. The Tribunal has concluded, in the circumstances of this Arbitration, that the documents would likely have been relevant and material to this dispute and shown that the Palytsia Option was not only intended to incentivise Mr Palytsia to exercise his powers and authority at Ukrnafta in the interest of and on the instructions of Mr Kolomoisky and Mr Bogoliubov, but would also reflect their manifest intent to obtain and maintain management control over Ukrnafta.

2006 - Firtash Agreement

516. In 2006, Mr Firtash indicated an interest in purchasing a part of the investment of Mr Kolomoisky and Mr Bogoliubov in Ukrnafta. As a result, Mr Kolomoisky and Mr Firtash entered into the Firtash Agreement on 23 November 2006, which provided for their joint control over the Ukrnafta supervisory board. They agreed *inter alia* that Mr Firtash would pay a total price of US$1 billion to Mr Kolomoisky to acquire *inter alia* 50% of Claimants' Ukrnafta shares; that they would coordinate their votes at Ukrnafta's general meetings; and that their appointees at Ukrnafta's supervisory board would be rearranged with a split of four appointees each.

517. Although, it is unclear why the Firtash Agreement did not go ahead, Mr Firtash paid two deposits towards the US$1 billion, amounting to US$250 million.[229] The Tribunal notes that the Firtash Agreement was concluded before Mr Kolomoisky and Mr Bogoliubov had established and transferred their Ukrnafta shares to Claimants. This was effected specifically to facilitate the proposed sale of the shares to Mr Firtash.

518. Consequently, due to the arrangements outlined above, Mr Kolomoisky and Mr Bogoliubov were able to influence not only the appointment of the senior executives of Ukrnafta, but also to control its business activities. This was despite their minority shareholding. Although Naftogaz was the majority shareholder in Ukrnafta, in effect Mr Kolomoisky and Mr Bogoliubov had acquired, and sought to maintain, management

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228 RPHB1, para. 97(vi).

229 Mas'ko, 2nd witness statement, para. 8; Exhibit C-2111; Exhibit C-2112 - the date of this document is incorrectly stated to be 28 March 2006.

control of Ukrnafta with the direct intervention of Mr Pinchuk and later, Mr Firtash.

519. In the Tribunal's view, the key element behind the Firtash Agreement was to gain and maintain control of the Ukrnafta supervisory board. In this regard, the Tribunal notes the correlation between the Kolomoisky-Pinchuk-Kuchma Arrangement and the Firtash Agreement, both of which enabled Mr Kolomoisky and Mr Bogoliubov to appoint members to the Ukrnafta supervisory board and influencing the company's business activities and focus.

2011 – the Executive Agreements

520. In 2011 three contracts were entered into with new senior managers of Ukrnafta: Mr Vanhecke, Mr Bakunenko[230] and Mr Sutton, respectively appointed chairman of the executive board, deputy chairman of the executive board, and director for planning and economics. Although appointed to these specific roles within Ukrnafta, their remuneration could be withheld by Claimants and by two other minority shareholders, Ballioti and Renalda. Although under the Executive Agreements, the appointees were expected to carry out their contractual obligations in the best interests of Ukrnafta, including budgetary and business planning targets, they were answerable *inter alia* to Claimants (whose main UBOs were Mr Kolomoisky and Mr Bogoliubov). Claimants were responsible for their remuneration. They were expected to manage and carry-on the business of Ukrnafta taking all steps *"in the reasonable and objective opinion of the Minority Shareholders"*; Mr Vanhecke was not to appoint any new member to the Board without *"the prior written consent of the Minority Shareholders indicating their approval to the appointment of such a candidate to the board of the Company"*.[231]

521. The effect of the Executive Agreements was to give the Minority Shareholders, including Claimants and therefore Mr Kolomoisky and Mr Bogoliubov control of the Ukrnafta business and to render them able to influence directly all decisions to be made by Ukrnafta. They also permitted the arrangement through which Mr Vanhecke was able to delegate his responsibilities to Mr Kushch and Mr Pustovarov, close associates of Mr

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[230] Mr Bakunenko provided a witness statement in these proceedings. However, he later indicated that he was unwilling to attend the hearing due to concerns for his safety. Therefore, the Tribunal decided to disregard the witness statement: Procedural Order No 5, para. 25.

[231] Exhibit R-47, Clause 5.

Kolomoisky, for increasing periods of time when he was not present at Ukrnafta's premises. This effectively allowed the Minority Shareholders, including Claimants and therefore Mr Kolomoisky and Mr Bogoliubov to control and run the Ukrnafta business.

Fraudulent activities: 2003 to 2015

522. There were other alleged fraudulent activities between 2003 and 2015. First, Ukrnafta oil products were sold to companies under the control of the Privat Group at an undervalue. According to Mr Kuyun (Respondent's expert) after Mr Palytsia's appointment as Ukrnafta CEO in 2003 there was an *"increase of Ukrnafta's oil supplies to the refineries owned by the Privat Group and a corresponding reduction of supplies to other refineries"*.[232] It is alleged that between 2003 and 2015 Ukrnafta lost nearly US$2.5 billion from this activity.[233]

523. From 2010 to 2011, Ukrnafta converted its gas into ammonia at a facility leased from DniproAZOT (a Privat Group entity) and then sold the ammonia back to DniproAZOT. Mr Kolomoisky admits that he is one of the ultimate beneficial owners of DniproAzot.[234] According to Respondent's experts, the "net-back" prices that Ukrnafta would have obtained had it sold the ammonia on the open market, rather than to DniproAZOT, were *"consistently higher than what DniproAZOT was paying"*.[235] Specifically, the loss suffered by Ukrnafta as a result was calculated at US$339 million.[236]

524. In 2012, Ukrnafta entered into contracts through Mr Kushch, with various entities forming part of the Privat Group. This led to substantial losses to Ukrnafta, estimated at US$281 million and benefiting the Privat Group to the same extent. This included 52 separate contracts for the purchase of petroleum products almost all of which were for under UAH 50 million; this was the amount that Mr Kushch and Mr Pustovarov had authority to enter into in the absence of Mr Vanhecke, and without the approval of Ukrnafta's supervisory board. They were contracts for delivery of products more than a year after they were made. The contracts were concluded at a fixed price that could be revised as markets

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232 Kuyun, Expert Report, para. 34. Mr Kuyun explains that this happened by limiting the number of purchasers of Ukrnafta oil to those controlled by or associated with the Privat Group. The sales took place either directly or indirectly through oil auctions managed by the Privat Group.

233 Kuyun, Expert Report, para. 95.

234 Kolomoisky, 1st witness statement, para. 152(a).

235 RoMRoJ, para. 90.

236 Giles and Resch, 2nd Expert Report, para. 233.

moved which was effectively a kind of loan for more than a year from the day of delivery until payment. Respondent claims that this activity amounted to losses of approximately US$310 million.

525. A further example is the Ukrainian plant for rubber pneumatic giant tyres. An agreement was entered into for the delivery of tyres to the value of UAH242 million. Ukrnafta paid the money but the goods were never delivered. Also, contracts were entered into with Stakhanov Ferroalloy Plant, for just under UAH50 million, on payment terms of 90 days from invoice. Pre-payment was allowed and Ukrnafta paid UAH420 million the day the contracts were concluded.[237] Despite the war in the Luhansk and Donetsk regions which had started subsequently, Ukrnafta continued to pay Stakhanov Ferroalloy Plant a total of UAH874 million.[238] This was recorded as a provision of UAH350 million in Ukrnafta's accounts.

526. In 2015, when Claimants' control over Ukrnafta was threatened, Ukrnafta entered into two further schemes which resulted in its audited opinions being qualified. The first scheme included the conclusion of 286 contracts for the sale and purchase of oil, which eventually resulted in a UAH7.5 billion loss for Ukrnafta. The second "pre-payment" scheme involved the conclusion of a series of contracts for the purchase of gasoline with 28 different counterparties, with a total value of UAH7,148,539,853. This resulted in Ukrnafta cash outflow of UAH7.25 billion (or US$341 million).[239]

527. Whatever the correct answer to these allegations and the losses suffered by Ukrnafta, the evidence shows clearly that due to the control obtained and maintained by Claimants and therefore Mr Kolomoisky and Bogoliubov over Ukrnafta, they were able to arrange and agree transactions that were in the interests of the Privat Group or entities controlled by Mr Kolomoisky rather than in the interest of Ukrnafta.

Conclusion

528. In the circumstances of this case it is clear to the Tribunal that the ownership of the Ukrnafta shares by Claimants, ultimately controlled by Mr Kolomoisky and Mr Bogoliubov,

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237 RoMRoJ, para. 107.
238 Exhibit R-250, p. 31.
239 Radcliffe, Expert Report, para. 2.66.

had their origin in bribery and corruption. This enabled Mr Kolomoisky and Mr Bogoliubov to influence directly and control Ukrnafta's management and supervisory boards, and to direct the business transactions entered into by Ukrnafta through the senior managers of Ukrnafta.

529. The Tribunal is not concerned here with determining the details relating to the alleged "fraudulent contracts" nor with the amounts of the losses suffered. However, due to the bribery, corruption and general practices contrary to international public policy and good faith of Mr Kolomoisky and Mr Bogoliubov, which permeated their relationship with Ukrnafta, the Tribunal has concluded that it does not have and it would be inappropriate to exercise jurisdiction in respect of Claimants' claims in this Arbitration.

530. The Tribunal recognises that the cases relied on by both Parties to support their positions have one thing in common – the bribery and corruption allegations related either directly to the making of an investment or to obtaining the contract which constituted the investment, as a result of which the tribunals declined jurisdiction.

531. The facts of this case are unique, because as explained above, the key element here was Mr Kolomoisky's and Mr Bogoliubov's control over Ukrnafta's management. Mr Kolomoisky already had control of shares in Ukrnafta way before the conclusion of the agreements with Mr Pinchuk (though the origin of those shares is not known). Therefore, at that time there was no apparent need for Mr Kolomoisky to establish Claimant companies and acquire more shares. However, what Mr Kolomoisky and Mr Bogoliubov did not have control over was Ukrnafta's decision making process and business focus; with their control over 40% shareholding, they controlled the minority shareholders. So, when Mr Pinchuk approached Mr Kolomoisky and Mr Bogoliubov with his proposal, they were "*keen to*" accept as it enabled them to maximise their benefits in Ukrnafta. These first steps in 2003 and 2004 led to the conclusion of the agreements described above and to the making of payments in the ensuing years, following which Mr Kolomoisky and Mr Bogoliubov arranged to transfer the Ukrnafta shares to the newly established companies, which became the Claimant companies.

532. The fact that no direct corrupt payment took place at the time when the Ukrnafta shares were acquired by Claimants does not negate the prior corrupt, illegal and bad faith conduct of Mr Kolomoisky and Mr Bogoliubov. Mr Kolomoisky and Mr Bogoliubov had

"unclean hands" when they arranged for the shares to be transferred to Claimants.

533. Further, after they had obtained management control of Ukrnafta they managed and carried out Ukrnafta's business activities corruptly and fraudulently by way of secret agreements and fraudulent contracts. Although the Tribunal makes no substantive determination on the merits of this issue, the specific contracts alleged to be fraudulent or the alleged losses suffered as a result, the Tribunal is convinced that those contracts were fraudulent. This conclusion is based on the evidence presented by Respondent *inter alia* in the Kuyun Report and in Mr Kuyun's evidence (the Tribunal was not persuaded by Claimants' attempt to discredit Mr Kuyun under examination at the hearing) and the surrounding factual circumstances of this case.

534. Even if the Claimant companies were not involved directly in the bribery, corruption and illicit arrangements, if Claimants were to succeed in their substantive claims in this Arbitration (with respect to which the Tribunal expresses no opinion), the actual beneficiaries would be the main UBOs, i.e. Mr Kolomoisky and Mr Bogoliubov. Having concluded that their actions had corrupt, fraudulent and illegal origins, the Tribunal has concluded that it would be wrong and contrary to international public policy to allow them to benefit from the bribery, corruption and illicit actions which enabled them to obtain control of Ukrnafta, which in turn paved the way for Claimants' alleged investment.

535. International arbitration is an important instrument for the determination of disputes arising out of international commercial transactions and investments. In this context, in addition to applying the applicable legal rules to the issues in dispute, the Tribunal considers that it also must uphold fundamental standards of international public policy which are internationally accepted.

Admissibility

536. Respondent has requested that the Tribunal dismiss all of the Claimants' claims for lack of jurisdiction and/or as inadmissible. This latter request is an alternative relief on the basis of the same facts.

537. The Tribunal, by way of *obiter* adds the following. If it had adopted the approach endorsed by the tribunal in the *Churchill Mining v Indonesia* arbitration it would likely have found the claims in this Arbitration inadmissible. In that case the tribunal found that a

"*fraudulent scheme permeated the claimants investments*" and was essential to the making and conduct from which all the claims arose.[240] The *Churchill* tribunal also found that the acts of forgery evidenced were "*of a particularly serious nature in light of the number and nature of forged documents and the aim pursued, namely to orchestrate, legitimize and perpetuate a fraudulent scheme to gain access to valuable mining rights*",[241] and therefore held that all claims before it were inadmissible.[242]

538. In this Arbitration, the pervasive extent of the bribery, corruption and actions taken to obtain and maintain control of Ukrnafta's management as found by the Tribunal have much symmetry with the fraud in *Churchill Mining*. The Tribunal therefore considers that it would have had serious grounds to find that Claimants' claims were inadmissible.

3. Did Respondent deny Claimants the advantages of Part III ECT in accordance with Article 17(1) ECT?

539. Article 17(1) ECT provides:

> *"Each Contracting Party reserves the right to deny the advantages of this Part to [i.e., Part III]:*
>
> *(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised;...."*

i. Respondent's position

540. Respondent contends that the Tribunal has no jurisdiction over Claimants' claims because Respondent has denied ECT advantages to Claimants pursuant to Article 17(1) ECT.

541. According to Respondent, Article 17(1) should be interpreted to allow ECT's Contracting Parties "*such as Ukraine, to deny the advantages of the treaty to shell companies owned or controlled by: (a) nationals of third States; or (b) nationals of the host State of the investment*".[243] Respondent contends that this reading of Article 17(1) is consistent with

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240 Exhibit RLA-134, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14, 6 December 2016, para. 507.

241 *Ibid.*, para. 515.

242 The Tribunal notes that in Spentex the tribunal was divided 2:1 whether the issue of bribery should be discussed as a matter of admissibility or jurisdiction: "[t]*he Tribunal concluded that in both cases, the claims must be dismissed.*" (Exhibit RLA-123, Betz K., Proving Bribery, Fraud and Money Laundering in International Arbitration (Cambridge University Press, 2017), p. 130 referring to *Spentex Netherlands, B.V. v Republic of Uzbekistan,* ICSID Case No. ARB/13/26, Award, 27 December 2016).

243 SoD, para. 652.

the ECT's object and purpose and is supported by legal scholars.

542. Respondent states that it had the right to deny Claimants the advantages of the ECT given that: (1) Claimants are owned or controlled by citizens or nationals of a third state (i.e., Israel or, in the alternative, Ukraine); and (2) Claimants have no substantial business activities in Cyprus which is the ECT Contracting Party in which Claimants are incorporated.

543. With regard to the first requirement, Respondent contends that Claimants are "*majority beneficially-owned by Mr Kolomoisky and Mr Bogoliubov*" who are described in the SoC as "*Cypriot-Israeli-Ukrainian nationals*".[244] Israel is not an ECT Contracting Party and therefore is a "*third state*" for the purposes of Article 17(1) ECT.

544. Respondent contends that the fact that Mr Kolomoisky and Mr Bogoliubov also have Cypriot nationality does not alter the fact that they are nationals of Israel and accordingly nationals of a third State. Claimants' argument that "*the mere of a person holding multiple nationalities does not change the result of him or her invoking the nationality that gains the relevant protection under the investment treaty*" demonstrates a confusion between general qualification for protection under a treaty and the ability to deny benefits under Article 17, which is a specific mechanism.[245]

545. Respondent further points out that, in any event, Mr Kolomoisky and Mr Bogoliubov acquired their Cypriot nationalities in 2009 and 2010, respectively. This was some years after Claimants had made their purported investment in Ukraine. According to Respondent, in cases involving investors with dual or multiple nationalities, it has been accepted that the nationality of the investor that shall be determinative is the one possessed at the time of the investment.[246] At the time when Claimants allegedly invested in Ukraine, i.e. March 2007, Mr Kolomoisky and Mr Bogoluibov were Israeli and Ukrainian nationals, but not Cypriot.

546. According to Respondent, Ukraine is also a "*third state*" for Article 17(1) purposes if that provision is interpreted in accordance with the ECT's object and purpose. Respondent

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244 *Ibid.*, para. 656 referring to SoC, para. 52.

245 RoMRoJ, para. 733.

246 Exhibit CLA-98, *Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela,* UNCITRAL, PCA Case No. 2013-3, Dissenting Opinion of Arbitrator Rodrigo Oreamuno, 15 December 2014, para. 9; Exhibit RLA-146, *The Bolivarian Republic of Venezuela v. Serafin Garcia Armas*, Paris Court of Appeal no. 15/01040, 25 April 2017.

explains:

> *"...it would be manifestly unreasonable to preclude States from denying the advantages of the ECT to domestic investors who had made their investment via a shell company incorporated in an ECT Contracting State as opposed to investors from non-Contracting States who had similarly made their investment through a shell company of convenience."*[247]

547. Therefore, Respondent submits that since Claimants are owned or controlled by third state nationals or citizens, they should be denied the advantages of the ECT.

548. Concerning the second requirement of Article 17(1), Respondent contends that Claimants are shell companies with no substantial business activity in Cyprus for Article 17(1) purposes. In support of its position, Respondent refers specifically to Claimants' annual reports and financial statements for the year ending 31 December 2006. Those documents provide that Littop *"did not carry out any activities"*[248] and Bridgemont *"did not carry out any trading activity"*.[249] In respect of Bordo, Respondent submits[250] that its *"principal activity"* in 2007 is described as *"holding of shares"*;[251] as *"investment holding"* in 2008;[252] and as *"investment holding and providing consultancy service in 2009, 2010, 2011"*.[253]

549. Respondent argues that Claimants' reliance on the *Amto* case[254] to support its position is inapposite. Respondent explains that the reason why the tribunal in *Amto* found that the investor had substantial business activity in the said country was due to the evidence provided by the investor to that end, e.g. tax certificates demonstrating the payment of a variety of taxes, law firm invoices demonstrating the investor's main activity, documents certifying that an office was rented. In contrast, Respondent contends that Claimants have not provided any evidence supporting their assertion that they had structured their business engaging a legal and corporate service entity and had hired people through a professional service agency. The only evidence provided in that regard were *"three services agreements dated nearly four years after the Claimants made their purported*

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247 RoMROJ, para. 734 (emphasis in the original).
248 Exhibit C-2303.
249 Exhibit C-2302.
250 RPHB1, footnote 606.
251 Exhibit C-2690.
252 Exhibit C-2691.
253 Exhibit C-2692.
254 CLA-11, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008.

investment in Ukraine".[255]

550. Finally, Respondent argues that it has validly denied the advantages of the ECT following Claimants' refusal to provide information regarding their beneficial ownership, by way of the DOB Letter dated 18 December 2015 stating:

> *"We regret in particular that you have refused to provide us with the identity of the person or persons who own or control the Companies. In light of this refusal and the lack of publicly available information regarding the Companies and their ownership structure, pursuant to Article 17 of the Energy Charter Treaty (the '**Treaty**') we hereby deny the advantages of the Treaty (including Part III thereof) to the Companies, which we understand have no substantial business activities in Cyprus, to the extent that citizens or nationals of a third state own or control the Companies or any of them.*
>
> *We also hereby deny, pursuant to Article 17 of the Treaty, the advantages of the Treaty to any affiliates or subsidiaries of the Companies."*[256]

551. Respondent avers that benefits may be denied with retrospective effect. It contends that the existence of Article 17(1) puts investors on notice that the State may deny the benefits of Part III to a certain category of investors at any point in time. It is up to the investors to include legal protection as opposed to relying on the advantages of Part III that may at any point be denied.

552. Respondent submits that its position, which is consistent with the object and purpose of the ECT, finds support in legal scholars and relevant arbitral decisions. For example, Respondent quotes Baltag:

> *"Because of the way Investments are structured nowadays, Contracting Parties usually become aware of the circumstances justifying the application of Article 17 of the ECT only after Investor files the claim.*
>
> [Footnote: *For example, in the application of Art. 17(1) of the ECT, denying Contracting Parties must be aware not only of the ownership and control of the Investor, but also whether it conducts substantial business activities in the Contracting Party where it is organized. While the ownership or control could be exposed prior to arbitration, Contracting Parties will most probably not engage in finding out whether or not Investor has substantial business activities in another Contracting Party.*]"[257]

553. Respondent also refers to Sinclair and Jagusch who explain why the retroactive application of Article 17 should be allowed:

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255 RoMRoJ, para. 738.

256 Exhibit R-189.

257 Exhibit RLA-120, Baltag C., The Energy Charter Treaty: The Notion of Investor, (Kluwer Law International, 2012), p. 153.

> *"The host State may not even be aware of the establishment of a new investment in its territory, let alone the nationality of that investor, the extent of its business activities in its home State, and the nationality of its underlying owners or controllers ... The host State may only learn of the conditions that would justify invoking its right to deny at such time as an investor notifies it that a dispute under the ECT has arisen and possibly not even then."*[258]

554. Additionally, Respondent refers to the investment tribunal decisions in *Ulysseas v Ecuador*[259] and *Guaracachi v Bolivia*.[260] In the former case the Tribunal stated that it:

> "[saw] *no valid reason to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made it's the [sic] investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State."*[261]

555. Similarly, the tribunal in *Guaracachi v Bolivia* explained:

> *"Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits."*[262]

556. Respondent further contends that its approach to Article 17 and the legitimacy of it being invoked as an answer to a claim once presented, is also supported by the *NextEra* case. Although the tribunal found that the State exercised its Article 17 right too late *"having been aware of a potential claim for more than three years and having delayed until filing its Memorial on Jurisdiction*", Respondent argues it was implicit in its reasoning that it could be open to a State to deny benefits in response to a claim relating to past events and that the effect of that denial would not be confined to future claims.[263] Respondent accordingly argues that it is the *"prospective-only application of Article 17 which is*

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258 Exhibit RLA-206, Jagusch S., Sinclair A., *"The Limits of Protection for Investments and Investors under the Energy Charter Treaty,"* in C. Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, 2006, p. 101.

259 Exhibit RLA-39, *Ulysseas, Inc. v The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010.

260 Exhibit RLA-40, *Guaracachi America Inc and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014.

261 Exhibit RLA-39, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010, para. 173.

262 Exhibit RLA-40, *Guaracachi America Inc and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, para. 372.

263 RPHB1, para. 428.

unworkable from a practical perspective."[264]

557. Respondent finally contends that the text of Article 17 does not limit the right of the Contracting States to deny the advantages of the ECT in respect of future disputes. It argues that it would be *"inappropriate and unfair for the Tribunal to stipulate that the Respondent should have exercised its right under Article 17 at an earlier point in time in order for the Respondent's rights under Article 17 to have legal effect"*.[265]

558. Respondent concludes that Article 17(1) can be applied both prospectively and retrospectively, depending on the specific circumstances of each case.

559. According to Respondent, in this case, following receipt of Claimants' Notice of Dispute on 5 January 2015, Respondent sent two letters to Claimants (via the Ministry of Justice) on 23 January[266] and 6 March 2015,[267] requesting further details about Claimants' claims, including the identity of the beneficial owners of Claimants. However, due to Claimants' failure to provide the requested information or even reply to the letters, on 18 December 2015 Respondent invoked Article 17(1) ECT through the DOB Letter.[268] That letter officially denied Claimants the advantages of the ECT.

560. In this respect, Respondent disputes Claimants' assertion that it is estopped from invoking Article 17 in this case because it knew, from press reports who the beneficial owners of Claimants were. Respondent argues that this is insufficient for it to make a decision under Article 17(1).

561. In the alternative, Respondent submits that if the Tribunal finds that Article 17 cannot be applied retroactively, then it still has legal effect prospectively and as such, it denies Claimants any ECT advantages concerning any facts and events that took place from 18 December 2015 onwards.

562. For these reasons, Respondent submits the Tribunal should accept its application of Article 17(1) as valid and effective and should decline jurisdiction over Claimants' claims.

ii. Claimants' position

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264 RoMRoJ, para. 741.
265 SoD, para. 671.
266 Exhibit R-188.
267 Exhibit R-1.
268 Exhibit R-189.

563. Claimants describe the following three contentions made by Respondent as "flawed": (1) that the Tribunal has no jurisdiction over Claimants' claims because Respondent has denied Claimants the advantages of the ECT pursuant to Article 17(1); (2) that Claimants have no substantial business activities in Cyprus; and (3) that Claimants are owned or controlled by citizens or nationals of a third State.

564. With regard to the first contention, Claimants submit that the retroactive application of Article 17(1) should not be allowed in this case for several reasons.

565. First, allowing retroactive application of Article 17(1) is not only unworkable from a practical perspective but could also breach the ECT. Claimants explain that it is not practical to interpret Article 17(1) as having no temporal limit of application. This would mean: (1) that a State can invoke it at any stage including during an ongoing arbitration, thereby vesting Respondent with the power to decide on a tribunal's jurisdiction even after proceedings have started; and (2) that international arbitration under the ECT, even for blatant breaches of the ECT, is rendered a pointless institution. Claimants also note that Respondent has given no explanation or supporting evidence to prove its argument, except "*to refer to a piece of commentary*".[269]

566. Second, the retroactive application of Article 17(1) is not supported by either the ECT's object and purpose, nor by basic principles of treaty interpretation. Claimants support their position by referring to relevant arbitral decisions where tribunals have concluded that to allow Article 17(1) to be applied with a retroactive effect would not be compliant with the ECT's object and purpose. Thus, a State can only invoke Article 17(1) prior to the commencement of arbitration proceedings. Claimants contend that "[e]very single tribunal *that has considered Article 17(1) of the ECT has rejected the very same argument the Respondent sought to revivify in the hearing*".[270] This conclusion derives from the principle of legal certainty, i.e. "*that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages*".[271]

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269 CPHB1, para. 593(a).

270 *Ibid.*, para. 103. (Emphasis in the original).

271 Exhibit RLA-53, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 225.

567. Third, Respondent's reading of Article 17(1) goes against the ECT's object and purpose when it is read in conjunction with Article 26 ECT. Under Article 26, when an investor starts an ECT arbitration under the ICSID Convention it accepts the State's offer to arbitrate. Consent cannot thereafter be unilaterally withdrawn as provided by Article 25(1) of the ICSID Convention. Thus, Claimants argue that if Respondent's reading of Article 17(1) was to be applied to this situation, it would render Article 25(1) ICSID Convention *"a dead letter in every ECT case heard pursuant to the ICSID Convention"*.[272]

568. Fourth, Claimants contend that even if Article 17(1) could be applied retrospectively, Respondent is estopped from invoking it in this case because it knew who Claimants' beneficial owners were from *"press reports and other publicly available documents"*.[273]

569. Fifth, even if Article 17 could be applied retrospectively and Respondent is not estopped from invoking it, Claimants submit *"the delay of the Respondent in making an Article 17 denial means it cannot rely on that provision to undermine the Tribunal's jurisdiction"*.[274] In particular, Claimants contend that Respondent cannot rely on Article 17(1) now because it failed to invoke it earlier, and in any event, prior to the commencement of this Arbitration. According to Claimants, in order for the denial of rights under Article 17(1) to be effective and consistent with the legal certainty principle, it must be made without delay after the dispute is notified. Respondent's one-year delay precludes it from invoking it retrospectively.

570. With regard to the second contention, Claimants deny Respondent's claim that Claimants do not have substantial business activity in Cyprus. According to Claimants "substantial" business activities does not mean "large" but "material" relying specifically on *Amto v Ukraine* and *Masdar v Spain*.[275] They insist that material is indicated by the employment of personnel and the conduct of investment-related activities.

571. In this respect, Claimants affirm that they have structured their business activities by engaging two service agencies: Andreas M Sofocleous & Co (a legal and corporate services

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272 CPHB1, para. 593(c)

273 Reply, para. 309(e).

274 *Ibid.*, para. 309(f).

275 Exhibit CLA-11, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, para. 69. Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 222-225 and 254.

provider) and Primecap Cyprus Limited (a professional services agency).[276] The purpose of the latter agency was to employ *"the necessary people to ensure that the Claimants hired the necessary legal and other advisors to maintain their shareholding in Ukrnafta"*.[277]

572. With respect to Mr Kolomoisky's and Mr Bogoliubov's nationalities, Claimants contend that they are not citizens nor nationals of a *"third state"* for Article 17(1) purposes. They are Cypriot nationals and Cyprus is an ECT Contracting Party.

573. Claimants further address Mr Kolomoisky's and Mr Bogoliubov's Israeli and Ukrainian nationalities separately and as follows:

1) Claimants argue that the only possible issue relating to their Israeli nationality is if their dual nationality could prevent them from relying on the ECT by virtue of their Cypriot nationality. Claimants submit that this is an incorrect interpretation of Article 17(1) and that *"the mere fact of a person holding multiple nationalities does not change the result of him or her invoking the nationality that gains the relevant protection under the investment treaty"*.[278]

2) As to their Ukrainian nationality, Claimants argue that it has been confirmed by relevant investment arbitration cases[279] and basic principles of treaty interpretation that nationals of the host State are also not nationals of a third State for the purpose of Article 17(1). Claimants reason that the third State element refers to a State that is not a Contracting Party to the ECT. Ukraine is a Contracting Party to the ECT and therefore cannot be described as a third State.

574. For the above reasons, Claimants submit that Respondent's denial of Claimants' entitlement to the benefits of the ECT under Article 17(1) is not justified. Accordingly, this jurisdictional challenge should be dismissed.

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276 Exhibit C-2114; Exhibit C-2115; Exhibit C-2116.

277 Reply, para. 310.

278 *Ibid.*, para. 311(b). (Emphasis in the original).

279 See e.g. Exhibit CLA-5, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 544 and 546; Exhibit CLA-6, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 544 and 546 and Exhibit CLA-7, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 544 and 546; Exhibit RLA-100, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 553.

iii. Tribunal's analysis

575. When Article 17(1) is invoked it denies the investor the benefits in Part III ECT. This includes the provisions relating to promotion, protection and treatment of investments. Before determining whether either of the two requirements justifying denial of benefits under Article 17(1) have been satisfied, the Tribunal first considers, as a preliminary question, whether Article 17(1) can be invoked both prospectively and retrospectively.[280]

576. The Tribunal notes both Parties' positions on whether Article 17(1) can be invoked after an arbitration has commenced, and if so, whether it should be allowed in this Arbitration. The decided cases and legal authorities relied on by the Parties are not determinative (and in any event, there is no binding precedent in international arbitration), but they do provide general guidelines and principles which may be applicable in the circumstances of this particular case.

577. Respondent relies on several decisions to support its position that the denial of benefits clause can be invoked and have effect after the Arbitration has been commenced.

578. In *Guaracachi v Bolivia*,[281] the investor's investment involved the indirect control of the shareholding of a Bolivian company which had a 30-year electricity generation license. The claimant's main claim was founded on the Government's nationalisation of a company that controlled 50.001% shareholding in the Bolivian company in which the investor had its shareholding. The respondent in that case invoked the denial of benefit clause in its statement of defence, after the arbitration had been commenced. The tribunal found that *"the denial of benefits cannot be equated to the withdrawal of prior arbitral consent, which is only permissible prior to the acceptance of the host State's consent by the investor"*.[282] The tribunal explained its reasons as follows:

> *"Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such denial, such that no legitimate expectations are frustrated by that*

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[280] In their submissions, both Parties have used *"retroactive"* and *"retrospective"* interchangeably. This is also the case in the decided awards. In this Award, the Tribunal uses both terms *"retrospective"* and *"retrospectively"*.

[281] Exhibit RLA-40, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011, Award, 31 January 2014.

[282] Exhibit RLA-40, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011, Award, 31 January 2014, para. 371.

denial of benefits."[283]

"...following the signature and final ratification of the BIT, the Claimants were fully aware of the denial of benefits clause and could have acted in such a way as to preclude the Respondent from being able to invoke that clause, and thereby avoid the risk of the denial of benefits, by having GAI undertake substantial activities in the USA or through some other equivalent solution. That did not happen. ...
The same must be said in relation to the supposedly retroactive application of the clause. The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed.
The Contracting Parties to the BIT could have agreed otherwise, but they decided not to do so. Instead they agreed that a Contracting Party could deny benefits (including the benefit of having a dispute decided by an arbitral tribunal) subject to meeting certain conditions, none of which entails that such denial is only effective in relation to disputes arising after the notification of such denial or imposes any other limitation period that would occur before the Respondent's submission of its Statement of Defence."[284]

579. The tribunal in the *Ulysseas v Ecuador* case came to a similar conclusion. Ecuador invoked the denial of benefits clause (Article I(2) of the US-Ecuador BIT) in its answer to the request for arbitration. The tribunal allowed the retroactive application of that provision stating that it *"s[aw] no valid reasons to exclude retrospective effects"*.[285] The tribunal rejected claimant's argument that it *"would cause uncertainties as to the legal relations under the BIT"* to allow the retrospective invocation of the clause.[286] Thus, the tribunal found that *"it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State"*.[287]

580. Similarly, the tribunal in *Pac Rim v El Salvador* found that the *"denial of benefits"* provision under the CAFTA had been properly invoked retrospectively.[288] In that case, the tribunal decided that under CAFTA there is no requirement for the denial of benefits provision to

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283 *Ibid.*, para. 372.
284 *Ibid.*, paras. 375-377.
285 Exhibit RLA-39, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010, para. 173.
286 *Ibid.*
287 Exhibit RLA-39, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010, para. 173.
288 Exhibit RLA-29, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012.

be invoked before an arbitration commences; the party seeking to deny benefits could do so as part of its jurisdictional defence after a claim has been submitted to arbitration. The tribunal noted specifically that there was *"no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2"*.[289]

581. The findings of the above tribunals and the discussion of the right to deny benefits were based on the interpretation of the denial of benefits provisions in the applicable BITs and on the CAFTA under which those arbitrations were commenced. None of the three cases discussed above was brought under the ECT. The Tribunal considers that the general principles relating to denial of benefits arising out of an international treaty remain the same, but in each case are subject to the language in the different instruments on which jurisdiction was based.

582. The recent *NextEra* case[290] was decided under the ECT. In that case, the tribunal noted that *"Article 17 of the ECT provides no guidance on the time at which the right to deny benefits must be exercised and the cases seem to be divided on this"*.[291] Whilst in the circumstances of the case, the tribunal denied respondent's right to rely on Article 17(1) because it had invoked it too late (i.e. almost 3 ½ years after Respondent first learnt of the claim), it did not exclude the possibility that it be invoked once the arbitration had been commenced. The tribunal's reasoning with respect to the timing of the invocation of Article 17(1), including the good faith interpretation on the right to deny the protections of the ECT, was as follows:

> *"Thus, by 15 March 2012, Respondent was aware that the NextEra Spanish investment was owned by a Dutch company, which regarded itself as having rights under the ECT, and that NextEra was willing to enforce those rights through international arbitration. The Spanish government gave no indication that it would deny those rights. Indeed, following this letter, the Spanish government made further assurances to NextEra and Claimants went ahead and completed the building of the Termosol Plants.*
> *In light of this, can Respondent then deny the benefits of Part III of the ECT once a claim has formally been made? In* Khan *the tribunal said:*
> 'A good faith interpretation does not permit a tribunal to choose a construction of Article 17 to allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny them these protections when the investor attempts to invoke them in international arbitration.'....

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289 *Ibid.*, para. 4.83.
290 *NextEra Global Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Award, 12 March 2019.
291 *Ibid.*, para. 262.

In the view of the Tribunal, once Spain became aware not just that it had a right to deny benefits but that Claimants were relying on Spain's statements and actions and were reserving a right to invoke the provisions of the ECT, it was put on notice of a potential exercise of ECT rights by NextEra. To delay until its Memorial on Jurisdiction on 9 September 2015, more than three years later, to exercise its right to deny benefits under Article 17(1) of the ECT is hardly a good faith exercise of its right as contemplated by the Khan *tribunal. During that period Spain gave assurances about the protection the NextEra investment would receive in full knowledge that it was an investment that, in Claimants' view, was proceeding under and with the protections of the ECT. As a result, Claimants were justified in proceeding on the assumption that Spain would not exercise its right to deny benefits under Article 17 of the ECT. Respondent was confronted on 15 March 2012 with a clear assertion that NextEra's international Dutch investment company had rights under the ECT and that NextEra planned to exercise such rights. Faced with such an assertion, and knowing that it had the right to deny the benefits that Claimants were asserting, Respondent could not stay silent, but it did. Its conduct can only be viewed as acquiescence in Claimants' assertion of ECT rights precluding Respondent from later seeking to assert a right to deny benefits when it filed its Memorial on Jurisdiction on 9 September 2015."* [292]

583. In the cases relied on by Respondent in support of the retrospective application of Article 17(1) ECT, the tribunals specifically indicated that their findings were particular to the circumstances of the case and the legal instruments on the basis of which the arbitrations had been commenced.

584. In contrast, Claimants also referred to several investment awards which they state consistently held that the retrospective application of Article 17(1) ECT is contrary to the object and purpose of the ECT when interpreted pursuant to Article 31 VCLT.

585. In *Plama v Bulgaria* (an ECT case under the ICSID Rules), the tribunal considered that allowing Article 17(1) to have retrospective effect would have serious consequences for an investor who could not plan in the long term for such an effect. For these reasons the tribunal decided that the effect of Respondent invoking Article 17(1) "*only deprived the Claimant of the advantages under Part III of the ECT prospectively*", [293] i.e. from the date of invocation.

586. Similarly, the tribunal in *Liman v Kazakhstan* said that to "*decide the case at hand, it is sufficient to note that when Respondent invoked Article 17(1) of the ECT for the first time in the Counter-Memorial on 4 August 2008, it did so belatedly since it was more than one*

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[292] *Ibid.*, paras. 266-269.

[293] Exhibit CLA-3, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 165.

year after Claimants had filed their Request for Arbitration".[294] As to the applicability of Article 17, the tribunal stated:

> *"Accepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as* 'to promote long-term co-operation in the energy field'. *Such long-term co-operation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages. Therefore, the Tribunal finds that Article 17(1) of the ECT does not have retroactive effect."*[295]

587. The tribunals in *Yukos* were also faced with an Article 17(1) denial of benefits invoked by the respondent. The parties in that case treated Article 17 as a question of admissibility and not jurisdiction. The tribunal observed that treating denial of advantages as retrospective

> *"...would, in light of the ECT's 'Purpose', as set out in Article 2 of the Treaty... be incompatible 'with the objectives and principles of the Charter'. Paramount among those objectives and principles is 'Promotion, Protection and Treatment of Investments' as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms."*[296]

588. Further, tribunals have specifically rejected the application of Article 17 when invoked during arbitration proceedings. In *Khan Resources* the tribunal stated:

> *"It is difficult to imagine that any Contracting Party, whatever its general policy regarding mailbox companies, would refrain from exercising its right to deny the substantive protections of the ECT to an investor who has already commenced arbitration and is claiming a substantial sum of money. A good faith interpretation does not permit the Tribunal to choose a construction of Article 17 that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration."*[297]

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294 Exhibit RLA-53, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 226.

295 *Ibid.*, para. 225.

296 Exhibit CLA-5, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 514; Exhibit CLA-6, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 514; Exhibit CLA-7, *Hulley Enterperises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 514.

297 Exhibit RLA-102, *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, para. 429.

589. The tribunal then concluded that *"Article 17(1) of the ECT does not operate in the present case to bar Khan Netherlands from invoking the protections of the ECT"*.[298]

590. In several decisions tribunals have concluded that a retrospective denial of rights is inconsistent with the object and purpose of the ECT in the specific circumstances of each of those cases. Hence, tribunals have rejected the retroactive application of Article 17 when invoked after an arbitration has commenced, as *"very late"*,[299] and being *"contrary to the transparency, co-operation and stability objectives of the ECT and it would lead to anomalous results"*.[300]

591. The awards to which the Tribunal has been referred and which have been discussed above provide no definitive or uniform answer to the time for invoking Article 17(1). In fact, most of these decisions have stated that their interpretation of Article 17(1) and its retrospective or prospective application, is specific to the factual and procedural circumstances of the case. In any event, these decisions are not binding on this Tribunal, though the principles expressed in them are illustrative and have been considered by the Tribunal for the purposes of this Award.

592. The Tribunal agrees with previous tribunals which have expressed the opinion that investors seeking to benefit from the ECT know or should be aware of the possibility that the benefits agreed by the Contracting Parties and provided for in the ECT may be denied by the State party as provided by Article 17(1). The ECT is silent as to when Article 17 should be invoked and from what date the invocation should have effect. The Tribunal therefore also agrees with the views expressed by several tribunals that investors should not be misled by States as to whether or not they will invoke Article 17. For this reason, if Article 17(1) is to be invoked, the State should do so within a reasonable period of time after the dispute arises and is known to both parties. What is a reasonable time will depend on the circumstances and facts of each case, such as the timing of the notice of dispute, the nature of the attempts for amicable settlement, and the assurances given that Article 17 would not be invoked.

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298 *Ibid.*, para. 431.

299 Exhibit CLA-3, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 162.

300 Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 239.

593. Thus, the Tribunal is of the view that whether or not Article 17(1) can be invoked after an arbitration has commenced depends on the specific circumstances and facts of the dispute, coupled with the Tribunal's analysis of Article 17(1) in light of the VCLT and consideration of relevant arbitral decisions.

594. Article 17(1) is silent on whether it should be applied both retrospectively and prospectively; so is the introduction to the ECT. Some tribunals[301] have observed that the present tense in which the provision is drafted (e.g. *"own or control"*; *"has no substantial business activities"*; *"is organized"*) indicates that this provision must have a prospective effect only. However, in this Tribunal's view this is not sufficient or determinative of the effect of the invocation of Article 17. Thus, recourse must be made to ECT's object and purpose.

595. When considering whether invoking Article 17(1) retrospectively is contrary to the object and purpose of the ECT the Tribunal interpreted Article 17(1) *"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,"* in accordance with Article 31(1) VCLT.

596. According to Article 2 ECT, the purpose of the ECT is to establish *"a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."* This is also confirmed by Understanding IV(1)(a) of the ECT.[302] For a long-term co-operation in the energy field to be possible and effective, there must be legal certainty for the investors. Such legal certainty exists when the host State's legal framework follows the rule of law, is predictable, complies with the ECT obligations they have accepted when acceding to the it and are applied in good faith. As provided under Article 10(1) ECT: "[e]*ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.*" Such conditions shall include *"a commitment to accord at all times... fair and equitable treatment"* and *"the most constant*

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[301] Exhibit CLA-3, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 159.

[302] Understanding IV(1)(a) provides that the *"representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations"*.

protection and security". Further, "*no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*". Thus, when investing in the energy field of a State under the ECT, an investor expects that the above obligations will be observed.

597. Invoking Article 17(1) to deny benefits is not necessarily contrary to the object and purpose of the ECT. Quite the contrary, the right of a State party to deny benefits under Article 17(1) is an expressly agreed and understood provision of the ECT accepted by all Contracting Parties. Its application *per se* cannot be seen as contrary to or undermining the object and purpose of the ECT. It is no different to any other legal rights or provisions existing before or at the time of the investment. Absent an agreement to the contrary there can be no obligation precluding the State from changing its laws.

598. The right for a State to invoke Article 17 retrospectively is supported by several authors who have addressed this issue. Baltag expresses the view clearly:

> "*Nevertheless, the purpose of the ECT for the long-term cooperation in the energy field, based on mutual benefits, does not automatically exclude a retrospective refusal of benefits for Investors and Investments, which under normal circumstances would not be protected by the provisions of the ECT.*"[303]

599. In a separate publication, Mistelis and Baltag considered whether a State would be expected to undertake "*a thorough review of each and every investment made in its territory*" before notifying the investors that they are to be denied the protection of the ECT.[304] They rejected this as "*an impossible task to be achieved by states, especially since states usually become aware of the circumstances justifying the denial of benefits only when faced with a claim from a presumptive investor*".[305]

600. Jagusch and Sinclair also express the view that Article 17(1) can be invoked when the investor seeks to bring a claim against the State. On a plain reading of Article 17(1) they state:

> "*... a Contracting Party to the ECT can exercise its Article 17(1) right to deny* at any time *and, most obviously, it ought to be entitled to exercise that right at the time the*

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303 Exhibit RLA-120, Baltag C., The Energy Charter Treaty: The Notion of Investor, (Kluwer Law International, 2012), p. 159.

304 Exhibit RLA-149, Mistelis L., Baltag C., "*Denial of Benefits and Article 17 of the Energy Charter Treaty*", (2009) Penn State Law Review, p. 1315.

305 *Ibid.*

investor actually brings a claim to enforce the protections (or 'advantages') of Part III of the treaty. Before that moment, a State will almost certainly have had no cause, nor any opportunity ... even to consider the status of any particular investor, nor their underlying ownership or control structure; or the extent of their business activities in the territory in which they are incorporated." [306]

601. As stated above, an investor should be aware of the existence of Article 17 and its potential effect if invoked, in the same way it is aware of its rights and protections under the ECT. The investor can also see what requirements must be satisfied in order for a State's invocation of Article 17(1) to be valid and effective. Article 17(1) *"reserves the right"* of a State to deny the advantages of Part III to an entity that meets the provided *criteria*. For these reasons the Tribunal does not find it legally uncertain or unreasonable for a State to invoke a right under the ECT after the circumstances for exercising such right have come into existence, and within a reasonable time thereafter.

602. In the instant case, the Tribunal looked at Respondent's invocation of Article 17(1) in the context of the following facts and circumstances of this dispute:

1) On 5 January 2015, Respondent received Claimants' notice of dispute, dated 31 December 2014, in accordance with Article 26(1) ECT.

2) During discussions relating to amicable settlement and before this Arbitration was commenced, Respondent requested Claimants to provide information regarding their claims and their beneficial owners. By its letter of 23 January 2015, the Ukrainian Ministry of Justice requested Claimants *"to provide us as soon as possible with the substantiation of claims with reference to specific calculations of losses and the relevant supporting documents"*.[307] In its letter of 6 March 2015, the Ukrainian Ministry of Justice requested Claimants to provide information such as *"calculations and documents that would confirm the amount of losses of companies"*, information regarding the *"ultimate beneficiary owners of the Companies"*, as well as *"[o]ther documents which could help [the State] to thoroughly study the dispute circumstances"*.[308]

3) On 24 March 2015, Claimants replied to Respondent's letter of 6 March 2015 refusing

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306 Exhibit RLA-37, Jagusch S., Sinclair A., *"Denial of advantages under Article 17(1)*," in G. Coop, C. Ribeiro (eds.), Investment Protection and the Energy Charter Treaty (Jurisnet, 2008), p. 35.

307 Exhibit R-188.

308 Exhibit R-1.

to provide information regarding their beneficial owners saying that Respondent did *"not explain why [it] consider[ed] this information to be relevant to the Claimants' claims under the Energy Charter Treaty or to any attempt to reach an amicable settlement"*.[309] Claimants further stated that *"Claimants are Cypriot entities which qualify as Investors under the Energy Charter Treaty"*.[310] Claimants also refused to provide information regarding the amount of their losses saying that they had already done so in their letter of 31 December 2014 and that in any event Respondent had access to such information through Naftogaz.

4) No further correspondence seems to have been exchanged between the Parties after that. Claimants filed their Request on 30 June 2015.

5) Respondent filed its Answer to the Request on 24 September 2015 expressly reserving its right to challenge the Tribunal's jurisdiction at a later stage. Specifically, Respondent stated that it *"reserve[d] its right to object including but not limited to jurisdiction of this Arbitral Tribunal based on, among other things and facts found during Arbitration, any evidence Claimants may submit in support of their written submissions"*.[311]

6) On 18 December 2015, Respondent invoked Article 17 though the DOB Letter served on Claimants following their refusal to provide information regarding their beneficial ownership in response to the Ministry's letter of 6 March 2015. The letter stated in pertinent part:

> *"We regret in particular that you have refused to provide us with the identity of the person or persons who own or control the Companies. In light of this refusal and the lack of publicly available information regarding the Companies and their ownership structure, pursuant to Article 17 of the Energy Charter Treaty (the '**Treaty**') we hereby deny the advantages of the Treaty (including Part III thereof) to the Companies, which we understand have no substantial business activities in Cyprus, to the extent that citizens or nationals of a third state own or control the Companies or any of them.*
>
> *We also hereby deny, pursuant to Article 17 of the Treaty, the advantages of the Treaty to any affiliates or subsidiaries of the Companies."*[312]

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309 Exhibit C-1944.
310 *Ibid.*
311 Answer to the Request, para. 3.2.
312 Exhibit R-189.

603. Respondent's formal denial of benefits under Article 17(1) occurred almost 6 months after the commencement of this Arbitration, and 3 months after the Answer to the Request. In the Tribunal's view, this was not a "late" application in the context of the circumstances of this dispute. The Arbitration had just commenced with the Parties' initial claims and defences set out in the Request and the Answer to the Request. Prior to the Request and after the notice of dispute, Respondent had sought details of the claim and information concerning the beneficial owners of Claimants. Unlike the situation in *NextEra* where Respondent waited until it received the claimant's memorial to invoke Article 17, in this case Respondent exercised its Article 17(1) right in a letter dated 18 December 2015, without waiting for the full SoC, with all supporting documents.

604. As established above, the invocation of Article 17(1) should not come as a surprise or cause legal uncertainty to any ECT investor. This is an inherent business risk akin to the risk of changes to the laws in the host country on which the investor relies.

605. In the Tribunal's view once Article 17(1) is invoked, there is no bar to it having retroactive effect and denying protections to all relevant events that took place prior to that invocation, even if arbitration proceedings had already commenced. This is because the purpose of Article 17(1) is to deny the investor the benefits of Part III ECT.

606. This Tribunal does not agree that Article 17(1) does not have a retrospective effect. If that had been the intent, it could have been expressly stated in the ECT. Further, after the "trigger letter" is sent or the arbitration has been commenced under the ECT, it is unlikely that additional claims will arise between the same parties to which the ECT could potentially apply. It would therefore empty Article 17(1) of its substance, if it were to apply prospectively only.

607. Turning now to the requirements of Article 17(1), Claimants' main UBOs, Mr Kolomoisky and Mr Bogoliubov, possess three nationalities: Israeli, Ukrainian and Cypriot. Claimants rely on their beneficial owners' Cypriot nationality as a shield to Article 17(1), since Cyprus is a Contracting Party to the ECT and thus not a third State. The question for the Tribunal is therefore twofold: (1) whether Mr Kolomoisky's and Mr Bogoliubov's two other nationalities (Israeli and Ukrainian) prevent Claimants from relying on ECT protections; and if not, then (2) whether the acquisition of their Cypriot nationality was prior to or after the dispute between the parties had arisen.

608. There is nothing in the ECT that precludes parties with dual or multiple nationalities from relying on the ECT provided one of those nationalities belongs to a State that is a Contracting Party to the ECT. However, a problem arises when such nationality has been acquired only for the purpose of gaining access to the benefits of the said treaty.

609. This applies in respect of the nationality of those who control Claimants for the purposes of Article 17. It would be an abuse of process to allow Claimants to invoke the Cypriot nationalities of the ultimate beneficial owners as a shield against Article 17 if this nationality had been acquired solely for this purpose once the dispute had arisen.

610. When determining an investor's nationality, Respondent contends that, consistent with the approach by the tribunal in the *Armas* case, the following three dates must be taken into account: the date of the investment, the date of the alleged breach, and the date at which a claim is filed. It argues that the same approach must be adopted for a claimant's owner or controller.

611. Mr Bogoliubov and Mr Kolomoisky acquired Cypriot nationalities in 2009 and 2010 respectively. This is approximately 2-3 years after Claimants acquired Ukrnafta shares for the first time, i.e. on 16 March 2007. Accordingly, at the time of Claimants' investment in Ukraine, Mr Kolomoisky and Mr Bogoliubov possessed only Ukrainian and Israeli nationalities. At that time, Respondent contends "*the present dispute was not merely foreseeable, but had been in existence for two years*"[313] and Claimants were aware of that.

612. There must have been a reason for Mr Kolomoisky and Mr Bogoliubov to have acquired Cypriot nationality. Other than the fact that they had incorporated companies through which to hold and manage their assets, specifically their Uknafta shares, there is no evidence of other grounds for their taking Cypriot nationality. At the hearing, Mr Kolomoisky stated that he does not live in Cyprus, but had "*visited quite frequently*".[314] On the basis that there was no other reason for their taking Cypriot nationality, the Tribunal has formed the view that Mr Kolomoisky and Mr Bogoliubov will have sought this nationality to ensure that the benefits of the ECT could not be denied to Claimants under Article 17(1) should they bring a claim under the ECT.

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313 RPHB1, para. 406(iii).

314 Transcript, Day 4, p. 83, ll. 15-22.

613. Claimants were special purpose vehicles in which Mr Kolomoisky and Mr Bogoliubov carefully placed the Ukrnafta shares. Although Claimants are incorporated in Cyprus they were ultimately owned or controlled by Mr Kolomoisky and Mr Bogoliubov who, at that time, possessed only Israeli and Ukrainian nationalities. Therefore, in the circumstances of this case, the Tribunal has formed the view that at the time of their investment Mr Kolomoisky and Mr Bogoliubov were third-party nationals for the purpose of Article 17(1). Clearly, Israel was a third-party State; not a Contracting Party to the ECT.

614. Although Ukraine was a party to the ECT at that time, it is clear that the ECT was not designed to protect the interest of domestic investors against their State.

615. The second element for Article 17(1) to preclude jurisdiction is that a party does not have "*substantial business activities*". The ECT contains no definition as to what constitutes "*substantial*". However, there are arbitral decisions which may provide some guidance in this regard.

616. The tribunal in *Amto v Ukraine* (an ECT case under SCC Rules) held that "*substantial*" does not mean "*large*"; it means "*of substance, and not merely of form*"", and that it is the "*materiality not the magnitude of the business activity [that] is the decisive question*".[315] In that case, one of the challenges to the tribunal's jurisdiction was based on Article 17(1) ECT and particularly, the investor's lack of "substantial investment" in its state of incorporation, i.e. Latvia.

617. In support of its contention that it had substantial business activities in Latvia, the claimant provided the following evidence: (1) a law firm report showing claimant's main business activity; (2) official tax certificates showing the payment of different types of taxes, e.g. residents income tax, social insurance obligatory payments (for the two staff employed), internal VAT, etc; (3) a statement from its landlord – certifying that claimant had been renting an office in Riga for 7 years; and (4) a bank statement showing claimant's account activity for the period of 1998-2007.[316]

618. The tribunal concluded that the claimant did have substantial business activities in Latvia

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[315] CLA-11, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, para. 69.

[316] CLA-11, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, para. 68.

"on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff."[317] These *"investment related activities"* that turned out to be decisive for the tribunal's ruling were proved by the claimant through the law firm's report. By referring to *"various agreements and share certificates relating to these investments"* the report showed that *"AMTO's main activity [was] in the field of financial investments by participating as a shareholder in companies in Finland, Ukraine, USA and Russia"*.[318]

619. In *Masdar Solar v Spain*[319] (an ECT based case brought before ICSID), the respondent's jurisdictional objection was also based on the fact that the claimant had no substantial business activities in its country of incorporation (the Netherlands). In particular, the respondent argued that the claimant was a shell company, that had no permanently employed people in the Netherlands and was not paying rent for an office; it was simply set up for convenience.[320]

620. The tribunal rejected the jurisdictional objection stating that the claimant had provided *"unchallenged evidence"* regarding *"its standing as a holding company with substantial international assets under its control"*.[321] This *"unchallenged evidence"* provided by the claimant included:

1) the fact that it was *"a holding company, which own[ed] major investments"* not only in Spain but in other countries too, i.e. *"the London Array offshore wind farm and Dudgeon projects, both UK renewable energy projects, and the Tafila wind project in Jordan, all of which [were] high value capital-intensive projects"*;[322]

2) the fact that it was *"demonstrably a business that ha[d] grown in the period of 2008-2014"*;[323]

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317 *Ibid.*, para. 69.
318 *Ibid.*, para. 68.
319 Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018.
320 *Ibid.*, para. 206.
321 *Ibid.*, para. 254.
322 *Ibid.*, para. 224.
323 *Ibid.*

3) it had an office in Amsterdam; [324]

4) it had no employees but had two Dutch Directors who were *"active participants in Board meetings"*; [325]

5) the Masdar Board *"met at least four times a year in the Netherlands"*; its functions included overseeing *"the investments and the assets owned by Masdar"* for the purpose of ensuring that they were *"well funded, well managed"* and sometimes would make decisions concerning capital contributions; [326]

6) Claimant enjoyed *"autonomy in the financial management of its investments"*, and assumed *"its own financial risks"* and issued *"guarantees"*; [327] and

7) Claimant held two bank accounts in the Netherlands with two different banks. [328]

621. In this Arbitration, Claimants contend that they have met the criteria provided in the *Amto* and *Masdar Solar* cases to show they have a substantial business for Article 17 purposes. They argue that the following factors considered relevant by the tribunal in *Masdar* are present in this Arbitration:

1) their business activities were structured through the engagement of Andreas M Sofocleous & Co (a legal and corporate service provider) and Primecap Cyprus Limited (a professional services agency), [329] which employed *"the necessary people to ensure that the Claimants hired the necessary legal and other advisors to maintain their shareholding in Ukrnafta"*; [330]

2) they are *"shareholders in a business that grew"* following their acquisition of the Ukrnafta shareholding; [331]

3) they assumed financial risk by entering into contracts in their own name (e.g. the 2010

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324 Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 225.

325 *Ibid.*

326 *Ibid.*

327 Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 226.

328 *Ibid.*, para. 229.

329 Exhibit C-2114; Exhibit C-2115; Exhibit C-2116.

330 Reply, para. 310.

331 RoJ, para. 445(c)(i).

Shareholders Agreement and 2010 Cooperation Agreement);[332]

4) they hold bank accounts in their own name;[333] and

5) their Boards met regularly, passed resolutions which concerned not only *"minor administrative points, but also substantive points"* such as *"in respect of the transfer of shares an* (sic) *conclusion of trust deeds"*.[334]

622. In contrast, Respondent denies that Claimants have had any substantial business activities in Cyprus. It argues that this is evident not only from Claimants' financial statements but also from the lack of evidence to support Claimants' assertions, especially concerning the engagement of Primecap and Andreas M Sofocleous & Co's services and their performed services.

623. Although the Tribunal is not bound to follow *Masdar* and *Amto,* it is not persuaded that in the present case Claimants' claimed characteristics of their substantial business activities in Cyprus are the same as those in *Masdar* or *Amto*. While the Tribunal acknowledges there are factual resemblances between these cases, it is of the view that there are important and significant differences.

624. In *Masdar*, the investor was described as *"an entity of substance"*. In addition to its office in the Netherlands, Masdar had substantial projects in other countries, i.e., the UK and Jordan. As a result, Masdar was able to show that its business had grown substantially over a 6-year period. When deciding that Masdar had a substantial business activity, the tribunal placed weight on the *"unchallenged evidence adduced by claimant"* as to its standing as a *"holding company with substantial international assets under its control"* and on the persuasive evidence given by a witness as to the *"true extent and materiality of the business conducted by Claimant in the Netherlands"*.[335]

625. In contrast, Claimants in the present case each have only one investment: Ukrnafta shares. They have no other business activity. The Tribunal accepts that the Ukrnafta shareholding may be a very valuable asset and its value may have grown over the years. However, it is

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[332] *Ibid.*, para. 445(c)(ii).
[333] *Ibid.* para. 445(c)(iii).
[334] *Ibid.*, para. 445(c)(iv).
[335] Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 254.

the Ukrnafta's business that may have grown and therefore the value of the Ukrnafta shares rather than Claimants' business activities.

626. In fact, Claimants state that since their initial acquisition of 40.05% of Ukrnafta shares on 16 March 2007, their collective shareholding increased to 40.1009% in 2011 and settled at that amount until the present. In other words, even Claimants' alleged shareholding in Ukrnafta did not grow over time. Accordingly, on the basis of the evidence presented the Tribunal is not persuaded that Claimants have substantial business activities in Cyprus. The facts and the findings of the tribunal in *Masdar* are of no assistance to Claimants.

627. As to *Amto*, the Tribunal notes that the investment in that case was a shareholding similar to the one of Claimants in this case. However, in *Amto* the tribunal found the claimant to have substantial business activities in the state of incorporation because claimant provided substantial and unchallenged evidence that they had a physical office in Latvia for 7 years as proved by a statement from their landlord; they had two full time staff in Latvia to whom they paid salaries; they had paid different types of taxes including residents income tax, social insurance obligatory payments and internal VAT. Additionally, Amto had provided a report showing that its "*main activity [was] in the field of financial investments by participating as a shareholder in companies in Finland, Ukraine, USA and Russia*".[336] Again, the claimant in that case, just like in *Masdar*, had more than one business activity in more than one state. No such evidence has been adduced by Claimants in this case. The facts and the findings of the tribunal in *Amto* therefore also are of no assistance to Claimants.

628. According to Mr Mas'ko, Claimants' business is administered by Andreas M. Sofocleous & Co, "*and its affiliated companies such as Proteas Management Services Ltd and Gramaro Accounting Services Ltd.*" [337] Mr Mas'ko stated that those firms:

> "*...provide legal services, administration and management services, such as provision of registered and administrative offices, secretaries and directors, and they arrange performance of all commercial activities, e.g. payment of fees and other duties, deal with tax matters, communicate with authorities and official bodies. They also provide a full range of accountancy and book-keeping services.*" [338]

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[336] CLA-11, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, para. 68.

[337] Mas'ko, 3rd witness statement, para. 11.

[338] *Ibid.*

629. To support their argument about a substantial business Claimants refer to the service agreements concluded by each Claimant individually with Primecap Cyprus Limited. All were executed on 23 December 2010.[339] Under those agreements, Primecap Cyprus Limited agreed to provide the following services to Claimants:

> "(a) *Coordination of various advisers (legal, tax etc.), communication with counterparties, taking part in negotiations on behalf of the Client;*
> *(b) Outsourcing and coordination of legal advisers in various jurisdictions, including through the subsidiary legal company in Ukraine;*
> *(c) Client's corporate rights management – taking part in supervisory boards, convening shareholders meetings etc;*
> *(d) Invoices and documents verification;*
> *(e) Expenses accounting and control;*
> *(f) Justification of reasonability of expenses amounts;*
> *(g) Preparation and execution of documents by the company's representatives in the name and on behalf of the Client;*
> *(h) Collection of documents, communication with audit companies.*"[340]

630. No such or similar agreements were presented with regard to the alleged services provided by Andreas M Sofocleous & Co and Gramaro Accounting Services Ltd. Claimants have not provided any evidence showing that either contracting party has actually acted upon these agreements. Specifically, no evidence is given as to any kind of personnel being employed by Claimants, or any details of tax and national insurance paid in respect of employees, or any formal office rental, nor advisors being employed by Primecap to serve the needs of Claimants. Further, those agreements were concluded only in 2010 which is 3 years *after* Claimants first acquired the Ukrnafta shares.

631. Moreover, the Tribunal notes that according to the auditors' reports for Littop, Bridgemont and Bordo, each company had two directors and a secretary. Littop's directors were Ploutis Konnaris and Katia Parpi and the secretary was Proteas Consulting & Services Ltd.[341] Bridgemont's two directors were Amalia Hadjipapa and Sylvia Janet Jensen and the secretary was Mercury Consulting & Services Ltd.[342] Bordo's two directors were Anna

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339 Exhibit C-2114; Exhibit C-2115; Exhibit C-2116.

340 Exhibit C-2114, Clause 1. Mr Mas'ko also stated that Primecap provided "*services to the Claimants in accordance with the service agreements, including coordination of work of advisors (tax advisors, valuators, legal advisors, etc) in various jurisdictions in order to support and/or lead the projects of the clients, collection of documents and communication with accountants and auditors, etc.*" (Mas'ko, 3rd witness statement, para. 11).

341 Exhibit C-2303.

342 Exhibit C-2302.

Korelidou and Nantia Vrachimi and the company secretary was Andreas Frangos.[343] However, these financial reports do not show any real working staff or employees of the company, no office premises, no salaries and no rent paid.

632. Regarding Claimants' financial activities and whether such exist at all, the Tribunal notes that the Bridgemont's and Littop's financial statement for the year ending at 31 December 2006 show the following:

1) both companies had a financial loss of US$6,320 most of which was in respect of tax;

2) both companies' total assets, liabilities and equity are stated to be US$ 7,319,680; and

3) the expenses for the 2006 year for both companies were US$917 comprising audit fees of US$393 and accountancy fees of US$524. [344]

633. Additionally, Claimants have provided the auditors' reports of Littop[345] and Bridgemont[346] for the years 2007-2011. Both Littop's and Bridgemont's principal business activities were described as "*investment holding*" from 2007 onwards; in 2006 it was stated that the companies "*did not carry out any activities during the period under review*".[347]

634. Regarding Bordo, the Tribunal notes that while no information was provided in respect of its financial year ending 2006, the financial statements for the years ending 2007, 2008 and 2009 were provided.[348] They showed:

1) For the year ending 2007, Bordo had total assets in the amount of US$518,355,639; a share capital of US$7,321,800; and accumulated losses of US$22,428. It is further stated that Bordo's principal activity is "*the holding of shares*".[349]

2) For the year ending 2008, Bordo had net profit/(loss) amounting to US$7,589, equity and liabilities in the amount of US$518,426,741; a share capital of US$7,328,076; and accumulated losses US$14,839. It is further stated that Bordo's principal activity that

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343 Exhibit C-2691.
344 Exhibit C-2302 and Exhibit C-2303.
345 Exhibit C-2701, Exhibit C-2702, Exhibit C-2703, Exhibit C-2704, Exhibit C-2706.
346 Exhibit C-2695, Exhibit C-2696, Exhibit C-2697, Exhibit C-2698, Exhibit C-2699.
347 Exhibit C-2303 and Exhibit C-2302.
348 Exhibit C-2690, Exhibit C-2691 and Exhibit C-2692.
349 Exhibit C-2690.

year was *"of investment holding"*.[350]

3) For the year ending 2009, Bordo had total comprehensive income of US$8,808; total equity and liabilities of US$518,425,068; share capital of US$7,328,076; accumulated losses of US$23,647. In that year's financial statement, it is stated that the *"principal activities of the Company, which are unchanged from last year, are that of investment holding and providing consultancy services"*.[351] The Tribunal notes that no evidence was given of these consultancy services or any income earned from them.

635. When cross-examined at the hearing, Mr Mas'ko accepted that at 31 December 2006, Claimants *"didn't have assets on their balance sheet at this time because shares came only on 16 March 2007. So it was no substantial assets on their balance, but it should be some assets"*.[352] However, he disagreed that this was still the case once Claimants acquired the shares, i.e. as at 16 March 2007.

636. Claimants also argue that they *"assumed financial risk"* by entering into contracts in their own name, i.e., the 2010 Shareholders Agreement and 2010 Cooperation Agreement comparing these to the situation in *Masdar*. However, in *Masdar*, the evidence related to the company's business and financial transactions in the Netherlands, where the company had its registered office.[353] In contrast, Claimants' conclusion of those two agreements appears to have been done in Ukraine. The Tribunal notes that the 2010 Shareholders Agreement was entered into between Naftogaz, Ukrnafta, and the Minority Shareholders, while the 2010 Cooperation Agreement was entered into between Respondent, Naftogaz and the Minority Shareholders. On both agreements next to the date is written "Kiev".[354] Further, the purpose of 2010 Shareholders' Agreement was the *"stable development of the oil and gas sector in Ukraine and security of energy supply"*.[355]

637. Accordingly, the Tribunal finds that whatever risk Claimants undertook when concluding those agreements is irrelevant to their proof of "substantial business activity" in Cyprus.

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350 Exhibit C-2691.
351 Exhibit C-2692.
352 Transcript, Day 5, p. 113, l. 24-p.114, l. 3.
353 Exhibit CLA-186, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 226-228.
354 Exhibit C-1068 and Exhibit C-1144.
355 Exhibit C-1068.

The benefit of those agreements was realised in Ukraine, not in Cyprus.

638. For the above reasons and based on the provided evidence, the Tribunal finds that Claimants did not have substantial business activities in Cyprus. They may have owned a valuable asset in the form of a holding of over 40 % Ukrnafta shares but this was not a substantial business activity as required by Article 17(1) ECT.

639. Accordingly, the Tribunal has concluded that Respondent validly resorted to Article 17(1) to deny the benefits of Part III ECT to Claimants in this Arbitration.

640. As discussed above, the Tribunal has determined that it does not have jurisdiction to determine the substantive claims in this Arbitration. The Tribunal has done so on the basis of three of the grounds raised by Respondent.[356] The Tribunal has concluded that each of these grounds alone is sufficient to refuse jurisdiction in this case. For this reason the Tribunal considers it unnecessary to undertake an in depth review of the other grounds for challenging jurisdiction raised by Respondent. The Tribunal expresses no view as to the merits of those jurisdictional objections and they remain undetermined.

641. Equally, and as a result of the Tribunal's conclusion that it does not have jurisdiction, the Tribunal has not sought to determine the merits of Claimants' substantive claims in this Arbitration.

VIII. COST

642. Both Parties have sought to recover their legal and other costs incurred in connection with the Arbitration.

643. At the request of the Tribunal, both Parties provided statements of their legal costs and expenses on 11 December 2020.

644. Claimants seek to recover £15,543,639.38 for their costs incurred in this Arbitration. This includes specifically:

Legal representation fees	£12,047,228.51

[356] Albeit the Tribunal notes that it found that Respondent was only partially successful on its objection pertaining to Claimants not having made an investment as required under Article 1(6) ECT at the time this Arbitration was commenced.

Experts costs	£1,947,565.83
Disbursements	£1,171,109.76

645. Respondent seeks to recover US$22,991,374.14 for its costs incurred in this Arbitration. This includes specifically:

Legal representation fees	US$20,464,196.52
Experts costs	US$2,239,540.90
Disbursements	US$287,636.72

646. Article 43(1) of the SCC Arbitration Rules states that the costs of an arbitration consist of the fees of the arbitral tribunal, the administrative fees and the expenses of the arbitral tribunal and the SCC. The costs of the arbitration are finally determined by the Board in accordance with the SCC Schedule of Costs (Article 43(2)). The costs of the arbitration, and the individual fees and expenses of each arbitrator and of the SCC must be set out in the final award (Article 43(4)). Unless the parties agree otherwise, the tribunal is entitled to apportion liability for the costs of the arbitration between the parties "*having regard to the outcome of the case and other relevant circumstances*" (Article 43(5)).

647. The funds to cover the costs of this Arbitration were sought from the Parties in equal shares in accordance with Article 45(3) of the Rules. Respondent did not contribute to those costs so that all the costs were met by the Claimants, i.e. EUR1,623,800. [357]

648. The costs of this Arbitration fixed by the Institute as at 29 December 2020 amounts to EUR 1,554,020 plus expenses. This is broken down as follows:

[357] An additional amount of EUR176,200 was still outstanding as at the date of this Award. Claimants were granted an extension until 5 February 2021 to make this payment.

Rodrigo Oreamuno	EUR407,460 plus EUR24,649 (expenses)
Yves Fortier	EUR407,460 plus EUR45,615.81, GBP1,844, CAD8,015 (expenses)
Julian D M Lew	EUR679,100 plus GBP3,812 (expenses)
Emilie Gonin	GBP214 (expenses only)
SCC Admin Fee	EUR60,000 plus EUR15,000 (VAT)

649. The Arbitral Tribunal is entitled to order one of the parties to reimburse the other party for all or part of the reasonable legal costs and other expenses incurred in connection with the arbitration. Article 44 of the SCC Arbitration Rules provides:

> *"Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon 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 and other relevant circumstances."*

650. The Tribunal has given careful consideration to the allocation of costs in this case. The Tribunal has dismissed Claimants' claims on three different jurisdictional bases and therefore has not determined the substantive claims. Accordingly, Claimants have been unsuccessful in this Arbitration. The Tribunal has reached no view on the merits of Claimants' substantive claims.

651. It is a widely accepted principle that both parties should contribute equally to the costs of the arbitration, and liability for those costs will be determined and allocated by the tribunal in its award.

652. Exercising its absolute discretion on the allocation of costs, the Tribunal has decided not to allocate costs between the Parties and to make no award on the costs of this Arbitration. As Respondent did not contribute to the costs of this Arbitration the Tribunal could not consider ordering the reimbursement of those costs.

653. Accordingly, the Tribunal has decided that each Party shall be responsible for its own costs, legal fees and expenses which they have incurred in connection with this Arbitration.

IX. DISPOSITIVE

654. For the reasons set out above, the Tribunal has decided, orders and makes the following Award:

i. The Tribunal declines jurisdiction over Claimants' claims in this Arbitration on the following grounds:

(a) Claimants Littop and Bridgemont did not have an investment as required under Article 1(6) ECT at the time this Arbitration was commenced;

(b) Claimants' alleged investment in Ukraine, including their conduct in obtaining and maintaining management control of Ukrnafta, is tainted by bribery and corruption and violates international public policy; and

(c) Respondent validly invoked Article 17(1) ECT to deny Claimants the benefits of Part III ECT.

ii. All other claims by Claimants are not determined.

iii. Each Party is to bear its own costs in relation to the Arbitration.

A party may bring an action to amend the award within three months from the date when the party received the award. This action should be brought before the Svea Court of Appeal in Stockholm, pursuant to section 36 of the Swedish Arbitration Act

A party may bring an action against the award regarding the decision on the fee(s) of the arbitrator(s) within three months from the date when the party received the award. This action should be brought before the Stockholm District Court, pursuant to section 41 of the Swedish Arbitration Act.

Seat of the Arbitration: Stockholm, Sweden

Date of Award: 4 February 2021

The Honorable	Professor Julian D M Lew QC	Rodrigo Oreamuno
L Yves Fortier PC, OC, OQ, QC	Chairperson	Arbitrator
Arbitrator		

ANNEX: LIST OF PARTIES' PLEADINGS AND SUPPORTING DOCUMENTS

I. SoC:

- Factual exhibits C-1 to C-1930
- Legal authorities CLA-1 to CLA-67
- Witness statements:
  - Palytsia, witness statement
  - Laber, witness statement
  - Bakunenko, witness statement
  - Kartashov , witness statement
  - Pustovarov, witness statement
  - Mas'ko, witness statement
- Expert Reports:
  - Haberman, Expert Report
  - Rogers, Expert Report
  - Leitzinger, Expert Report
  - Khachaturyan, Expert Report
- Three Annexes:
  - Annex 1: Chronology
  - Annex 2: Dramatis Personae
  - Annex 3: Own Gas Schedule

II. SoD and Respondent's Request for Bifurcation:

- Factual exhibits R-1 to R-191
- Legal authorities RLA-1 to RLA-109
- Rizanenko, witness statement
- Expert Reports:
  - Pirani, Expert Report
  - Paliashvili, Expert Report
  - Giles and Resch, Expert Report

III. Claimants' Response to the Request for Bifurcation:

- Factual axhibits C-1931 to C-1959
- Legal authorities CLA-68 to CLA-98

IV. Reply:

- Factual exhibits C-1960 to C-2488
- Legal authorities CLA-99 to CLA-150
- Witness Statements:
  - Kolomoisky, witness statement
  - Rollins, witness statement
  - Kartashov, witness statement
  - Pustovarov, witness statement
  - Laber, witness statement
  - Palytsia, witness statement

  - Mas'ko, witness statement
- Expert Reports:
  - Ilyashev, Expert Report
  - Clerides, Expert Report
  - Haberman, Expert Report
  - Leitzinger, , Expert Report
  - Rogers, Expert Report
- Two annexes
  - Annex 1: Depiction of Claimants' beneficial interest between 30 October 2008 and 20 March 2009
  - Annex 2: Claimants' Updated Chronology dated 28 August 2017

V. RoMRoJ:

- Factual exhibits R-192 to R-365
- Legal authorities RLA-110 to RLA-209
- Witness Statements:
  - Rizanenko, witness statement
  - Kobolyev, witness statement
  - Fedorova, witness statement
- Expert Reports:
  - Pirani, Expert Report
  - Paliashvili, Expert Report
  - Giles and Resch, Expert Report
  - Kubko, Expert Report
  - Kulchytskyy, Expert Report
  - Katser, Expert Report
  - Radcliffe, Expert Report
  - Kuyun, Expert Report

VI. RoJ:

- Factual exhibits C-2489 to C-2819
- Legal authorities CLA-151 to CLA-200
- Witness Statements:
  - Igor Kolomoisky, witness statement
  - Mas'ko, witness statement
  - Kartashov, witness statement
  - Palytsia, witness statement
  - Pustovarov, witness statement
- Expert Reports:
  - Clerides, Expert Report
  - Ilyashev, Expert Report
  - Leitzinger, Expert Report
  - Navrotsky, Expert Report
- Annex 1 on attribution

VII. Reply to the Contested Submissions:

- Factual exhibits R-366 to R-428

- Legal authorities RLA-210 to RLA-216
- Witness Statements:
    - Rizanenko, witness statement
    - Kobolyev, witness statement
    - Fedorova, witness statement
- Expert Reports:
    - Paliashvili, Expert Report
    - Kubko, Expert Report
    - Kulchytskyy, Expert Report

VIII. CPHB1:

- Annex to the PHB containing photographs of the Respondent's witnesses and experts

IX. RPHB1:

- Giles and Resch, Expert Report
- Annex to the PHB containing photographs of the Respondent's witnesses and experts

X. CPHB2

XI. RPHB2

XII. Parties' Statements of Costs