

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

("Russia-Ukraine BIT")

- and -

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
RULES OF ARBITRATION ADOPTED IN 1976 ("UNCITRAL RULES")

- between -

OA O TATNEFT

("Claimant")

- and -

UKRAINE

("Respondent", and together with the Claimant, the "Parties")

AWARD ON THE MERITS

The Arbitral Tribunal:

Professor Francisco Orrego Vicuña
The Honorable Charles N. Brower
The Honorable Marc Lalonde, P.C., O.C., Q.C.

Registry:

Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS

9 November 2004 Judgment	Judgment by the Avtozavodsky District Court to reinstate Mr. Ovcharenko as Chairman of the Management Board
26 September 2007 Decisions	Interim Measures and Supplementary Decision issued by the Kriukivskiy District Court on 26 September 2007
26 September 2007 Interim Measures	Interim Measures issued by the Kriukivskiy District Court on 26 September 2007
26 September 2007 Supplementary Decision	Supplementary Decision issued by the Kriukivskiy District Court on 26 September 2007
1965 Hague Convention on Service Abroad	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, adopted on 15 November 1965 in The Hague
1995 Incorporation Agreement	Agreement on the Creation and Operation of Ukratnafta Transnational Financial and Industrial Petroleum Company of 1995 signed on 27 July 1995
AmRuz	AmRuz Trading AG, a Swiss company, admitted as Ukratnafta shareholder on 10 June 1998
Answer	The Claimant's Answer to the Respondent's Objections to Jurisdiction and Admissibility dated 29 June 2009
Article 293 Investigation	Investigation pursuant to Article 293 of the Criminal Code initiated by the Deputy Head of the Investigation Division—Head of the Investigation Unit of Kremenchug City Department of the Ministry of Interior on 19 October 2007
Article 357 Investigation	Investigation pursuant to Article 357 of the Criminal Code initiated by the Deputy Head of the Investigation Division—Head of the Investigation Unit of Kremenchug City Department of the Ministry of Interior on 24 October 2007
BIT or Russia-Ukraine BIT	Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments done on 27 November 1998
Claimant (or Tatneft)	OA O Tatneft, a publicly traded open joint stock company incorporated in accordance with Russian law with its registered office at Lenin St. 75, Almetyevsk, Republic of Tatarstan, 423400, Russian Federation
Claimant's Memorial	Claimant's First Memorial on the Merits dated 15 June 2011
Claimant's Second Memorial	Claimant's Second Memorial on the Merits dated 10 August 2012

CMU	Cabinet of Ministers of Ukraine
Counter-Memorial	Respondent's First Counter-Memorial on the Merits dated 13 December 2011
Decree No. 704/94	Decree of the President of Ukraine No. 704/94 "On the Establishment of Transnational Financial and Industrial Oil Company Ukratnafta" dated 29 November 1994
Decree on Foreign Jurisdictional Bodies	Decree of the President of Ukraine "On the Procedure for Representing the Rights and Interests of Ukraine During Dispute Resolution, Adjudication of Disputes Involving Foreign Subjects and the State of Ukraine in Foreign Jurisdictional Bodies" No. 581/2002 of 25 June 2002
ECHR	European Convention of Human Rights
ECT	Energy Charter Treaty dated 17 December 1994
First Baker & O'Brien Report	Expert Report of Baker & O'Brien, Inc. dated November 2011
First Bezant Report	Expert Report of Mark Bezant of FTI Consulting dated 15 June 2011
Jacobs Report	Expert Report of Jacobs Consultancy Limited dated 10 August 2012
Joint Factual Chronology	Chronology of Facts jointly submitted by the Parties on 19 February 2013
Kremenchug refinery	JSC Kremenchugnefteorgsintez oil refinery in Kremenchug
NAFTA	North-American Free Trade Agreement signed on 17 December 1992
Naftogaz	Ukraine's state-owned energy company
Partial Award on Jurisdiction	Partial Award on Jurisdiction dated 28 September 2010
PCA	Permanent Court of Arbitration
Reply	Respondent's Reply on Jurisdiction dated 30 September 2009
Resolution 528	Resolution of the Cabinet of Ministers of Ukraine No. 528 "Rules of Issue and Use of Promissory Note Forms" dated 10 September 1992
Seagroup	Seagroup International Inc., an American parent company of AmRuz, admitted as Ukratnafta shareholder on 10 June 1999
Section 129	Section 129 of the Resolution of the Cabinet of Ministers of Ukraine, No. 1155 of 17 August 2002

Second Baker & O'Brien Report	Second Expert Report of Baker & O'Brien dated 14 December 2012
Second Bezant Report	Second Expert Report of Mark Bezant of FTI Consulting dated 10 August 2012
Second Counter-Memorial	Respondent's Second Counter-Memorial dated 16 December 2012
SPFU	State Property Fund of Ukraine
Statement of Defense	Respondent's Statement of Defense and Objections to Jurisdiction and Admissibility dated 20 February 2009
Taiz	Taiz LLC, a Ukrainian intermediary
Technoprogress	Technoprogress Research and Production, a Ukrainian intermediary
UK-Ukraine BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments dated 10 February 1993
Ukraine (or Respondent)	Ukraine, a sovereign State, successor to the United Soviet Socialist Republic, acting in these proceedings through the Ministry of Justice
Ukrtatnafta (or "the Company" or "UTN")	Ukrtatnafta
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules, adopted in 1976
VCLT	Vienna Convention on the Law of Treaties, adopted on 23 May 1969 in Vienna

DRAMATIS PERSONAE

Mr. Yury Bergelson	Lawyer representing Mr. Pavel V. Ovcharenko
Mr. Yuri Boyko	2001: Successor of Mr. Matytsin, former manager of Ukratnafta Former Minister for Energy and Coal Industries in the Ukraine
Mr. Vladimir A. Fedotov	1997–2000: Ministry of Finance of Tatarstan 1998–2000: Board of Directors of Tatneft
Mr. Sergey Glushko	2004: Chairman of UTN and successor of Mr. Ovcharenko between 2004 and 2007
Mr. Igor V. Grafsky	2000–2001: Deputy Head of the Financial Department of Zenit Bank 2001: Member of Tatneft’s Strategic Planning Department 2002–2003: General Director of UTN-Center 2005–2010: Deputy Trade Representative of the Republic of Tatarstan in Ukraine 2010: head of Tatneft’s representative office in Ukraine
Mr. Igor Kolomoisky	Current head of the “Privat Group”
Mr. Ruslan V. Liapka	1999–2011: occupied several positions in Ukratnafta, the latest being Member of Ukratnafta’s Board
Mr. Igor O. Mityukov	1994–1995: Vice Prime-Minister of Ukraine on Financial Issues and Banking
Mr. Pavel V. Ovcharenko	January 31, 2003–September 21, 2004; November 11, 2004–November 12, 2004; October 19, 2007–date: Chairman of Ukratnafta’s Management Board
Mr. Sergei Pereloma	2002: Acting chairman of Ukratnafta’s Management Board
Mr. Yuri Pocheptsov	Authorized representative of Mr. Ovcharenko
Mr. Yevhen M. Pryshchepa	2003–2009: Ministry of Justice of Ukraine, State Executive Officer
Mr. Oleg V. Savchenko	2007: Head of the Investigation Unit of the Kremenchug City Department of the Poltava Regional Department of the Ministry of Internal Affairs
Mr. Nurislam Z. Syubaev	1995–2001: First Deputy Chairman of the

Ms. Tamara M. Vilkova

Management Board of Zenit Bank
2001-date: Chief of the Strategic Planning
Department of Tatneft
2003-2006: Member of the Board of Directors of
AmRaz

1993-1995: Senior State Tax Inspector in the State
Tax Inspectorate of the Republic of Tatarstan
Since 1995: Deputy Head of Tatneft's Finance
Department, later Head of Tatneft's Tax Department
1998-2012: Tatneft's Deputy Chief Accountant
2012-date: Tatneft's Chief Advisor to the
Accounting and Reporting Division

LIST OF WITNESSES AND EXPERTS

Claimant

Witnesses

- Mr. Vladimir Alexandrovich Fedotov (First Witness Statement dated 14 June 2011 and Second Witness Statement dated 10 August 2012)
- Mr. Igor Viktorovich Graftsky (Witness Statement dated 9 August 2012)
- Mr. Oleg Vitalievich Savchenko (Witness Statement dated 7 August 2012)
- Mr. Nurislam Zinatulovich Syubaev (Witness Statement dated 10 August 2012)
- Ms. Tamara Mikhailovna Vilkoval (Witness Statement dated 3 August 2012)

Experts

- Mr. Bate C. Toms (First Expert Report dated 15 June 2011 and Second Expert Report dated 31 July 2012)
- Mr. Mark Bezant (First Expert Report dated 15 June 2011 and Second Expert Report dated 10 August 2012)
- Jacobs Consultancy Limited (Expert Report dated 10 August 2012)
- Dr. Olexander Martinenko, LL.M. (Expert Report dated 10 August 2012)

Respondent

Witnesses

- Mr. Ruslan Vladimirovich Liapka (First Witness Statement dated 8 December 2011 and Second Witness Statement dated 12 December 2012)
- Mr. Igor Oleksandrovych Mityukov (Witness Statement dated 5 December 2011)
- Mr. Yevhen Mykoalyovych Pryshchepa (First Witness Statement dated 5 December 2011 and Second Witness Statement dated 10 December 2012)

Experts

- Baker & O'Brien (First Expert Report dated November 2011 and Second Expert Report dated 14 December 2012)
- Professor M. Buromenskiy (First Expert Report dated 8 December 2011 and Second Expert Report dated 20 November 2012)
- Mr. Vadym Eduardovych Belyanevych (First Expert Report dated 9 December 2011 and Second Expert Report dated 14 December 2012)

Tribunal's Witnesses

- Mr. Yury Bergelson
- Mr. Igor Kolomoisky

I. INTRODUCTION

1. This is the second and Final Award in an arbitration between OAO Tatneft (the "Claimant") and Ukraine (the "Respondent"). The dispute arises out of certain events in the period between 2004 and 2007 that resulted in the Claimant's loss of shareholdings in the company Ukratnafta—as the Claimant contends, in violation of Ukraine's obligations under the Russia-Ukraine BIT. In a Partial Award on Jurisdiction dated 28 September 2010 (the "Partial Award on Jurisdiction"), the Tribunal affirmed jurisdiction over the Claimant's claims. The present Final Award addresses the merits of the case, in respect of both liability in principle and quantum.
2. The Claimant is OAO Tatneft, a publicly traded open joint stock company incorporated in accordance with Russian law and has its registered office in the Republic of Tatarstan,¹ a constituent republic of the Russian Federation, under the address of Lenin St. 75, Almetyevsk, Republic of Tatarstan, 423400. Tatneft is one of the largest producers of crude oil in Russia and produces 80% of the crude oil in Tatarstan.² The Government of the Republic of Tatarstan holds a 36% interest and special voting rights in Tatneft,³ with its remaining shares being held by other investors.⁴
3. The Claimant is represented in these proceedings by:

Mr. Jonathan I. Blackman, Cleary Gottlieb Steen Hamilton LLP
Ms. Claudia Annacker, Cleary Gottlieb Steen Hamilton LLP
4. The Respondent is Ukraine, a sovereign State formerly a member of the Union of Soviet Socialist Republics.⁵ The Respondent acts in these proceedings through the Ministry of Justice, 13 Horodetskogo St., Kiev 01001, Ukraine.
5. The Respondent is represented in these proceedings by:

Mr. Eric A. Schwartz, King & Spalding LLP

¹ Statement of Claim, ¶ 3; Certificate of the Ministry of the Russian Federation for Taxes and Levies (C-1). See also Answer, ¶ 20; Rejoinder, ¶ 7.

² Statement of Defense, ¶¶ 6-7; Tatneft's 2006 Form 20-F, SEC Filing, p. 51 (R-3).

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

⁴ See, for example, Statement of Defense, ¶ 68; Answer, ¶ 20; Reply, ¶¶ 65-67; Rejoinder, ¶ 9.

⁵ Statement of Defense, ¶ 9.

Mr. James Castello, King & Spalding LLP
Mr. Dmitri Grischenko, Grischenko & Partners
Mr. Sergiy Voitovich, Grischenko & Partners

II. PROCEDURAL HISTORY

6. On 11 December 2007, the Claimant sent a Notice of Dispute to the Respondent requesting that they open negotiations pursuant to Article 9(1) of the Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments ("Russia-Ukraine BIT").⁶ As the Parties were unable to settle the dispute, the Claimant served on the Respondent a Notice of Arbitration and Statement of Claim dated 21 May 2008 under the United Nations Commission on International Trade Law Arbitration Rules, adopted in 1976 ("UNCITRAL Rules"), in accordance with Article 9(2)(c) of the Russia-Ukraine BIT.
7. In its Statement of Claim, Tatneft alleged that certain "actions and omissions of [the] Respondent constitute[d] violations of its obligations to Tatneft under the Russia-Ukraine BIT, in particular Articles 2, 3(1), and 5 [...]"⁷ and requested that the Tribunal order, *inter alia*, the Respondent to pay upwards of US\$ 520 million for unpaid oil deliveries and upwards of US\$ 610 million for the loss of the management rights of the Claimant and its shareholding interest in Ukratnafta.⁸
8. Also in the Statement of Claim, the Claimant appointed Professor Rudolf Dolzer as arbitrator. On 26 June 2008, the Respondent appointed The Honorable Marc Lalonde, P.C., O.C., Q.C. as arbitrator. On 24 July 2008, the co-arbitrators appointed Professor Francisco Orrego Vicuña as the presiding arbitrator. Professor Orrego Vicuña accepted this appointment on 29 July 2008.
9. The Respondent challenged Professor Dolzer on 27 October 2009. The Secretary-General of the Permanent Court of Arbitration ("PCA"), who the Parties had designated as the appointing authority to decide the challenge, sustained the challenge on 19 December 2008. On 16 January 2009, the Claimant appointed The Honorable Charles N. Brower as arbitrator.

⁶ Russia-Ukraine BIT (R-2, C-23). In view of the fact that there are some differences between these two English translations on which the respective Parties have relied in these proceedings, where one or the other Party has argued following a given version the Tribunal has so noted and decided accordingly. No issues other than those noted have been argued by either Party to turn on any such difference. The Tribunal, when quoting from this treaty in this Partial Award on Jurisdiction, has chosen generally to refer to the translation offered by Respondent (R-2) except as otherwise indicated.

⁷ Statement of Claim, ¶ 67.

⁸ Statement of Claim, ¶ 68.

10. On 20 February 2009, the Respondent submitted a Statement of Defense and Objections to Jurisdiction and Admissibility ("Statement of Defense").
11. On 12 March 2009, the Tribunal decided that jurisdiction would be addressed as a preliminary matter.
12. On 23 March 2009, the Parties and the Tribunal signed the "Terms of Appointment and Procedural Order No. 1."
13. On 29 June 2009, the Claimant filed its Answer to the Respondent's Objections to Jurisdiction and Admissibility ("Answer"). On 30 September 2009, the Respondent filed its Reply on Jurisdiction ("Reply"), and on 14 December 2009, the Claimant filed its Rejoinder on Jurisdiction ("Rejoinder").
14. On 17 February 2010, the Tribunal issued Procedural Order No. 2 concerning the organization of the jurisdictional hearing.
15. From 29 March to 31 March 2010, the hearing on jurisdiction was held at the Peace Palace in The Hague, the Netherlands.
16. On 28 September 2010, the Tribunal issued its Partial Award on Jurisdiction.
17. Following the invitation of the Tribunal for the Parties to agree on a procedural calendar for the succeeding merits phase, the Parties proposed their respective procedural schedules on 25 November and 26 November 2010.
18. On 29 November 2010, the Tribunal issued a procedural schedule for the merits phase.
19. On 7 April 2011, the Respondent requested the Tribunal to extend the deadline for its first memorial by three months and to adjust the succeeding deadlines accordingly. On the same day, the Claimant proposed the alternative of extending all deadlines by two months.
20. On 8 April 2011, the Tribunal extended all deadlines by two months. The Tribunal also provisionally scheduled the merits hearing for 26 November to 5 December 2012.
21. On 15 June 2011, the Claimant submitted its First Memorial ("Memorial") accompanied by exhibits and legal authorities.

22. On 5 October 2011, the Respondent requested a further extension of the deadline for its first memorial and submitted an amended draft procedural schedule. The Claimant objected to the Respondent's request on the same day.
23. On 6 October 2011, the Tribunal invited the Claimant to comment on the request of the Respondent and its proposed amended schedule. On the same day, the Claimant reiterated its objection to the requested extension and provided further reasons for it.
24. On 12 October 2011, the Tribunal extended the deadline for the Respondent's first memorial and proposed a revised procedural schedule, which assigned 5 to 15 March 2013 as contingency dates for the hearing on the merits.
25. On 19 October 2011, the Claimant requested that the hearing be scheduled for March 2013 to allow for sufficient preparation time. The Respondent confirmed its availability for this month on the same day. The Tribunal proceeded to fix a new procedural schedule on 20 October 2011.
26. On 28 November 2011, the Tribunal requested the Parties to reserve 18 March to 28 March 2013 for the merits hearing.
27. On 13 December 2011, the Respondent filed its First Memorial ("Counter-Memorial").
28. On 24 January 2012, the Parties exchanged requests for documents. On 21 February 2012, they submitted disputed document production requests to the Tribunal, followed shortly by each Party's comments on the other's Redfern Schedule.
29. On 6 March 2012, the Tribunal issued its decision on the Parties' document requests and requested the Parties to complete document production by 17 April 2012.
30. On 28 March 2012, after consultation with the Parties, the Tribunal definitively scheduled the merits hearing for 18 March to 28 March 2013.
31. On 10 August 2012, the Claimant submitted its Second Memorial ("Second Memorial").
32. On 16 December 2012, the Respondent submitted its Second Counter-Memorial ("Second Counter-Memorial").
33. On 8 January 2013, the Tribunal sent the Parties a draft of Procedural Order No. 3 on the organization of the hearing. The Tribunal and the Parties discussed this draft during the second

Procedural Meeting held on 6 February 2013. On 12 February 2013, the Tribunal issued Procedural Order No. 3.

34. On 18 February 2013, each Party notified the other Party and the Tribunal of the witnesses it intended to cross-examine at the hearing.
35. On 19 February 2013, the Parties submitted a joint Chronology of Facts ("Joint Factual Chronology").
36. On 25 February 2013, in accordance with Procedural Order No. 3 Section 7.2, the Parties informed the Tribunal of the translation needs of certain of its witnesses and experts who would be testifying at the hearing. On the same day, and in accordance with Section 3.4 of Procedural Order No. 3, the Parties proposed a joint hearing schedule, keeping 28 March as a reserve date.
37. On 28 February 2013, in accordance with Procedural Order No. 3 Section 4.4, the Tribunal requested the Parties to use their best efforts to secure the appearance and testimony of Mr. Igor Kolomoisky and Mr. Yury Bergelson, whom neither Party had presented as witnesses, at the hearing. It also noted that it would conduct expert conferencing for the Parties' experts.
38. On 4 March 2013, the presiding arbitrator (on behalf of the Tribunal) and the Parties participated in a telephone conference. Pursuant to this discussion, the Tribunal sent the Parties a letter the next day that expounded on its request that Mr. Kolomoisky and Mr. Bergelson testify at the hearing, clarified the process of expert examination, and discussed possible adjustments to the hearing schedule.
39. On 6 March 2013, the Respondent informed the Tribunal and the Claimant that Mr. Kolomoisky was willing to testify at the hearing and had requested copies of the submissions. It also noted that it would inform Mr. Kolomoisky of the Tribunal's instructions on the disclosure of case-related materials.
40. On 8 March 2013, the Respondent informed the Tribunal and the Claimant that it had received no further information on the attendance of Mr. Kolomoisky and Mr. Bergelson at the hearing.
41. On 11 March 2013, the Respondent noted that it had not received word from Mr. Kolomoisky and Mr. Bergelson regarding their attendance. The Respondent also proposed a revised hearing schedule on which both Parties had agreed.

42. On 14 March 2013, each Party submitted draft topics for the expert testimony. On 15 March 2013, the Tribunal provided the Parties with a consolidated draft and invited the Parties to discuss this matter at the beginning of the hearing.
43. From 18 March 2013 to 27 March 2013, the hearing on the merits was held at the premises of the PCA in the Peace Palace, The Hague, the Netherlands, and was attended by the following:

Tribunal

Professor Francisco Orrego Vicuña
The Honorable Charles N. Brower
The Honorable Marc Lalonde, P.C., O.C., Q.C.

For the Claimant

Ms. Maria Savelova
Mr. Peter Gloushkov
OAO Tatneft

Mr. Jonathan Blackman
Mr. Jeffrey Rosenthal
Dr. Claudia Annacker
Mr. Cameron Murphy
Mr. Aren Goldsmith
Dr. Enikő Horváth
Mr. Lorenzo Melchionda
Ms. Laurie Achtouk-Spivak
Ms. Ann Nee
Mr. Yury Babichev
Ms. Marina Akchurina
Ms. Marina Weiss
Ms. Estefanía Ponce Durán
Ms. Aija Lejniece
Ms. Antonina Vykhest
Mr. Christopher Fleming
Cleary Gottlieb Steen & Hamilton

Ms. Tetyana Yaremko
Ms. Anna Vlasyuk
B.C. Toms & Co.

Mr. Sergiy Grishko
CMS Cameron McKenna

Mr. Igor Nazarchuk
Vasko & Nazarchuk

Mr. Richard Edwards
Mr. Tigran Ter-Martirosyan
FTI Consulting

Mr. Konstantin Golota
Translator

For the Respondent
Mr. Eric Schwartz
Mr. James Castello

Mr. John Gaffney
Ms. Lorraine de Germiny
Mr. Cedric Soule
King & Spalding

Mr. Sergei Voitovich
Ms. Iryna Glushchenko
Mr. Maksym Makhyna
Mr. Sava Poliakov
Mr. Dmitri Shemelin
Grischenko & Partners

Ms. Olena Trapeznikova
Ms. Alona Pryguza
Ms. Nataliya Paliy
Ukrainian Ministry of Justice

Fact Witnesses

Mr. Nurislam Syubaev
Mr. Vladimir Fedotov
Mr. Oleg Savchenko
Mr. Igor Mityukov
Mr. Yevhen Pryshchepa
Mr. Ruslan Liapka
Mr. Yury Bergelson
Mr. Igor Kolomoisky

Expert Witnesses

Mr. Bate Toms
Dr. Olexander Martinenko
Mr. Mark Bezan
Mr. Alvin Hill
Mr. Kevin Waguespack
Prof. Mykhaylo Buromenskiy
Mr. Vadim Belyanevych

For the PCA

Mr. Dirk Pulkowski
Ms. Camille Ng
Ms. Ina Gättschmann
Ms. Ji Chen

Court Reporter

Mr. Trevor McGowan

Interpreters

Mr. Evgeny Elshov
Mr. Sergei Mikhayev
Mr. Oleks Nesnov
Mr. Victor Shevchenko
Mr. Yuri Somov

44. On the second day of the hearing, 19 March 2013, the Respondent informed the Tribunal that Mr. Bergelson was willing to testify. The next day, the Respondent informed the Tribunal that Mr. Kolomoisky would be in The Hague on 21 March 2013 and was willing to testify then.

45. On 21 March 2013, Mr. Bergelson testified before the Tribunal.
46. On 22 March 2013, the Tribunal scheduled the testimony of Mr. Kolomoisky for 25 March 2013. He testified on that date.
47. Following the conclusion of the hearing, via letter dated 28 March 2013, the Tribunal instructed the Parties on arrangements for transcript corrections and the filing of post-hearing briefs and cost submissions, among others.
48. On 30 May 2013, the Parties filed their respective Post-Hearing Briefs ("Claimant's Post-Hearing Submission" and "Respondent's Post-Hearing Memorial").

III. THE PARTIES' REQUESTS

49. In its Memorial, the Claimant requested the Tribunal to render an award:⁹
 - a) Declaring that Respondent has violated its obligations under the Russia-Ukraine BIT;
 - b) Ordering Tatneft's direct and indirect shareholdings in Ukratnafta be returned to it and Tatneft be compensated for any loss in value of the shareholdings compared to what they would have been worth if Tatneft had been able to exercise its management rights;
 - c) Ordering Respondent in the alternative to pay compensation for the losses incurred by Tatneft in an amount in excess of US\$ 741 million to 824 million;
 - d) Ordering Respondent to pay the fees and expenses of this arbitration, including legal fees;
 - e) Ordering Respondent to pay interest on any amount awarded to Claimant;
 - f) Granting any further or other relief to Claimant that the Arbitral Tribunal shall deem appropriate.
50. In its Second Memorial, the Claimant modified the amount of its alternative claim for compensation from "US\$ 741 million to 824 million" to "an amount in excess of US\$ 1.073 million."¹⁰
51. In its Post-Hearing Brief, the Claimant withdrew its request for the restitution of its UTN shareholdings and the management rights associated with this,¹¹ and estimated the losses arising from Ukraine's breaches of the Russia-Ukraine BIT, with interest, as follows:
 - a) US\$ 917 million and US\$ 1.144 billion if interest is calculated using the returns on US\$ denominated Ukrainian government bonds;

⁹ Memorial, ¶ 562.

¹⁰ Second Memorial, ¶ 576.

¹¹ Claimant's Post-Hearing Submission, ¶ 66 n. 146.

- b) US\$ 881 million and US\$ 1.084 billion if interest is calculated using the returns on US\$ denominated Russian government bonds;
 - c) US\$ 820 million and US\$ 984 million if interest is calculated using the interest earned on US\$ denominated deposits in the Russian Federation.¹²
- 52. In the same submission, the Claimant clarified that it was maintaining its request that the Tribunal order the Respondent to pay the costs of the arbitration, including the Claimant's legal fees, and that it grant the Claimant any relief deemed appropriate.¹³
- 53. In its Counter-Memorial, the Respondent made the following request:¹⁴
 - a) An order dismissing the Claimant's claims in their entirety.
 - b) An order directing the Claimant to discharge in full the costs of the arbitration it has commenced, including payment of all of the Respondent's costs in the arbitration.
- 54. In its Second Counter-Memorial, the Respondent reiterated its request in the same terms.¹⁵

IV. STATEMENT OF FACTS

- 55. As previously indicated, the Parties submitted a Joint Factual Chronology in advance of the hearing, and indicated that this was without prejudice to their respective positions and to disputed facts that may not have been included therein. The Tribunal includes this Joint Factual Chronology as Appendix I, and refers to it when necessary below.

A. EVENTS UP TO THE REINSTATEMENT OF MR. OVCHARENKO

1. The Creation of Ukratnafta

- 56. The present arbitration concerns the lawfulness under the Russia-Ukraine BIT of measures undertaken by the Respondent in relation to CJSC Ukratnafta ("Ukratnafta"). The creation of Ukratnafta is best understood against the background of the dissolution of the Soviet Union in 1991.
- 57. During the days of the Soviet Union, the highly viscose and sulphurous oil extracted in Tatarstan¹⁶ was delivered to a refinery in Kremenchug (the JSC "Kremenchugnefteorgsintez" or

¹² Claimant's Post-Hearing Submission, ¶ 157. Interest figures are calculated up to 27 May 2013, Claimant's Post-Hearing Submission, ¶ 66 n. 144.

¹³ Claimant's Post-Hearing Submission, ¶ 158 n. 327.

¹⁴ Counter-Memorial, ¶¶ 481-482.

¹⁵ Second Counter-Memorial, ¶¶ 473-474.

¹⁶ Memorial, ¶ 13.

the “Kremenchug refinery”) through a direct pipeline from Tatarstan to Ukraine.¹⁷ As the dissolution of the Soviet Union caused Tatarstan and Ukraine to become separate States, the governments of these countries entered into the Ukratnafta Treaty in 1995 and established Ukratnafta,¹⁸ a joint venture that was to own and operate the Kremenchug refinery and supply refined oil products to Ukrainian and international markets.¹⁹

58. The Ukratnafta Treaty was signed by representatives of both Tatarstan and Ukraine.²⁰ It was not, however, ratified by the Ukrainian Parliament²¹ in light of the Ukrainian legal regime that differentiates between treaties and international agreements, as further explained below. There is no information on the record as to whether the Treaty was formally ratified in Tatarstan.
59. Ukratnafta was registered as a Ukrainian closed joint stock corporation²² and intended to represent Tatarstan and Ukrainian interests on a 50/50 or parity basis.²³ As set out in the Ukratnafta Incorporation Agreement,²⁴ the share of Ukraine was mostly allocated to the State Property Fund of Ukraine (“SPFU”)²⁵ while the share of Tatarstan was split between the government²⁶ and the Claimant.²⁷

¹⁷ Memorial, ¶ 13.

¹⁸ Memorial, ¶ 12; Counter-Memorial, ¶ 35.

¹⁹ Memorial, ¶ 14.

²⁰ Counter-Memorial, ¶ 31.

²¹ Second Memorial, ¶ 154 n. 320.

²² Memorial, ¶ 12; Counter-Memorial, ¶ 35.

²³ Memorial, ¶ 12; Counter-Memorial, ¶ 35; Transcript (18 March 2013), 18:23-25, 154:14-18.

²⁴ Agreement on the Creation and Operation of Ukratnafta Transnational Financial and Industrial Petroleum Company of 1995 (the “Ukratnafta Incorporation Agreement”) (C-121).

²⁵ The exact percentage is 49.986%. Counter-Memorial, ¶ 36, also stating that the remaining 0.14% share would belong to Credit Union “Expobank”; Memorial, ¶ 12.

²⁶ Exact percentage is 29.734% share. Note that Respondent calls this the State Committee of the Republic of Tatarstan on the Management of State Property; see Counter-Memorial, ¶ 38.

²⁷ Exact percentage is 20.02% share. Six other shareholders received the remaining fraction of shares. As set out in the Counter-Memorial, ¶ 38, the remaining six shareholders from the Tatarstan side are Production Association “Tatneftprom” (with a .08% share), JSC “Tatneftekhiminvestkholding” (with a .014% share), JSC “Suvar” (with a .014% share), Joint Venture “Djoy – Tatneftprom TR Communications LTD” (city of Almetevsk) (with a .014% share), and Bank “Devon-Credit” (with a .014% share), and KSC “TINK” (with a .012% share).

60. Both the Ukratnafta Incorporation Agreement²⁸ and the related Presidential Decree No. 704/94 ("Decree No. 704/94")²⁹ of the President of Ukraine indicated that Ukraine would contribute the Kremenchug refinery to Ukratnafta, which the SPFU did in 1996.³⁰
61. While the Annex to the Ukratnafta Incorporation Agreement stated that the Claimant would contribute fixed assets for the operation of specified oil wells to Ukratnafta,³¹ the Ukratnafta shareholders, in a General Shareholders Meeting held on 10 June 1998, authorized the Claimant to contribute US\$ 31 million instead.³² This had the effect of reducing the Claimant's stake in Ukratnafta to 8.613% from the approximately 20% share contemplated in 1995.³³ Zenit Bank transferred US\$ 30 million to Ukratnafta,³⁴ and was replaced by the Claimant as a shareholder on 19 July 2000, as authorized by a General Shareholders Meeting held on 23 May 2000.³⁵ The Claimant paid the remaining US\$ 1 million directly to Ukratnafta on 11 August 2000.³⁶
62. AmRuz Trading AG ("AmRuz"), a Swiss company, was admitted as a shareholder in Ukratnafta during a General Shareholders Meeting held on 10 June 1998.³⁷ On 1 June 1999, Ukratnafta, AmRuz, and Seagroup International Inc. ("Seagroup"), the American parent company of AmRuz, executed share purchase agreements in which AmRuz and Seagroup used promissory notes to obtain a collective 18% share in Ukratnafta.³⁸ Specifically, AmRuz tendered 30 promissory notes and Seagroup tendered 35 promissory notes for their shares at US\$ 1 million per note and, in the case of Seagroup, one more promissory note at US\$ 845,132.³⁹ These share purchase agreements were approved in the 10 June 1999 General Shareholders Meeting,⁴⁰ which is also when Seagroup was admitted as a shareholder in

²⁸ Memorial, ¶ 17, citing to the Article 5(2) of the 1995 Incorporation Agreement (C-121).

²⁹ Counter-Memorial, ¶ 29; Memorial, ¶ 17; both citing to the Decree of the President of Ukraine No. 704/94 "On the Establishment of Transnational Financial and Industrial Oil Company Ukratnafta", November 29, 1994 (REX-5).

³⁰ Counter-Memorial, ¶ 40; Transcript (18 March 2013), 154:18-21.

³¹ Counter-Memorial, ¶ 38; Transcript (18 March 2013), 14:5-9.

³² Memorial, ¶ 21; Counter-Memorial, ¶ 46; Transcript (18 March 2013), 14:19-21.

³³ Memorial, ¶ 21; Transcript (18 March 2013), 14:21.

³⁴ Counter-Memorial, ¶ 61; Second Memorial, ¶ 224.

³⁵ Joint Factual Chronology, ¶ 23.

³⁶ Counter-Memorial, ¶ 63.

³⁷ Joint Factual Chronology, ¶ 15.

³⁸ Memorial, ¶ 22; Transcript (18 March 2013), 16:9-12.

³⁹ Counter-Memorial, ¶ 110.

⁴⁰ Transcript (18 March 2013), 161:19-23.

Ukratnafta.⁴¹ These share purchase agreements were amended in May 2000 to give AmRuz and Seagroup four years to redeem the promissory notes.⁴² In December 2007, the Claimant acquired an interest in 100% of Seagroup and 49.6% of AmRuz.⁴³, for a total price of US\$ 81 million. Roughly at the same time (April 2009), Korsan acquired a 1.15% interest in Ukratnafta for the sum of US\$ 2 million.

2. The Dismissal of Mr. Pavel Ovcharenko in 2004

(a) Undisputed Facts

63. On 21 September 2004, the Supervisory Board—which was tasked with overseeing the activities of the Management Board, the implementation of shareholder resolutions, and the protection of shareholder rights⁴⁴—dismissed Mr. Pavel Ovcharenko as Chairman of the Management Board and replaced him with Mr. Sergei Glushko.⁴⁵ Mr. Glushko was the appointee of Naftogaz to the Management Board, and his appointment was specifically proposed by Mr. Yuri Boyko, the head of Naftogaz who later become the Minister of Fuel and Energy of Ukraine.⁴⁶
64. Mr. Ovcharenko filed an application for reinstatement on 4 October 2004⁴⁷ on the basis that Ukratnafta had breached Article 159 of the Civil Code and Articles 40 and 41 of the Labor Code.⁴⁸ The Avtozavodsky District Court granted this application on 9 November 2004 (“9 November 2004 Judgment”)⁴⁹
65. Mr. Ovcharenko was reinstated as Chairman of the Management Board on 11 November 2004. In the General Shareholders Meeting that was held the next day, the Ukratnafta shareholders

⁴¹ Joint Factual Chronology, ¶ 19.

⁴² Memorial, ¶ 247, referring to Addendum No. 1 to Sales and Purchase Contract No. 02-1-99 of June 1, 1999, and Addendum No. 1 to Sales and Purchase Contract No. 1747/12 of June 1, 1999 (C-16 and C-17); Transcript (18 March 2013), 162:2-5.

⁴³ Second Memorial, ¶ 227; Transcript (18 March 2013), 18:16-21.

⁴⁴ Memorial, ¶ 26.

⁴⁵ Memorial, ¶¶ 97-98, referring to Minutes No. 5/N/2004 of the 21 September 2004 Meeting of Ukratnafta’s Supervisory Board of Ukratnafta (C-5).; Counter-Memorial, ¶ 77; Transcript (18 March 2013), 20:15-16.

⁴⁶ Second Memorial, ¶ 235; Transcript (27 March 2013), 78:18-22.

⁴⁷ Memorial, ¶ 99; Counter-Memorial, ¶ 79.

⁴⁸ Counter-Memorial, ¶ 79.

⁴⁹ Memorial, ¶ 99; Counter-Memorial, ¶ 79; Transcript (18 March 2013), 20:16-20.

approved the Supervisory Board's 21 September 2004 dismissal of Mr. Ovcharenko, and instructed the Management Board to consider the reinstatement of Mr. Glushko.⁵⁰

66. Three years later, on 5 September 2007, Mr. Ovcharenko applied to the Kriukivskiy District Court for interim measures and a "supplementary decision" in connection with the 9 November 2004 Judgment, which he alleged did not specify the necessary enforcement actions.⁵¹
67. On 26 September 2007, the Kriukivskiy District Court issued the requested interim measures ("26 September 2007 Interim Measures") and supplementary decision ("26 September 2007 Supplementary Decision", and together with 26 September 2007 Interim Measures, "26 September 2007 Decisions").⁵² Noting that the 9 November 2004 Judgment had not yet been enforced, the Court issued the interim measures pursuant to Article 151 of the Civil Procedure Code, and authorized Mr. Ovcharenko to proceed with its enforcement.⁵³ The Court further noted that the enforcement of the 9 November 2004 Judgment was rendered impossible by the absence in this judgment of the necessary actions for an enforcement, and thereby found "lawful grounds" for issuing a supplementary decision. The supplementary decision authorized Mr. Ovcharenko to perform the functions of the Chairman of the Management Board, to access the Ukrtatnafta premises, and to remove obstacles to his resuming control.⁵⁴
68. It was allegedly pursuant to the 26 September 2007 Decisions that the activities of 19 October 2007 took place.

(b) Disputed Facts

- i. The Legal Validity of the 11 November 2004 Reinstatement of Mr. Ovcharenko and His Subsequent 12 November 2004 Removal

The Claimant's Position

69. The Parties do not dispute the occurrence of the events recounted above, but do characterize and contextualize them differently. According to the Claimant, this case exemplifies a "raider" action, which it defines as "the combination of a criminal seizure of property by an organized group and the involvement of the State through the issuance of unlawful court decisions, the

⁵⁰ Memorial, ¶ 101; Joint Factual Chronology, ¶ 54; Transcript (18 March 2013), 20:25 to 21:1-6.

⁵¹ Counter-Memorial, ¶ 82.

⁵² Memorial, ¶ 102; Counter-Memorial, ¶¶ 82-83; Transcript (18 March 2013), 22:1-9.

⁵³ Memorial, ¶ 104; Counter-Memorial, ¶ 82.

⁵⁴ Memorial, ¶ 103; Counter-Memorial, ¶ 83.

assistance of enforcement officers of the State and the support of the State actors in the illegal acts.”⁵⁵ The Claimant identifies “Privat Group,” a company headed by the Ukrainian businessman Mr. Kolomoisky, as the corporate raider.⁵⁶ It notes that Privat Group, through its affiliate Korsan LLC, acquired a “toehold” in Ukratnafta in late 2006, in the form of a 1% shareholding interest that “g[a]ve [Mr. Kolomoisky] a little foot in the door [... to] systematically take over the Tatarstan side of the company.”⁵⁷

70. Noting that Article 99(3) of the Civil Code gives Ukratnafta shareholders the unqualified right to determine the management of the company,⁵⁸ the Claimant contends that there was no basis to reinstate Mr. Ovcharenko as Chairman of the Management Board once the shareholders had decided against him in the General Shareholders Meeting held on 12 November 2004.⁵⁹ In view of this, the Claimant contends that the theories of labor law on which the Respondent relies for its argument on the invalidity of the removal of Mr. Ovcharenko are irrelevant.⁶⁰ The Claimant further alleges that this removal by the shareholders supersedes Mr. Ovcharenko’s dismissal by the Supervisory Board on 21 September 2004 and the 9 November 2004 Judgment ordering his reinstatement.⁶¹ The Claimant rejects the Respondent’s argument that Article 99(3) of the Civil Code relates only to the “temporary suspension” of employees,⁶² and identifies the “temporary suspension” provision to which the Respondent refers as Article 46 of the Labor Code.⁶³ It stresses that Article 99(3) of the Civil Code refers to the fundamental power of a company to remove and permanently terminate the mandate of the Chairman of the Board of Management,⁶⁴

The Respondent’s Position

71. As a preliminary point, and as will be discussed in further detail below, the Respondent contends that Mr. Ovcharenko’s reinstatement is irrelevant to the Claimant’s case in this

⁵⁵ Memorial, ¶ 53.

⁵⁶ Memorial, ¶¶ 80-90; Transcript (18 March 2013), 17:6.

⁵⁷ Memorial, ¶ 5; Transcript (18 March 2013), 17:7-16. The Tribunal notes a small discrepancy between the Memorial, according to which the shares were acquired in 2007, and the Claimant’s explanation at the hearing that the shares were acquired “at the end of the year 2006”.

⁵⁸ Second Memorial, ¶ 27; Transcript (18 March 2013), 76:8-11.

⁵⁹ Second Memorial, ¶ 31.

⁶⁰ Second Memorial, ¶ 31; Transcript (18 March 2013), 20:22-24.

⁶¹ Second Memorial, ¶¶ 26, 279.

⁶² Second Memorial, ¶¶ 27-28.

⁶³ Second Memorial, ¶ 29.

⁶⁴ Second Memorial, ¶ 28; Transcript (18 March 2013), 21:16-21.

arbitration. It also notes that the Claimant has “failed to show that [Mr. Ovcharenko’s] reinstatement was illegally facilitated by Ukraine in any way.”⁶⁵

72. The Respondent alleges that the Ukratnafta shareholders could not have dismissed Mr. Ovcharenko during the General Shareholders’ Meeting on 12 November 2004 because his “reinstatement” the previous day was a “sham.”⁶⁶ First, the reinstatement did not fulfill the requirement in Article 77 of the Ukrainian Law on “Executive Proceedings” and in the then Charter of Ukratnafta that the Supervisory Board cancel its own dismissal order.⁶⁷ Second, Mr. Ovcharenko was impeded from assuming his position as Chairman, given that he was not notified of his reinstatement, which in any case lasted for only a day.⁶⁸ Third, Mr. Glushko was referred to as “chairman” several times during the 12 November 2004 General Shareholders Meeting.⁶⁹ And, fourth, no bailiff had issued a resolution confirming the reinstatement as was the usual and proper practice.⁷⁰ The Respondent further posits that Ukratnafta’s Supervisory Board, Management Board (save for Mr. Glushko), and shareholders may not even have known about the 9 November 2004 decision of the Avtozadovsky District Court at that time.⁷¹
73. But even assuming the validity of the 11 November 2004 reinstatement of Mr. Ovcharenko, the Respondent argues that the Ukratnafta shareholders’ dismissal of Mr. Ovcharenko on 12 November 2004 violated provisions of the Ukrainian Labor Code.⁷² First, in violation of Article 36(8), the shareholders dismissed Mr. Ovcharenko without cause—that is, without indicating a ground under the Labor Code or the contract for his dismissal. Instead, the shareholders merely approved the Supervisory Board’s 21 September 2004 termination decision, which the 9 November 2004 Judgment had established to be inadequate.⁷³ The Respondent further states that the Claimant conflates the proposition that the shareholders can

⁶⁵ Respondent’s Post-Hearing Memorial, ¶ 55.

⁶⁶ Second Counter-Memorial, ¶ 273; Respondent’s Post-Hearing Memorial, ¶ 55.

⁶⁷ Counter-Memorial, ¶ 160; Second Counter-Memorial, ¶¶ 269-270; Transcript (19 March 2013), 35:5-20, 35:23-25 to 36:1-2.

⁶⁸ Counter-Memorial, ¶ 161; Second Counter-Memorial, ¶¶ 269, 271; Transcript (19 March 2013), 36:21-25.

⁶⁹ Counter-Memorial, ¶ 162; Second Counter-Memorial, ¶ 272; Transcript (19 March 2013), 36:6-20.

⁷⁰ Counter-Memorial, ¶ 163.

⁷¹ Respondent’s Post-Hearing Memorial, ¶ 55.

⁷² Second Counter-Memorial, ¶¶ 274-275; Respondent’s Post-Hearing Memorial, ¶ 55.

⁷³ Second Counter-Memorial, ¶ 277; Transcript (19 March 2013), 39:1-5, 40:7-14; Transcript (27 March 2013), 130:15-20.

dismiss the chairman of the management board, with which the Respondent agrees,⁷⁴ with the separate notion, which is inapplicable in this case, that such dismissal does not require a showing of good cause.⁷⁵ And second, Mr. Ovcharenko was dismissed before his term expired, thereby violating Article 36(2), which authorizes the dismissal of an employee once his or her employment contract ends.⁷⁶ Moreover, the courts could not have confirmed the (re-)dismissal of Mr. Ovcharenko as lawful on grounds other than those initially advanced to justify his termination.⁷⁷

74. The Respondent reiterates that Article 99(3) of the Civil Code, which it stresses is a “sufficiently unclear and ambiguous” provision because it was newly passed then,⁷⁸ does not authorize the permanent dismissal of employees and relates only to their temporary suspension.⁷⁹ Alternatively, the Respondent contends that this provision requires the dismissal of an employee to be predicated on a finding of cause, which was not the case here.⁸⁰ The Respondent further points out that there is no evidence that Ukratnafta ever presented arguments based on this provision in prior court proceedings.⁸¹
75. From all of the above, the Respondent concludes that “Mr. Ovcharenko had, at the very minimum, a tenable claim to reinstatement”⁸²

ii. The Kriukivskiy Court’s Decision to Proceed *Ex Parte*

The Claimant’s Position

76. The Claimant alleges that the decision of the Kriukivskiy Court to proceed *ex parte* on the basis of Article 76 of the Code of Civil Procedure was invalid.⁸³ It argues that the Court disregarded the requirement in Section 129 of the Resolution of the Cabinet of Ministers of Ukraine, No. 1155 of 17 August 2002 (“Section 129”) that the signature of an authorized representative

⁷⁴ Transcript (27 March 2013), 130:13-14.

⁷⁵ Transcript (27 March 2013), 132:15-18.

⁷⁶ Second Counter-Memorial, ¶ 278.

⁷⁷ Second Counter-Memorial, ¶ 279.

⁷⁸ Transcript (19 March 2013), 42:10-18.

⁷⁹ Second Counter-Memorial, ¶¶ 281, 284-287.

⁸⁰ Second Counter-Memorial, ¶ 288.

⁸¹ Transcript (19 March 2013), 41:16-25 to 42:1-2.

⁸² Respondent’s Post-Hearing Memorial, ¶ 55.

⁸³ Second Memorial, ¶ 376.

of Ukratnafta establish proof of service process, permitting this to be established by an unsigned postal note instead.⁸⁴ The Claimant recalls that the resolutions to enforce the 26 September 2007 Supplementary Decision were sent by ordinary mail and posits there was no attempt to verify their delivery because “the goal was to create a legal pretext to physically take over the refinery.”⁸⁵ The Claimant also alleges that the Court must have known that raiders frequently use postal notes to fabricate receipt of service of process.⁸⁶

77. The Claimant notes that a further violation of process occurred when the Court, in its 26 September 2007 Supplementary Decision, authorized remedies that Mr. Ovcharenko had not originally raised in pleadings leading to the 9 November 2004 Judgment.⁸⁷
78. In its analysis of this court decision and all others, the Claimant highlights the corruption of the Ukrainian judicial system and notes that to “do a theft by law,” one would “classical[ly]” apply for an *ex parte* order in Ukrainian courts which would be enforced against the absent party.⁸⁸

The Respondent's Position

79. As a preliminary point, the Respondent distinguishes between the general assertion that the Ukrainian judicial system suffers from instances of corruption (which the Respondent does not directly reject)⁸⁹ and specific allegations of corruption in respect of the judicial decisions involved in the present case.⁹⁰ It stresses that the Tribunal should focus on the latter and not the former.⁹¹ Moreover, the Respondent characterizes as “staggering” the degree of corruption that would have had to take place to support the Claimant’s position that a majority of the judicial decisions underlying this case, many of which were the focus of public interest and scrutiny,⁹² were wrongly decided.⁹³ It further remarks that the Claimant seems to take the position that any decision favoring it was rightly decided, whereas those that go against its interests were

⁸⁴ Second Memorial, ¶¶ 20, 280.

⁸⁵ Transcript (18 March 2013), 24:2-9.

⁸⁶ Second Memorial, ¶ 20; Transcript (18 March 2013), 52:18-20.

⁸⁷ Second Memorial, ¶¶ 21, 280.

⁸⁸ Transcript (18 March 2013), 23:22-25, 157:9-14.

⁸⁹ Transcript (27 March 2013), 76:25 to 77:1-3.

⁹⁰ Transcript (18 March 2013), 157:15-21.

⁹¹ Transcript (18 March 2013), 158:1-7.

⁹² Transcript (27 March 2013), 77:8-19.

⁹³ Transcript (27 March 2013), 76:15-22, 77:3-7.

influenced by corruption and therefore wrong.⁹⁴ In response, the Respondent points out that the issues that were the subject of the relevant court decisions were susceptible to different resolutions, and the fact that different resolutions were reached highlights the independence of the judiciary.⁹⁵ It states that “there was no presentation during the hearing and there is no evidence in the record of specific corruption infecting any of these particular court decisions, except to the extent that Tatneft says that it doesn’t like the reasoning in some of the decisions, and it finds that circumstantial evidence.”⁹⁶

80. The Respondent rejects the Claimant’s argument that the Kriukivskiy District Court should have required the signature of an authorized representative of Ukratnafta to prove service of process, on the basis that Section 129, on which the Claimant relies,⁹⁷ is overridden by the more specific Article 76(8) of the Code of Civil Procedure, which contains no such requirement.⁹⁸ Section 129 would, moreover, allow representatives of companies to stall court proceedings indefinitely by refusing to sign the service of process.⁹⁹ It also notes that the Claimant’s allegation that raiders frequently fabricate postal notes to prove service of process is unsubstantiated.¹⁰⁰
81. Stating that the 26 September 2007 Supplementary Decision simply identified attributes of the position of Chairman of the Management Board, the Respondent points out that the Claimant never identified which new powers the 26 September 2007 Supplementary Decision allegedly granted Mr. Ovcharenko and claimed only that Mr. Ovcharenko had no authority to reassign, unilaterally, responsibilities to himself and his allies, which (according to the Respondent) the Supplementary Decision did not authorize him to do.¹⁰¹

⁹⁴ Transcript (27 March 2013), 90:15-19.

⁹⁵ Transcript (27 March 2013), 90:20-25.

⁹⁶ Transcript (27 March 2013), 105:13-19.

⁹⁷ Second Counter-Memorial, ¶ 253.

⁹⁸ Second Counter-Memorial, ¶¶ 254-255.

⁹⁹ Second Counter-Memorial, ¶ 254.

¹⁰⁰ Second Counter-Memorial, ¶ 256.

¹⁰¹ Second Counter-Memorial, ¶ 265.

iii. The Issuance of Interim Measures under Article 151 of the Code of Civil Procedure

The Claimant's Position

82. The Claimant argues that the Kriukivskiy Court had no plausible basis for issuing the 26 September 2007 Interim Measures because, in violation of Article 151 of the Code of Civil Procedure, the difficulty or impossibility of enforcing the 9 November 2004 Judgment ordering the reinstatement of Mr. Ovcharenko was not established.¹⁰² In the Claimant's view, Mr. Ovcharenko was reinstated on 11 November 2004.¹⁰³ The Claimant also points out that the 9 November 2004 Judgment had become binding only on 29 August 2007, as it had been subject to numerous retrials before then.¹⁰⁴ From this, the Claimant notes that Mr. Ovcharenko waited just weeks before the 26 September 2007 decisions to enforce the judgment.¹⁰⁵
83. But even assuming that the enforcement of the 9 November 2004 Judgment was difficult or impossible (which the Claimant denies), the Claimant posits that Mr. Ovcharenko deliberately chose not to request assistance from the district court in enforcing this decision, as would have been proper, and instead applied for interim measures to bypass procedural protections.¹⁰⁶
84. The Claimant alleges that the misapplication of the Kriukivskiy Court of Article 151 of the Code of Civil Procedure violated Articles 212 and 213 of the Code of Civil Procedure, which require courts to subject the existing evidence to a full and objective analysis and to issue decisions that are properly motivated or supported by an investigation of the circumstances underlying the parties' claims.¹⁰⁷

The Respondent's Position

85. The Respondent maintains that the protracted failure of Ukratnafta to comply with the 9 November 2004 Judgment—from either its issuance date, which is when it became enforceable, or from 29 August 2007, which is when it became binding¹⁰⁸—justified the

¹⁰² Second Memorial, ¶¶ 19, 276-277.

¹⁰³ Second Memorial, ¶ 277.

¹⁰⁴ Second Memorial, ¶¶ 17, 277.

¹⁰⁵ Second Memorial, ¶¶ 18, 277.

¹⁰⁶ Second Memorial, ¶¶ 19.

¹⁰⁷ Second Memorial, ¶ 375.

¹⁰⁸ Second Counter-Memorial, ¶ 260 n. 456, 261. The Respondent also clarifies that this factual proposition was not pleaded as breaches of the "complete and unconditional legal protection" and "full protection and

issuance of the 26 September 2007 Interim Measures under Article 151 of the Code of Civil Procedure.¹⁰⁹ The Respondent alleges that Mr. Ovcharenko had twice been unsuccessful in his attempts to enforce this judgment, which, among other things, justified the Kriukivskiy Court's decision to grant provisional relief.¹¹⁰ The Respondent also points out that decisions by more than half a dozen courts evaluating the lawfulness of the reinstatement of Mr. Ovcharenko preceded the 26 September 2007 Interim Measures, and that the Claimant has not alleged that it was precluded from participating in these proceedings.¹¹¹ Hence there is no evidence that the 26 September 2007 Interim Measures were not reasonably tenable under Ukrainian law or otherwise issued in bad faith.¹¹²

86. The Respondent also points out that the 26 September 2007 Supplementary Decision had the same legal consequences for Ukratnafta as the 26 September 2007 Interim Measures, which means that the latter could not have caused harm to the Claimant if the former was a tenable application of Ukrainian law, which the Respondent argues was the case here.¹¹³

iv. The Interim Measures As a Form of Post-judgment Enforcement Order

The Claimant's Position

87. The Claimant alleges that the 26 September 2007 Interim Measures were inappropriate and were used to enforce the 9 November 2004 Judgment that, after three years, had become moot.¹¹⁴ By issuing the interim measures decision as an *ex parte* order and by declaring it immediately enforceable, the Kriukivsky Court deprived the Claimant of the opportunity to resist its enforcement.¹¹⁵ The Court thus negated the due process protections that the Claimant would have enjoyed had this judgment been enforced according to Articles 24 and 25 of the Ukrainian Enforcement Law.¹¹⁶ The Claimant also submits that the court decision granting the

security" standards, which would make it irrelevant to the Claimant's argument that the Respondent had breached the Russia-Ukraine BIT, but states that it is addressing this point for the sake of completeness. Second Counter-Memorial, ¶ 260 n. 456. Transcript (19 March 2013), 43:25 to 44:1-3.

¹⁰⁹ Second Counter-Memorial, ¶ 260; Respondent's Post-Hearing Memorial, ¶ 55.

¹¹⁰ *Id.*

¹¹¹ Transcript (19 March 2013), 29:9-21.

¹¹² Second Counter-Memorial, ¶ 260.

¹¹³ Second Counter-Memorial, ¶ 261.

¹¹⁴ Second Memorial, ¶¶ 22, 278; Transcript (18 March 2013), 51:1-6.

¹¹⁵ Transcript (18 March 2013), 51:7-16.

¹¹⁶ Second Memorial, ¶ 376.

26 September 2007 Interim Measures was materially unfair and inequitable since the only stated reason for its issuance was that the 9 November 2004 Judgment had not yet been executed.¹¹⁷

The Respondent's Position

88. The Respondent explains that the 26 September 2007 decision on Interim Measures was issued as a form of provisional relief to secure the enforcement of the 26 September 2007 Supplementary Decision, which was issued half an hour after the 2007 Interim Measures even if the 2007 Supplementary Decision did not mention it by name.¹¹⁸

v. The Proportionality of the 26 September 2007 Decisions

The Claimant's Position

89. Even assuming that Mr. Ovcharenko's rights had been violated (which the Claimant denies), the Claimant alleges that the 26 September 2007 Decisions were disproportionate to any such violations, in contravention of Article 152(3) of the Code of Civil Procedure. The 2007 Supplementary Decision placed Mr. Ovcharenko in a position to make far-reaching decisions in relation to Ukratnafta's operational activities, including decisions that were reserved for the Management Board and that required the approval of the Supervisory Board under Ukratnafta's constituent instruments.¹¹⁹ In the Claimant's view, there was no legal basis for the Kriukivskiy Court, in its 26 September 2007 Decisions, to expand Mr. Ovcharenko's powers, as a monetary remedy could have made Mr. Ovcharenko whole and he could have returned to the court for assistance in the enforcement of such remedy.¹²⁰

The Respondent's Position

90. The Respondent alleges that the 26 September 2007 Supplementary Decision was authorized by Article 220(1)(2) of the Code of Civil Procedure, because the 9 November 2004 Judgment did not specify the necessary orders for the reinstatement of Mr. Ovcharenko.¹²¹

¹¹⁷ Transcript (18 March 2013), 51:1, 17-22.

¹¹⁸ Second Counter-Memorial, ¶ 260 n. 456.

¹¹⁹ Transcript (18 March 2013), 51:23-25 to 52:1-6.

¹²⁰ Second Memorial, ¶ 377.

¹²¹ Second Counter-Memorial, ¶¶ 262-263.

91. As previously stated, the Respondent points out that the Claimant never identified which new powers the 26 September 2007 Supplementary Decision allegedly granted Mr. Ovcharenko, and observes that this decision only identified basic attributes of the position of Chairman of the Management Board ¹²² and spelled out the legal consequences of Mr. Ovcharenko's reinstatement, which is precisely the relief that Mr. Ovcharenko had sought.¹²³

3. Events of 19 October 2007

(a) Undisputed Facts

92. Following the proceedings before the Kriukivskiy Court, Mr. Ovcharenko sought enforcement of the 26 September 2007 Decisions.
93. To that end, on 12 October 2007, Mr. Yevgeniy Pryshchepa, a bailiff employed by the State Executive Office within the Ministry of Justice,¹²⁴ sent Ukratnafta by ordinary mail three resolutions that initiated the process for enforcing writs of execution connected with the 26 September 2007 Supplementary Decision and imposed a deadline of 18 October 2007 for compliance with them.¹²⁵ On 18 October 2007, Mr. Pryshchepa sent a fourth resolution to implement the 26 September 2007 Interim Measures ruling.¹²⁶
94. On 19 October 2007, Mr. Pryshchepa and Mr. Ovcharenko (who was accompanied by other persons) entered the premises of Ukratnafta. While the Parties dispute the precise nature of what occurred during the course of this day, it is clear that the reinstatement of Mr. Ovcharenko as Chairman of the Management Board was accomplished by that afternoon.
95. On 22 October 2007, Mr. Glushko commenced a lawsuit, which would later become Case 2-336/2008, against Mr. Ovcharenko and Ukratnafta before the Avtozavodsky District Court of Kremenchug, to request that Mr. Ovcharenko be ordered to cease exercising the functions of the Chairman of the Management Board and that Mr. Glushko be reinstated in this position,¹²⁷ on the basis that Mr. Ovcharenko had allegedly taken control of Ukratnafta through an illegal

¹²² Second Counter-Memorial, ¶ 265.

¹²³ Second Counter-Memorial, ¶ 265 n 466.

¹²⁴ Second Counter-Memorial, ¶ 290.

¹²⁵ Second Counter-Memorial, ¶ 290.

¹²⁶ *Id.*

¹²⁷ Joint Factual Chronology, ¶ 95.

attack premised on a court judgment that had already been complied with.¹²⁸ Finding that the reinstatement of Mr. Ovcharenko was lawful, the Court dismissed this lawsuit on 18 January 2008.¹²⁹ On 19 March 2008, the Poltava Region Court of Appeal dismissed the appeal of Mr. Glushko.¹³⁰ The Supreme Court of Ukraine rejected his cassation appeal on 5 November 2008.¹³¹

(b) Disputed Facts

96. As a general matter, the Parties disagree on the significance of the events of 19 October 2007. While the Claimant considers these events leading to the reinstatement of Mr. Ovcharenko to be central to its claim, the Respondent characterizes them as peripheral and irrelevant to the main issues in the case¹³² and argues that the reinstatement of Mr. Ovcharenko did not cause any of the losses for which the Claimant claims compensation.¹³³ In this regard, the Respondent points out that the Claimant's direct shareholdings had been invalidated by Ukrainian court decisions¹³⁴ before Mr. Ovcharenko was reinstated, which was not in any case the proximate cause of the share invalidation;¹³⁵ that the Claimant did not have any indirect shareholdings in Ukratnafta (through AmRuz and Seagroup) at the time that Mr. Ovcharenko was reinstated, as the Claimant had acquired an interest in them only in December 2007;¹³⁶ and that the Claimant's claim for lost payments for oil deliveries were based on the actions of Taiz and Technoprogress in 2009 and unrelated to the events of 19 October 2007.¹³⁷
97. The Respondent also highlights that Privat Group and the Respondent are distinct entities,¹³⁸ giving as an example the fact that in the only shareholder meeting that took place after 19 October 2007, Ukraine-controlled Naftogaz voted contrary to the interests of

¹²⁸ Memorial, ¶ 150.

¹²⁹ Joint Factual Chronology, ¶ 115.

¹³⁰ Joint Factual Chronology, ¶ 123.

¹³¹ Joint Factual Chronology, ¶ 143.

¹³² Transcript (19 March 2013), 23:18-21, 26:5-7; Transcript (27 March 2013), 127:23-25 to 128:1-6; Respondent's Post-Hearing Memorial, ¶¶ 49-50.

¹³³ Transcript (19 March 2013), 24:7-9; Transcript (27 March 2013), 128:7-12.

¹³⁴ Transcript (19 March 2013), 24:19-25.

¹³⁵ Transcript (19 March 2013), 25:1-4; Respondent's Post-Hearing Memorial, ¶ 52.

¹³⁶ Transcript (19 March 2013), 24:10-18; Respondent's Post-Hearing Memorial, ¶ 51.

¹³⁷ Transcript (19 March 2013), 25:9-14; Respondent's Post-Hearing Memorial, ¶ 53.

¹³⁸ Transcript (27 March 2013), 79:18-25 to 80:1.

Mr. Ovcharenko and his management team.¹³⁹ It states, indeed, that “Naftogaz and Privat Group are not blood brothers; they distrust each other intensely.”¹⁴⁰

98. The Parties’ disagreement on the events of 19 October 2007 principally concerns the circumstances of Mr. Ovcharenko’s reinstatement on that day and the legality under Ukrainian law of the conduct of the bailiff, Mr. Pryshchepa.

i. The Circumstances of Mr. Ovcharenko’s Reinstatement

The Claimant’s Position

99. In the Claimant’s view, the events of 19 October 2007 confirm that Ukratnafta was the target of a corporate raid. The Claimant describes the events of this day as a forcible takeover of Ukratnafta, carried out by the private security forces of Privat Group with the assistance of Ukrainian government officials, including Mr. Pryshchepa.¹⁴¹
100. Relying on video recordings of security cameras (excerpts of which are submitted as evidence in this arbitration), the Claimant presents the following account of what had occurred:

As seen in the security camera footage, at 9:26am on October 19 approximately 25 men dressed in plain clothes stormed the third floor of the Ukratnafta administrative building, carrying tools to break through the door to the management offices if necessary. After those 25 men entered the hallway on the third floor, at 9:28am 20 different men wearing uniforms hurried up the stairs to the third floor of the administrative building, paving the way for 21 more men who followed a minute later, including Mr. Ovcharenko and the bailiffs. In total, between 9:26 and 9:30am, 66 men, some carrying weapons, were involved in the takeover of the administrative building at Ukratnafta.¹⁴²

101. The Claimant further contends that locks were broken to enter the premises of the refinery.¹⁴³
102. To support its characterization of the events as a forcible seizure of Ukratnafta, the Claimant cites various statements by Ukrainian politicians and refers to scholarly writings, press reports, and reports of NGOs decrying this event.¹⁴⁴

¹³⁹ Transcript (27 March 2013), 78:23-25 to 79:1-6.

¹⁴⁰ Transcript (27 March 2013), 79:10-12.

¹⁴¹ Second Memorial, ¶ 43; Claimant’s Post-Hearing Submission, ¶ 14.

¹⁴² Second Memorial, ¶ 34 (emphasis in original; footnotes omitted). See also Transcript (18 March 2013), 24:25 to 27:1-17; Claimant’s Post-Hearing Submission, ¶¶ 16-17.

¹⁴³ Transcript (18 March 2013), 24:19-21.

¹⁴⁴ Memorial, ¶¶ 116-121; Transcript (18 March 2013), 33:1-25 to 36:1-7.

103. The Claimant concludes more generally that the Ukrainian State did not merely turn a blind eye to the events of 19 October 2007 but actively supported them by its courts' decisions and enforcement orders, by sending bailiffs as well as Ministry of Interior troops, and by conducting "bogus legal proceedings".¹⁴⁵

The Respondent's Position

104. Referring to the video recordings produced by the Claimant, the Respondent denies that there was any violence or physical confrontation on the Ukratnafta premises on 19 October 2007.
105. The Respondent alleges that Mr. Pryshchepa had no connection with the groups of men in plain clothes or camouflage seen on the video recording and in fact assumed that they were Ukratnafta security guards.¹⁴⁶ Mr. Pryshchepa—so the Respondent alleges—accompanied Mr. Ovcharenko onto the Ukratnafta premises for the sole purpose of fulfilling his obligation under Article 30(1) of the Law on Enforcement Procedure of Ukraine to verify that Ukratnafta had received a copy of the resolution initiating enforcement proceedings and that it had not voluntarily implemented the judgment that was to be executed.¹⁴⁷ The Respondent also points out that there was a second bailiff, Mr. Sergey Kruhovi, who had gone to Ukratnafta on 19 October 2007 in order to enforce the decision of 9 November 2004.¹⁴⁸
106. As a result of Mr. Pryshchepa's visit, Mr. Ovcharenko was provided with the Ukratnafta documents, seals and stamps, and confirmed to Mr. Pryshchepa that Ukratnafta's personnel had not prevented him from performing his duties as Chairman of the Management Board. The Respondent thus takes the position that Ukratnafta had "voluntarily reinstated Mr. Ovcharenko."¹⁴⁹
107. As to the statements by the Ukrainian politicians strongly criticizing the events of 19 October 2007, as adduced by the Claimant, the Respondent observes that these statements were made during a period in which the details of this day were yet unclear.¹⁵⁰

¹⁴⁵ Transcript (18 March 2013), 32:9-11, 38:5-21; Claimant's Post-Hearing Submission, ¶ 20.

¹⁴⁶ Second Counter-Memorial, ¶¶ 307, 320-321.

¹⁴⁷ Second Counter-Memorial, ¶ 306.

¹⁴⁸ Transcript (19 March 2013), 31:10-18.

¹⁴⁹ Second Counter-Memorial, ¶ 291.

¹⁵⁰ Counter-Memorial, ¶¶ 89-90.

ii. The Legality under Ukrainian Law of the Conduct of the Bailiff

The Claimant's Position

108. The Claimant argues that the manner in which Mr. Pryshchepa enforced the 26 September 2007 Decisions was contrary to Ukrainian law. First, Article 27 of the Ukrainian Enforcement Law required Mr. Pryshchepa to obtain the signature of the officials of Ukratnafta as proof that the enforcement resolutions had been properly delivered, which he failed to do.¹⁵¹ Instead, he sent the enforcement resolutions on Friday, 12 October 2007, by ordinary mail, which means that under normal circumstances they would be received after three to four days. According to the Claimant, there is no evidence in the records that the resolution was received any time prior to or after 18 October 2007, the due date for voluntary compliance.¹⁵²
109. Second, Article 10.2 of the Enforcement Law states that the sanction for a first instance of non-compliance with enforcement resolutions is a fine, which would be followed by a new time period for compliance; a second instance of non-compliance triggers a further fine and the option of initiating criminal proceedings. The law does not, however, authorize the bailiff to "forcibly enforce" the resolutions.¹⁵³ Thus, on 18 October 2007, Mr. Pryshchepa would have been obliged to establish a new time period for voluntary compliance.¹⁵⁴
110. The strictures of Article 10.2 of the Enforcement Law apply especially in the case of the resolution related to the 26 September 2007 Interim Measures. That resolution was only issued on 18 October 2007, which made it unreasonable to fault Ukratnafta for its failure to comply voluntarily within one day.¹⁵⁵ That said, the Claimant adds that this resolution was in fact never received by Ukratnafta but simply read out to its representatives on 19 October 2007 while the takeover was ongoing.¹⁵⁶

The Respondent's Position

111. The Respondent alleges that the manner in which Mr. Pryshchepa enforced the 26 September 2007 Decisions was in accordance with Ukrainian law. Article 27(1) of the Ukrainian

¹⁵¹ Second Memorial, ¶ 40; Transcript (27 March 2013), 19:10-14.

¹⁵² Transcript (18 March 2013), 53:1-9.

¹⁵³ Second Memorial, ¶ 41.

¹⁵⁴ Transcript (18 March 2013), 53:10-14.

¹⁵⁵ Second Memorial, ¶ 41; Transcript (27 March 2013), 19:15-20.

¹⁵⁶ Transcript (18 March 2013), 53:25 to 54:1-3.

Enforcement Law specifies that resolutions initiating the enforcement of court decisions are to be sent by ordinary mail, with no further requirement that the signature of the company's officials be obtained.¹⁵⁷ Article 30(1) of the Law on Enforcement Procedure requires a bailiff to verify that the resolution initiating enforcement proceedings has been received and that the judgment has not been voluntarily implemented, which is why Mr. Pryshchepa visited the Ukratnafta facilities on 19 October 2007.¹⁵⁸

112. In response to the Claimant's contention that the 18 October 2007 resolution should not have been enforced on the following day, the Respondent points out that Mr. Pryshchepa had determined that that resolution—which prohibited Ukratnafta and its employees from interfering with Mr. Ovcharenko's entry on the premises or his carrying out his duties as Chairman of the Management Board—had not yet been received by Ukratnafta. Mr. Pryshchepa accordingly proceeded to read the resolution to the members of the Management Board.¹⁵⁹ When he ascertained that Mr. Ovcharenko was provided with the company's constitutive documents, seal, and stamps, Mr. Pryshchepa recorded the voluntary compliance of Ukratnafta with the 26 September 2007 Decisions.¹⁶⁰ The Respondent therefore states that "Tatneft has not shown that Mr. Pryshchepa 'forcibly' enforced anything."¹⁶¹

4. Criminal Investigation of 19 October 2007

(a) Undisputed Facts

113. On 19 October 2007, the Deputy Head of the Investigation Division—Head of the Investigation Unit of the Kremenchug City Department of the Ministry of the Interior, Mr. Oleg Savchenko, initiated an investigation on whether the events at the Kremenchug refinery of the same day violated Article 293 of the Criminal Code, which sanctions group disruptions of the public order ("Article 293 Investigation").
114. On 24 October 2007, Mr. Savchenko initiated an investigation of the events of 19 October 2007, pursuant to Article 357 of the Criminal Code, in relation to an alleged misappropriation of the seal and stamp of Ukratnafta ("Article 357 Investigation").

¹⁵⁷ Second Counter-Memorial, ¶ 303.

¹⁵⁸ Second Counter-Memorial, ¶¶ 306, 308-309.

¹⁵⁹ Second Counter-Memorial, ¶ 310.

¹⁶⁰ Second Counter-Memorial, ¶ 312; Transcript (19 March 2013), 44:17-19.

¹⁶¹ Second Counter-Memorial, ¶ 306.

115. On 31 October 2007, the Avtozavodsky Regional Court quashed the Article 357 Investigation.¹⁶²
116. On 22 May 2008, the Article 293 Investigation was closed under paragraph 2, Article 6 of the Criminal Procedure Code “due to lack of *corpus delicti*.”¹⁶³

(b) Disputed Facts

i. The Claimant’s Position

117. The Claimant attacks the legitimacy of the said criminal investigations.¹⁶⁴ With regard to the investigation pursuant to Article 293 of the Ukrainian Criminal Code, the Claimant points to the testimony of Mr. Savchenko, its witness, who states that the investigation was passed from one department to the next, with no actual investigative activity being undertaken.¹⁶⁵ According to Mr. Savchenko, on 29 October 2007, the Avtozavodsky Regional Court quashed the investigator’s decision to open the criminal investigation on the basis that the action by private security forces could not be considered “criminal” because they participated in the enforcement of a court decision.¹⁶⁶ And when the investigation returned to Mr. Savchenko in late 2007, it became largely dormant due to the instruction of his superiors that the investigation proceed on a formal basis alone.¹⁶⁷ As Mr. Savchenko explains, the investigation was officially and prematurely closed on May 2008, upon the orders of high-ranking government officials.¹⁶⁸ Unusually, the case file was then physically transferred to the Main Investigation Unit of the Ministry of the Interior in Kyiv, which led Mr. Savchenko to conclude that a high-ranking official wanted to be sure that the investigation remained closed.¹⁶⁹ Accordingly, the Claimant alleges that it was the absence of a meaningful investigation that allowed the Ministry of the Interior and the Prosecutor General’s office to conclude that insufficient evidence existed to bring criminal charges.¹⁷⁰

¹⁶² Second Memorial, ¶ 55; Transcript (18 March 2013), 82:16-18.

¹⁶³ Joint Factual Chronology, ¶ 129.

¹⁶⁴ Second Memorial, ¶¶ 48, 284; Transcript (18 March 2013), 82:16-18.

¹⁶⁵ Second Memorial, ¶ 50; Claimant’s Post-Hearing Submission, ¶ 21.

¹⁶⁶ Second Memorial, ¶ 51.

¹⁶⁷ Second Memorial, ¶ 52.

¹⁶⁸ Second Memorial, ¶ 53; Transcript (27 March 2013), 22:4-10.

¹⁶⁹ Second Memorial, ¶ 54.

¹⁷⁰ Second Memorial, ¶ 53.

118. As to the investigation under Article 357 of the Ukrainian Criminal Code, the Claimant states that this was quashed by the Avtozavodsky Regional Court of Kremenchug within a week after it was brought¹⁷¹ and that the Kremenchug Prosecutor chose not to challenge this decision.¹⁷² It also claims that Mr. Yury Bergelson, a lawyer representing Mr. Ovcharenko, offered Mr. Savchenko employment and an outright bribe to assist the raiders, and conveyed to Mr. Savchenko that a substantial amount of US\$ 25 million had been paid to the Prosecutor's office to ensure the failure of the investigations.¹⁷³

ii. The Respondent's Position

119. The Respondent points out that the Claimant relies exclusively on the testimony of Mr. Savchenko to discredit the investigations.¹⁷⁴ It alleges that Mr. Savchenko's characterization of the 19 October 2007 events as a raider attack is a personal view that conflicts with the official investigative findings.¹⁷⁵ Moreover, in the Respondent's view, Mr. Savchenko's alleged encounter with Mr. Bergelson raises questions about the credibility of Mr. Savchenko, as he neither reported the encounter nor initiated criminal proceedings with regard to it.¹⁷⁶
120. The Respondent alleges that the testimony of Mr. Savchenko concerning the Article 293 Investigation is incomplete, as it does not include his interviews with the bailiffs present at Ukratnafta on 19 October 2007 and fails to mention his non-involvement in the investigation for a certain time.¹⁷⁷ The testimony also misrepresents the facts, such as in its description of the instructions from the Kremenchug Prosecutor.¹⁷⁸ Mr. Savchenko's testimony, in the Respondent's view, also contains unsubstantiated inferences regarding the alleged role of higher authorities in directing and closing the investigation,¹⁷⁹ and is contradictory, in that it accuses

¹⁷¹ Second Memorial, ¶ 55.

¹⁷² *Id.*

¹⁷³ Second Memorial, ¶ 56; Transcript (27 March 2013), 22:11-15.

¹⁷⁴ Second Counter-Memorial, ¶ 328.

¹⁷⁵ Second Counter-Memorial, ¶ 329.

¹⁷⁶ Second Counter-Memorial, ¶ 330.

¹⁷⁷ Second Counter-Memorial, ¶ 331.

¹⁷⁸ Second Counter-Memorial, ¶ 332.

¹⁷⁹ *Id.*

Mr. Ovcharenko of trespassing on Ukratnafta although he was accompanied by a bailiff and authorized by the execution writs to be at the Ukratnafta premises at that time.¹⁸⁰

121. The Respondent alleges that the testimony of Mr. Savchenko on the Article 357 investigation is similarly unreliable, given that he neither addresses the 31 October 2007 Avtozavodsky Court Judgment stating that he had breached articles in the criminal code in initiating the investigation¹⁸¹ nor discloses that his conduct caused the cancellation of this investigation.¹⁸²
122. The Respondent concludes that the Claimant has not established that the above-mentioned investigations were terminated either improperly or without good reason, or that the said investigations uncovered actions that would be considered criminal under the Ukrainian Criminal Code.¹⁸³

5. Presence of the Ministry of the Interior Troops at Ukratnafta

(a) Undisputed Facts

123. It is undisputed between the Parties that the Kremenchug refinery was subject to special protection following the events of 19 October 2007. More specifically, on 24 October 2007, Military Unit 3059 of the Internal Troops of the Ministry of the Interior of Ukraine began providing security services at the refinery.¹⁸⁴

(b) Disputed Facts

i. The Claimant's Position

124. According to the Claimant, the Respondent installed members of the State security services in order to facilitate Mr. Ovcharenko's reinstatement and to perpetuate the raiders' occupation of the refinery. In the Claimant's view, the presence of these troops is evidence of the Respondent's active complicity in the illegal actions of the corporate raiders.¹⁸⁵

¹⁸⁰ Second Counter-Memorial, ¶ 333.

¹⁸¹ Second Counter-Memorial, ¶ 334; Respondent's Post-Hearing Memorial, ¶ 55.

¹⁸² Second Counter-Memorial, ¶ 334.

¹⁸³ Transcript (19 March 2013), 44:22-25 to 45:1-5.

¹⁸⁴ Joint Factual Chronology, ¶ 101.

¹⁸⁵ Second Memorial, ¶ 45; Transcript (18 March 2013), 54:23-25 to 55:1-55:10.

ii. The Respondent's Position

125. The Respondent states that military forces and other military organizations—such as the Ministry of the Interior troops—are authorized to carry out commercial activities in Ukraine, which include the provision of security services, as was the case for Ukratnafta.¹⁸⁶ Hence, the provision of security services to Ukratnafta in this case cannot be considered “irregular” or “abusive” conduct of the State.¹⁸⁷

6. The Management at Ukratnafta after 2007

(a) Undisputed Facts

126. Immediately after Mr. Ovcharenko was reinstated as Chairman of the Management Board on 19 October 2007, he issued an order physically banning Mr. Glushko from the Kremenchug refinery. In the following weeks, the management of the company was restructured under the leadership of Mr. Ovcharenko through various orders that he issued, and he retained numerous consultants and advisors to assist him in managing the company.¹⁸⁸
127. Following 19 October 2007, all four members of the Management Board who had been nominated by the Tatarstan shareholders were either dismissed or forced to resign.¹⁸⁹ The Claimant declined to appoint their replacements.¹⁹⁰ It appears (according to the Claimant's submissions, which on this point were not contested by the Respondent) that key management roles, including those in the financial department, were reassigned either to Mr. Ovcharenko himself or to managers close to him.¹⁹¹
128. In February 2010, the first and only General Shareholders Meeting since the events of October 2007 was held. The shareholders notably resolved to validate the share auctions at which the shares of the Tatarstan parties were sold; to confirm Mr. Ovcharenko as Chairman of the Management Board; and to elect Mr. Kolomoisky and his associates as members of the Supervisory Board.¹⁹² As a result of these resolutions, six of the eleven seats were held by

¹⁸⁶ Second Counter-Memorial, ¶ 355.

¹⁸⁷ *Id.*

¹⁸⁸ Memorial, ¶ 131; Transcript (18 March 2013), 96:2-9.

¹⁸⁹ Memorial, ¶ 130.

¹⁹⁰ Counter-Memorial, ¶ 106.

¹⁹¹ Memorial, ¶ 131.

¹⁹² Memorial, ¶ 323; Second Memorial, ¶ 221.

individuals affiliated with the Privat Group, with the remaining members of the Supervisory Board being nominated by Naftogaz.¹⁹³ Moreover, the shareholders approved dividends¹⁹⁴ in an amount of UAH 85,165,600 for 2006, and UAH 40,757,200 for 2007.¹⁹⁵

129. To the Tribunal's knowledge, Mr. Ovcharenko remains Chairman of the Management Board to the present day.

(b) Disputed Facts

i. The Claimant's Position

130. The Claimant accuses Mr. Ovcharenko of several misdeeds since his reinstatement in 2007. Specifically, the Claimant alleges that the 19 October 2007 order banning Mr. Glushko from the refinery deprived Mr. Glushko of the rights and benefits to which he was entitled as a full member (if not Chairman) of the Management Board.¹⁹⁶ Moreover, ignoring the necessary Supervisory Board approval, Mr. Ovcharenko allegedly expanded his own power and assigned positions to his allies while marginalizing the other Management Board members and the employees loyal to Tatarstan.¹⁹⁷ Finally, the Claimant alleges that Mr. Ovcharenko vested substantial executive powers in the newly hired consultants and advisors, which in turn caused the dismissal or forced resignation of the Management Board members nominated by the Tatarstan shareholders.¹⁹⁸
131. The Claimant rejects the Respondent's allegation that the reallocation of management positions was either a normal reorganization following a change in management, or caused by the alleged lack of cooperation of the board members, and points out that this occurred within days of Mr. Ovcharenko's reinstatement.¹⁹⁹
132. The Claimant also alleges that Mr. Ovcharenko mismanaged Ukratnafta's assets to the point of putting the company on the "brink of financial and operational collapse,"²⁰⁰ and states that the

¹⁹³ Transcript (18 March 2013), 32:16-24.

¹⁹⁴ Transcript (18 March 2013), 30:18-25, 97:11-15.

¹⁹⁵ C-481 at p. 9.

¹⁹⁶ Second Memorial, ¶ 128.

¹⁹⁷ Second Memorial, ¶¶ 129, 131; Transcript (18 March 2013), 97:1-7.

¹⁹⁸ Second Memorial, ¶ 130.

¹⁹⁹ Second Memorial, ¶¶ 60-61; Transcript (27 March 2013), 47:13-18.

²⁰⁰ Memorial, ¶ 132.

financial results show that Ukratnafta was profitable before 2007 but not after Mr. Ovcharenko had taken over.²⁰¹

133. Lastly, the Claimant alleges that, under Mr. Ovcharenko's leadership, Ukratnafta ceased to provide it with detailed financial reports on a monthly basis, as it had done since January 2003.²⁰² The Trade Representation of the Republic of Tatarstan in Ukraine wrote letters to the Ukrainian government authorities on behalf of the Claimant and the Republic of Tatarstan to protest this situation, but to no avail.²⁰³

ii. The Respondent's Position

134. The Respondent disagrees with the Claimant's depiction of post-2007 Ukratnafta. It criticizes the Claimant for its primary reliance on—and alleged misrepresentation of—the witness statement of Mr. Vladimir Fedotov, the Claimant's nominee to the Management Board. Moreover, the Respondent observes that the Claimant did not complain to the relevant Ukrainian authorities at any point, despite its claims of illegal behavior.²⁰⁴
135. The Respondent states that the initial lack of cooperation of Ukratnafta's directors following the events of 19 October 2007 forced Mr. Ovcharenko to take on their management duties. He subsequently, however, enjoyed good working relationships with the other members of the Management Board, save for Mr. Fedotov, who kept to himself.²⁰⁵ While the members of the Management Board eventually all resigned, the Respondent points out that the Claimant could have appointed replacement members, but failed to do so.²⁰⁶
136. The Respondent also rejects the Claimant's allegation of Mr. Ovcharenko's mismanagement of assets as unsubstantiated.²⁰⁷ Rather, the Respondent points out that it was the Claimant that cut off its oil supply to the Kremenchug refinery to retaliate for Mr. Ovcharenko's reinstatement, and it was this that jeopardized the financial situation of Ukratnafta.²⁰⁸ The Respondent adds

²⁰¹ Second Memorial, ¶ 62.

²⁰² Memorial, ¶¶ 133-134.

²⁰³ Second Memorial, ¶ 63.

²⁰⁴ Counter-Memorial, ¶¶ 101, 108.

²⁰⁵ Counter-Memorial, ¶ 106.

²⁰⁶ *Id.*

²⁰⁷ Counter-Memorial, ¶ 103.

²⁰⁸ Counter-Memorial, ¶ 105.

that Mr. Ovcharenko had found Ukratnafta in a financially desolate state at his reinstatement,²⁰⁹ specifically pointing to payables in excess of UAH 2.6 billion owed to Taiz and Technoprogress, the Claimant's intermediary suppliers.²¹⁰

137. Lastly, the Respondent does not deny that Mr. Ovcharenko appointed consultants and advisors, but points out that the Claimant has alleged no wrongdoing on their part.²¹¹

7. The Tribunal's Considerations Concerning the Facts of Mr. Ovcharenko's Reinstatement and Related Events

138. The Tribunal turns now to the discussion of the facts as alleged by the Parties with a view to establish which in its assessment has been the backdrop of the dispute submitted to its resolution.
139. Like many projects of the kind characterizing the creation of Ukratnafta it is not difficult to ascertain that it started out in the best spirit of cooperation, as reflected in the Ukratnafta Treaty and the Incorporation Agreement, as well as in the respective decrees issued by the Tatarstan and Ukraine governments. The purpose of ensuring parity was quite evident in the arrangements concerning the distribution of shares and the contributions to be made by each party, in essence consisting of oil wells and production facilities in Tatarstan and the Kremenchug refinery in the Ukraine. This multinational arrangement was undoubtedly the best available option at the time following the dissolution of the Soviet Union and the separation of its constitutive territorial and political entities.
140. In the short run, however, it appears that such purposes would not be easily attained. While it is quite probable that there were objective technical, economic and legal difficulties to contributing the Tatarstan oil wells as originally envisaged, it is also relevant to note that the alternative contributions that were finally authorized by the shareholders were in amounts that, given the magnitude of the business projected, were not very impressive. US\$ 31 million for Tatneft, US\$ 30 million for AmRuz and US\$ 35 million for Seagroup are the figures in the record. Moreover, the arrangements leading to these contributions, notably the payment of US\$ 1 million by Tatneft and the intra-group transfer of shares held by Zenit Bank valued at US\$ 30 million, like the issuance of promissory notes by AmRuz and Seagroup and the

²⁰⁹ Counter-Memorial, ¶ 102.

²¹⁰ Counter-Memorial, ¶ 103.

²¹¹ Counter-Memorial, ¶ 107.

extension of payment dates, are expressive of this difficulty. Questions also arose as to the valuation of the Kremenchug refinery.

141. It can also be noted that during the start-up period intra-corporate relations appeared to be harmonious but this began gradually to change. The Tatar shareholders were more experienced in the oil business, as evidenced by the strong participation of Tatneft in the project, and as a result acquired greater influence in the management of Ukratnafta. Although Tatneft was nominally a minority shareholder, the incorporation of AmRuz and Seagroup and the strategic and voting alliance that ensued among the three shareholders led to greater influence in the decisions of the company. Also the Tatar Ministerial participation in the shareholding was quite naturally associated to Tatneft and its related companies.
142. This situation could not be to the liking of the Ukrainian side, as a consequence of which a power struggle ensued within Ukratnafta that led to the appointment, dismissal, reappointment and reiterated dismissal of the Chairman of the Management Board, Mr. Pavel V. Ovcharenko, as well as to long-lasting lawsuits and court decisions examined above. This power struggle was at the heart of the events of 19 October 2007, which as noted the Claimant characterizes as a “raider” action and the Respondent as the peaceful reinstatement of Mr. Ovcharenko in compliance with court decisions. Scant reference to a letter of resignation of Mr. Ovcharenko in one testimony does not find support in the documents in the record of this case.²¹²
143. One other fact needs to be taken into account for the proper understanding of the dispute before the Tribunal. Beginning in 2007 a group of companies associated with the Privat Bank, which in turn were all directly or indirectly related to Mr. Igor Kolomoisky, an influential businessman with extensive interests in the oil industry and other business activities in Ukraine, developed an interest in gaining control over Ukratnafta, which had a central role in that sector. One company in that group by the name of Korsan acquired in 2007 a modest 1.15% of the shareholding. Following complex corporate arrangements and litigation, by 2010 Korsan had become the owner of 47.08% of Ukratnafta’s shareholding, which together with other related interests attained up to 56% of the shareholding, with the State Property Fund of Ukraine holding 43.05%.²¹³ The Tatarstan, Tatneft, AmRuz and Seagroup participation was gradually diminished until it became totally extinguished. These arrangements notwithstanding, the Respondent rightly points out that at no point has the Ukrainian State ceased to be a minority

²¹² Witness Testimony of Fedotov, Transcript (20 March 2013), 39:13-19.

²¹³ Second Memorial, ¶ 218, referring to Annual Report for the financial year 2010, dated April 28, 2011 (C-475).

shareholder in Ukratnafta.²¹⁴ Mr. Kolomoisky, as will be discussed further below, was called as a witness by the Tribunal at the oral hearing.

144. At this point the original influence exercised in the company by the Tatarstan and related shareholders, including Tatneft, was reversed and it was the Ukrainian shareholding that acquired prominence in the control and management of Ukratnafta. Both Parties believe that Ukratnafta was badly mismanaged while under the control of the other party, an issue that was also at the heart of the confrontations between shareholders.²¹⁵ These developments were quite naturally resisted by Tatneft.²¹⁶ In fact, it is of interest to note, as the Respondent does, that it was Tatneft that first complained to Ukraine about AmRuz and Seagroup's acquisition of shares in Ukratnafta because of having only nominally paid for them with unsecured notes and because of the effect this together with other factors had on the alteration of the parity principle, a view that later changed in light of its strategic alliance between Tatarstan entities and Amruz and Seagroup.²¹⁷ The view has been expressed, however, that AmRuz and Seagroup were at least originally controlled by the Ukrainian side.²¹⁸ What was at stake in these discussions was not the form of the capital contributions by different shareholders but how this would determine which side, Ukraine or Tatarstan, would control the company, which also explains why later Tatneft would support AmRuz and Seagroup so as to avoid a change of control.²¹⁹
145. As will be discussed further below, at this point as a consequence of the modification of the capital contribution the parity principle was reversed in favor of the Ukrainian shareholding, and such principle had thereby become defunct.
146. It is against this complex background that the Tribunal must now turn to establish whether there was in fact a corporate raid and the inextricably related question of the dismissal and reinstatement of Mr. Ovcharenko.

²¹⁴ Transcript (18 March 2013), 155:17-25 to 156:1-14.

²¹⁵ First Witness Statement of Fedotov, ¶¶ 10-15; Witness Statement of Syubaev, ¶¶ 1-13; First Witness Statement of Liapka, ¶¶ 15-17; Second Witness Statement of Liapka, ¶¶ 3-5; Witness Testimony of Fedotov, Transcript (19 March 2013), 156:5-25 to 157:1-18.

²¹⁶ Witness Testimony of Syubaev, Transcript (19 March 2013), 123:9-25 to 124:1-19, 128:5-20.

²¹⁷ Respondent's Post-Hearing Memorial, ¶ 8; Transcript (19 March 2013), 128:5-25 to 130:1-21.

²¹⁸ Witness Testimony of Syubaev, Transcript (19 March 2013), 142:16-25 to 143:1-25.

²¹⁹ Respondent's Post-Hearing Memorial, ¶ 8, with reference to the Witness Testimony of Syubaev.

147. The Tribunal has carefully examined the evidence submitted and can conclude that the events of 19 October 2007 at the Kremenchug refinery were not that peaceful.²²⁰ Both witness statements and the video recording of the events show that in fact there was a forceful takeover of the Kremenchug refinery and the administrative offices. The not insignificant number of people appearing in those recordings forcing their way into the premises, some in uniform, is credible evidence that a physical occupation took place on that date. While it is not clearly established that weapons were available to such occupants neither can this feature be ruled out, and this was certainly the case when Ministry of the Interior troops were called to secure the refinery a few days later on 24 October 2007.
148. The Tribunal has also noted the various statements submitted by the Claimant as to the existence of corporate raids and similar takeovers in Ukraine, including the statements of political and business leaders and international agencies.²²¹ While this is undoubtedly a recurrent phenomenon it cannot be relied upon as evidence that every single corporate acquisition is the result of some form of wrongdoing either by private individuals and entities or entailing the connivance of State agencies and the judiciary. This can only be established on a case by case basis and the Tribunal will do so next in the context of the discussion about the dismissal and reinstatement of Mr. Ovcharenko and the courts' decisions related thereto.
149. The controversy relating to the dismissal and reinstatement of Mr. Ovcharenko as Chairman of Ukratnafta's Management Board needs to be discussed in the context of the basic principles governing corporate management and their reflection in the applicable law. The Tribunal has no doubt that the dismissal of the Chairman of the Management Board is a decision that can be adopted without hindrance by the corporate governing bodies if for some reason they are unhappy about his performance. The fact that the dismissal of Mr. Ovcharenko was decided in the first instance by the Supervisory Board on 21 September 2004 and ultimately endorsed by the General Shareholders Meeting on 12 November 2004 responds to this principle as it is expressly recognized in Articles 99 and 159 of the Civil Code.
150. The choice of who is considered the most qualified Chairman of a company or its Chief Executive Officer is recognized by Article 99(3) of the Ukrainian Civil Code allowing for the suspension of members of the executive body of a company from their duties.²²² While the Respondent has argued that such power relates to "temporary suspension" and not a permanent

²²⁰ First Witness Statement of Fedotov, ¶¶ 35-52; Second Witness Statement of Fedotov, ¶¶ 2-6.

²²¹ Transcript (18 March 2013), 33:2-25 to 36:1-7.

²²² First Expert Report of Toms, ¶ 149.

dismissal, the Claimant's view that such temporary suspension is addressed by Article 46 of the Labor Code is convincing.²²³ In fact, this last Article addresses events such as coming to work intoxicated with alcohol and other such misconduct of an employee which is very different from a corporate decision concerning the performance of duties of its executive officers. But even if the general provisions on the termination of labor agreements embodied in Articles 40 and 41 of the Labor Code are taken into account, there is evidently a difference between the ambit of application of the civil code and that of labor legislation. Moreover, the dismissal of the Chairman of the Management Board by resolution of the Supervisory Board was explicitly included in Mr. Ovcharenko's employment contract in accordance with Article 36 of the Labor Code.²²⁴

151. Whether it might have been preferable for the decision to terminate Mr. Ovcharenko to have stated specific reasons is one thing, but the fact that even without this explanation dismissal is the exercise of a valid right is quite another. On the other hand, while the Respondent's argument to the effect that Articles 99 and 159 of the Civil Code do not provide that compliance with the Labor Code is not required,²²⁵ it is also true that neither does the Civil Code provide that the subject matter of the Labor Code ought to prevail over essential provisions of contract law. The fact that Article 36(8) of the Labor Code is referred to by the Order to dismiss Mr. Ovcharenko does not alter the effects of the Civil Code.
152. It has been noted that the Avtozavodsky District Court ordered the reinstatement of Mr. Ovcharenko on 9 November 2004. It was held by the Court that the power to order such dismissal was not within the competence of the Supervisory Board but of the General Shareholders Meeting and that further the Supervisory Board had been enjoined from making decisions concerning the appointment and termination of members of the Management Board, including its Chairman. Assuming that this was a defect of such dismissal, the fact that it responded to the company's policy is not to be doubted as in fact was confirmed not long thereafter by the very General Shareholders Meeting held on 12 November 2004 where Mr. Ovcharenko was again dismissed following his reinstatement a day earlier.
153. As the Court chose to base its decision on the Ukrainian Labor Code and not the Civil Code, it could not of course address the question of the powers of corporate governance found at the origin of the dismissal but only the grounds governing employment under the Labor Code,

²²³ Second Expert Report of Toms, at ¶¶ 44-48.

²²⁴ Mr. Ovcharenko's Employment Contract dated 6 February 2003 (REX-17).

²²⁵ Respondent's Closing Slides, 77.

which as noted is a different matter. Even though the reasoning of the Court was not to the liking of Ukratnafta's Management, the Management reinstated Mr. Ovcharenko as an employee on 11 November 2004 following the order of the Court to this effect. As also noted, the General Shareholders Meeting held on 12 November 2004 once again removed Mr. Ovcharenko and elected Mr. Glushko as the new Chairman. The Tribunal cannot fail to notice that there was in this sequence of events a kind of cat and mouse strategy, but in the end the Court's decision was formally complied with, although whether Mr. Glushko, the Acting Chairman, duly discussed the implications of the litigation with the Management Board is subject to important doubt.²²⁶ The Respondent believes that the reinstatement was a "sham" and that it failed to comply with various procedural requirements of Ukrainian law.

154. This corporate governance lasted in any event for the three years that followed until new court decisions intervened in the ongoing dispute between the main protagonists of the corporate struggle. Other interests also had a role to play in this process, this being in particular the case of Naftogaz, a Ukrainian State-owned company that in fact has resisted the efforts of the Privat Group to acquire control of Ukratnafta, as evidenced by the fact that Naftogaz voted against the appointment of Mr. Ovcharenko at the General Shareholders Meeting of 5 February 2010.²²⁷
155. The next issue for the Tribunal to address is the question of the *ex parte* Supplementary Judgment and the *ex parte* interim measures issued by the Kriukivskiy District Court on 26 September 2007, both issued in the context of the Court's understanding that the reinstatement of Mr. Ovcharenko, ordered on 9 November 2004, had not been implemented and that a Supplementary Judgment was required so as to indicate the specific measures to be taken to that effect. Both decisions were appealed by Ukratnafta and further proceedings were initiated by Mr. Glushko seeking protection of his rights as Chairman of the Management Board, but none of them succeeded.
156. Such decisions were followed by four writs of execution issued by Bailiff Yevgeniy Pryshchepa initiating enforcement proceedings sent by ordinary mail giving a short delay for voluntary compliance and in one case for immediate enforcement. Whether the signature of an authorized representative of Ukratnafta was required or not as a matter for service of process to be legally valid, a point on which the Parties disagree, does not detract from the fact that Ukratnafta was not on notice of the *ex parte* proceedings taking place at this stage and that in any event the

²²⁶ Transcript (19 March 2013), 43:25 to 44:1-9; Witness Testimony of Fedotov in Transcript (20 March 2013), 39:8, 40:6-19, and 41:2-5; Respondent's Post-Hearing Memorial, ¶ 55.

²²⁷ Respondent's Post-Hearing Memorial, ¶ 55, at 28-29; Exhibit C-381; Transcript (27 March 2013), 78:6-25 to 79:1-17.

period granted does not appear to have been adequate for an orderly process of voluntary enforcement. The Tribunal cannot ignore the fact that service by means of an unsigned postal note, as pointed out by the Claimant, is not conducive to certainty of notification.²²⁸

157. The Supplementary Judgment, in addition to underlining Ukratnafta's obligation to grant Mr. Ovcharenko access to the company's premises, specifically included within his powers that of making decisions concerning the organizational, operational and economic, financial and other activities of the company. The Parties, as also noted above, have different views about whether this latter aspect of the decision granted Mr. Ovcharenko new remedies not discussed in the proceedings leading to the 9 November 2004 decision on his reinstatement and whether on the whole they might have entailed measures out of proportion in respect of the reinstatement issue and the possible remedies to such situation. In any event, the fact is that Mr. Ovcharenko's reinstatement was inextricably associated with the aim of achieving a complete takeover of the company's management, which in fact he proceeded to effect swiftly.²²⁹
158. The discussion about the 26 September 2007 Supplementary Judgment and the decision on interim measures is essentially based on the issue of whether there was or not a valid enforcement of the 9 November 2004 decision ordering Mr. Ovcharenko's reinstatement. While as noted the Claimant believes that this was positively the case, in the Respondent's view, and as contained in the 26 September 2007 Decisions, there had been no such valid enforcement. The question was discussed at length during the litigation that followed Mr. Ovcharenko's alleged reinstatement on 11 November 2004 that culminated on 29 August 2007 when the order became binding.
159. The Claimant's view that if there had been difficulties with or even the impossibility of carrying out such enforcement the proper procedure would have been to apply to the District Court and not to request separate interim measures of an *ex parte* nature in violation of Article 151 of the Code of Civil Procedure is convincing. This is so, first, because as a matter of fact the reinstatement order had been enforced on 11 November 2004, even if on a purely formal basis as shown by the second dismissal of Mr. Ovcharenko the following day, and this again was a clear expression of the policy and decision irrespectively of whether the resolutions were issued by the Supervisory Board, the Chairman of the Management Board or the General Shareholders Meeting, a point also subject to much discussion between the Parties.

²²⁸ Claimant's Post-Hearing Submission, ¶ 11; Second Expert Report of Toms, at 63-64.

²²⁹ Witness Testimony of Liapka, Transcript (25 March 2013), 22:3-25 to 23:1-10.

160. Next, and more importantly, the Claimant's view is convincing because under such procedure the Parties would have had the possibility of fully arguing their case even though this was done in prior litigation.²³⁰ In any event it is to be noted that in the Respondent's view the 26 September 2007 Supplementary Judgment would have had the same legal consequences as the Interim Measures, but still this does not detract from the fact that *ex parte* decisions can only be justified on very exceptional bases and strictly following the requirements laid down under Article 151 of the Code of Civil Procedure, which does not appear to have been the case here. The chronology of these decisions, showing that the interim measures were issued thirty minutes earlier than the Supplementary Judgment they were supposed to enforce, does not help to explain a logical legal sequence of these acts, which is normally the other way around.
161. It was the purported enforcement of the Supplementary Judgment and the interim measures of 26 September 2007 which led to the events described in connection with the occupation of the Kremenchug refinery. It is at this point that the role of the bailiff Mr. Yevgeniy Pryshchepa in these events becomes particularly relevant. It has been considered above that the various writs of execution issued in respect of that enforcement were not quite transparent and timely and did not follow the strict requirements of Articles 24 and 87 of the Ukrainian Law on Enforcement Proceedings.²³¹ The Claimant has also noted that even a supplementary judgment is subject to strict requirements under Articles 11 and 220 of the Code of Civil Procedure, which again do not appear to have been duly observed in this case.
162. It has also been considered that the occupation of the premises does not appear to have been as peaceful as described by the Respondent and the bailiff.²³² While it is true that physical violence appears to have been used on the occasion of the events of 19 October 2007 in a limited way, concerning in particular security guards and breaking into the premises,²³³ the role of the bailiff was not as simple as providing for and verifying the enforcement in question.²³⁴ What has been described as the voluntary reinstatement of Mr. Ovcharenko by the Ukratnafta officials present during those events is not credible as it followed various measures of coercion, in particular preventing such officials from leaving the premises. The fact that a few days later the Minister of the Interior's troops were called in does not corroborate that characterization of a voluntary

²³⁰ Claimant's Post-Hearing Submission, ¶ 10.

²³¹ Expert Report of Martinenko, ¶¶ 105-117.

²³² First Witness Statement of Pryshchepa, ¶¶ 14-20; Second Witness Statement of Pryshchepa, ¶¶ 2-7.

²³³ Witness Testimony of Savchenko, Transcript (20 March 2013), 74:2-17.

²³⁴ Claimant's Post-Hearing Submission, ¶¶ 16-17.

reinstatement either, particularly in view of the fact that the units called were from a rather distant region.²³⁵

163. The reinstatement of Mr. Ovcharenko was swiftly completed that very day and the lawsuits and appeals commenced by the departing Chairman Mr. Glushko were successively dismissed by the Avtozadovsky District Court of Kremenchug and the Poltava Region Court of Appeals. An unsuccessful takeover on the part of Mr. Glushko on 23 October 2007 has also been alleged by a witness for the Respondent.²³⁶ As will be examined further below Ukratnafta's management was completely reorganized following Mr. Ovcharenko's reinstatement. It must also be noted that both the reinstatement of Mr. Ovcharenko and the reorganization of the company were closely linked to the interests of Korsan as explained in Mr. Kolomoisky's statement at the hearing.²³⁷
164. An issue related to these events is that concerning the criminal investigations that were initiated because of the complaints lodged about the alleged illegality of the enforcement proceedings, disruption of public order and misappropriation of Ukratnafta's seal and stamp. The investigations discussed earlier were either quashed by the Avtozavodsky Regional Court or closed by administrative decision.
165. Two key witnesses appeared in connection with these investigations, Mr. Oleg Savchenko, the investigation officer, on behalf of the Claimant, and Mr. Yuri Bergelson, a lawyer for Mr. Ovcharenko, who appeared as a witness called by the Tribunal. While the first was of the view that the investigations were impeded by the officers in charge of the intervening agencies so as to prevent the findings and completion, including allegations of the Prosecutor having been paid US\$ 25 million,²³⁸ the second witness vehemently denies any such allegations²³⁹ and affirmed that Mr. Savchenko had misapplied the provisions of Articles 293 and 357 of the Criminal Code governing such investigations, which was the true reason for their termination.
166. Besides the fact that the two witnesses do not appear to love each other, the Tribunal finds that their respective credibility is quite limited. Mr. Savchenko's account of a meeting purportedly

²³⁵ Witness Testimony of Savchenko, Transcript (20 March 2013), 102:20-25 to 103:1-7, 103:8-14; Claimant's Post-Hearing Submission, ¶ 20.

²³⁶ First Witness Statement of Liapka, ¶¶ 37-39.

²³⁷ Transcript (25 March 2013), 162:10-13; Claimant's Post-Hearing Submission, ¶ 7.

²³⁸ Witness Statement of Savchenko, ¶ 23; Witness Testimony of Savchenko, Transcript (20 March 2013), 90:25 to 92:1-16.

²³⁹ Witness Testimony of Bergelson, Transcript (21 March 2013), 4:11-18, 6:1-25 to 7:1-6.

held with Mr. Bergelson is rather vague, and the allegations of the latter attempting to influence him and referring to bribes cannot be adequately established on this basis. Mr. Bergelson's testimony is even less credible as he repeatedly offered contradictory versions of his role in these investigations and proceedings and how he became involved in them.²⁴⁰

167. Be that as it may, the Tribunal cannot fail to notice that the investigations were not carried out in spite of the fact that the complaints about the occupation and taking over of the Kremenchug refinery offered enough elements that would justify the thoroughness of these proceedings.
168. The facts discussed above show that immediately following his reinstatement Mr. Ovcharenko proceeded to the complete reorganization of Ukratnafta, both at the managerial level and as regards the composition of the governing organs of the company. While this fact has not been disputed, the reasons motivating such measures have been a matter of total disagreement between the Parties.
169. Whether or not the company had been in a state of mismanagement under the former Chairman, Mr. Glushko, and whether there were serious financial consequences arising from such situation, or whether the reality was exactly the opposite,²⁴¹ the measures taken in order to ban Mr. Glushko from the refinery do not help the Respondent's argument that all decisions taken by the incoming Chairman were purely a matter of managerial reorganization. Besides his role as former Chairman of the Management Board, Mr. Glushko had nonetheless remained a member of such organ and was thus, as argued by the Claimant, deprived of his corporate rights and relieved of his duties.
170. Moreover, it appears well established that the incoming Chairman considerably expanded his powers and proceeded to appoint a number of consultants and advisors responding to his authority,²⁴² a plan that appears to have been prepared in advance of the 19 October 2007 events.²⁴³ The aggregate of such decisions led to the dismissal or resignation of the members of the Management Board nominated by the Tatarstan shareholders and a number of staff members related to the Tatarstan interests in the company.

²⁴⁰ Claimant's Post-Hearing Submission, ¶ 21 n. 57.

²⁴¹ Witness Testimony of Fedotov, Transcript (20 March 2013), 1:10-25 to 7:1-25.

²⁴² First Witness Statement of Fedotov, ¶¶ 53-63; Witness Testimony of Fedotov, Transcript (20 March 2013), 36:4-25 to 37:1-5.

²⁴³ Witness Testimony of Liapka, Transcript (25 March 2013), 6:2-5, 7:14-21.

171. The Respondent's argument to the effect that there was a lack of cooperation of such board members is credible as the confrontation and corporate struggle between shareholders and management continued unabated during all this period, but remedying such situation should not have been achieved by measures of the kind discussed but by means of the mechanisms of corporate governance, including the Supervisory Board and ultimately the General Shareholders Meeting. Equally serious is the fact that the Claimant's allegation that the new management ceased to provide it with the monthly financial reports appears not to have been contradicted, a decision which quite clearly interferes with essential corporate rights of shareholders. Whether the Claimant complained of this irregularity to the authorities or whether the Tatarstan Trade Representative in Ukraine protested does not detract from the fact that such irregularity existed.

B. ANNULMENT OF SHAREHOLDINGS IN UKRTATNAFTA

1. Court Decisions on the Claimant's Shareholdings in Ukrtatnafta

(a) Undisputed Facts

i. Case 32/1

172. The events discussed were followed late in 2007 by proceedings before the Ukrainian courts concerning the Claimant's legal position as a shareholder in Ukrtatnafta—and in particular the propriety of the Claimant's acquisition of its Ukrtatnafta shares
173. In fact, on 19 December 2007, the Prosecutor commenced proceedings on behalf of the Government and the Ministry of Fuel and Energy of Ukraine before the Kyiv Economic Court under Case 32/1 for, among other things, the invalidation of the shareholder resolutions that had approved the modification of the capital contribution of the Tatarstan shareholders and the liquidation of Ukrtatnafta.²⁴⁴ Korsan filed a statement of claim in support of the Prosecutor's claim on 13 March 2008.²⁴⁵ In bringing this claim, the Prosecutor contended that he did not learn of the violations that were the subject of Case 32/1 until he received an 28 April 2007 letter from the then Minister of Fuel and Energy, Mr. Boyko, who complained, following an

²⁴⁴ Joint Factual Chronology, ¶ 113; Second Counter-Memorial, ¶ 17.

²⁴⁵ Joint Factual Chronology, ¶ 121.

investigation of Ukratnafta carried out by the Ukrainian Audit Control Board,²⁴⁶ that the formation of the authorized share capital of Ukratnafta violated Ukrainian law.²⁴⁷

174. On 4 September 2008, the Kyiv Economic Court accepted the Prosecutor's arguments on the applicable three-year statute of limitations and found that the claim was not barred by it,²⁴⁸ declared that the change in the form of the capital contribution of the Tatarstan shareholders and the modification of Ukratnafta's constituent documents with regard to it was illegal, and thereby set aside the 1997 and 1998 General Shareholders Meeting resolutions with respect to those issues;²⁴⁹ and ordered that Ukratnafta be cancelled from the trade register and liquidated.²⁵⁰ The reasoning behind the Court's decision to set aside the 1997 and 1998 General Shareholders Meeting resolutions authorizing the change in form of the capital contribution of the Tatarstan shareholders is similar to that employed by the Economic Court of the Poltava Region in Case 17/178 on 3 November 2009, which will be discussed in detail below.²⁵¹
175. Several parties appealed this decision to the Kyiv Economic Court of Appeal, namely the Prosecutor, on 10 September 2008;²⁵² Naftogaz, on 11 September 2008;²⁵³ the Cabinet of Ministers of Ukraine, on 12 September 2008;²⁵⁴ and the Claimant, also on 12 September 2008.²⁵⁵
176. On 14 May 2009, the Kyiv Economic Court of Appeal confirmed the renewal of the limitation period; upheld the nullification of the 1997 and 1998 General Shareholders Meeting resolutions and all versions of the Incorporation Agreement that approved the modification in the form of the contribution of the Tatarstan shareholders; and reversed the order that Ukratnafta be cancelled from the trade register and liquidated.²⁵⁶ The Higher Economic Court confirmed this judgment on 20 August 2009.²⁵⁷ On 27 October 2009, the Supreme Court of Ukraine upheld the

²⁴⁶ Memorial, ¶ 165.

²⁴⁷ Second Counter-Memorial, ¶ 58.

²⁴⁸ Memorial, ¶¶ 168-172.

²⁴⁹ Memorial, ¶ 176.

²⁵⁰ Memorial, ¶ 176; Joint Factual Chronology, ¶ 135.

²⁵¹ Respondent's Counter-Memorial, ¶ 192.

²⁵² Joint Factual Chronology, ¶ 137.

²⁵³ Joint Factual Chronology, ¶ 138.

²⁵⁴ Joint Factual Chronology, ¶ 139.

²⁵⁵ Joint Factual Chronology, ¶ 140.

²⁵⁶ Joint Factual Chronology, ¶ 158; Memorial, ¶¶ 181-182; Transcript (18 March 2013), 199:15-25.

²⁵⁷ Joint Factual Chronology, ¶ 169.

20 August 2009 judgment of the Higher Economic Court,²⁵⁸ and rejected the cassation appeal filed by the Claimant on June 2009.²⁵⁹

177. On 18 April 2011, the Kyiv Economic Court of Appeal dismissed the application for review of the case.²⁶⁰

ii. Case 17/178

178. Before Case 17/178 is discussed in detail, it should be noted that Ukratnafta filed a similar claim—in what was to be Case 17/1—against the Republic of Tatarstan, Infosistema (the new share register of Ukratnafta that was controlled by the Privat Group), and ING Bank Ukraine (the nominal holder of the Republic of Tatarstan's shares in Ukratnafta) on 18 December 2008 to invalidate the shareholdings of the Republic of Tatarstan based on the alleged illegality of the modification of its capital contribution to Ukratnafta from “[a] parcel of shares in economic entities of oil refining complex [...] the right to develop oil deposits, and other state-owned assets of enterprises and organizations of the Republic of Tatarstan”²⁶¹ to shares in OAO Tatneftprom, one of the founding Ukratnafta shareholders from Tatarstan.²⁶²

179. The procedural history of Case 17/1 is as follows. On 13 March 2009, the Economic Court of the Poltava Region “decide[d] to reinstate the period of limitations for Ukratnafta,” and invalidated the share purchase agreement for the purchase of 28% of Ukratnafta's shares by the Republic of Tatarstan.²⁶³ The Kyiv Interregional Economic Court of Appeal reversed this decision on 22 July 2009.²⁶⁴ On 25 August 2009, the Higher Economic Court granted Ukratnafta's cassation appeal and reversed the decision of the Kyiv Interregional Economic Court of Appeal.²⁶⁵ On 3 November 2009, the Supreme Court rejected the cassation appeal filed by the Republic of Tatarstan against the judgment of the Higher Economic Court.²⁶⁶ As the

²⁵⁸ Joint Factual Chronology, ¶ 179.

²⁵⁹ Joint Factual Chronology, ¶ 160.

²⁶⁰ Joint Factual Chronology, ¶ 198.

²⁶¹ Memorial, ¶ 17, *citing to* the Decree of the President of Tatarstan No. UP-883 “On the Establishment of Transnational Financial and Industrial Oil Company Ukratnafta”, 13 December 1994 (REX-6); Counter-Memorial, ¶ 30.

²⁶² Counter-Memorial, ¶ 46; Memorial, ¶ 20.

²⁶³ Joint Factual Chronology, ¶ 151.

²⁶⁴ Joint Factual Chronology, ¶ 167.

²⁶⁵ Joint Factual Chronology, ¶ 171.

²⁶⁶ Joint Factual Chronology, ¶ 183.

Respondent has pointed out, the Claimant does not make any claim in respect of Case 17/1,²⁶⁷ which is why it will not be discussed in further detail here.

180. Case 17/178 was commenced on 31 August 2009, when Ukratnafta sued the Claimant and other parties before the Economic Court of the Poltava Region to seek invalidation of the Claimant's purchase of Ukratnafta shares, based on the holding in Case 32/1.²⁶⁸ To establish that its claim was not barred by the applicable statute of limitations, Ukratnafta argued that it was unable to challenge the validity of the General Shareholders Meetings and share purchase agreements relating to the form of the contributions of the Tatarstan shareholders prior to the decision in Case 32/1.²⁶⁹
181. On 29 October 2009, the Deputy President of the Economic Court of the Poltava Region dismissed the challenge that the Claimant had launched against one of the judges hearing the cases,²⁷⁰ in which the Claimant had alleged that the particular judge was manifestly biased against the Claimant as he had decided against the Republic of Tatarstan in Case 17/1.²⁷¹
182. On 3 November 2009, the Economic Court of the Poltava Region accepted Ukratnafta's arguments on the statute of limitations and found that its claim was not barred by it; held that the shareholder resolutions accepting a modification of the Claimant's contribution from fixed assets to cash were unlawful; and invalidated the Claimant's share purchase and ordered the return of its shares to Ukratnafta.²⁷²
183. Specifically, the Court found that the Claimant's contribution of fixed assets relating to the operation of specified oil wells—like the stated and actual contribution by the SPFU of the Kremenchug refinery—was essential to establishing Ukratnafta and to fulfilling the objective for its establishment.²⁷³ The resolution during the General Shareholders Meeting dated 10 June 1998 that permitted a modification in the Claimant's contribution to the authorized capital of

²⁶⁷ Counter-Memorial, ¶ 21.

²⁶⁸ Joint Factual Chronology, ¶ 172; Memorial, ¶ 224; Transcript (27 March 2013), 67:24-25 to 68:1-5.

²⁶⁹ Counter-Memorial, ¶¶ 202-203; Transcript (27 March 2013), 68:8-21.

²⁷⁰ Joint Factual Chronology, ¶ 181.

²⁷¹ Memorial, ¶ 226.

²⁷² Joint Factual Chronology, ¶ 182, Memorial, ¶ 230; Counter-Memorial, ¶ 123.

²⁷³ Counter-Memorial, ¶ 124.

Ukratnafta therefore violated the Ukratnafta Treaty, the Ukrainian Constitution, Decree No. 704/94, and the Resolution of the Cabinet of Ministers No. 487.²⁷⁴

184. On the basis that the Claimant did not pay for its shares in the form specified by the above-mentioned authorities, the Court found that the Claimant had breached Article 8(3) of the Law of Ukraine “On Securities and Exchange,” which conditions the transfer of shares on the full payment for them.²⁷⁵ It thus set aside Option Agreement No. 77 of 20 May 1998 between Ukratnafta and Zenit Bank, the 16 June 2000 Share Purchase Agreement between Ukratnafta and Zenit Bank, and the 15 August 2000 share transfer on the basis of which the Claimant had obtained its shares, and ordered the Claimant to return its shares to Ukratnafta.²⁷⁶
185. The Kyiv Interregional Economic Court of Appeal affirmed this ruling on 23 December 2009.²⁷⁷ The Higher Economic Court dismissed the Claimant’s cassation appeal of this ruling to the Supreme Court on 10 February 2010.²⁷⁸ And on 26 May 2010, the Higher Economic Court dismissed the appeal of the Claimant against its 10 February 2010 ruling.²⁷⁹

(b) Disputed Facts

- i. The Courts’ Alleged Non-Application in Cases 32/1 and 17/178 of the Statute of Limitations

The Claimant’s Position

186. The Claimant maintains that the claims in Cases 32/1 and 17/178 were time-barred under the applicable three-year statute of limitations under Ukrainian law.²⁸⁰ Specifically, the Claimant alleges that the limitation period commences when persons know or should have known of the violation of their rights;²⁸¹ that the proposition stating that the statute of limitations can be disregarded for as long as the admission of a claim would vindicate a right is unsupported;²⁸² and that, in deciding whether to set aside limitation periods, the Ukrainian courts may exercise

²⁷⁴ *Id.*

²⁷⁵ Counter-Memorial, ¶ 125.

²⁷⁶ Memorial, ¶ 234; Counter-Memorial, ¶ 126.

²⁷⁷ Joint Factual Chronology, ¶ 183.

²⁷⁸ Joint Factual Chronology, ¶ 191.

²⁷⁹ Joint Factual Chronology, ¶ 194.

²⁸⁰ Transcript (18 March 2013), 80:14-17; Claimant’s Post-Hearing Submission, ¶ 60.

²⁸¹ Second Memorial, ¶ 110; Transcript (18 March 2013), 79:9-18.

²⁸² Second Memorial, ¶ 112-113.

“substantial discretion” but not unfettered discretion,²⁸³ with the former requiring the support of “material reasons,”²⁸⁴ such as “objectively insurmountable” obstacles that prevented a party from bringing a lawsuit to defend its rights.²⁸⁵ There were no “material reasons” nor “objectively insurmountable” obstacles in Cases 32/1 and 17/178.²⁸⁶

187. Turning to Case 32/1, the Claimant alleges that, as several Ukrainian government officials attended the 1997 and 1998 General Shareholders Meetings, the approval of the shareholder resolutions authorizing the changes to the amendment documents triggered the running of the three-year prescription period.²⁸⁷ Moreover, the Claimant observes that the Prosecutor sought to annul Article 5 of Ukratnafta’s 1995 Incorporation Agreement in Case 8/604 which commenced in 2002; therefore, his statement that he learned of the relevant amendments to the Ukratnafta documents only in July 2007 was clearly and demonstrably false.²⁸⁸ Finally, the 5 August 2010 application of the Cabinet Ministers of Ukraine (“CMU”) to reopen Case 32/1 stated that the Prosecutor “knew that [he] had valid reasons for filing a claim over violations of procedure of incorporation of [Ukratnafta] on 25 November 2003,”²⁸⁹ which was the date of a letter from the Prosecutor to the Ukrainian Parliament, in which the Prosecutor highlighted a resolution of the General Shareholder Meeting of 19 July 1997.²⁹⁰ Neither the Prosecutor nor the Ministry of Justice disclosed these facts, and the Kyiv Economic Court rejected an application by Seagroup that the Prosecutor be ordered to produce documents relating to the 2002 and 2004 inspections of Ukratnafta, which would have cast doubt on the Prosecutor’s claim that he had no knowledge of the relevant facts before 2007.²⁹¹

188. Turning then to Case 17/178, the Claimant states that there was no plausible basis for the Economic Court of the Poltava Region to have found that the Prosecutor had only learned of the source of the violation of Ukratnafta’s rights either when Case 32/1 was reviewed in 2008 or during a 2007 audit; it points out that Ukratnafta had known of its constituent documents, the relevant resolutions of the General Shareholders Meetings, the shareholder transactions it had

²⁸³ Second Memorial, ¶ 114.

²⁸⁴ Second Memorial, ¶ 115.

²⁸⁵ Second Memorial, ¶ 116.

²⁸⁶ Second Memorial, ¶ 117.

²⁸⁷ Second Memorial, ¶ 124; Transcript (18 March 2013), 59:23-60:3.

²⁸⁸ Second Memorial, ¶ 119; Claimant’s Post-Hearing Submission, ¶¶ 32-33.

²⁸⁹ Second Memorial, ¶¶ 120-121.

²⁹⁰ Second Memorial, ¶ 122.

²⁹¹ Second Memorial, ¶ 123; Transcript (18 March 2013), 60:15-19.

entered into, and its shareholder contributions for years.²⁹² The Claimant rejects the argument that the Respondent could not have sought the annulment of the share purchase agreements with Zenit Bank and Tatneft until Case 32/1 was decided²⁹³ by identifying the legal alternatives open to the Respondent that would have resulted in its desired outcome—the annulment of the share purchases—without the annulment of the General Shareholders Meetings’ resolutions.²⁹⁴

The Respondent’s Position

189. The Respondent alleges that the Prosecutor was only informed of the violations that were the subject of Case 32/1 when he received a letter from Mr. Boyko on 28 April 2007,²⁹⁵ after which he promptly launched an investigation and filed Case 32/1.²⁹⁶ It dismisses as irrelevant the Claimant’s speculation on Mr. Boyko’s motives for writing this letter.²⁹⁷ While the Prosecutor had investigated the 1998 General Shareholders Meeting, which amended the Ukratnafta constituent documents in a prior case, Case 8/604, as well as the devaluation of the Kremenchug refinery, that case had not involved the compatibility of the changes of the Claimant’s contribution with the Ukratnafta Treaty.²⁹⁸ Similarly, the 25 November 2003 letter of the Prosecutor to which the Claimant referred was written in response to a request that the Prosecutor investigate matters relating to the alleged privatization of the Respondent’s shareholding in Ukratnafta, which did not involve the change in the Claimant’s contribution and could not therefore support the contention that the Prosecutor examined the circumstances of Tatneft’s purchase of Ukratnafta’s shares at that time.²⁹⁹ Finally, the CMU had no basis to claim in its 5 August 2010 application to reopen Case 32/1 that the Prosecutor knew of the violations resulting from the change in the Claimant’s contribution as early as 2003.³⁰⁰ There is as such no basis for the contention of the Claimant that the Court had accepted the Prosecutor’s representations even if suspecting them to be false.³⁰¹

²⁹² Memorial, ¶ 228; Second Memorial, ¶ 129; Claimant’s Post-Hearing Submission, ¶¶ 60-61.

²⁹³ Second Memorial, ¶ 130; Claimant’s Post-Hearing Submission, ¶ 63.

²⁹⁴ Second Memorial, ¶¶ 131-134.

²⁹⁵ Second Counter-Memorial, ¶¶ 60-61; Transcript (18 March 2013), 188:13-16; 191:13-16.

²⁹⁶ Transcript (27 March 2013), 107:3-7.

²⁹⁷ Transcript (27 March 2013), 106:19-24.

²⁹⁸ Second Counter-Memorial, ¶¶ 65-66; Transcript (18 March 2013), 219:2-11; Transcript (27 March 2013), 112:4-16, 114:3-8.

²⁹⁹ Second Counter-Memorial, ¶¶ 67-68; Respondent’s Post-Hearing Memorial, ¶ 37.

³⁰⁰ Second Counter-Memorial, ¶¶ 70-71.

³⁰¹ Respondent’s Post-Hearing Memorial, ¶ 37.

190. Referring to Article 29(2) of the Economic Procedure Code, the Respondent argues that the knowledge of both the SPFU and other public officials could not be imputed to the Prosecutor because his function is to protect State interests without representing any State organ,³⁰² which means that only the knowledge of the Prosecutor is relevant for the statute of limitations.³⁰³
191. The Respondent concludes by stating that, given the discretion enjoyed by the Ukrainian courts in assessing time periods, the Prosecutor would have known that his initiation of Case 32/1 was at least reasonably tenable,³⁰⁴ and maintains that the statute of limitations only commenced when the Prosecutor had completed his investigation and was satisfied that Ukrainian law had been violated.³⁰⁵
192. As to the acceptance by the Kyiv Economic Court of Case 32/1, the Respondent maintains that there is no evidence that the belated filing of the Prosecutor was in bad faith;³⁰⁶ contends that the Court thoroughly considered but then rejected the arguments that the Claimant made on the conduct of the Prosecutor;³⁰⁷ and notes that the Claimant ignores the discretion enjoyed by the courts in determining the application of the statute of limitations.³⁰⁸ The Respondent also contends that the exercise of judicial discretion must be assessed on a case-to-case basis, given that there is no statutory or jurisprudential definition of materiality—specifically, that a “material reason” to extend a prescription period does not translate to the impossibility of filing a case within the said period—and in this case, the discretion was properly exercised.³⁰⁹
193. As to Case 17/178, the Respondent explains that the Economic Court of the Poltava Region extended the applicable prescription period based on the decision in Case 32/1,³¹⁰ which established that Ukratnafta’s rights had been violated.³¹¹ Moreover, while Ukratnafta was not

³⁰² Transcript (18 March 2013), 222:17-20; Respondent’s Post-Hearing Memorial, ¶ 38.

³⁰³ Second Counter-Memorial, ¶¶ 72-78.

³⁰⁴ Second Counter-Memorial, ¶¶ 79-82.

³⁰⁵ Second Counter-Memorial, ¶ 83.

³⁰⁶ Second Counter-Memorial, ¶ 86.

³⁰⁷ Second Counter-Memorial, ¶ 87.

³⁰⁸ Second Counter-Memorial, ¶ 88; Transcript (18 March 2013), 222:1-6.

³⁰⁹ Second Counter-Memorial, ¶¶ 89-90; Transcript (27 March 2013), 110:16-25 to 111:1-15; Respondent’s Post-Hearing Memorial, ¶ 39.

³¹⁰ Second Counter-Memorial, ¶¶ 93-95, 102; Transcript (18 March 2013), 201:14-15.

³¹¹ Second Counter-Memorial, ¶¶ 96-97; Transcript (18 March 2013), 202:1-8.

authorized to challenge resolutions passed at its own General Shareholders Meetings,³¹² it was obliged to challenge the validity of the share purchase agreements once Case 32/1 had nullified the underlying shareholder resolutions, in order to comply with the statute of limitations.³¹³ Lastly, whether any legal alternatives to the invalidation of the relevant share purchase agreements were open to Ukratnafta (as the Claimant suggests) is irrelevant to the question of whether the Court had properly exercised its discretion with regard to the statute of limitations.³¹⁴ The Respondent also points out that the Claimant does not adduce any authority for its contention that legal alternatives to the invalidation of the relevant share purchase agreements were open to Ukratnafta, which in any case would be irrelevant to an evaluation of the court's factual determination, and notes that the Claimant never raised this argument in the Ukrainian courts.³¹⁵

ii. The Merits of the Court Decisions

The Claimant's Position

194. As a preliminary matter, the Claimant alleges that the founding shareholders all agreed that it would be impracticable for the Tatarstan parties to contribute oilfields and oil-related assets due to high exploration and extraction costs, the Ukrainian economic crisis that affected the market for refined oil products, and potential problems posed by the legislation then in force; and thereby decided on other forms of contribution from the Tatarstan shareholders.³¹⁶
195. The Claimant then states that the court decisions annulling the shares of the Tatarstan parties due to the inadequacy of their asset contributions have little basis in Ukrainian law because neither the Ukratnafta Treaty nor any legal provision refers to the Tatarstan shareholders' contributions or establishes "principles and rules" concerning them.³¹⁷ Moreover, the Ukratnafta shareholders were empowered to amend the Incorporation Agreement and Charter without governmental approval.³¹⁸

³¹² Second Counter-Memorial, ¶¶ 98-99; Transcript (18 March 2013), 223:23-25 to 224:1-2; Transcript (27 March 2013), 114:17-19.

³¹³ Second Counter-Memorial, ¶ 100; Transcript (27 March 2013), 114:19-25 to 115:1-6.

³¹⁴ Second Counter-Memorial, ¶ 103; Transcript (18 March 2013), 224:9-22.

³¹⁵ Transcript (27 March 2013), 115:16-25 and 116:1-19; Respondent's Post-Hearing Memorial, ¶¶ 40-41.

³¹⁶ Memorial, ¶ 19.

³¹⁷ Second Memorial, ¶¶ 142-152; Claimant's Post-Hearing Submission, ¶ 37.

³¹⁸ Second Memorial, ¶¶ 151-165; Transcript (18 March 2013), 61:23-25 to 62:1-8.

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³¹² Second Counter-Memorial, ¶¶ 98-99; Transcript (18 March 2013), 223:23-25 to 224:1-2; Transcript (27 March 2013), 114:17-19.

³¹³ Second Counter-Memorial, ¶ 100; Transcript (27 March 2013), 114:19-25 to 115:1-6.

³¹⁴ Second Counter-Memorial, ¶ 103; Transcript (18 March 2013), 224:9-22.

³¹⁵ Transcript (27 March 2013), 115:16-25 and 116:1-19; Respondent's Post-Hearing Memorial, ¶¶ 40-41.

³¹⁶ Memorial, ¶ 19.

³¹⁷ Second Memorial, ¶¶ 142-152; Claimant's Post-Hearing Submission, ¶ 37.

³¹⁸ Second Memorial, ¶¶ 151-165; Transcript (18 March 2013), 61:23-25 to 62:1-8.

196. With regard to the first point, the Claimant clarifies that Article 2 of the Ukrtatnafta Treaty did not define the nature and content of the “principles and provisions” to be adopted by the Governments or make these principles an integral part of the Ukrtatnafta Treaty or legislation,³¹⁹ and the Ukrainian Presidential Decree did not create obligations for the Claimant or any of the other Tatarstan shareholders.³²⁰ Moreover, Resolution No. 487 of 4 July 1995 of the CMU did not address the form of contributions of the Claimant.³²¹
197. The Claimant alleges that the fifteen-year life span of Ukrtatnafta and its profitability for a time rebut the argument that the change in the contribution from the Claimant and the Republic of Tatarstan made it impossible for Ukrtatnafta to achieve its objective³²² or that the Claimant’s contribution of oil equipment was an essential condition for the creation of Ukrtatnafta.³²³ It also points out that, if it were true that Ukraine would not have agreed to sign the Ukrtatnafta Treaty and the Incorporation Agreement had it known that the intended contributions of the Tatar parties would not be honored, then the Ukrtatnafta Treaty would have addressed this matter.³²⁴
198. In support of its position that Ukrainian law allowed Ukrtatnafta’s shareholders to amend the company’s Incorporation Agreement and Charter without governmental approval,³²⁵ the Claimant refers to Article 12 of the Ukrtatnafta Treaty, which does not impose the requirement of governmental approval for the amendment of Ukrtatnafta’s constituent instruments³²⁶ and the Ukrtatnafta Treaty and Decree No. 704/94, which do not authorize the Ukrainian and Tatarstan Governments to approve Ukrtatnafta’s constituent documents or to veto the General Shareholders Meeting’s decisions amending them. At the same time, Article 8(5) of the Ukrtatnafta Treaty does empower the General Shareholders Meeting to approve the constituent documents.³²⁷ The Claimant further points out that neither the Ukrtatnafta Treaty nor Decree

³¹⁹ Second Memorial, ¶ 143.

³²⁰ Second Memorial, ¶¶ 147, 147 n. 305.

³²¹ Second Memorial, ¶ 148; Transcript (18 March 2013), 61:17-23.

³²² Second Memorial, ¶ 150.

³²³ Second Memorial, ¶ 151.

³²⁴ Second Memorial, ¶ 152.

³²⁵ Second Memorial, ¶¶ 153-155; Transcript (18 March 2013), 71:17-24.

³²⁶ Second Memorial, ¶¶ 157-158.

³²⁷ Second Memorial, ¶ 160.

No. 704/94 contains “basic principles” concerning the required contributions of the shareholders or otherwise defines the content of Ukratnafta’s constituent documents.³²⁸

199. The Claimant observes that the Respondent did in fact approve the 1997 and 1998 General Shareholders Meetings’ resolutions through the SPFU³²⁹ and high-ranking Government officials who attended them and/or served on the Supervisory Board at those times.³³⁰
200. The Claimant also characterizes the Courts’ conclusions on Article 8(3) of the Law of Ukraine “On Securities and Stock Exchange” as “grossly inconsistent and completely divorced from the facts that the courts themselves [had] ascertained” because on the one hand, the Courts acknowledged that the Claimant had paid US\$ 31 million in cash as its contribution to Ukratnafta’s capital, while on the other hand, the plain language of Article 8(3) makes clear that its application could have been triggered only if the Claimant had made no contribution at all.³³¹
201. The Claimant’s expert on Ukrainian law confirms that, under Article 48(2) of the Ukrainian SSR Civil Code, the Ukrainian courts were obliged to grant restitution to Tatneft after invalidating its share acquisitions. According to the expert, courts had to apply the provision *proprio motu*, irrespective of whether any party actually requests restitution, as decided by the court in the *Dekon* case.³³² Accordingly, a court that invalidates an agreement, should apply Article 48(2) of the Ukrainian SSR Civil Code and “return the property to the parties whose contract has been subject to invalidation.”³³³ The Claimant highlights that the Economic Court of the Poltava Region in fact did not order Ukratnafta to return the cash payment the Claimant made, which amounted to US\$ 31 million.³³⁴
202. Lastly, the Claimant questions the entry into force of the Ukratnafta Treaty—on which the Ukrainian courts relied heavily—as a matter of public international law as well as Ukrainian law. First, under public international law, an international agreement is an agreement between

³²⁸ Second Memorial, ¶ 161; Transcript (18 March 2013), 61:17-25 to 62:1-3; Claimant’s Post-Hearing Submission, ¶ 40.

³²⁹ Second Memorial, ¶ 163.

³³⁰ Second Memorial, ¶ 164.

³³¹ Memorial, ¶¶ 231-233.

³³² Second Expert Report of Toms, at 69; Transcript (25 March 2013), 86:1-5.

³³³ Transcript (25 March 2013), 89:10-17.

³³⁴ Memorial, ¶ 235.

two States which would not be the case when it comes to the Ukrtatnafta Treaty.³³⁵ Second, according to Article 13 of the Ukrtatnafta Treaty, it would enter into force as of the date of the last notification of compliance by the Parties with their domestic procedures. The Claimant notes that there is no evidence in the records that such notifications had been exchanged.³³⁶ Third, as a matter of Ukrainian law, it is undisputed that the Ukrtatnafta Treaty was never approved by the Ukrainian Council of Ministers under Article 9(b) of the (then applicable) 1993 Law on International Agreements.³³⁷

203. Countering the Respondent's position, the Claimant argues that, if the Ukrtatnafta Treaty had come into effect, the Ukrainian courts would not have been competent to address its alleged violations since Article 11 of the Ukrtatnafta Treaty provided that all disputes relating to its interpretation and fulfillment should be resolved by way of negotiations and consultations. Consequently, if Ukraine "really believed [that the Ukrtatnafta Treaty had been violated], it would have been required under Article 11 to address the matter with the Government of Tatarstan; not unilaterally through its own domestic judicial system".³³⁸
204. However, the Claimant does not deny that the Ukrtatnafta Treaty was "de facto followed up to a point."³³⁹
205. The Claimant adds that, in any event, it is immaterial whether the Ukrtatnafta Treaty became effective or not since it was superseded by the Incorporation Agreement and its subsequent amendments. It argues that the Tribunal has already decided that these later agreements are the decisive legal instruments in the present case. Relying on paragraphs 188 and 195 of the Tribunal's Partial Award on Jurisdiction, the Claimant maintains that Ukrtatnafta's shareholders unanimously decided that the Incorporation Agreement and its subsequent amendments would ultimately regulate the nature and size of the contributions to be provided by the Tatarstan shareholders.³⁴⁰ According to the Claimant, the Respondent has not shown any basis for revisiting the decisions made in the Partial Award on Jurisdiction.³⁴¹

³³⁵ Transcript (27 March 2013), 7:11-12.

³³⁶ Transcript (27 March 2013), 7:13-19, 8:13-17.

³³⁷ Transcript (27 March 2013), 7:20-25 to 8:1.

³³⁸ Transcript (27 March 2013), 11:19-25 to 12:1-12.

³³⁹ Transcript (27 March 2013), 9:8-10.

³⁴⁰ Transcript (27 March 2013), 9:16-25 to 10:1-19.

³⁴¹ Transcript (27 March 2013), 11:3-6.

The Respondent's Position

206. The Respondent argues that the invalidation of the Claimant's direct shareholdings in Case 17/178, as foreshadowed by Case 32/1, was reasonably tenable as a matter of Ukrainian law. It points out that there were seven court decisions on the merits in respect of Cases 32/1 and 17/178, and that the judges involved in each decision took the position that the change in the Claimant's capital contribution to Ukratnafta violated the Ukratnafta Treaty and Ukratnafta's other founding documents.³⁴²
207. As a preliminary point, the Respondent states that, while it had accepted the possibility that the specific details concerning the contribution of the Tatarstan shareholders may have been varied,³⁴³ it would not have agreed to sign either the Ukratnafta Treaty or the Incorporation Agreement had it known that the contribution of the Tatarstan shareholders would have been other than oil fields and fixed assets related to oil wells, as was the case here.³⁴⁴ This intention is reflected in the provisions of the Ukratnafta Treaty that concern the contribution from the Tatar side.³⁴⁵ Stating that the fundamental purpose of Ukratnafta was "to serve as an inter-state economic complex with combined production and refining capabilities," the Respondent further alleges that it donated the Kremenchug refinery to Ukratnafta on the basis that it would receive oil ownership rights in Tatarstan oil deposits and related oil production equipment, which would have the effect of ensuring a minimum supply of oil to the Kremenchug refinery.³⁴⁶ In Case 32/1, the Kyiv Economic Court accepted this view.³⁴⁷
208. As a further preliminary point, the Respondent discusses whether the Ukratnafta Treaty was effective under international law or whether it was incorporated into domestic Ukrainian legislation.³⁴⁸
209. The Respondent first clarifies that "under the Ukrainian regime, [the Ukratnafta Treaty] was effective as a matter of international law that binds the parties."³⁴⁹ First, Article 13 of the Ukratnafta Treaty, which pegs the effective date of the treaty as the "date of the last notice of

³⁴² Transcript (27 March 2013), 104:19-25 to 105:1-10.

³⁴³ Counter-Memorial, ¶ 33.

³⁴⁴ Counter-Memorial, ¶¶ 33, 56.

³⁴⁵ Transcript (27 March 2013), 117:4-23.

³⁴⁶ Counter-Memorial, ¶ 56.

³⁴⁷ Transcript (18 March 2013), 197:20-25 to 198:1.

³⁴⁸ Transcript (27 March 2013), 117:24-25 to 118:1-5.

³⁴⁹ Transcript (27 March 2013), 121:22-24; Respondent's Post-Hearing Memorial, ¶ 44.

compliance by the Parties with their domestic procedures,” is not clear about whether the treaty requires any further domestic procedure for it to take effect, but the Parties to the treaty did agree on immediate implementation without such a precondition.³⁵⁰ Second, while Article 2(3) of the Ukrainian Law on International Treaties assumes that international treaties are concluded on behalf of the Government of Ukraine, the Respondent explains that the distinction between those treaties and those that are concluded on behalf of Ukraine is merely internal and of no significance under international law.³⁵¹ In any case, the CMU specifically cited Article 2(3) in their orders with regard to the Ukrtatnafta Treaty, which therefore places this treaty in the category of an international or intergovernmental treaty.³⁵² Third, the CMU implemented the treaty, thereby signaling that the requirements of Article 13 of the Ukrtatnafta Treaty had been met from the Ukrainian side.³⁵³ The Respondent points out that the Republic of Tatarstan also considered the intergovernmental treaty to be effective and did not otherwise invalidate or withdraw from it.³⁵⁴

210. The Respondent then argues that, even if the Ukrtatnafta Treaty is not considered effective under international law, it still forms an integral part of the domestic legal order of Ukraine through the “doctrine of reference.”³⁵⁵ The Respondent cites to the decisions in Cases 32/1 and 17/178 that constantly upheld the proposition that the Ukrtatnafta Treaty was an integral part of Ukrainian legislation.³⁵⁶ It also points to several provisions in Ukrainian law that support this position, such as Article 4 of the Law on Enterprises, which states that “[i]f an international treaty or an international agreement to which Ukraine is a party establishes rules other than those set out in the Ukrainian legislation on enterprises, the rules of the international treaty or agreement shall apply,” and which does not specify that the ratification of a treaty is a precondition to its incorporation into domestic law.³⁵⁷ While a separate provision, Article 17 on the Ukrainian Law on International Treaties, states that “[i]nternational Agreements of Ukraine that are concluded and properly ratified constitute an integral part of the national legislation of

³⁵⁰ Transcript (27 March 2013), 118:18-25 to 119:1-6.

³⁵¹ Transcript (27 March 2013), 119:6-22.

³⁵² Transcript (27 March 2013), 119:23-25 to 120:1-3.

³⁵³ Transcript (27 March 2013), 120:4-19.

³⁵⁴ Transcript (27 March 2013), 120:20-25 to 121:1-21.

³⁵⁵ Transcript (27 March 2013), 122:2-5; Respondent’s Post-Hearing Memorial, ¶ 46.

³⁵⁶ Transcript (27 March 2013), 122:11-16.

³⁵⁷ Transcript (27 March 2013), 122:19-25 to 123:1-17.

Ukraine ...”, the Respondent clarifies that Article 17 refers to a category of intergovernmental treaties that is separate from the category covered by Article 4 of the Law on Enterprises.³⁵⁸

211. As for Article 9 of the Ukrainian Law on International Treaties, which states that “[t]he international agreements of Ukraine which are not subject to ratification, but are subject to approval, are approved as follows...,”³⁵⁹ the Respondent makes the following points. First, it is not clear whether Article 13 of the Ukrtatnafta Treaty requires approval in the form of some domestic procedure in order for it to be effective.³⁶⁰ Second, Article 9 does not indicate that every treaty must be ratified or approved to be effective, and in fact, most of Ukraine’s treaties are not ratified or approved.³⁶¹ Third, the CMU does not issue separate approvals of treaties that it has signed, which means that the category in Article 9 that actually requires a separate signature by the CMU after its approval signature is a “null set.”³⁶² And fourth, the approval for signature of the CMU of the Ukrtatnafta Treaty, in conjunction with the powers of the CMU under the relevant legislation, operate to make the Ukrtatnafta Treaty binding as part of Ukrainian domestic legislation.³⁶³
212. Turning then to the relevant cases, the Respondent first states that the courts in Cases 32/1 and 17/178 applied the systemic method of interpretation that is recognized by Ukrainian law³⁶⁴ and not the “literal and fragmentary reading of the Ukrtatnafta Treaty and related governing documents” allegedly employed by the Claimant and its experts in their consideration of the issue of the Claimant’s shareholdings.³⁶⁵ It then discusses the Ukrtatnafta Treaty and other related documents that governed the establishment and operation of Ukrtatnafta—which it stresses is not an ordinary Ukrainian joint stock company but is instead an inter-state economic complex that was established by a treaty³⁶⁶—to establish the importance placed on the form of

³⁵⁸ Transcript (27 March 2013), 123:18-25 to 124:1-6.

³⁵⁹ Transcript (27 March 2013), 124:13-16.

³⁶⁰ Transcript (27 March 2013), 124:21-25.

³⁶¹ Transcript (27 March 2013), 125:1-6.

³⁶² Transcript (27 March 2013), 125:7-13.

³⁶³ Transcript (27 March 2013), 125:14-25 to 126:1-9.

³⁶⁴ Transcript (18 March 2013), 215:11-16.

³⁶⁵ Counter-Memorial, ¶ 187.

³⁶⁶ Transcript (18 March 2013), 207:5-19.

contributions by the founding members, which support the necessity of requiring governmental approval for any material change to the company's founding documents.³⁶⁷

213. The Respondent also rejects the Claimant's argument that the consent of the Ukrainian Government was indirectly given through SPFU.³⁶⁸ In the Respondent's view, the SPFU's approval at the 1997 and 1998 General Shareholders Meetings did not imply the approval of these changes under the Ukrtatnafta Treaty, and moreover, the SPFU exceeded its authority in approving amendments to the Ukrtatnafta founding documents.³⁶⁹
214. The Respondent states that the Ukrainian courts' analysis and application of Article 8(3) of the Law of Ukraine "On Securities and Stock Exchange" in Case 17/178 was reasonably tenable, in that it was the change in the form of the Claimant's contribution to Ukrtatnafta that violated Article 8(3)'s requirement that it pay for its shares, as the said article requires proper—and not just any—payment, which translates to payment in the form prescribed in Ukrtatnafta's governing documents.³⁷⁰
215. The Respondent highlights the multiplicity of judges, at different courts, who considered the merits of both Cases 32/1 and 17/178.³⁷¹
216. The Respondent further clarifies that the Economic Court of the Poltava Region did not order the restitution of the cash payment made by Tatneft for its shares because Tatneft did not seek such restitution, for what the Respondent describes as strategic reasons.³⁷² The Respondent rejects the reliance of the Claimant's expert on the *Dekon* case as controlling authority for the proposition that courts should grant restitution even absent a request from the defendant that it do so, by explaining that *Dekon* contradicts the general trend of court decisions;³⁷³ that the Claimant's expert was only made aware of this case as a result of the Respondent's expert report;³⁷⁴ that the Ukrainian system does not recognize precedent in court cases;³⁷⁵ and that a

³⁶⁷ Second Counter-Memorial, ¶¶ 184-185, 187-193, 195; Transcript (18 March 2013), 216:19-25 to 217:1; Respondent's Post-Hearing Memorial, ¶ 47.

³⁶⁸ Transcript (18 March 2013), 206:3-7.

³⁶⁹ Second Counter-Memorial, ¶¶ 196-197.

³⁷⁰ Second Counter-Memorial, ¶¶ 198-199.

³⁷¹ Transcript (18 March 2013), 196:17-25 to 197:1.

³⁷² Transcript (18 March 2013), 225:24-25; 226:1-25, and 227:1.

³⁷³ Transcript (27 March 2013), 101:24-25 to 102:1-8.

³⁷⁴ Transcript (27 March 2013), 103:6-8.

³⁷⁵ Transcript (27 March 2013), 103:9-13.

2005 Supreme Court decision contradicted the position in *Dekon*.³⁷⁶ And lastly, the Respondent points out that Tatneft could have filed a counterclaim in the Ukrainian court proceedings to seek restitution, but failed to do so.³⁷⁷

2. The Tribunal's Considerations Concerning the Annulment of Tatneft's Shareholding in Ukratnafta

217. The Tribunal turns now to the discussion of the complex facts concerning the proceedings and decisions of the Ukrainian courts in respect of the validity of the Claimant's direct and indirect shareholdings in Ukratnafta as summarized above. This was yet another step in the process of corporate confrontation surrounding this case and one in which, besides the role of the courts, that of the Prosecutor, several government officials and the Korsan group becomes a salient feature of its developments. Although the Respondent is of the view that the events related to the reinstatement of Mr. Ovcharenko are peripheral to the main issues with which the arbitration is concerned in light of the evolution of the case, and that there is no proximate cause between such events and the alleged damages, the Tribunal tends to see a rather close link between all such events as they were a part of the corporate struggle described and the end goal of the control of Ukratnafta changing hands.

(a) The Issues Concerning the Amendment of Tatneft's Capital Contribution

218. Proceedings seeking the invalidation of Ukratnafta's shareholders resolution approving the modification of the capital contribution of the Tatarstan shareholders and the valuation of Ukratnafta were commenced as it has been explained by the Prosecutor before the Kyiv Economic Court on 19 December 2007 giving birth to Case 32/1. The issue arose as a consequence of a letter addressed to the Prosecutor by the Minister of Fuel and Energy dated 28 April 2007 explaining that, in light of investigations carried out, the formation of the authorized capital of Ukratnafta was in violation of Ukrainian law. The said Minister believed that by revaluing the amount represented by Ukraine's contribution of the Kremenchug refinery to a figure three times smaller, and increasing the value of the Tatarstan-contributed shares by means of a changed capital structure, the control of the company appeared to be the objective pursued.³⁷⁸ The Tribunal must also note in this respect the Claimant's argument to the effect

³⁷⁶ Transcript (27 March 2013), 103:14-25.

³⁷⁷ Transcript (27 March 2013), 103:5-10.

³⁷⁸ Letter from the Minister of Fuel and Energy to the Public Prosecutor General of Ukraine, dated 28 April 2007 (REX-145).

that the letter in question was sent by Minister Boyko, who prior to his ministerial position had been appointed Chairman of Ukratnafta's Management Board in 2001, and was based on the alleged illegalities brought forward by a Member of Parliament whose identity is not disclosed³⁷⁹ and whose letter was not produced,³⁸⁰ aspects that cast doubt on the independence of the Ministry in the events that the letter triggered. Because of Mr. Boyko's prior appointment as Chairman of Ukratnafta's Management Board it is likely, as Claimant argues, that he knew long before he sent the ministerial letter about the alleged illegalities.³⁸¹

219. In considering the question of the invalidation of the shareholders' resolution the Tribunal is mindful of two facts of importance. The first is that the Ukratnafta Treaty of Incorporation of 4 July 1995 had envisaged that the Tatarstan contribution to the company would consist of a guaranteed supply of oil with a certain minimum specified, just as the Agreement on Incorporation and Operation of Ukratnafta did. More specifically, the Presidential Decree of the Republic of Tatarstan dated 13 December 1994³⁸² envisaged as a capital contribution the shares it owned in certain economic entities concerned with oil production and the right to develop oil deposits, among other state-owned assets, so as to match the capital contribution of Ukraine, all of it in light of the concept of creating an integrated oil production and refining industry with the equal participation of Ukraine and Tatarstan. A number of other supplementary agreements and Orders had also relied on the equality of the contributions of the founding members, as the Kyiv City Economic Court concluded in its judgment of 4 September 2008 in Case 32/1 and as the Kyiv Economic Court of Appeals confirmed in its decision of 14 May 2009.
220. The second fact that needs to be taken into account in the consideration of this issue is that in the end such form of capital contribution was changed because of various alleged technical, economic and legal difficulties and as it no longer appeared to respond to the intent of establishing a full cycle of oil extraction and processing extending from the oil wells in Tatarstan to the Kremenchug refining in Ukraine. As a result the Tatarstan shares in Tatneft and Tatneftprom that were transferred were valued at US\$ 103.575 million, the Tatneft contribution at US\$ 1 million and the Zenit Bank shareholdings in trust for the latter company at US\$ 30 million. In turn the supply of oil to Ukratnafta did not meet the amounts specified on a yearly basis.

³⁷⁹ First Witness Statement of Liapka, ¶ 18; Second Witness Statement of Liapka, ¶ 3.

³⁸⁰ Claimant's Post-Hearing Submission, ¶ 27.

³⁸¹ *Id.*

³⁸² Decree of the President of Tatarstan, Dec. 13, 1994 (REX-6).

221. In spite of the resolutions in question having evidently departed from the original conception of the project, the Tribunal cannot fail to note first that such modifications were unanimously approved by the shareholders. More importantly, a number of high level officers of the Ukraine government were present at the General Shareholders Meetings held in 1997 and 1998 and concurred in the unanimous approval of the modifications introduced. Among such officials there was the Minister of Fuel and Energy, the Director of the State Property Fund and the Deputy Minister of Finance. A list of twenty-four Ukrainian officials participating in Ukratnafta's Supervisory Board through 2007 was provided by the Claimant at the hearing during closing arguments.
222. The Prosecutor's statement of claim filed in Case 32/1³⁸³ explaining that the initiation of the proceedings found its justification in "the injury caused to the economic interests of the State by the inefficient use of state-owned assets" does not seem to find support in the facts noted. It is not quite credible that each and every State official participating in the approval of the resolutions would have been unaware of such inefficiency had that been the case. Although the view that there is no evidence of the approval of the amendments in question by the Cabinet of Ministers of Ukraine or another authorized state agency has been put forth, the fact that all relevant ministries and agencies participated in the shareholders meetings noted appears as a sufficient manifestation of governmental authority to that effect. The Claimant argues with good reason that such official participation in the approval of the resolutions in question was enough to trigger the three-year prescription period that will be discussed below. The view expressed to the effect that such officials could only provide their comments in the pertinent meetings in a personal capacity is simply not tenable.³⁸⁴
223. At this point the Tribunal must note two troubling points in the developments taking place in connection with the amendment of capital contributions. The first is that the Prosecutor had already investigated Ukratnafta's foundation in the period 2002-2003, that is several years after the amendments had been introduced, but it was not until 2007 that proceedings were initiated on the argument that the letter to the Prosecutor by the Minister of Fuel and Energy following an audit control had prompted this action. While the delay might not be entirely unusual in a public service, this fact coincides with the second troubling point, namely that Korsan, the company controlled by the Privat Group, had acquired in January 2007 a 1% shareholding in Ukratnafta. From this point onwards the role of the Prosecutor in this case appears increasingly

³⁸³ Statement of Claim filed by the Ukrainian Prosecutor General's office on 19 December 2007 in the Case 32/1 (C-127).

³⁸⁴ Transcript (26 March 2013), 116:1-25 to 117:1-13.

questionable and the relationship between the proceedings initiated and the interests of Korsan or related companies becomes significantly connected in their timing.

(b) The Issues Concerning the Statute of Limitations

224. The arguments discussed became particularly relevant in the context of the discussion of the statute of limitations by the courts. The Prosecutor's statement of claim in Case 32/1 affirmed that he had not been aware of the violations of Ukrainian law allegedly taking place in connection with the amendment of capital contributions until he received the letter noted of the Minister of Fuel and Energy in 2007, thus justifying the Prosecutor's submission that the three-year limitation period established in Article 71 of the Ukrainian Civil Code should not apply. This statement of claim was promptly supported by Korsan in a submission to the Kyiv Economic Court. This Court concluded in its judgment of 4 September 2008 that it was "obvious" that the Prosecutor only learnt of such violations on the occasion of the Minister's letter and a report from the Main Auditing Office.
225. The Tribunal finds that the matter was less than obvious.³⁸⁵ This is so first because the Claimant has produced evidence to the effect that the Cabinet of Ministers in an application before the courts of 5 August 2010 concerning Case 32/1 stated that the Prosecutor General's office knew all the circumstances relating to Ukratnafta's authorized capital "back in 2003."³⁸⁶ The Tribunal cannot fail to note that the very fact that this application opposing annulment originated in the Ukrainian government is demonstrative of how the Respondent itself was not satisfied with the conclusions of the courts. It is also significant that the Kyiv Economic Court denied Seagroup's petition for the production of documents concerning the inspections of Ukratnafta by the Prosecutor General's office that were conducted during the preceding years. A letter from the Deputy Prosecutor General of Ukraine dated 25 November 2003,³⁸⁷ also submitted in evidence by the Claimant, shows that in fact the Prosecutor had been monitoring the process of capital contributions with anticipation, including the Prosecutor's Claim filed in 2002 in Case 8/604, in which invalidation of the Ukratnafta Agreement was sought insofar as the procedure for the payment of shares was concerned.³⁸⁸ The Claimant convincingly explains that in seeking to annul Article 5(5) of the Incorporation Agreement in 2002 in respect of

³⁸⁵ Transcript (18 March 2013), 58:23-25 to 61:1-9.

³⁸⁶ Application for Review of Court Decisions upon Discovery of New Facts of 5 August 2010 (C-457 Corr.).

³⁸⁷ Prosecutor's Letter of 25 November 2003 (C-460).

³⁸⁸ Statement of Claim in Case 8/604 of 16 September 2002 (C-294).

AmRuz and Seagroup, the Prosecutor necessarily knew then about the question concerning paragraph 3 of the same article authorizing Tatneft to pay in cash its capital contribution just as it authorized Tatarstan to pay its own contribution with shares in Tatneftprom.³⁸⁹

226. In its judgment of 4 September 2008 the Kyiv Economic Court concluded that because the Prosecutor had only learnt in 2007 about the breach of Ukrainian law allegedly committed by the change in the capital contributions of the Company the excuse invoked by the Prosecutor for missing the limitation period was admissible and the rights of the State were liable to protection. This Tribunal does not sit as a reviewer of the decisions of Ukrainian courts but it must nonetheless examine the merits of those excuses in light of their relevance to the resolution of the instant dispute.
227. Article 71 of the Ukrainian Civil Code provides unequivocally for a general limitation period of three years for the protection of infringed rights. In accordance with Article 76 of that Code such period begins from the date the right to claim comes into existence, with specific reference to the right of action beginning from the date that person is aware or should have known of the violation of its rights. It is only when the limitation period is missed for a material reason that the action may be admissible and the right in question shall be entitled to protection, as provided for under Article 80(2) of the Civil Code.³⁹⁰
228. The Claimant has convincingly explained in this context that the late letter of the Minister of Fuel and Energy to the Prosecutor is not a material reason justifying the dispensation of the limitation period because it does not show that there could have been an “objectively insurmountable” obstacle preventing a party from bringing an action in defense of its rights. The Respondent’s argument to the effect that there is no need to show objective impossibility as a ground for the renewal of the limitations period³⁹¹ is at odds with the specific provisions of the Civil Code on this matter. While the Respondent rightly points out that a material reason is not the same as impossibility and that the two should not be equated, as Mr. Toms states in his reports and testimony,³⁹² it does not appear to be enough that a court will consider itself satisfied that there is a valid excuse for failing to file on time as this is an entirely discretionary appreciation that cannot be reconciled with the need to apply a legal standard. This could lead to

³⁸⁹ Claimant’s Post-Hearing Submission, ¶ 32.

³⁹⁰ Expert Report of Martinenko, ¶ 14.

³⁹¹ First Expert Report of Belyanevich, ¶ 21; Transcript (26 March 2013), 25:17-25 to 26:1-21.

³⁹² Respondent’s Post-Hearing Memorial, ¶ 39; Second Expert Report of Toms, at 6; Witness Testimony of Toms, Transcript (26 March 2013), 22:13-25 to 26:1-21.

the extreme view that the protection of rights does not require the affected person to comply with any formal condition, including compliance with the limitations period,³⁹³ whereas total discretion of the courts, as a legal expert maintains,³⁹⁴ is incompatible with a legal standard.

229. The Tribunal considers, moreover, that it is the duty of the Prosecutor General to keep abreast of situations which have been the subject of an investigation and in this case the evidence adduced to the effect that he had investigated the capital contributions as early as 2002-2003 is demonstrative of the fact that such officer knew, or should have known, of the alleged problems subject to a late claim in 2007.
230. The Respondent's argument to the effect that the knowledge of public officials could not be imputed to the Prosecutor because his function is to protect State interests without representing any State organ, and consequently only his knowledge is relevant for the purposes of the statute of limitations,³⁹⁵ does not appear to be in accordance with the institutional role of public officers whose duties go far beyond any question of personal knowledge, particularly in view of the broad role the Prosecutor has under Ukrainian law.³⁹⁶ Moreover, when the Prosecutor is acting on behalf of a claimant there would be no reason for granting that officer a more privileged role.³⁹⁷ The legal experts, Mr. Toms and Mr. Belyanovich, have debated the issue of whether there is in Ukraine legal support for the concept of imputed knowledge,³⁹⁸ but this is a question that is closer to a factual determination than to any legal standard.
231. Neither is the argument that earlier investigations had not been concerned with the question of capital contributions under the Treaty and consequently that there could have been no knowledge at that time of the issues with which the Prosecutor was concerned as from 2007 any more convincing. In fact, while again it is true that the questions investigated in 2003 were not as complete as those prompting the 2007 investigation,³⁹⁹ it is also true that at that early stage the issue of amending the capital contributions was already quite prominent in the structure of Ukratnafta. The Prosecutor could not have ignored it or assumed that an oversight on his part would not have consequences.

³⁹³ First Expert Report of Belyanovich, ¶¶ 17-18, at 51

³⁹⁴ First Expert Report of Belyanovich, ¶ 14, at 75-76.

³⁹⁵ Second Expert Report of Belyanovich, ¶ 41.

³⁹⁶ First Expert Report of Toms, ¶ 27.

³⁹⁷ Expert Report of Martinenko, ¶ 20.

³⁹⁸ Respondent's Post-Hearing Memorial, ¶ 38.

³⁹⁹ Respondent's Post-Hearing Memorial, ¶ 37.

232. The Tribunal does not doubt that in assessing time periods the courts enjoy a measure of discretion but this has its limits as established by law.⁴⁰⁰ The statute of limitations is one such important limit and cannot remain open indefinitely as would be the consequence of requiring personal knowledge of the Prosecutor to trigger it as the Respondent believes to be the case.⁴⁰¹ Even less so could the application of the limitation period in cases filed by the Prosecutor in the interests of the State be treated with greater deference than in any other case,⁴⁰² nor could it be treated in a privileged manner.
233. If these were isolated cases one might consider that the interpretation of the courts is tenable as far as the limitation period is concerned, just like the Prosecutor must be presumed to act in good faith, but in the context of this dispute the facts and circumstances on which it rests show a string of actions seeking the same corporate objective within the struggle for the control of Ukratnafta that has been explained. In spite of there being no definition of materiality under the law or jurisprudence, as argued by the Respondent, it appears not to be unwarranted to conclude that the requirement of materiality was not strictly examined and that its normal legal meaning was certainly exceeded in the conclusions of the courts.
234. Having declared the action admissible, the Court then proceeded to rule that the change in the capital contributions and the corresponding modification of Ukratnafta's constituent documents were illegal, set aside the resolutions of the General Shareholders Meeting discussed, and ordered the cancellation of the company from the trade register to be followed by liquidation. The various appeals and other actions noted before the Kyiv Economic Court of Appeal, the Higher Economic Court and the Supreme Court did not change the essence of the decision of 4 September 2008, except that the order to cancel the Company from the trade register and to liquidate it was reversed.
235. These judicial developments were followed soon afterwards by various other actions before the courts, all of them concerning different aspects of the changed capital contributions to Ukratnafta. Case 17/1 was filed by Ukratnafta on 18 December 2008 requesting the invalidation of the shareholdings of the Republic of Tatarstan in the Company in view of its contribution having been changed from Ukratnafta's shareholdings in the economic oil refining complex of that Republic to shares in Tatneftprom. Mr. Ovcharenko signed this filing on behalf of Ukratnafta. The various court decisions concerning this claim that have been noted above

⁴⁰⁰ Expert Report of Martinenko, ¶¶ 14-16, 34-37.

⁴⁰¹ Witness Testimony of Belyanovich, Transcript (26 March 2013), 110:19-25 to 111:1-7.

⁴⁰² Second Expert Report of Belyanovich, ¶¶ 41-42.

again dealt with the renewal of the limitation period and the invalidation of the share purchase agreement of Tatarstan in Ukratnafta which, with the exception of one decision reversing prior findings, reiterated in essence the approach that had been followed in Case 32/1.

236. The most prominent of the cases that followed was Case 17/178 where most of the issues discussed were again decided by the courts on grounds similar to those considered in Case 32/1. In this new case the Economic Court of the Poltava Region decided on 3 November 2009 that the actions brought by Ukratnafta against Tatneft seeking the invalidation of the latter's purchase of shares were not time barred because the claimant did not have the power to seek the annulment of such purchase agreements until Case 32/1 was decided. This proposition is not supported in light of the facts of the case as Ukratnafta, even if it might not have been able to bring an action against its own shareholders, could have sought the protection of its rights at any material time following the share transactions believed to be in breach of the law and in particular could have challenged the contracts emanating from those resolutions.⁴⁰³
237. The Tribunal cannot fail to note the Claimant's argument to the effect that Ukratnafta, in seeking the invalidation of Tatneft's share purchase agreement, ignored the resolutions passed by the General Meeting of its own shareholders, which is hardly credible and could thus not support the view that the company learnt of such an event years later.
238. The Prosecutor's arguments in justification of this late filing are identical to those made earlier in Case 32/1 insofar it affirms that it had only become aware of the breach of Ukrainian law in 2007. This argument was also accepted by the Economic Court of the Poltava Region which allowed the case to proceed. Again here, however, the Claimant in the instant case convincingly explains that the Prosecutor knew of the amendments as early as 2002 in the context of his initiation of Case 8/604 against AmRuz and Seagroup seeking to annul Article 5 of Ukratnafta's 1995 Incorporation Agreement. This fact is clearly indicative that there could be no material reason to renew the limitation period as required under the Civil Code. The issue of a material reason and impossibility to file on time will be discussed further below in light of the expert legal reports of Mr. Toms and Mr. Belyanovich.

⁴⁰³ Respondent's Post-Hearing Memorial, ¶ 40, with reference to the Witness Testimony of Toms, Transcript (26 March 2013), 30:14-17.

(c) The Discussion of the Alleged Illegality of Amended Capital Contributions and Invalidity

239. The Court in Case 17/178 reached the conclusion that the shareholders' resolutions accepting the modification that allowed Tatneft to substitute cash payments for the oil wells and supply originally envisaged by the Ukrtatnafta Treaty and other enactments was unlawful and consequently invalidated Tatneft's share purchase, ordering the return of such shares to Ukrtatnafta. Contribution in kind, in the view of the Court, was as essential as the contribution of the Kremenchug refinery made by the SPFU in due course. In addition, the Court concluded that because the shares bought had not been paid in full, as required by Article 8(3) of the Law of Ukraine "On Securities and Exchange," this condition had also been breached and on this basis it set aside the 1998 Option Agreement between Ukrtatnafta and Zenit Bank and the transfers that led to Tatneft's shareholding in Ukrtatnafta. The appeals and cassation that followed this decision were not successful.
240. In deciding Case 17/178 the Economic Court of the Poltava Region enumerated the provisions that had in its opinion been breached by Tatneft's share purchases. These provisions include those in the Ukrainian Constitution, the Civil Code, the Presidential Decree of 1994 on the establishment of Ukrtatnafta, the 1995 resolution of the CMU concerning the Treaty establishing Ukrtatnafta and the Treaty itself.⁴⁰⁴ The Tribunal can only note in disbelief that if in fact all these violations had been committed no one, particularly no government service, had ever raised questions before judicial proceedings were commenced a decade later.
241. The Tribunal cannot fail to notice that the sequence of court decisions concerning the question of capital contributions led with each step to a situation more unfavourable to Tatneft. While Case 32/1 in ordering to cancel Ukrtatnafta from the trade register and thereafter proceeding to the liquidation of the Company would have undone the venture altogether, this order was the only aspect of the judgment that was ultimately reversed on appeal, consequently allowing Ukrtatnafta to survive. Case 17/178, in invalidating the share transfers that had allowed for Tatneft's participation and ordering the return of such shares to Ukrtatnafta, dramatically changed the shareholdings in the Company to the detriment of one party and the benefit of the other. This, however, as it will be seen, would not be the last step in the sequence.
242. The Tribunal, while again not pretending to sit in review of the courts' decisions, must reach its own conclusions as to whether the modification of the capital contributions was illegal as this

⁴⁰⁴ First Expert Report by Toms, ¶¶ 44-77.

aspect is of significant importance for the present dispute. The Parties do not dispute that the capital contributions were changed in light of the General Shareholders Meetings resolutions discussed. Cash was substituted for twenty-two oil fields and the supply of specific volumes of oil. The justification for such modification, related to problems concerning costs and the Tatarstan legislation in force at the time, does not appear to be quite convincing, at least in light of the substitute value that was contributed, but it is also a fact that such reasons were never questioned at the time and, on the contrary, the modifications were unanimously approved, including with the concurring vote of the Ukrainian public officials noted.

243. Although the Tribunal can accept the Claimant's argument to the effect that the specific wording of the Ukrtatnafta Treaty and Decree No. 704/94 of the President of Ukraine, like that of other related enactments, is not entirely clear as to the scope of the obligations it sets in connection with capital contributions, it is quite evident that the new scheme of capital contributions was not that originally envisaged in the establishment of Ukrtatnafta. Neither are these instruments entirely clear about which governmental bodies were entrusted with the responsibility of authorizing amendments to Ukrtatnafta's constituent documents.
244. Both the Cabinet of Ministers of Ukraine and that of Tatarstan, as stated by the Court in Case 17/178, were indeed entrusted with the establishment of the Company. The Court concluded in that case that any amendments to the constitutive instruments of Ukrtatnafta had also to be made in accordance with the agreement of the authorities whose acts established the Company. While approval of the constitutive instruments and decisions related thereto, like the initial capital contributions and the transfers of State assets, were indeed assigned to the respective Council of Ministers, the powers concerning corporate governance and administration did not necessarily follow the same route as they belong to the normal functions of a joint-stock company under their constituent documents.⁴⁰⁵ There was thus a dual authority governing the Company, one under the aegis of political bodies and the other under the powers of the organs of the corporate structure governing the Company.
245. The Court in Case 17/178 appears to have taken into consideration just the first kind of powers but not the responsibility of the corporate organs in governing the Company. The Claimant points out in this respect that under Article 16.2 of the 1995 Agreement on the establishment of the Company it is the shareholders meetings that are empowered to modify and amend the Agreement and the Charter, with the sole requirement being that this be done in writing and signed by the authorized representatives of each Founder, a provision which also accords with

⁴⁰⁵ Expert Report by Martinenko, ¶ 56.

the 1991 Law on Business Associations of Ukraine which entrusts the general meeting of shareholders with modifications of the corporate charter.⁴⁰⁶ It is also argued in this respect that neither the Ukrtatnafta Treaty nor the 1994 Presidential Decree contained any prohibition or restriction of this power.

246. It has now to be determined whether the amendment of capital contributions pertains to the powers of public bodies as held by the Court in Case 17/178, and hence can only be approved by such bodies, or whether the amendment ought to be considered an aspect concerning the powers of corporate governance and can thus be approved by the shareholders meetings as was done in the instant case. The Tribunal is mindful of the fact that capital contributions, while at their origins might be determined by the political bodies of the participating countries, in the course of events that follow in the life of a company might be a matter for decision of the corporate bodies, unless specific restrictions have been written in to this end. The Tribunal is mindful that in its Partial Award on Jurisdiction it decided that the relations between Ukrtatnafta and Tatneft were in the nature of business relations and this is the very rationale that determines that the issue now under consideration has to be decided under the rules of corporate governance.
247. The fact that Ukrtatnafta was established by Treaty and conceived at its origins as a single interstate economic complex, as indicated by the Cabinet of Ministers of Tatarstan in its Resolution No. 05-39/4101⁴⁰⁷ and as the background of the creation of the Company clearly shows, does not detract from the fact that its general shareholders meetings were entrusted with the specific task of managing the company and this indeed includes the question of changes in capital contributions. If a shareholders meeting decides, for example, to increase the capitalization of the company to attain new corporate objectives this would fall squarely within such organ's powers. The amendments concerning capital contributions are not in essence different, particularly if approved by the representatives of the founding members in the shareholders meetings so deciding, as was very much the case here.
248. The Tribunal has carefully considered the Respondent's views to the contrary but it is not persuaded that they can justify a different conclusion in this aspect of the dispute. Whether the Court's interpretation in Case 17/178 is reasonably tenable as a matter of Ukrainian law might be true, but this is only so if the amendments concern an aspect of the Treaty that evidently pertains to the public aspects of the establishment of the Company, as would be the case, for

⁴⁰⁶ First Expert Report by Toms, ¶¶ 94, 103; Second Expert Report by Toms, at 20-21.

⁴⁰⁷ Second Expert Report by Buromenskiy, Exhibit MVB-50 at 1.

example, if the shareholders were to decide to invite a third State to participate in Ukratnafta. But it is not quite so if the amendments concern other kinds of powers. Without meaning any criticism to the judgment in question, the conclusion that in the best of cases it is incomplete is inescapable. In any event, the Tribunal needs to be mindful of the Claimant's argument to the effect that even if some acts might be in conformity with Ukrainian Law they cannot be invoked in justification of a failure to perform the BIT as a matter of principle under international law.

249. Whether the Ukrainian government would not have signed the Treaty or the Incorporation Agreement had it understood that capital contributions could be later amended is a matter of speculation that cannot influence this Tribunal's findings. The Tribunal does not disagree with the view that Ukraine's contribution of the Kremenchug refinery was conceived as the counterpart of the Tatarstan's contribution of the oil wells, but cannot ignore the fact that such understanding changed in light of the concurrence of representatives of all founding members in the shareholders meetings in approving the changes later perceived as necessary. Whether the SPFU exceeded its powers in so approving, as also argued by the Respondent, does not change this conclusion and it is a matter of internal responsibilities that cannot be imputed to the detriment of the Claimant's rights under the BIT.

(d) Questions Concerning the Enactment of the Ukratnafta Treaty

250. The Tribunal must discuss at this point one important aspect on which the Parties have relied in support of their respective arguments, namely the question of whether the Ukratnafta Treaty was in force. As noted above the Claimant believes that the Treaty was not in force and thus could not be the basis on which the courts grounded their conclusions to undo the share arrangements agreed by the investors and the corporate bodies that intervened in these capital restructurings.⁴⁰⁸ In the Claimant's view, the "Treaty" was not an agreement between two States and therefore it does not qualify as a proper treaty under international law, and in any event the procedures provided under Article 13 of the Treaty for entry into force were not complied with as there is no record of a notification by the Parties in compliance with their domestic procedures, a situation which is also incompatible with the then applicable Ukrainian Law on International Agreements.
251. Had the Treaty been in force, the Claimant further maintains, the courts of Ukraine would have lacked jurisdiction to deal with the disputes as they should have been submitted to the dispute settlement procedures of Article 11 of the Treaty. Although the Treaty could have been de facto

⁴⁰⁸ Second Expert Report by Toms, at 24-25.

followed in some respects, for all legal and practical purposes it was the Incorporation Agreement as amended that governed the powers and operations of Ukratnafta, with particular reference to the question of capital contributions, which in the Claimant's view would mean that whether the Treaty was effective or not is immaterial.

252. It has also been explained above that in the Respondent's view the Treaty duly came into force as the Parties agreed on its immediate implementation thus making unnecessary any further domestic proceedings. The fact that the Ukrainian Council of Ministers implemented the Treaty is in itself, according to the Respondent, evidence that the Treaty was properly an intergovernmental agreement and there is no reason to distinguish this type of treaty from other categories which Ukrainian Law envisaged for domestic purposes that are of no relevance under international law. The Tatarstan Republic at all times also considered the Treaty to be an intergovernmental agreement.
253. As also explained above, the Respondent also asserts that at all times it has considered the Treaty as a part of the domestic legal order and this would be the case even if the Treaty is not considered to be effective under international law. Article 4 of the Law on Enterprises also recognizes the prevalence of the provisions of international agreements over domestic law. A similar understanding is explained in connection with the reference that Article 17 of the Law on International Treaties makes to a different category of intergovernmental treaties as constituting a part of the national legislation. This last law distinguishes between treaties subject to ratification and others subject to approval; in practice most of Ukraine's treaties do not follow either of these alternatives and are considered in effect after they have been signed.
254. The Tribunal has no doubt about the fact that the Ukratnafta Treaty of 4 July 1995 was properly a treaty under international law, as has convincingly been explained by the expert opinion of Professor Buromenskiy.⁴⁰⁹ Mr. Toms' legal assessment of this question is wrong under international law as the Respondent has pointed out.⁴¹⁰ It is necessary to bear in mind in this respect that under Article 2.1(a) of the 1969 Vienna Convention on the Law of Treaties the definition of a treaty is a broad one, being required that it be concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and "whatever its particular designation." The Ukratnafta Treaty was in fact concluded between States, Ukraine on the one hand and the Republic of Tatarstan on the other, and the fact that the latter is a Republic of the Russian Federation in no

⁴⁰⁹ First Expert Report of Buromenskiy, ¶ 27.

⁴¹⁰ Respondent's Post-Hearing Memorial, ¶¶ 42-47.

way detracts from its governmental character, as frequently autonomous republics within a federal State have the power to enter into treaties concerning their international relations in matters of their competence, as appears to be the case for the Republic of Tatarstan⁴¹¹ in spite of how some uncertainty might exist in this respect.⁴¹² The status of Ukrtatnafta as a “single interstate economic complex” governed by the Treaty, as noted in the letter of the Tatarstan authorities to Ukraine of 3 August 2004,⁴¹³ is the kind of competence that pertains to such autonomous Republic.

255. At no point was the issue that the Republic of Tatarstan might not have qualified as a State for the purpose of the Treaty raised before this case was brought. The intergovernmental nature of this Treaty is accordingly well established and it is properly included in the list of treaties entered into by this Republic⁴¹⁴ and, as the Respondent notes, no notice of termination has been issued.⁴¹⁵
256. The question discussed by the Parties as to whether the Treaty became effective as stipulated in its Article 13 on the date of the last notice of compliance by the Parties with their respective domestic procedures is an aspect that in essence depends on domestic law rather than international law.⁴¹⁶ Each Party is free to follow its own domestic procedures and for that matter its practice is particularly relevant in this connection.⁴¹⁷ The Claimant’s view to the effect that Ukraine never gave notice of having complied with its procedures, just as it appears that Tatarstan also did not do, does not affect the binding nature of the Treaty if the intention of the Parties was so to be understood. The fact that the Cabinet of Ministers of Ukraine instructed a Vice-Minister to sign the Treaty on behalf of the government and issued the corresponding Resolution No. 487 of 4 July 1995 has been well established by Mr. Mityukov, the official entrusted with this task.⁴¹⁸ More importantly, the government proceeded to implement the Treaty and comply with its provisions, including the nomination of the Supervisory Board, thus further evidencing the understanding that the Treaty was binding. The same holds true for the

⁴¹¹ First Expert Report of Buromenskiy, ¶¶ 27-42.

⁴¹² Transcript (26 March 2013), 90:20-25 to 93:1-6.

⁴¹³ Second Expert Report of Buromenskiy, Exhibit MVB-50.

⁴¹⁴ First Expert Report of Buromenskiy, Exhibit MVB-10.

⁴¹⁵ Respondent’s Closing Slides, 39.

⁴¹⁶ First Expert Report of Buromenskiy, ¶ 99-115.

⁴¹⁷ First Expert Report of Buromenskiy, ¶ 67.

⁴¹⁸ Witness Statement of Mityukov, ¶¶ 9-12; Witness Testimony of Mityukov, Transcript (20 March 2013), 135:1-17.

Ukratnafta Charter and its Incorporation Agreement of 23 July 1995, both of which are again founded on the Treaty.

257. The meaning of the Ukrainian domestic legislation on treaties thus has a limited role in the context of this dispute, mainly related to the internal procedures to be followed in respect of some categories of treaties. Article 2(3) of the Law on International Treaties appears to address the question of executive agreements as it refers to international treaties on “economical, trade, scientific, technical and other matters belonging to governmental competence.” which are to be concluded on behalf of the Government and which according to Article 9 of this Law are approved by way of a resolution, that is also a simplified procedure. Other kinds of treaties are also distinguished by Article 17 of this Law when referring to the international agreements of Ukraine that are concluded and properly ratified. As the Respondent has argued these distinctions are of interest only for domestic purposes and do not affect the status of the respective agreements under international law. In fact, while approval suffices for the first category, more formal procedures of ratification are eventually necessary for the second type of treaties. This situation is common to many countries and those procedures do not really change the nature of the treaty concerned.
258. The practice in this respect is solely a domestic question. By its very nature the Ukratnafta Treaty can well be considered an executive agreement establishing the “single interstate economic complex” described above. It thus follows that the requirements for approval are entirely a choice for domestic law and practice, which may even dispense with any particular procedure as long as the intention to comply with the agreement is manifest, as is the case here. Interestingly, the Respondent has explained that in the Ukrainian treaty practice at least 85% of the treaties in effect are not ratified, many of which are not approved either.⁴¹⁹
259. An issue related to the effectiveness of the Treaty is whether the Ukrainian courts would be competent to deal with disputes under this instrument. As noted, the Claimant believes that if the Treaty is in effect, only the dispute settlement procedures of its Article 11 should govern and the Ukrainian courts would be incompetent in this respect. The Tribunal considers that there are two sides to this question. The first is that concerning intergovernmental disputes which are naturally governed by the Treaty. This also explains why finally this dispute has been brought under the Russia-Ukraine BIT, again an intergovernmental treaty under which investors have rights of action to protect their interests. The second side is that concerning the question of the

⁴¹⁹ Respondent’s Closing Slides, 54.

implementation of the provisions of the Treaty under domestic law, which is an aspect related to the administration and operation of the company as a corporate entity.

260. In spite of the issues of dual authority that have been discussed in respect of corporate governance, these properly belong to the implementation of the Treaty and disputes related thereto are thus subject to domestic judicial intervention, provided the guarantees of protection envisaged under the BIT are satisfied, which is the question that has been brought to this Tribunal. In this respect, the finding of the Ukrainian courts to the effect that the Treaty is a part of Ukrainian legislation is correct, as this will also be the normal consequence of an international legal obligation, including the prevalence of these obligations over domestic rules in case of contradiction, as Article 4 of the Law on Enterprises clearly establishes. Whether the treaty in question is brought into effect by means of approval, ratification or otherwise, the consequences in domestic legislation are the same.
261. The question the Tribunal must still answer is whether the fact that the Treaty is in effect changes the Tribunal's conclusions as to the meaning of the capital contributions originally envisaged and the powers to have these contributions changed as per the decisions of the company's governing bodies, most notably through the General Shareholders Meeting. It has been explained above that the amendments introduced to capital contributions, while different from those originally envisaged, are of a kind pertaining to the administration of the company as a commercial entity and do not fall under the elements of the public governance of Ukratnafta as happens with other matters, such as would be the case explained of bringing in a State party not counted among the original parties to the Treaty. It follows that those conclusions stand and that accordingly the amendments introduced are not in breach of the Treaty or for that matter of Ukrainian legislation in view of how the original capital contributions were neither entirely clear nor understood to be permanent and not subject to amendment.⁴²⁰ On this point the Tribunal is also mindful of paragraph 188 of the Partial Award on Jurisdiction. In respect of this conclusion, the Tribunal does not agree with those arrived at by the expert international law report of Professor Buromenskiy, who believes that an amendment concerning the nature of contributions is contrary to the Treaty⁴²¹ unless approved at an interstate level.⁴²²

⁴²⁰ Claimant's Post-Hearing Submission, ¶ 40.

⁴²¹ First Expert Report of Buromenskiy, ¶¶ 157-170.

⁴²² Second Expert Report of Buromenskiy, ¶¶ 43-48.

(e) A Systematic Adverse Line of Decisions and the Role of the Prosecutor General

262. The performance of the Company following the changes in capital contributions does not appear to have been affected by the amendments and would prove, as the Claimant argues in opposition to the Respondent, that the objectives of the Company could be achieved all the same and that the contribution of oil wells and equipment was not an essential condition for the creation of Ukrtatnafta.
263. The Parties have argued about whether the systemic method of interpretation applied by the courts, which the Respondent considers appropriate, or the literary and fragmentary reading of the pertinent instruments, which it believes the Claimant to support, also justifies the conclusions of those courts. The Tribunal is all in favor of a systemic method of interpretation and it is precisely in this light that the aggregate of legal instruments relevant to this dispute show that one thing was the original intent of the parties and quite another was how perceptions changed in the course of events and materialized in agreements that responded to such perceptions, again with the feature of having been unanimously approved.
264. It should be noted that arguments have also been made to the effect that the Courts' interpretation of Article 8(3) of the Law "On Securities and Stock Exchange" is right or wrong. The Claimant believes that this provision could only have been triggered if no contribution had been made at all while the Respondent maintains that it was the change in the form of payment that violated the Article in question and not the issue of whether a contribution was made or not.
265. The Tribunal is mindful of the fact that on many occasions national courts tend to take a position on given points of fact and law that are the most favorable to the national interest involved in a dispute. To the extent that this approach can be justified in light of its compatibility with the ordinary meaning of governing provisions it might be considered tenable and cannot be a point of criticism. When this exercise, however, results in systematic decisions against the rights of the other party, and the latter's arguments might be considered equally tenable, there is reason to believe that the process might have run astray of due process and the necessary impartiality in delivering justice.
266. The various cases that have been examined above show that the line of reasoning followed by the courts was, save for occasional exceptions, systematically adverse to the rights of the Claimant. The Tribunal has not ruled out that some aspects of those decisions might be tenable in light of the facts or the applicable law, but it also believes that a number of the arguments of

the Claimant are also tenable and hence would have merited due consideration. This situation calls into question the independence with which the courts proceeded in such cases and casts a serious doubt about whether there was any intention to examine the rights claimed so as to impartially rule on their eventual merit.

267. Had such decisions been the outcome of completely separate proceedings on issues of fact and law one could readily admit that the claimants in such proceedings were simply wrong. But as has been noted, almost every decision adopted resulted in a sequence that was with each step more adverse to the Claimant and directly leading to findings that would in the end deprive it of all rights in the Company. Furthermore, the Tribunal cannot ignore the fact that all such proceedings were linked by a common thread that found its origins in the systematic role of the Prosecutor in the unfolding of this dispute.
268. All the relevant cases were initiated by requests that the Prosecutor brought to the courts, invariably seeking to reopen matters in respect of which limitation periods had long become applicable. In the view of this Tribunal, the arguments in support of such requests were for the most part unconvincing and on occasions contradicted by the Prosecutor's own actions. Neither can the Tribunal overlook the fact that such requests acquired momentum immediately following the acquisition by Korsan of a 1% shareholding in the Company, a process which ended in the prominent role that Korsan has today in its shareholding composition. As in many countries, the Prosecutor performs an influential State service and has strong influence in the administration of justice.

C. ANNULMENT OF SHAREHOLDINGS IN AMRUZ AND SEAGROUP

1. Court Decisions on the Shareholdings of AmRuz and Seagroup⁴²³

269. The proceedings relevant to this dispute did not end with the decisions concerning Tatneft and followed earlier cases, and also were accompanied by later cases concerning the shareholdings of AmRuz and Seagroup in Ukratnafta. The facts relating to this other aspect of the dispute will be examined next.

(a) Undisputed Facts

270. In August 2001, the SPFU filed a lawsuit against Ukratnafta and all of its shareholders before the Kyiv Economic Court to set aside the share purchase agreements entered into by each of

⁴²³ Second Counter-Memorial, ¶¶ 198-199.

AmRuz and Seagroup with Ukratnafta on the basis that the contracts violated the legal requirement that the shares of the founding shareholders be paid for within one year and that Ukrainian law barred the use of promissory notes to pay for these shares, in what were to become Cases 28/198 and 28/199, respectively.⁴²⁴ Tatneft entered the case as a third party in opposition to the claims.⁴²⁵

271. The Kyiv Economic Court upheld the SPFU's claims for both cases on 28 November 2001.⁴²⁶ The Court found that the use of promissory notes to purchase shares violated Article 13 of the Company Law,⁴²⁷ which excluded promissory notes from the kinds of assets that could be used to contribute to the charter capital of a company.⁴²⁸ It also found that the addenda to the share purchase agreements that were entered into between Ukratnafta and AmRuz and Seagroup, respectively, had the effect of extending the deadline for AmRuz and Seagroup to make their capital contributions to Ukratnafta beyond that imposed by Articles 11 and 33 of the Company Law, as well as Ukratnafta's Incorporation Agreement and Charter.⁴²⁹ The Court therefore nullified the share purchase agreements entered into with AmRuz and Seagroup, respectively, and ordered that AmRuz and Seagroup return their shares to Ukratnafta.⁴³⁰ The Kyiv Economic Court of Appeal affirmed this judgment on 14 March 2002.⁴³¹
272. On 29 May 2002, the Higher Economic Court reversed the judgments of 28 November 2001.⁴³² It found that, when AmRuz and Seagroup entered into their respective share purchase agreements, Ukrainian law did not forbid the use of promissory notes to purchase company shares because Article 13 of the Company Law authorized the use of securities to contribute to the share capital of a company, and Article 3 of the Securities and Stock Exchange Law defined securities to include "notes."⁴³³ It also held that the addenda to the share purchase agreements did not violate Article 33 of the Company Law or Ukratnafta's Incorporation Agreement or

⁴²⁴ Joint Factual Chronology, ¶ 28; Memorial, ¶ 245; Transcript (18 March 2013), 163:16-22.

⁴²⁵ Transcript (18 March 2013), 162:22-25.

⁴²⁶ Memorial, ¶ 246; Counter-Memorial, ¶ 116.

⁴²⁷ Ukrainian Company Law, Article 13 (C-297).

⁴²⁸ Memorial, ¶¶ 246-247.

⁴²⁹ Memorial, ¶¶ 246-247.

⁴³⁰ Memorial, ¶ 248.

⁴³¹ Memorial, ¶ 249; Counter-Memorial, ¶ 117; both citing to the Judgments of the Kyiv Economic Court of Appeal, 14 March 2002, in Cases 28/198 and 28/199 (C-323 and C-324). Second Memorial, ¶ 171; Joint Factual Chronology, ¶ 30.

⁴³² Memorial, ¶ 250; Counter-Memorial, ¶ 117.

⁴³³ Memorial, ¶ 250.

Charter because the obligation of AmRuz and Seagroup to make their capital contribution to Ukratnafta was satisfied as soon as they transferred the promissory notes.⁴³⁴

273. The Supreme Court of Ukraine dismissed the cassation appeals filed by the SPFU on 18 July 2002 and 1 November 2002, respectively.⁴³⁵
274. At around this time, on 16 September 2002, the Prosecutor filed a lawsuit—in what was to become Case 8/604—before the Poltava Region Economic Court against AmRuz, Seagroup, Ukratnafta, and other Ukratnafta shareholders to set aside Article 5(5) of the Ukratnafta Incorporation Agreement, insofar as it authorized the use of “securities,” including promissory notes, as payment for Ukratnafta shares on the basis that this was contrary to Ukrainian law.⁴³⁶ Arguing that AmRuz and Seagroup merely contributed debt obligations to Ukratnafta, the Prosecutor alleged that the use of promissory notes by AmRuz and Seagroup to pay for their shares violated Article 31 of the Company Law, which stated that the shareholders should pay at least 50% of the nominal value of the share capital before the first shareholders’ general meeting.⁴³⁷ On 19 December 2002, the Poltava Region Economic Court dismissed the Prosecutor’s claim.⁴³⁸ Acknowledging the dismissal of the Higher Economic Court of Cases 28/198 and 28/199, it upheld the lawfulness of using promissory notes to purchase Ukratnafta shares,⁴³⁹ thereby concluding that Article 5(5) of the Incorporation Agreement complied with Ukrainian law.⁴⁴⁰
275. In November 2004, Naftogaz, which is the state-owned energy company of Ukraine, filed a lawsuit against AmRuz, Seagroup, and Ukratnafta shareholders—in what was to become Case 15/559—to set aside Article 5(3) of the Incorporation Agreement, on the basis that this provision violated Articles 13 and 31 of the Company Law, because promissory notes were not “securities” within the meaning of Article 13, and both AmRuz and Seagroup did not make their contributions within the statutory period owing to the extension of the maturity date of the promissory notes.⁴⁴¹ On 10 January 2005, the Kyiv Economic Court upheld the use of

⁴³⁴ Memorial, ¶ 251.

⁴³⁵ Memorial, ¶ 253; Second Memorial, ¶ 171.

⁴³⁶ Memorial, ¶ 255; Joint Factual Chronology, ¶ 33; Transcript (27 March 2013), 66:14-20.

⁴³⁷ Second Memorial, ¶ 256.

⁴³⁸ Joint Factual Chronology, ¶ 34.

⁴³⁹ Memorial, ¶ 257; Transcript (27 March 2013), 66:21-24.

⁴⁴⁰ Memorial, ¶ 259.

⁴⁴¹ Memorial, ¶¶ 261-262.

promissory notes; confirmed that AmRuz and Seagroup had paid for their Ukratnafta shares once they had transferred the notes; and thereby rejected Naftogaz's argument that AmRuz and Seagroup had failed to pay half of their contribution before the first general shareholders' meeting.⁴⁴² On 1 April 2005, the Kyiv Economic Court dismissed the appeal of Naftogaz against this decision.⁴⁴³ On 6 September 2005, the Higher Economic Court, in considering the cassation appeal lodged by Naftogaz, rejected all but one of the grounds for appeal raised by Naftogaz,⁴⁴⁴ a decision which was later set aside by the Supreme Court of Ukraine on 18 April 2006, in response to a cassation appeal filed by AmRuz and Seagroup.⁴⁴⁵

276. On 24 January 2008, the Prosecutor lodged an extraordinary cassation appeal with the Supreme Court of Ukraine to set aside the 29 May 2002 decisions of the Higher Economic Court and reopen Cases 28/198 and 28/199⁴⁴⁶—citing to Article 111(15) of the Code of Commercial Procedure then in force, which authorized the reopening of a case decided by the Higher Economic Court if that court had applied the same legal provision differently in similar cases⁴⁴⁷—on the basis of Case 45/383 *Northland Power Darnytia Inc. v. Ukrnaftogaz OJSC* (“*Northland Power*”) dated 14 November 2006.⁴⁴⁸ Because Article 111(16) of the Code of Commercial Procedure required the cassation appeal to be filed within a month from the relevant decision, the Prosecutor invoked Article 53 of the Code of Commercial Procedure, which allowed the filing of this cassation appeal beyond one month for “justifiable reasons.”⁴⁴⁹
277. On 21 February 2008, the Supreme Court of Ukraine, citing Article 111(15) of the Code of Commercial Procedure,⁴⁵⁰ accepted the extraordinary cassation appeal filed by the Prosecutor,⁴⁵¹ and remanded Cases 28/198 and 28/199 for de novo review.⁴⁵² On 18 March

⁴⁴² Memorial, ¶¶ 264-265.

⁴⁴³ Joint Factual Chronology, ¶ 57.

⁴⁴⁴ Memorial, ¶¶ 265-266.

⁴⁴⁵ Memorial, ¶ 267.

⁴⁴⁶ Joint Factual Chronology, ¶ 116.

⁴⁴⁷ Memorial, ¶ 272; Transcript (18 March 2013), 170:17-23.

⁴⁴⁸ Memorial, ¶ 272; Transcript (18 March 2013), 64:6-12.

⁴⁴⁹ Memorial, ¶ 273.

⁴⁵⁰ Transcript (18 March 2013), 171:10-15.

⁴⁵¹ Memorial, ¶ 281; Counter-Memorial, ¶ 120.

⁴⁵² Memorial, ¶ 270; Counter-Memorial, ¶ 118; Transcript (18 March 2013), 64:21-25 to 65:1.

2008, the relevant courts set aside the 2002 judgments of the Higher Economic Court as well as the other judgments rendered in Cases 28/198 and 28/199.⁴⁵³

278. On 28 May 2008 for Case 28/198 and 2 June 2008 for Case 28/199, the Kyiv Economic Court, before which the aforementioned cases were retried, invalidated the share purchase agreements entered into between Ukratnafta and AmRuz and Seagroup, respectively, and ordered AmRuz and Seagroup to return their shares to Ukratnafta.⁴⁵⁴ In doing so, the Court held that AmRuz and Seagroup violated Article 8(3) of the Securities Law because they received their shares on 8 June 1999 in exchange for 65 promissory notes, of which only three were redeemed.⁴⁵⁵ The Court also held that AmRuz and Seagroup had breached Article 33 of the Law of Ukraine on Business Associations, which required shareholders to pay the full price of shares no later than one year after the registration of a joint stock company.⁴⁵⁶ Lastly, the Court referred to the Resolution of the Cabinet of Ministers of Ukraine No. 528, dated 10 September 1992 and entitled “Rules of Issue and Use of Promissory Note Forms” (“Resolution 528”), which allows promissory notes to be issued only for the payment of “delivered products, executed works and rendered services.”⁴⁵⁷
279. The Kyiv Economic Court of Appeal upheld these decisions on 7 August 2008 and 8 August 2008, respectively,⁴⁵⁸ as did the Kyiv Higher Economic Court on 24 September 2008.⁴⁵⁹ On 27 November and 11 December 2008, the Supreme Court of Ukraine rejected the cassation appeal filed by AmRuz and Seagroup.⁴⁶⁰
280. In December 2008, Korsan filed a request before the Economic Court of the Poltava Region, in what was to become Case 17/60, against Ukratnafta, Mr. Ovcharenko, and other Ukratnafta officials seeking to obligate Ukratnafta to sell the shares that formerly belonged to AmRuz and Seagroup.⁴⁶¹ The Court granted this request on 31 March 2009,⁴⁶² without informing the

⁴⁵³ Memorial, ¶ 283.

⁴⁵⁴ Memorial, ¶ 285; Counter-Memorial, ¶ 120.

⁴⁵⁵ Counter-Memorial, ¶ 121.

⁴⁵⁶ Counter-Memorial, ¶ 121.

⁴⁵⁷ Counter-Memorial, ¶ 121.

⁴⁵⁸ Memorial, ¶ 287; Counter-Memorial, ¶ 120.

⁴⁵⁹ Memorial, ¶ 288; Counter-Memorial, ¶¶ 121, 239.

⁴⁶⁰ Memorial, ¶ 289; Counter-Memorial, ¶¶ 122, 240.

⁴⁶¹ Joint Factual Chronology, ¶ 148.

⁴⁶² Joint Factual Chronology, ¶ 154.

Claimant or any other Ukratnafta shareholders of these proceedings.⁴⁶³ On 8 October 2009, the Higher Economic Court dismissed the Claimant's and Naftogaz's cassation appeal against the decision of the lower court,⁴⁶⁴ and on 4 February 2010, the Supreme Court dismissed the Claimant's and Naftogaz's cassation appeal against the decision rendered by the Higher Economic Court.⁴⁶⁵

(b) Disputed Facts

i. The Parity Requirement of the Ukratnafta Treaty

281. As a preliminary matter, the Claimant alleges that the parity requirement imposed by the Ukratnafta Treaty did not prevent AmRuz and Seagroup from acquiring Ukratnafta shares. This principle was, in the Claimant's view, not intended to extend beyond the incorporation of Ukratnafta.⁴⁶⁶ Hence, the purchase of Ukratnafta shares at a later point in time by AmRuz and Seagroup—both of whom were incorporated neither in Ukraine nor in Tatarstan—could not have breached this requirement.⁴⁶⁷
282. For its part, the Respondent argues that the acquisition of AmRuz and Seagroup of Ukratnafta shares, which gave them an 18% collective interest in Ukratnafta, in addition to what it characterizes as their almost instant alliance with the Tatarstan shareholders, was a substantial breach of the parity principle, which was a fundamental basis of the Ukratnafta Treaty.⁴⁶⁸

ii. The Non-Application of the Statute of Limitations in, and the Merits of, Cases 28/198 and 28/199

The Claimant's Position

283. In filing his application to reopen Cases 28/198 and 28/199 six years after the adjudication of these cases and fourteen months after the allegedly inconsistent decision in *Northland Power*, the Prosecutor, according to the Claimant, made only a conclusory and unsubstantiated assertion that he was unaware of both the Higher Economic Court judgments and the *Northland Power*

⁴⁶³ Memorial, ¶ 294.

⁴⁶⁴ Joint Factual Chronology, ¶ 177.

⁴⁶⁵ Joint Factual Chronology, ¶ 189.

⁴⁶⁶ Second Memorial, ¶ 228; Transcript (27 March 2013), 10:11-19.

⁴⁶⁷ Second Memorial, ¶ 228.

⁴⁶⁸ Counter-Memorial, ¶¶ 50-51, 57.

case,⁴⁶⁹ which the Claimant states was a lie because the Prosecutor would have learned of Cases 28/198 and 28/199 as early as in 2002 through Case 8/604, which he had initiated to set aside AmRuz's and Seagroup's purchases of Ukrtatnafta shares, as these cases were relied on as precedent by the court in Case 8/604.⁴⁷⁰ Similarly, the Prosecutor allegedly became aware of the *Northland Power* case by participating in Case 17/34 *State Property Fund of Ukraine v. CJSC Energy Generating Company Ukr-Can Power* "(Kyiv) and others, which was litigated in parallel and, according to the Claimant, was strictly intertwined with the *Northland Power* case.⁴⁷¹ The Claimant also adds that the *Northland Power* case was one of the most prominent cases in Ukraine at that time attracting wide coverage by the local press.⁴⁷²

284. Turning to the Supreme Court proceedings resulting in the de novo review of Cases 28/198 and 28/199, the Claimant contends that these proceedings involved serious due process violations for three reasons. First, the Supreme Court proceedings were held *ex parte* and *in camera*.⁴⁷³ According to the Claimant, AmRuz and Seagroup had not been notified of the Prosecutor's request to reopen Cases 28/198 and 28/199 prior to the Supreme Court's acceptance of the request on 21 February 2008.⁴⁷⁴ Hence, the Respondent acted inconsistently with the provisions of the 1965 Hague Convention on Service Abroad.⁴⁷⁵ Second, even if AmRuz and Seagroup had been notified of the Prosecutor's request, such notice would not be determinative in the present case since the Supreme Court did not allow AmRuz and Seagroup to submit any objections to the admissibility of the Prosecutor's request.⁴⁷⁶ Third, when AmRuz and Seagroup were made aware of the Supreme Court's decision to reopen Cases 28/198 and 28/199, which occurred after its issuance, they had no opportunity to challenge the decision, which was not subject to appeal.⁴⁷⁷

⁴⁶⁹ Second Memorial, ¶¶ 181-182; Claimant's Post-Hearing Submission, ¶ 43.

⁴⁷⁰ Second Memorial, ¶ 186; Transcript (27 March 2013), 66:11-14; Claimant's Post-Hearing Submission, ¶ 44.

⁴⁷¹ Second Memorial, ¶ 187; Claimant's Post-Hearing Submission, ¶ 45.

⁴⁷² Claimant's Post-Hearing Submission, ¶ 45.

⁴⁷³ Second Memorial, ¶ 173; Transcript (18 March 2013), 64:21-25.

⁴⁷⁴ Transcript (27 March 2013), 61:23-25 to 62:1-15.

⁴⁷⁵ Claimant's Post-Hearing Submission, ¶ 50; Transcript (27 March 2013), 62:15-16; 97:25 to 98:1-3 (the Tribunal notes that this argument was first made by the Claimant during the Hearing on the Merits).

⁴⁷⁶ Claimant's Post-Hearing Submission, ¶ 50; Transcript (27 March 2013), 62:20-25 to 63:1-14.

⁴⁷⁷ Claimant's Post-Hearing Submission, ¶ 50 (internal citations omitted); Transcript (27 March 2013), 63:19-24.

285. From the foregoing, the Claimant concludes that the Supreme Court's decision to grant the Prosecutor's manifestly time-barred request to reopen Cases 28/198 and 28/199 without providing AmRuz and Seagroup an opportunity to be heard and to challenge the decision resulted in serious breaches of due process and the principle of *res judicata*.⁴⁷⁸
286. The Claimant adds that the Supreme Court wrongly exercised its discretion to extend the statutory deadline in this case, as it did not meet the requirements that it base its decision on evidence of "material reasons" for the missed deadlines; account for the circumstances behind the failure to meet the deadline; and express the "material reasons" for a failure to act within the time period in a substantiated opinion.⁴⁷⁹
287. The Claimant maintains that, if the unilateral assertion of ignorance (without more) sufficed to reopen final court decisions many years after they had been adjudicated, the *res judicata* effect of court decisions and the finality of judgments would be eviscerated.⁴⁸⁰
288. The Claimant contends that the decisions to reopen Cases 28/198 and 28/199 lacked a colorable basis under Ukrainian law.⁴⁸¹ Although Article 111(15)-3 of the Ukrainian Code of Commercial Procedure then in force empowered the Supreme Court of Ukraine to reconsider judgments of the Higher Economic Court if the latter court had applied the same legal provision similarly in different cases,⁴⁸² Cases 28/198 and 28/199, on the one hand, and *Northland Power*, on the other, could not have been inconsistent, because the latter was a case in which no contribution had been made for the cancelled shares⁴⁸³ and in which the lawfulness of promissory notes as a means of purchasing shares was not considered.⁴⁸⁴
289. The Claimant notes that, in any event, if the decisions to reopen Cases 28/198 and 28/199 were warranted under Ukrainian law, which it denies, it would mean that Ukrainian law would allow for the reopening of court decisions any time after they had become final on the basis of a mere

⁴⁷⁸ Claimant's Post-Hearing Submission, ¶ 51.

⁴⁷⁹ Second Memorial, ¶¶ 178-179 (internal citations omitted).

⁴⁸⁰ Second Memorial, ¶ 180.

⁴⁸¹ Second Memorial, ¶ 191; Transcript (27 March 2013), 63:23-25 to 64:1-2.

⁴⁸² Second Memorial, ¶ 193; Transcript (18 March 2013), 66:18-25.

⁴⁸³ Second Memorial, ¶ 199; Transcript (18 March 2013), 67:14-21.

⁴⁸⁴ Second Memorial, ¶ 200; Transcript (18 March 2013), 67:7-13.

assertion of inconsistency.⁴⁸⁵ This again would contravene the principles of legal certainty and *res judicata*.⁴⁸⁶

290. In the Claimant's view, the key requirement under Ukrainian law for reopening proceedings—the inconsistency of two or several court decisions—was not satisfied in this case. Specifically, the Claimant states that the courts in Cases 28/198 and 28/199, collectively, and *Northland Power* were not inconsistent in their application of Article 8(3) of the Securities Law and Article 33 of the Company Law because the courts in the former cases did not consider Article 8(3), having found that promissory notes could be used to pay for shares, and merely cited Article 33, as was also the case for the *Northland Power* decision.⁴⁸⁷ The Claimant further alleges that these decisions are highly questionable, given that the Ukrainian courts had previously stated that the use of promissory notes to pay for shares was permitted under Ukrainian law.⁴⁸⁸
291. The Claimant's expert confirms that, under Article 48(2) of the Ukrainian SSR Civil Code, the Ukrainian courts were obliged to grant restitution to AmRuz and Seagroup after invalidating their share acquisition.⁴⁸⁹ However, the Kyiv Court of Appeal, while upholding the decision of the Kyiv Economic Court, did not order the return to AmRuz and Seagroup of the promissory notes that they had issued or the amounts that they had paid under the notes.⁴⁹⁰
292. The Claimant's expert admits that AmRuz and Seagroup were theoretically entitled to file a counterclaim for the return of their property or for a grant of compensation under Ukrainian law.⁴⁹¹ However, as a matter of practice, one would never file such a counterclaim since Ukrainian courts would consider it to be a concession.⁴⁹² In the expert's opinion, the decision in the *Dekon* case corroborated its position that AmRuz and Seagroup should not have had to file a separate action for the return of their property.⁴⁹³

⁴⁸⁵ Claimant's Post-Hearing Submission, ¶ 56.

⁴⁸⁶ Claimant's Post-Hearing Submission, ¶ 53.

⁴⁸⁷ Second Memorial, ¶ 201; Transcript (18 March 2013), 67:4-6.

⁴⁸⁸ Memorial, ¶ 290.

⁴⁸⁹ Toms Second Expert Report, at 69.

⁴⁹⁰ Memorial, ¶¶ 286-287.

⁴⁹¹ Transcript (25 March 2013), 90:10-15.

⁴⁹² Transcript (25 March 2013), 90:17-25.

⁴⁹³ Transcript (25 March 2013), 91:2-15.

The Respondent's Position

293. The Respondent first points out that the SPFU prevailed in its claims against AmRuz and Seagroup in six out of the seven courts that reviewed this case on the merits,⁴⁹⁴ and that the only court that took the position of the Claimant was the Higher Economic Court, which the Respondent contends was mistaken in doing so.⁴⁹⁵
294. The Respondent stresses that the Ukrainian President immediately ordered an investigation when he received a note on 2 July 2001 that advised him that AmRuz and Seagroup had obtained an 18% share of Ukratnafta in exchange for mostly promissory notes.⁴⁹⁶ It also states that Tatneft had initially expressed concerns about the unpaid shares of AmRuz and Seagroup, only to reverse its position later on⁴⁹⁷ for its own self-interest.⁴⁹⁸
295. As a general matter, the Respondent notes that “it is staggering to consider the degree of corruption that would have had to have been perpetrated in this case at all levels of the judiciary, right up to the Ukrainian Supreme Court” in order to support the Claimant’s primary line of argument that the loss of shares of AmRuz and Seagroup resulted from corrupt legal proceedings.⁴⁹⁹
296. The Respondent notes that the Prosecutor had moved to reopen the 2002 decisions of the Higher Economic Court on the shareholdings of AmRUZ and Seagroup once it learned of the later decision of the same court in *Northland Power Daryntsia*.⁵⁰⁰ It rejects the Claimant’s argument that the Prosecutor had acted wrongfully in filing the petition to reopen Cases 28/198 and 28/199. It states that the application to reopen the cases was based on the Northland Power decision, which rendered any prior knowledge by the Prosecutor’s office of Cases 28/198 and 28/199 immaterial.⁵⁰¹ It also points out that the Prosecutor could not have been made aware of the *Northland Power* decision by its participation in the related Case 17/34 because this case predated *Northland Power* by four months⁵⁰² and characterizes the argument that the Prosecutor

⁴⁹⁴ Transcript (18 March 2013), 163:23-25 to 164:1-6; Respondent’s Post-Hearing Memorial, ¶ 9.

⁴⁹⁵ Transcript (27 March 2013), 89:6-16; Respondent’s Post-Hearing Memorial, ¶ 11.

⁴⁹⁶ Transcript (27 March 2013), 86:2-22; Respondent’s Post-Hearing Memorial, ¶ 7.

⁴⁹⁷ Transcript (27 March 2013), 87:6-18.

⁴⁹⁸ Transcript (27 March 2013), 87:19-25 to 88:1-22.

⁴⁹⁹ Respondent’s Post-Hearing Memorial, ¶ 14.

⁵⁰⁰ Respondent’s Post-Hearing Memorial, ¶ 12.

⁵⁰¹ Second Counter-Memorial, ¶ 113; Transcript (27 March 2013), 94:12-19.

⁵⁰² Second Counter-Memorial, ¶ 114; Transcript (18 March 2013), 177:7-14.

would have been monitoring this case for fear of an appeal of Case 17/34 to the Supreme Court as weak.⁵⁰³ The Respondent explains that mere knowledge of *Northland Power Daryntsia* was insufficient to enable the Prosecutor to file an appeal and notes that the Prosecutor had to know, specifically, that this case and Cases 28/198 and 28/199 had relied on Article 33 of the Business Entities Law.⁵⁰⁴

297. The Respondent lastly notes that there has been no evidence that the Prosecutor's application and its acceptance by the Supreme Court was a pretext to benefit the raiders.⁵⁰⁵ The Respondent also points out that neither AmRuz nor Seagroup contradicted (whether by evidence or pleading) the Prosecutor's explanation of how he had learned of the *Northland Power* case.⁵⁰⁶ Moreover, the explanation provided by the Prosecutor to support his application to renew the cassation term was typically accepted by courts in like matters.⁵⁰⁷ The Respondent further rejects the Claimant's argument, made during the hearing, that the Prosecutor would have known about the *Northland Power* case merely because this case was famous, and reiterates that the factual record is silent on this matter.⁵⁰⁸
298. The Respondent rejects the Claimant's characterization of the Supreme Court decision on the cassation renewal as *ex parte* and *in camera*. First, the Respondent states that the decision was not rendered *ex parte* because the Prosecutor notified AmRuz and Seagroup of the cassation appeal, and both AmRuz and Seagroup could have made submissions on this proceeding, but did not.⁵⁰⁹ In fact, the Respondent points out that there is no evidence that either AmRuz or Seagroup had raised the objection that they had not been notified of the proceeding, and notes that the Claimant itself had not made this argument before the present proceedings.⁵¹⁰
299. The Respondent rejects the Claimant's argument (which it characterizes as "belated") that the Prosecutor's notice to AmRuz and Seagroup did not comply with the requirements of the 1965 Hague Convention on Service Abroad and argue that there is no evidence showing that AmRuz

⁵⁰³ Transcript (27 March 2013), 94:20-25 to 95:1-7; Respondent's Post-Hearing Memorial, ¶ 19.

⁵⁰⁴ Respondent's Post-Hearing Memorial, ¶ 19.

⁵⁰⁵ Second Counter-Memorial, ¶ 115.

⁵⁰⁶ Transcript (18 March 2013), 172:15-19; Respondent's Post-Hearing Memorial, ¶ 20.

⁵⁰⁷ Transcript (27 March 2013), 93:16-21; Respondent's Post-Hearing Memorial, ¶ 20..

⁵⁰⁸ Transcript (27 March 2013), 95:15-25 to 96:1.

⁵⁰⁹ Transcript (18 March 2013), 173:14-24; Respondent's Post-Hearing Memorial, ¶ 21.

⁵¹⁰ Transcript (27 March 2013), 97:15-20.

and Seagroup had alleged a Hague Convention violation when they appeared before the Supreme Court or that this Convention even applies to the matter at hand.⁵¹¹

300. Second, the Respondent argues that the Supreme Court decision was not made in camera because decisions to grant cassation review are made at a conference of judges, based only on written submissions.⁵¹² Moreover, the consistent practice of the Supreme Court was not to provide reasons for its procedural decisions, as a result of which its decisions on the cassation appeal could not be considered “extraordinary” or “unjustified” just because they were unsubstantiated.⁵¹³
301. Maintaining that the Supreme Court had a material reason to extend the limitation period to enable the Prosecutor to apply for the reopening of Cases 28/198 and 28/199, the Respondent first clarifies that the test at the time of the Supreme Court’s decision to reopen Cases 28/198 and 28/199 was whether similar laws had been applied differently in the two cases at hand.⁵¹⁴ It then rejects the Claimant’s allegation that the *Northland Power* case was not sufficiently similar to Cases 28/198 and 28/199 so as to give rise to any inconsistency.⁵¹⁵ It states that at their core, Cases 28/198 and 28/199—as well as *Northland Power*—concerned the failure of the parties to pay for their shares.⁵¹⁶ The Respondent specifically alleges that AmRuz and Seagroup not only tendered promissory notes instead of paying for their shares, but further failed to pay the amounts owed under the promissory notes.⁵¹⁷ It further states that the ultimate outcome of both Cases 28/198 and 28/199 turned on the same legal provisions that were the subject of the court’s decision in *Northland Power*, namely Article 8(3) of the Securities Law and Article 33 of the Business Associations Law.⁵¹⁸ It concludes by stating that “the decisions of both courts were consistent with the decisions in *Northland Power* and were entirely in accordance with Ukrainian law.”⁵¹⁹

⁵¹¹ Transcript (27 March 2013), 98:4-10; Respondent’s Post-Hearing Memorial, ¶ 22

⁵¹² Transcript (18 March 2013), 174:7-14.

⁵¹³ Second Counter-Memorial, ¶¶ 125-126; Transcript (18 March 2013), 179:19-25, 180:1-18.

⁵¹⁴ Second Counter-Memorial, ¶¶ 121-124.

⁵¹⁵ Transcript (18 March 2013), 182:16-25 to 183:1-4.

⁵¹⁶ Counter-Memorial, ¶ 226; Transcript (18 March 2013), 184:8-10.

⁵¹⁷ Counter-Memorial, ¶ 226.

⁵¹⁸ Counter-Memorial, ¶ 226; Transcript (18 March 2013), 181:2-5, 182:4-7.

⁵¹⁹ Counter-Memorial, ¶ 229.

302. The Respondent further points out that neither AmRuz nor Seagroup requested that the Kyiv Court of Appeal order the return of the promissory notes or the amounts paid under them,⁵²⁰ and argues that the Court was therefore under no obligation to award them the said restitution.⁵²¹ As in the context of its discussion of Cases 32/1 and 17/178 (discussed above), the Respondent rejects the Claimant's expert's reliance on the *Dekon* case as controlling authority for the proposition that courts should grant restitution even absent a request from the defendant that it do so, by explaining that *Dekon* contradicted the general trend of court decisions including a 2005 Supreme Court decision,⁵²² that the Claimant's expert was only made aware of this case by the reference of the Respondent's expert to it;⁵²³ and that the Ukrainian system does not recognize precedent in court cases.⁵²⁴
303. Lastly, the Respondent notes that both AmRuz and Seagroup could have filed counterclaims to seek restitution, but both failed to do so.⁵²⁵

iii. The Propriety of Procedure in Case 17/60

The Claimant's Position

304. The Claimant argues that the failure of the Economic Court of the Poltava Region to notify the Claimant of Case 17/60 and the dismissal by the Higher Economic Court of the Claimant's appeal with regard to this issue was wrong and violated the due process rights of the Claimant.⁵²⁶ It contends that this court decision affected the right of the Claimant to participate in the management of Ukrtatnafta, given that the authority to sell Ukrtatnafta's unpaid shares was vested in the Supervisory Board and was subject to the approval of the General Shareholders Meeting and that the Claimant and the other shareholders had the right to establish the timing and modalities of the sale of the AmRuz and Seagroup shares.⁵²⁷

⁵²⁰ Transcript (27 March 2013), 100:14-16.

⁵²¹ Transcript (18 March 2013), 186:20-25 to 187:1-8; Respondent's Post-Hearing Memorial, ¶ 26.

⁵²² Transcript (27 March 2013), 101:24-25 to 102:1-8, 103:14-25.

⁵²³ Transcript (27 March 2013), 103:6-8.

⁵²⁴ Transcript (27 March 2013), 103:9-13; Respondent's Post-Hearing Memorial, ¶ 27.

⁵²⁵ Transcript (27 March 2013), 103:5-10.

⁵²⁶ Second Memorial, ¶ 214.

⁵²⁷ Second Memorial, ¶¶ 210-213.

The Respondent's Position

305. The Respondent states that Ukrainian law does not require the Economic Court of the Poltava Region to notify the Claimant of the existence of the proceedings in Case 17/60, as the Economic Procedure Code only required the Court to notify the actual parties, meaning AmRuz and Seagroup, of the existence of the proceedings. While Articles 111-103(3) of the Economic Procedure Code provides that a court decision may be quashed on cassation if it “concerns” the rights and obligations of a non-party, the application of this provision is a matter of judicial discretion.⁵²⁸

2. The Tribunal's Consideration of the Facts Concerning the Shareholdings of AmRuz and Seagroup

306. In the view of the Ukrainian Ministry of Fuel and Energy, the two new shareholders were admitted as the need to attract new capital arose in connection with the purchase of oil that could no longer be available as a consequence of the change in the capital contribution of oil wells by Tatarstan.⁵²⁹ Although these other companies are not a party to the dispute before this Tribunal they have the working arrangements with Tatneft that have been described. Whether such arrangements have or have not an influence on the Claimant's rights is a matter to be considered further below. But what is of importance at this stage of the analysis of the Tribunal is that such other proceedings, namely Cases 28/198 and 28/199, appear to have followed the same pattern considered above.
307. On the ground that the use of promissory notes that intervened in the capital contributions of AmRuz and Seagroup had violated Article 13 of the Company Law, the lawsuits filed by the SPFU against Ukratnafta and all its shareholders seeking invalidation of such contributions were upheld by the Kyiv Economic Court on 28 November 2001. In the Court's view, that provision excluded promissory notes from the kinds of assets that at the time could be used to contribute to the capital of a company and limited promissory notes to being used for payment for “delivered products, performed operations or rendered services.” The outcome of these decisions was that the Court annulled the share purchase agreements entered into with AmRuz and Seagroup, respectively, and ordered that AmRuz and Seagroup return their shares to Ukratnafta.

⁵²⁸ Second Counter-Memorial, ¶¶ 176-182.

⁵²⁹ Letter from Yu Boyko to the Prosecutor's Office, 28 April 2007 (REX-145).

308. A related issue considered in these cases was whether the extension from 2000 to 2003 of the time period for the payment of the promissory notes agreed to had breached Articles 11 and 33 of the Company Law and the Ukrtatnafta Incorporation Agreement and Charter, with the decisions in question so ruling.
309. Although these decisions were affirmed by the Kyiv Economic Court of Appeal on 14 March 2002, they were ultimately reversed by the Higher Economic Court on 29 May 2002 on the ground that Articles 3 and 21 of the Law on Securities and Stock Exchange in conjunction with Article 13 of the Law on Business Companies considered promissory notes a security that can be contributed to the capital of a company. The Supreme Court in a series of decisions adopted in 2002 and 2006 upheld the validity of the use of promissory notes and the extension of the payment period as being compatible with the legislation in effect at the time and Article 5.3 of the Incorporation Agreement. The provisions of the Articles of the Company Law noted were thus held to have been satisfied as in force at the time of the transactions considered in these cases.
310. Although the Respondent believes that the decisions of the Higher Economic Court on the acceptance of the promissory notes issued in payment of the capital contributions of AmRuz and Seagroup, and ultimately their confirmation by the Supreme Court, are legally incorrect,⁵³⁰ the interpretation of Ukrainian law on which they are based is tenable and cannot be disqualified because of being different from the interpretation advanced by other courts that intervened in this matter. That delivery of promissory notes constituted “payment” for the purposes of Ukrainian law was a tenable conclusion, just like the extension in the date for payment is. To take into account the law as it stood at the time, in view of amendments barring the use of promissory notes for founders’ capital contributions becoming effective later, is also tenable in spite of the Respondent’s belief to the contrary.⁵³¹
311. The fact that there were six out of seven Ukrainian courts at four judicial levels, with 21 out of 24 reviewing judges, that ruled against the use of promissory notes, which the Respondent invokes in support of its argument,⁵³² does not mean that only one interpretation could be regarded as tenable, or that jurisprudence can be established by majority counting. The same holds true for the fact that all decisions that followed the Supreme Court’s reopening of Cases 28/198 and 28/199 were similarly adverse to the companies concerned.

⁵³⁰ Respondent’s Post-Hearing Memorial, ¶ 11; Transcript (18 March 2013), 167:7-25 to 168:1-18.

⁵³¹ Respondent’s Post-Hearing Memorial, ¶ 11.

⁵³² Respondent’s Post-Hearing Memorial, ¶ 9.

312. The decisions of the Higher Economic Court and the Supreme Court noted stand in contrast to the line of the Tatneft cases considered above and show that, at least with regard to the issue of promissory notes, there were tenable arguments on the side of the affected companies. This development, however, in spite of having provided the basis for a stable legal conclusion on the payment of capital contributions by means of promissory notes, was to be short-lived.
313. Indeed, in 2002 the Prosecutor had initiated proceedings against AmRuz, Seagroup, Ukrtatnafta and other shareholders that led to Case 8/604 before the Poltava Region Economic Court, asserting that Article 5(5) of the Ukrtatnafta Incorporation Agreement authorizing the use of securities, on the basis of which the promissory notes were issued, was contrary to Ukrainian law because the use of promissory notes merely contributed debt obligations and did not comply with the requirement of Article 31 of the Company Law insofar as it could not satisfy the obligation to pay at least 50% of the capital before the first General Shareholders Meeting. The Poltava Region Economic Court dismissed this claim relying on the prior decisions of the Higher Economic Court in Cases 28/198 and 28/199 noted above upholding the lawfulness of promissory notes to effect such capital contributions. Shortly afterwards, in 2004, Naftogaz filed new lawsuits based on the argument that promissory notes were not “securities” within the meaning of Article 13 of the Company Law, and also asserting that the extension of the payment date agreed to was contrary to Article 31 of this law. This other claim was also dismissed on appeal by the Kyiv Economic Court and, with the exception of one ground, by the Higher Economic Court.
314. The Prosecutor, however, years later, in 2008, filed a Cassation Appeal against the decisions of the Higher Economic Court in respect of Cases 28/198 and 28/199, seeking to reopen such cases in spite of the lapsed appeal time period, on the ground that the Higher Economic Court had applied the same legal provision in a different manner in Case 45/383, the *Northland Power* case of 2006. The Prosecutor asserted in particular that it had not participated in this case and was therefore unaware of the different interpretations made, a view which the Claimant believes is untrue in light of the various judicial proceedings in which this official had participated and which interlinked the various issues involved, including the *Northland Power* case.⁵³³ The Supreme Court then reversed its earlier understanding and ruled that contributing debt obligations was contrary to Article 13 of the Companies Law. It also decided that there were justifiable grounds for commencing cassation proceedings in spite of the missed cassation

⁵³³ Claimant’s Post-Hearing Submission, ¶ 45; First Expert Report of Toms, ¶ 121; Witness Testimony of Toms, Transcript (25 March 2013), 70:19-25 to 74:1-23.

appeal period, and remanded the cases concerned for de novo review. The judgments of the Higher Economic Court and other courts in these cases were set aside.

315. The Respondent sees no contradiction in these Supreme Court decisions based on the understanding that at first this Court did not deal with the merits of the case, which only came to be considered at the stage of the cassation appeal, opposing on this point the views of Mr. Toms.⁵³⁴ The scope of the decisions in question might be different but the fact that stands is that the whole issue was reopened and finally led to conclusions exactly contrary to those reached earlier.
316. The Parties have disputed whether the Cassation Appeal was duly notified to AmRuz and Seagroup, a particularly important due process requirement as the appeal would be decided within one month as mandated by the Ukraine Code of Economic Procedure. In spite of the fact that procedural negligence on the part of these companies is invoked by the Respondent as the basis for having failed to oppose that application before the Supreme Court and resulting in an *ex parte* decision,⁵³⁵ there is no appropriate evidence that such application was properly served and just sending a copy of the cassation appeal is not the same as having duly serviced a proper notice, particularly if in the Claimant's view the ensuing decision was not later subject to appeal.⁵³⁶ Although the Claimant invoked at the hearing the service requirements of the Hague Convention on Service Abroad this argument was not invoked before the courts nor well explained⁵³⁷ and will thus not be further discussed.
317. As a result of these new developments the share purchase agreements entered into between Ukratnafta and AmRuz and Seagroup, respectively, were invalidated in 2008 and AmRuz and Seagroup were ordered to return their shares to Ukratnafta. It was held that Article 8(3) of the Securities Law had been breached because shares had been exchanged for sixty-five promissory notes of which only three had been redeemed. Article 33 of the Ukraine Law on Business Associations had also been breached because the shares had not been paid in full at least one year before the registration of the joint stock company. Such exchange was also held incompatible with the 1992 Resolution of the Cabinet Ministers of Ukraine on the use of promissory notes allowing their issuance for delivered products, executed works and rendered

⁵³⁴ Respondent's Post-Hearing Memorial, ¶¶ 24-25, with reference to the Witness Testimony of Toms.

⁵³⁵ Transcript (18 March 2013), 172:15-25 to 174:1-14; Exhibit C-333; Respondent's Post-Hearing Memorial, ¶ 21.

⁵³⁶ Claimant's Post-Hearing Submission, ¶ 50.

⁵³⁷ Respondent's Post-Hearing Memorial, ¶ 22.

services. All these decisions were affirmed by the Kyiv Economic Court of Appeal, the Higher Economic Court and the Supreme Court in the proceedings that followed.

318. Not long afterwards, also in 2008, Korsan began proceedings in Case 17/60 against Ukratnafta and several of its officials seeking to compel the sale of shares formerly held by AmRuz and Seagroup; a request which was granted in 2009 without informing the defendants.
319. The Parties have argued about whether the share purchases of AmRuz and Seagroup were contrary to the parity principle of the Ukratnafta Treaty, and in particular about whether the parity requirement was permanent or not intended to extend beyond the incorporation of Ukratnafta. The Tribunal has already discussed above that the question of the form of capital contributions does not relate to the public nature of the Treaty but rather to the governance of Ukratnafta. The situation here is not different. There is no reason to believe that the parity requirement was meant to be permanent as the governance of the company would have been placed in a straitjacket if that were the case. In the Tribunal's Partial Award on Jurisdiction it was already established that parity had to be understood in a framework of flexibility. Reasons of legal interpretation aside, including the powers given to the company's governing bodies by the Incorporation Agreement, the situation that followed these developments confirms that parity was not an essential element of the future structure of the company. In fact it will be explained further below that following the invalidation of Tatneft shares and the sale of those held by AmRuz and Seagroup, all shares are today in the hands of Ukrainian interests, public and private. The parity principle simply does not exist today.
320. The Tribunal is not convinced either by the Prosecutor's assertion that because of being allegedly unaware of Cases 28/198 and 28/199 and the *Northland Power* decision there was cause to reopen the cases in question. The evidence introduced by the Claimant shows that in fact the Prosecutor had been a party to cases where the same cases and the *Northland Power* decision had been specifically discussed, notably Case 8/604 before the Economic Court of the Poltava Region and Case 17/34 in the Kyiv Economic Court of Appeal. The Prosecutor's statements before the Supreme Court to the effect that he had only learnt of the events concerning Cases 28/198 and 28/199 when Ukratnafta had filed its claims before the courts and not earlier is therefore questionable,⁵³⁸ as is the view that such official had not been aware of

⁵³⁸ Cassation Appeal of the General Prosecutor of January 24, 2008 against the Decree of the Higher Economic Court of May 29, 2002, Case 28/198, p. 3 (C-333); Cassation Appeal of the General Prosecutor of January 24, 2008 against the Decree of the Higher Economic Court of May 29, 2002, Case 28/199, p. 3 (C-334).

Case 32/1 as it had been invoked in its own application in Case 8/604.⁵³⁹ Although differences in dates have been noted by the Respondent to argue that *Northland Power* had been issued four months later than the decision in Case 17/34 and hence could not be in the knowledge of the Prosecutor,⁵⁴⁰ this does not mean that the Prosecutor was unaware of what was being discussed in that other case as the Claimant believes.⁵⁴¹

321. The Tribunal is mindful of the fact that Article 111(15) of the Ukrainian Code of Economic Procedure provides as a ground for the Supreme Court's reopening a resolution of the Higher Commercial Court that of when the latter has applied the same provision differently in similar cases. Again here the Parties hold different views. While the Respondent believes that the cases concerning AmRuz and Seagroup dealt with the same issue as *Northland Power*, namely the non-payment of capital contributions in light of Article 8(3) of the Securities Law and Article 33 of the Business Associations Law and thus that the cases were similar and justified their reopening by the Supreme Court, the Claimant is of the view that the cases were not similar as *Northland Power* was a case in which no contribution had been made for the cancelled shares and in which the lawfulness of promissory notes as a means of purchasing shares was not considered.
322. When a court finds in one case that promissory notes could not be used for payment of capital contributions and in another that no capital contributions had been made at all, it is difficult to consider these cases as being similar, particularly in light of the earlier Supreme Court resolution accepting that defendants had discharged their obligations concerning equity contributions by providing the company with the promissory notes in question. If such payment is considered valid it cannot indeed be compared to a situation in which no payment exists. Furthermore, the Tribunal notes the Claimant's argument to the effect that the Cabinet Ministers of Ukraine in an application for review of the decisions in Cases 28/198 and 28/199 recognized as recently as 2010 the validity of AmRuz's and Seagroup's share purchases on the ground that they were in accordance with the Ukrainian law in force in 1999.
323. The Tribunal considers that the Respondent's argument to the effect that at the time of the Supreme Court's reopening of the cases there was a practice not to give reasons in justification

⁵³⁹ Witness Testimony of Dr. Belyanovich, Transcript (26 March 2013), 8:21-25 to 9:1-4; Judgment of the Poltava Region Economic Court of November 12, 2002, Case 8/604, at 1 and 3, Exhibit C-90; Second Expert Report of Toms, at 31.

⁵⁴⁰ Respondent's Post-Hearing Memorial, ¶ 18.

⁵⁴¹ Respondent's Post-Hearing Memorial, ¶ 20, with reference to the Witness Testimony of Toms.

of such outcome,⁵⁴² and thus that unsubstantiated decisions could not be considered unjustified, is not likely to convince this Tribunal. Neither does the Tribunal find any more convincing the argument that a typical reason for reopening cases is the non-participation of the Prosecutor in the original litigation.⁵⁴³ The Claimant correctly points out that under Ukrainian law, as provided under Articles 71, 76 and 80 of the Civil Code and Articles 111-16 and 53 of the Code of Economic Procedure, the extension of statutory deadlines requires evidence of “material reasons” that would so justify an extension,⁵⁴⁴ a standard that cannot be met by unsubstantiated opinions, particularly when the cases involved entail important economic consequences for the defendants and a serious legal issue concerning the question of *res judicata* of judicial decisions. The Tribunal further notes that the Ukrainian law experts whose reports were produced in the instant case by both Parties are in agreement about such strict requirements for the courts to renew a limitation period, as the Claimant has maintained.⁵⁴⁵

324. Neither can the Tribunal find convincing the Respondent’s view to the effect that there is a distinction to be made in respect of cases where the Prosecutor acts on behalf of another entity, in which it would be the date the Prosecutor learnt of the relevant violation, and not the date in which the entity so learnt, that would trigger the operation of the Statute of Limitation.⁵⁴⁶
325. The Tribunal must thus conclude that the extension of a specific statutory deadline does not appear to be justified in this context. Neither is the fact that notifications were omitted in Case 17/60 in respect of Tatneft helpful to support the Respondent’s arguments in respect of compliance with due process of law. The Tribunal agrees with the Respondent’s views to the effect that not every allegation of due process violations can result in the breach of the fair and equitable treatment,⁵⁴⁷ as will be discussed further below, but in this case the questionable role of the Prosecutor that has been noted applies in similar terms to this other series of lawsuits directed to reopening past cases and it thus becomes not an isolated event.

⁵⁴² First Expert Report of Belyanevich, ¶ 24, at 79.

⁵⁴³ Transcript (26 March 2013), 13:4-25 to 15:1-2.

⁵⁴⁴ Second Expert Report of Toms, at 28-29.

⁵⁴⁵ First Expert Report of Belyanevich, ¶ 20; Expert Report of Martinenko, ¶¶ 36-37.

⁵⁴⁶ Second Expert Report of Belyanevich, ¶ 41, with reference to the Second Expert Report of Toms, at 13-14.

⁵⁴⁷ Transcript (19 March 2013), 15:1-12.

D. THE ALLEGED DEBT FOR PAST OIL DELIVERIES

326. The Claimant has also brought a claim for the question of alleged debt for past oil purchases. While intertwined with the claims examined above, this claim will be examined by the Tribunal further below.

V. TATNEFT'S CLAIMS UNDER THE RUSSIA-UKRAINE BIT

A. THE APPROACHES TO TREATY BREACHES CONTENDED BY THE PARTIES

327. The first question the Tribunal has to examine in connection with the claims for liability is whether it is appropriate to follow a systemic approach calling for the assessment of the Respondent's conduct as a whole, which is the position taken by the Claimant, or an approach calling for the examination of the facts individually, which is the position favored by the Respondent.
328. The Claimant relies in support of its position on *Rosinvest* (§ 410), *Vivendi II* (§ 7.5.31) and *Walter Bau* (§ 12.43), cases which have underlined the need to consider acts and omissions in a cumulative manner and not as isolated events incapable on their own of establishing liability. In the Claimant's view, the cumulative acts to be assessed belong to four main categories, all of which have been factually examined above: the seizure of the Kremenchug refinery and the associated change in Ukratnafta's management; the annulment of Tatarstan's title to shares in the Company (Cases 32/1 and 17/178); the annulment of AmRuz's and Seagroup's title to shares (Cases 28/198 and 28/199); and the annulment of Tatneft's title to shares (Case 17/178).
329. The Claimant maintains that most of the investor's rights protected under the Russia-Ukraine BIT and its interrelations with other treaties have been breached, with particular reference to the standards for fair and equitable treatment, complete and unconditional legal protection, full protection and security, effective means for assertion of claims and enforcement of rights, and expropriation.⁵⁴⁸ These claims will be examined below.
330. In considering the facts of this case the Tribunal has noted that there is a clear link between these series of events and that they all culminated in the taking over of Ukratnafta by Ukrainian-related interests to the exclusion of the Tatarstan interests. These developments took place step by step with each aggravating the situation of the Claimant. It would be an artificial proposition to try to assess these events in an isolated manner, particularly in view of the fact

⁵⁴⁸ Claimant's Post-Hearing Submission, §§ 1-4.

that the shareholding in Ukratnafta changed dramatically during the intervening period. Indeed, Tatneft's, AmRuz's and Seagroup's interests disappeared altogether with only Naftogaz's shareholding remaining untouched; the SPFU shares were also diminished and Korsan's interest increased from 1% to 47.08%, a process that appears not to have ended.

331. As a point of fact, during his testimony at the oral hearing Mr. Kolomoisky explained that the original plans to create a vertically integrated company had not succeeded thus far because they needed the concurrence of Naftogaz as Ukraine's most important shareholder, but efforts at trying to harmonize operations in the sectors in which the group operates are going on⁵⁴⁹ and that in any event the initial share purchase was conceived as an entry ticket to the prospect of further acquisitions.⁵⁵⁰ It is also of interest to note that of the US\$ 720 million paid at this stage by Korsan for the shares in Ukratnafta, only US\$ 200 million related to the assets bought and the balance was related to building up the company's working capital and other needs.⁵⁵¹
332. The Tribunal is also mindful that cumulative and composite acts and omissions are a well established principle governing liability under international law as evidenced by Article 15 of the International Law Commission Articles on State Responsibility. The Claimant's arguments to this effect are well supported by the jurisprudence of tribunals and writers.⁵⁵²

B. THE OBLIGATION TO PROVIDE "COMPLETE AND UNCONDITIONAL LEGAL PROTECTION"

333. Article 2(2) of the Russia-Ukraine BIT requires the Respondent to provide "complete and unconditional legal protection" to qualifying investments, as follows:

Each of the Contracting Parties guarantees in accordance with its legislation the complete and unconditional legal protection of investments made by investors of the other Contracting Party.

⁵⁴⁹ Transcript (25 March 2013), 121:22-25 to 122:1-9, 130:6-14.

⁵⁵⁰ Transcript (25 March 2013), 137:9-17, 138:3-14.

⁵⁵¹ Witness Testimony of Kolomoisky, Transcript (25 March 2013), 125:25 to 129:1-20.

⁵⁵² Claimant's Post-Hearing Submission, ¶ 1.

1. The Claimant's Position

(a) The Claimant's Interpretation of Article (2) of the BIT

334. The Claimant interprets Article 2(2) of the Russia-Ukraine BIT in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT").⁵⁵³ Relying on what it takes to be the ordinary meaning of the terms of Article 2(2), the Claimant interprets the provision as requiring the Respondent to ensure that Russian investments enjoy the protection of Ukrainian law and to refrain from conduct that would deprive the said investments of this protection.⁵⁵⁴ It thereby characterizes Article 2(2) of the Russia-Ukraine BIT as "an assurance to the investor that the [host State's] laws will be applied,"⁵⁵⁵ which means that the "failure to comply with the national law to which a treaty refers will have an international effect."⁵⁵⁶ As an example of such an "international effect" of domestic law breaches, the Claimant refers to *Bogdanov v. Moldova*, where the tribunal found that Moldova's violations of its own law breached Article 2(2) of the Russia-Moldova BIT. The Russia-Moldova BIT requires Moldova to guarantee "under its legislation a complete and unconditional legal protection of the capital investments" of Russian investors.⁵⁵⁷

335. The Claimant contends that the immediate context of paragraph 2 of Article 2 within the Russia-Ukraine BIT confirms its interpretation of the provision; it observes that paragraph 1 of Article 2 requires the Contracting Parties to "encourage investors of the other Contracting Party to make investments in its territory." The Claimant further considers its interpretation of Article 2(2) confirmed by the object and purpose of the Russia-Ukraine BIT—as stated in its Preamble—"to create and maintain favorable conditions for mutual investments," of which the application of the law is a crucial element.⁵⁵⁸

336. The Claimant draws further support from Article 7 of the Agreement on Cooperation in the Field of Investment Activity dated 24 December 1993 ("1993 Investment Cooperation Agreement"), which was open to signature by all member-States of the Commonwealth of

⁵⁵³ Pursuant to Article 31(1), an international treaty must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties of May 23, 1969, 1155 U.N.T.S. 331 (CLA-16).

⁵⁵⁴ Memorial, ¶ 328; Transcript (18 March 2013), 73:18-25.

⁵⁵⁵ Memorial, ¶ 331, citing *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*.

⁵⁵⁶ Memorial, ¶ 331, citing *Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines*.

⁵⁵⁷ Memorial, ¶ 332.

⁵⁵⁸ Memorial, ¶ 333; Transcript (18 March 2013), 74:15-20.

Independent States.⁵⁵⁹ The Claimant alleges that the 1993 Investment Cooperation Agreement requires the contracting parties to provide compensation for State actions that are inconsistent with legislation, and that that Agreement formed the basis of Article 2(2). As the Claimant points out, the Preamble of the Russia-Ukraine BIT acknowledges that the BIT is “seeking to develop the main provisions of the [1993 Investment Cooperation Agreement].”⁵⁶⁰

337. The Claimant rejects the Respondent’s interpretation of Article 2(2), which it characterizes as requiring a “heightened showing such as miscarriage of justice.”⁵⁶¹ It differentiates the investment treaty awards cited by the Respondent to support its position by pointing to the phrase “in accordance with its legislation” in Article 2(2).⁵⁶² The Claimant contends that this phrase has the effect of setting compliance with Ukrainian law as the applicable standard for state conduct, to the exclusion of the customary international law minimum standard or an autonomous treaty standard, thereby equating the violation of a State of its domestic law with a treaty violation or a breach of an international obligation.⁵⁶³ It also argues that the substance of these awards do not in fact support the position of the Respondent.⁵⁶⁴

(b) Application of Article 2(2) of the BIT to the Facts

338. The Claimant alleges that the Respondent violated Article 2(2) in several ways: it failed to prevent—and later provided legal sanction to—the raid, thereby denying the Claimant’s investments of the basic protections under the Ukrainian Civil Code, the Code of Civil Procedure, and the Enforcement Law;⁵⁶⁵ it deprived the Claimant of its shareholding in Ukratnafta in court decisions—namely, Cases 32/1 and 17/178—that ignored the applicable

⁵⁵⁹ Second Memorial, ¶ 350.

⁵⁶⁰ Memorial, ¶ 334; Second Memorial, ¶ 350; Transcript (18 March 2013), 74:25 to 75:1-3.

⁵⁶¹ Second Memorial, ¶ 347.

⁵⁶² Second Memorial, ¶ 348.

⁵⁶³ Second Memorial, ¶ 349, citing to International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2), Yearbook of the International Law Commission (2001), vol. II(2), p. 26 p. 38, Commentary (7) to Article 3 (CLA-297); International Law Commission, Report of the Commission to the General Assembly, in Report of the International Law Commission on the Work of its Twenty-Fifth Session, UN Doc. A/9010/REV.1, Yearbook of the International Law Commission (1973), vol. II, p. 161, p. 188 (CLA-276); International Law Commission, The Internationally Wrongful Act of the State, Source of International Responsibility, in Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/246, Yearbook of the International Law Commission (1971), vol. II(1), p. 199, p. 232 (CLA-298).

⁵⁶⁴ Second Memorial, ¶ 351.

⁵⁶⁵ Memorial, ¶¶ 338-344; Second Memorial, ¶¶ 373-381.

three-year statute of limitations and were unfounded and unlawful;⁵⁶⁶ and it deprived the Claimant of its indirect shareholdings in Ukratnafta, held by AmRuz and Seagroup, in Cases 28/128 and 28/129, which were improperly reopened, and by subsequently allowing Mr. Ovcharenko to sell these shares that had been improperly appropriated.⁵⁶⁷

339. Even if the court decisions had been issued in compliance with Ukrainian law, which is denied, the Claimant argues that Ukraine in issuing them failed to provide effective means for the assertion of claims and the enforcement of rights with respect to Tatneft's investment.⁵⁶⁸

2. The Respondent's Position

(a) The Respondent's Interpretation of Article 2(2) of the BIT

340. While the Respondent accepts the Claimant's view that Article 2(2) "entitle[s] Russian investments to the protection of Ukrainian law and impose[s] on Ukraine a corollary obligation to ensure the enjoyment of such protection and refrain from conduct that deprives Russian investments of the legal protection of Ukrainian law,"⁵⁶⁹ the Respondent stresses that a breach of Article 2(2) can only occur if there has in fact been a violation of Ukrainian law. As noted above, the Respondent denies that the authorities or courts of Ukraine acted contrary to Ukrainian law.
341. Turning to the specific issue of the application of the standard of "complete and unconditional legal protection" to judicial decisions, the Respondent explains that arbitral review of conduct of the judiciary is relatively rare. Where tribunals were called upon to review judicial decisions, they had concluded that state courts provide appropriate legal protection when the court is available to the investors for the assertion of their rights⁵⁷⁰ and when the court's rulings on those rights are legally tenable and made in good faith.⁵⁷¹

⁵⁶⁶ Memorial, ¶¶ 345-348; Second Memorial, ¶¶ 391-398; Transcript (18 March 2013), 80:14-22.

⁵⁶⁷ Memorial, ¶¶ 349-353; Second Memorial, ¶¶ 399-407; Transcript (18 March 2013), 80:23-25 to 81:1-6.

⁵⁶⁸ Claimant's Post-Hearing Submission, ¶ 13.

⁵⁶⁹ Counter-Memorial, ¶ 141.

⁵⁷⁰ Counter-Memorial, ¶¶ 144-146, citing *Ronald Lauder v. the Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 314 (emphasis added by Respondent), *RLA-52* (where the tribunal stated that "[t]he Respondent's only duty under the Treaty [which contained a "full protection and security" clause] was to keep its judicial system available for the Claimant and any entities he controls to bring their claims" and found that the initiation of Czech court proceedings protecting the claimant's interest evinced the full availability of the Czech judicial system to the claimant) and *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case ARB/05/8 Award, 11 September 2007, ¶¶ 360-361, CLA-172, where the tribunal stated that "[t]he Respondent's duty under the Treaty was, first to keep its judicial system available for

342. The Respondent rejects the interpretation of the Claimant that the standard of “complete and unconditional legal protection” is breached by the misapplication of domestic law even when a court decision is rendered in good faith and is otherwise reasonably tenable.⁵⁷² It questions the importance placed by the Claimant on the phrase “in conformity with its legislation,” stating that the “full protection and security” standard (which the Tribunal addresses in the next section) obliges the Respondent to comply with its local legislation, and that there is no basis to impose on the Respondent a more stringent test than that for “full protection and security.”⁵⁷³
343. The Respondent also contends that the Claimant’s argument that a treaty requirement that a State conform to its domestic law elevates that State’s violation of its domestic law to a treaty breach finds no support in the sources cited.⁵⁷⁴
344. The Respondent further rejects the Claimant’s reliance on the 1993 Investment Cooperation Agreement, pointing out that this treaty was terminated in 2002 and was not incorporated by reference in the Russia-Ukraine BIT. Moreover, the Respondent contests the Claimant’s view that the Agreement creates international liability for State parties as a result of the mere misapplication of their domestic law (without any additional improper conduct that would otherwise breach a full legal protection standard).⁵⁷⁵

the Claimant to bring its contractual claims” and concluded that the claimant had failed to show that it was prevented from seeking reparation from the Lithuanian courts for the alleged violation of its rights.

⁵⁷¹ Counter-Memorial, ¶¶ 147-151, citing *Mohammad Ammar Al-Bahloul v. Tajikistan*, S.C.C. Case V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, CLA-197 where the tribunal reviewed the allegation from the claimant that the Tajik court had breached applicable substantive laws by misapplying Tajik corporate law and concluded that they “[we]re unable to find that the Tajik courts could not legitimately reach the substantive law conclusions which they did” (064/2008), Partial Award on Jurisdiction and Liability, ¶¶ 246-247, 2 September 2009, CLA-197 and Counter-Memorial, ¶ 149, citing *Frontier Petroleum Services Ltd. V. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 273, CLA-168,⁵⁷¹ where the tribunal clarified that the state is obliged to “make a functioning system of courts and legal remedies available to the investor”, although “not every failure to obtain redress” through the courts violates this obligation, and stated that state responsibility is not engaged by a court decision that is considered “wrong” by an international tribunal, or by the fact that the protection could have been more effective, for “as long as the courts have acted in good faith and have reached decisions that are reasonably tenable.” Transcript (19 March 2013), 8:6-11, 10:7-13.

⁵⁷² Second Counter-Memorial, ¶ 47.

⁵⁷³ Second Counter-Memorial, ¶ 48, with internal citations omitted.

⁵⁷⁴ Second Counter-Memorial, ¶¶ 49-50, referring to the ILC’s Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentary (7) to Article 3. The Respondent states that the former source states that the characterization of a State act as lawful by internal law does not affect its characterization as internationally wrongful by international law, and the latter states that the compliance with internal law is relevant to the issue of international responsibility where international law requires a State to comply with its internal law.

⁵⁷⁵ Second Counter-Memorial, ¶ 52.

(b) Application of Article 2(2) of the BIT to the Facts

345. The Respondent contends that it complied with Article 2(2) of the Russia-Ukraine BIT. It rejects the Claimant's characterization of the events of 19 October 2007 as a raid, and frames them instead as the proper implementation of valid court decisions ordering the reinstatement of Mr. Ovcharenko.⁵⁷⁶ In particular, it alleges that neither the 26 September 2007 court decisions reinstating Mr. Ovcharenko⁵⁷⁷ nor the 19 October 2007 enforcement of these decisions were illegal.⁵⁷⁸ The Respondent also argues that, in any event, Mr. Ovcharenko's reinstatement could not have been the cause of the Claimant's alleged losses.⁵⁷⁹
346. Turning then to the decisions of the Ukrainian courts complained of by the Claimant, the Respondent maintains that the Claimant has failed to show either that the Ukrainian judiciary was not available to it or that the court proceedings were not "reasonably tenable" or not conducted in good faith.⁵⁸⁰
347. The Respondent points out that there is no basis for the allegation that the Prosecutor lied or was otherwise improperly motivated in its motion to reopen the prescription period for Case 32/1 or in its motion to renew the cassation term in Cases 28/198 and 28/199.⁵⁸¹ It further argues that the Claimant has not shown that the courts that found a valid reason to reopen these cases were acting improperly.⁵⁸²
348. The Respondent contends that the court decisions invalidating the Claimant's direct shareholding in Ukratnafta did not breach Article 2(2) because the Economic Court of the Poltava Region, in Case 17/8, reasonably found that it had jurisdiction,⁵⁸³ that the claims brought to it were not time-barred,⁵⁸⁴ and that the Claimant's purchase of shares was invalid.⁵⁸⁵ The Economic Court also reasonably applied Article 83(2) of the Securities Law.⁵⁸⁶ The

⁵⁷⁶ Counter-Memorial, ¶ 153.

⁵⁷⁷ Counter-Memorial, ¶¶ 154-165.

⁵⁷⁸ Counter-Memorial, ¶¶ 166-181.

⁵⁷⁹ Counter-Memorial, ¶¶ 182-189; Second Counter-Memorial, ¶¶ 140-146.

⁵⁸⁰ Transcript (19 March 2013), 10:8-13.

⁵⁸¹ Transcript (19 March 2013), 10:14-23.

⁵⁸² Transcript (19 March 2013), 10: 23-25.

⁵⁸³ Counter-Memorial, ¶¶ 195-196.

⁵⁸⁴ Counter-Memorial, ¶¶ 197-203, Transcript (19 March 2013), 11:1-14.

⁵⁸⁵ Counter-Memorial, ¶¶ 204-209.

⁵⁸⁶ Counter-Memorial, ¶¶ 210-212.

Respondent further argues that the higher courts reasonably upheld the lower court's decision in this matter.⁵⁸⁷

349. The Respondent also maintains that the court decisions invalidating the Ukratnafta shares of AmRuz and Seagroup did not breach Article 2(2) because they conformed to Ukrainian law. Even if one were to question the conformity of these decisions to Ukrainian law, the Claimant has not shown, in the Respondent's view, that these decisions were not "reasonably tenable" or not rendered in good faith.⁵⁸⁸ Specifically, the Respondent argues that the Supreme Court of Ukraine reasonably remanded Cases 28/198 and 28/199,⁵⁸⁹ and that the Kyiv Economic Court and the Kyiv Economic Court of Appeal reasonably found that the contributions of AmRuz and Seagroup to the authorized capital of Ukratnafta violated Ukrainian law.⁵⁹⁰ In the Respondent's view, the Kyiv Court of Appeal reasonably applied Article 83(2) of the Securities Law,⁵⁹¹ and the Higher Economic Court of Ukraine and the Supreme Court of Ukraine reasonably upheld the findings of the lower court.⁵⁹²

3. The Tribunal's Findings

350. The conditions under which judicial misconduct triggers a State's international responsibility have been the subject of controversy in both arbitral jurisprudence and scholarly discussions. This controversy extends to the related question of how deferential international courts or tribunals should be in reviewing the alleged misconduct of domestic courts. These difficulties are compounded in the present case as it is not only the conduct of courts that it is at issue but also the participation of the State in many of the facts discussed, either by means of the intervention of various ministries and State agencies or in particular that of the Public Prosecutor, an official who in spite of normally having autonomous functions is nonetheless a State agent. A further difficulty from the point of view of international law is that the judiciary is as part of the State as any State body and its independence does not exclude it from engaging the responsibility of the State as a matter of principle. Deferential treatment of the role of courts by international tribunals is necessary, above all when their independence is fully established,

⁵⁸⁷ Counter-Memorial, ¶¶ 213-216.

⁵⁸⁸ Counter-Memorial, ¶ 217-241.

⁵⁸⁹ Counter-Memorial, ¶¶ 220-228.

⁵⁹⁰ Counter-Memorial, ¶¶ 229-235.

⁵⁹¹ Counter-Memorial, ¶¶ 236-238.

⁵⁹² Counter-Memorial, ¶¶ 239-241.

but this does not extend to excuse acts or omissions that might be in breach of treaty obligations.

351. The Tribunal must first note in this respect that the traditional customary law responsibility arising as a consequence of denial of justice by the State courts is not present in this case, in any event as far as procedural aspects are considered. The courts have been generally available to the affected parties, although there have been questions concerning *ex parte* decisions or proceedings that, while not necessarily constituting denial of justice might be in breach of other standards of protection. The delay in deciding cases submitted to the courts is not extraordinary as compared to that which occurs in many judicial systems. Evidence concerning nationality-based discrimination is not readily available although there has been in this case a clear intent to substitute Ukrainian interests for those of Tatarstan and the companies related to the latter's interests; it is not possible, however, to establish that this was the consequence of discrimination in terms of nationality, but might also have an incidence in respect of the breach of other standards of protection. The same holds true in respect of allegations of corruption which have not specifically identified any such instance and are based on a general perception affecting the Ukrainian judiciary.
352. The Tribunal must also note that there is broad agreement in considering that mere errors of fact or law on the part of the domestic courts do not breach the standard of denial of justice. There is, however, no consensus on whether a "substantive denial of justice" exists, as opposed to a procedurally based one, and, if the answer is in the affirmative, what its threshold should be. It should be noted that in respect of the fair and equitable treatment standard the observance of both substantive and procedural due process has been occasionally required, as reflected in *SIAG and Vecchi v. Egypt, Mondev and Amto*.
353. The early efforts at codification of the law of State responsibility did not ignore this question and in fact placed considerable emphasis on the view that a manifestly unjust judgment could well result in engaging the liability of the wrongdoer State, a proposition that at the time was on many occasions, but not always, considered in the context of denial of justice. On occasions, too, this was to be coupled with a discriminatory intent towards the protected alien.
354. Responsibility in light of questions concerning the interpretation and application of the law find, in addition to those standards that might be found applicable under customary law, a direct link with the standard of "complete and unconditional legal protection" and the "effective means" standard found in some BITs. This is the case of Article 2(2) of the Russia-Ukraine BIT relevant

in this dispute, as used in the Energy Charter Treaty and brought into the BIT by operation of the Most Favoured Nation Clause, to which the Tribunal turns now.

355. The key phrase “complete and unconditional legal protection” is not further defined in Article 2(2) of the Russia-Ukraine BIT. It thus falls to the Tribunal to determine the content of the Respondent’s obligation under Article 2(2) in light of the rules governing the interpretation of treaties and, to the extent necessary, under customary international law.
356. Case law is not abundant on this point as not many BITs have included this particular kind of protection. The Parties have discussed in support of their respective positions the decision in *Yury Bogdanov v. Republic of Moldova*, the Claimant arguing that it shows the engagement of liability in view of the Respondent’s non-compliance with domestic law and the Respondent maintaining that such a case did not concern any action by the courts. The implications of such a decision for a case in which court action is at the heart of the dispute are not clear and thus cannot be relied upon by this Tribunal. However, the finding that an investor can rely on the assurance that the laws will be applied has not escaped the attention of tribunals, as evidenced in *MTD*.
357. The Parties have also discussed in this context Article 7 of the 1993 Investment Cooperation Agreement, providing for compensation if actions of State bodies or officials inconsistent with the legislation of the State that is host to the investment result in damages to the investor. While this Agreement has a nexus to the BIT in light of the latter’s Preamble, it is not specific enough to help in the interpretation of such BIT, in addition to the fact that the Agreement was never ratified by Russia and even temporary application was terminated.
358. The Tribunal is also mindful that this discussion is linked to the requirement of ensuring that the protected person will have effective means available for the assertion of claims and the enforcement of rights as emphasized in *Parkerings v. Lithuania*. This is the case of the instant dispute, as Article 10(12) of the Energy Charter Treaty—as incorporated in the Russia-Ukraine BIT through the most-favoured nation clause found in Article 3(1)—explicitly contains this requirement in respect of the protection of the investment.
359. The Parties have discussed the case *Amto v. Ukraine* in connection to this particular requirement, which although it dealt with the question of having legislation for the protection of property and contractual rights available, was not concerned with the kind of judicial conduct here complained of. This particular decision is thus of little help in providing guidance in the interpretation of this standard. Of greater relevance are the cases of *Chevron v. Ecuador* and

White Industries v. India. The tribunal in the former understood a similar provision of the applicable BIT as closely related to the customary law standard of denial of justice, but noted that under the BIT the test might be less demanding than under the denial of justice. The latter case was more explicit in identifying the contents of the effective means standard, mainly in conjunction with issues of delay in court proceedings that were of relevance in that case.

360. This Tribunal must note that both decisions corroborate to an extent the proposition that the customary law denial of justice test has not remained unchanged since first formulated and that the current understanding that customary law has evolved so as to become more closely identified with the applicable treaty standards is the prevalent approach. The Respondent, however, views such decisions as inapposite to this case as they dealt with long delays in the court system of 13 and 9 years respectively.

361. In light of the facts of this case, the Tribunal has concluded above that there are no grounds for a finding of denial of justice. The observance of the BIT standards discussed in this connection is open to greater doubt as there are elements of the factual record that could lead in the direction of a breach as far as the compliance with domestic law is concerned, but not so in respect of the effective means standard as the court system has been generally available, with some limited exceptions. These questions, however, are inseparable from the discussion and findings concerning other BIT standards, in particular the fair and equitable treatment, within which such questions are subsumed. While the individuality of Article 2(2) might be justified in the context of certain disputes, in the instant case all of its relevant elements are indistinguishable from the BIT's principal standards.

C. FAIR AND EQUITABLE TREATMENT, FULL PROTECTION AND SECURITY AND "EFFECTIVE MEANS": THE OBLIGATION UNDER ARTICLE 3(1) OF THE RUSSIA-UKRAINE BIT IN CONJUNCTION WITH EACH OF ARTICLE 2(2) OF THE UK-UKRAINE BIT AND ARTICLE 10(12) OF THE ENERGY CHARTER TREATY

362. Article 3(1) of the Russia-Ukraine BIT provides:

Each of the Contracting Parties shall provide in its territory, for investments made by investors of the other Contracting Party, and for activities in connection with such investments, treatment [or a regime] no less favourable than the treatment [or the regime] provided for its own investors or for investors of any third state, excluding the application of measures of a discriminatory nature which could obstruct the management and the disposal of investments.

363. Article 2(2) of the Agreement between the Government of the United Kingdom, Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal

Protection of Investments of 10 February 1993 (“UK-Ukraine BIT”)⁵⁹³ obliges the Respondent to accord investments of investors of the other Contracting Party the following treatment:

Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party. (emphasis added)

364. Article 10(12) of the Energy Charter Treaty, done on 17 December 1994 (“ECT”)⁵⁹⁴ and to which Russia and Ukraine are parties, states:

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations. (emphasis added)

365. The Claimant posits that Article 3(1) of the BIT has the effect of incorporating the more favorable treatment protections accorded to investors of third States into the Russia-Ukraine BIT,⁵⁹⁵ and the Respondent does not oppose this position in principle.⁵⁹⁶ However, the Parties disagree as to how the protections under the UK-Ukraine BIT and the ECT are to be interpreted—in particular in relation to alleged judicial wrongs—and whether any of these protections has been breached by Ukraine in the present case.

1. Fair and Equitable Treatment

(a) The Claimant’s Position

i. The Claimant’s Interpretation of the “Fair and Equitable Treatment” Standard

366. The Claimant states that the application of the fair and equitable treatment standard, which is not further defined in the UK-Ukraine BIT, depends on the facts of each case. However, fair and equitable treatment clearly encompasses fundamental legal standards.⁵⁹⁷ The Claimant specifies

⁵⁹³ Agreement between the Government of the United Kingdom, Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 10 February 1993 (C-24).

⁵⁹⁴ Appeal against Decision of the Economic Court of Kyiv City of 4 September 2008 in Case 32/1 filed by the Cabinet of Ministers of 12 September 2008 (CLA-152).

⁵⁹⁵ Memorial, ¶¶ 360-364.

⁵⁹⁶ Counter-Memorial, ¶ 242.

⁵⁹⁷ Memorial, ¶ 365; Transcript (18 March 2013), 48:5-11.

that the following form part of the fair and equitable treatment obligation: the prohibition against unreasonable or arbitrary conduct;⁵⁹⁸ the obligation to accord substantive and procedural due process;⁵⁹⁹ the obligation not to deny justice;⁶⁰⁰ the obligation to ensure a stable and predictable legal framework in conformity with general principles of legal certainty, the statute of limitations and *res judicata*;⁶⁰¹ the protection of the investor's legitimate expectations with respect to the host State's law and its application, which includes transparency and the observation of such well-established fundamental standards as good faith;⁶⁰² and the prohibition against discrimination, which is also included as a stand-alone protection in Article 2(2) of the Russia-Ukraine BIT and Article 2(2) of the UK-Ukraine BIT.⁶⁰³

367. In the Claimant's view, a state's international responsibility is not exhausted by the concept of denial of justice. While court decisions that misapply domestic law but otherwise conform to the international obligation of a state trigger state responsibility only in the event that denial of justice is shown,⁶⁰⁴ court decisions that conflict with a state's treaty-based international obligations constitute an internationally wrongful act regardless of whether the court's conduct qualifies as a denial of justice.⁶⁰⁵
368. The Claimant argues that the fair and equitable treatment standard is independent and more protective of foreign investments than the denial of justice standard under customary international law. In support of its position, it cites *EDF (Services) v. Romania* and *Lemire v. Ukraine*, stating that these decisions do not distinguish between judicial and other state conduct in reviewing judicial conduct for arbitrariness. Thus, the application of the fair and equitable treatment standard to judicial conduct is not limited to protection from denial of justice.⁶⁰⁶
369. The Claimant also argues that the awards cited by the Respondent are inapposite. As the Claimant explains, *Mondev v. United States* involved the interpretation of NAFTA Article 1105(1), which specifically equates fair and equitable treatment to the international

⁵⁹⁸ Memorial, ¶¶ 367-375; Claimant's Post-Hearing Submission, ¶ 2.

⁵⁹⁹ Memorial, ¶ 393; Transcript (18 March 2013), 48:12-15; Claimant's Post-Hearing Submission, ¶ 2.

⁶⁰⁰ Memorial, ¶¶ 399-401; Transcript (18 March 2013), 48:15-17; Claimant's Post-Hearing Submission, ¶ 2.

⁶⁰¹ Claimant's Post-Hearing Submission, ¶ 2.

⁶⁰² Memorial, ¶¶ 413-419 Transcript (18 March 2013), 48:23-25.

⁶⁰³ Memorial, ¶¶ 425-428.

⁶⁰⁴ Second Memorial, ¶¶ 250-252.

⁶⁰⁵ Second Memorial, ¶¶ 248-249, 251-252.

⁶⁰⁶ Second Memorial, ¶¶ 261-263, citing *EDF (Services) v. Romania* and *Lemire v. Ukraine*.

minimum standard (that is, the standard of customary international law). Moreover, the *Mondev* Award does not differentiate judicial from administrative conduct or limit the fair and equitable treatment standard to protection from denial of justice.⁶⁰⁷ *RosInvestCo v. Russian Federation* involved an expropriation claim, and the tribunal did not apply its holding that court decisions must be reviewed for a denial of justice, as it chose to examine the respondent's conduct as a whole.⁶⁰⁸ Finally, *Azinian v. Mexico* was adjudicated under NAFTA⁶⁰⁹ and did not involve the conduct of the Mexican courts.⁶¹⁰

370. The Claimant contends that the jurisprudence on Article 6 of the European Convention of Human Rights ("ECHR"), on which the Respondent relies, is also unavailing because investment treaties accord investors better protection than the ECHR, with Article 6 providing for procedural protections alone.⁶¹¹

371. The Claimant thereby posits that the standard for analyzing court decisions is the "reasonably tenable" standard.⁶¹²

ii. Application of the "Fair and Equitable Treatment" Standard to the Facts

372. The Claimant contends that the Respondent breached the fair and equitable treatment standard in the following ways. First, it claims that the Respondent subjected the investments of the Claimant to arbitrary and unreasonable measures, including the deprivation of control, management, and ownership of Ukratnafta. In particular, the Claimant regards as unfair and unreasonable the 26 September 2007 court decisions that led to the events of 19 October 2007 and the reinstatement of Mr. Ovcharenko⁶¹³ and the subsequent court decisions that deprived the Claimant of its direct and indirect shareholdings in Ukratnafta.⁶¹⁴

⁶⁰⁷ Second Memorial, ¶ 264.

⁶⁰⁸ Second Memorial, ¶¶ 265-266.

⁶⁰⁹ Second Memorial, ¶ 258.

⁶¹⁰ Second Memorial, ¶ 259.

⁶¹¹ Second Memorial, ¶ 267.

⁶¹² Second Memorial, ¶ 274.

⁶¹³ Memorial, ¶¶ 378-379; Transcript (18 March 2013), 50:1-25 to 51:1-6; Claimant's Post-Hearing Submission, ¶¶ 8-9.

⁶¹⁴ Memorial, ¶¶ 380-392.

373. The Claimant characterizes these court decisions as evidence of the Respondent's active support of and complicity with Privat Group, which, in the Claimant's view, is one of the most vigorous raiders in Ukraine and which had masterminded the raid against Ukratnafta.⁶¹⁵
374. Second, the Claimant argues that the conduct of the Respondent violated basic requirements of procedural propriety and due process. In particular, the Claimant refers to the Ukrainian court's acceptance of the Prosecutor's and Ukratnafta's claims in Cases 32/1 and 17/178, although these claims were barred by the three-year statute of limitations.⁶¹⁶ It is the Claimant's position that the Prosecutor's conduct in these cases was abusive and "represents a clear example of the misuse of the broad powers that the Prosecutor enjoys in Ukraine."⁶¹⁷ The Claimant asserts that conduct of such type led the Venice Commission to conclude that the Ukrainian Prosecutor's powers considerably exceed the scope of functions performed by a prosecutor in a democratic state, prompting the Council of Europe to require Ukraine to commit to adapt the role of the Prosecutor's office to European standards, which Ukraine has not done.⁶¹⁸
375. The Claimant also refers to the reopening of Cases 28/198 and 28/199 after they had become final.⁶¹⁹ It argues that the general principle of legal certainty is violated when a Prosecutor "is permitted to use remote or, as here, fabricated inconsistencies in case law to set aside the *res judicata* effect of a final judgment."⁶²⁰
376. As a further point relating to the violation of the due process requirement, the Claimant alleges that it was denied the right to participate in Case 17/60, where the Ukrainian courts ordered the AmRuz and Seagroup shares to be sold at auction, and that the Claimant was denied appeal on the merits on allegedly preposterous procedural grounds.⁶²¹
377. Third, the Claimant contends that the court decisions relating to the reinstatement of Mr. Ovcharenko as Chairman of the Management Board and the invalidation of the Claimant's direct and indirect shareholdings in Ukratnafta evidence the pivotal role of the Ukrainian courts

⁶¹⁵ Claimant's Post-Hearing Submission, ¶¶ 6-7.

⁶¹⁶ Memorial, ¶ 395; Transcript (27 March 2013), 57:1-3, 70:15-23; Claimant's Post-Hearing Submission, ¶¶ 34, 60.

⁶¹⁷ Claimant's Post-Hearing Submission, ¶ 26.

⁶¹⁸ Claimant's Post-Hearing Submission, ¶ 26.

⁶¹⁹ Memorial, ¶ 396; Transcript (27 March 2013), 63:23-24; Claimant's Post-Hearing Submission, ¶ 46.

⁶²⁰ Claimant's Post-Hearing Submission, ¶ 46.

⁶²¹ Memorial, ¶ 397.

in the “black” raider attack in this case. These court decisions, in the Claimant’s view, amounted to a denial of justice because they were clearly improper and discreditable.⁶²²

378. Fourth, the Claimant contends that the Respondent frustrated the Claimant’s legitimate expectations by failing to ensure a predictable, consistent, and stable legal framework for the Claimant’s investments. It states that the Respondent frustrated the Claimant’s expectation that its status as an Ukratnafta shareholder would be respected and that the purchase by AmRuz and Seagroup of their Ukratnafta shares would not be reexamined after the Ukrainian courts had repeatedly upheld them. The Claimant holds that Ukraine violated its Treaty obligation to provide effective means for the assertion of claims and the enforcement of rights by enabling a regime that eventually rendered the statute of limitations a dead letter. It contends that the Ukrainian regime allowed the Prosecutor to challenge foreign investments regardless of the length of time that the State was aware of the purported violations.⁶²³ In the Claimant’s view, a prescription period may only be renewed in exceptional circumstances in order to comply with the principle of legal certainty. The fact that a Prosecutor merely claims to not have had earlier knowledge of certain facts does not qualify as material reason for such a renewal.⁶²⁴

379. The Claimant argues further that the Respondent frustrated the Tatarstan shareholders’ expectation that the Ukrainian courts would respect the unanimous decision of the Ukratnafta General Shareholders Meeting to reinstate and then remove Mr. Ovcharenko and reinstate Mr. Glushko as the Chairman of the Management Board.⁶²⁵

380. Fifth, the Claimant contends that the Respondent discriminated against the investments of the Claimant by its differential treatment of the Claimant’s, Naftogaz’s and Korsan’s investments in Ukratnafta, in that the Prosecutor took no action against Korsan for the violation of the alleged parity requirement—when its increased shareholding in Ukratnafta, coupled with the 43.054% stake of Naftogaz, gave the Ukrainian shareholders a 99.895% stake in Ukratnafta—whereas the Prosecutor had brought proceedings against the Tatarstan shareholders for their violation of the supposed parity requirement.⁶²⁶

⁶²² Memorial, ¶¶ 399-412.

⁶²³ Claimant’s Post-Hearing Submission, ¶ 36.

⁶²⁴ Claimant’s Post-Hearing Submission, ¶ 35.

⁶²⁵ Memorial, ¶¶ 413-424; Transcript (18 March 2013), 48:2-5.

⁶²⁶ Memorial, ¶¶ 425-431.

(b) The Respondent's Position

i. The Respondent's Interpretation of the "Fair and Equitable Treatment" Standard

381. At the outset, the Respondent points out that neither the UK-Ukraine BIT nor international law precisely defines the notion of fair and equitable treatment.⁶²⁷ The Respondent contends that this standard protects against a denial of justice when applied to court decisions.⁶²⁸ Accordingly, it is mainly concerned with judicial processes and procedures, with the substance of these decisions being relevant only to the extent that they shed light on the adequacy of judicial process.⁶²⁹ The denial of justice standard is not breached by the mere misapplication of domestic law, the Respondent contends, but only by "fundamental unfairness as understood by reference to international norms,"⁶³⁰ which translates to "a grave and manifest injustice" or bad faith.⁶³¹
382. While the Respondent clarifies that it is not equating the fair and equitable treatment standard to the minimum standard of treatment applicable under customary international law, it argues that modern tribunals—such as in *Swisslion v. Macedonia*⁶³²—have confined their analysis of fair and equitable treatment to whether there was a denial of justice in a particular case.⁶³³ It argues that *Vivendi v. Argentina* and *Azurix v. Argentina* do not support the Claimant's position that the fair and equitable treatment standard allows the review of court decisions for more than a denial of justice, as court decisions were not at issue in these cases.⁶³⁴ Instead, the Respondent suggests the applicability of *Azinian v. Mexico* where Mexican court decisions were reviewed under the denial of justice test.⁶³⁵

⁶²⁷ Counter-Memorial, ¶ 243.

⁶²⁸ Counter-Memorial, ¶ 244; Transcript (19 March 2013), 13:7-14.

⁶²⁹ Counter-Memorial, ¶ 244.

⁶³⁰ Second Counter-Memorial, ¶ 167.

⁶³¹ Second Counter-Memorial, ¶ 175.

⁶³² Second Counter-Memorial, ¶¶ 143-144.

⁶³³ Second Counter-Memorial, ¶¶ 141-142; Transcript (19 March 2013), 15:13-17.

⁶³⁴ Second Counter-Memorial, ¶ 145.

⁶³⁵ Second Counter-Memorial, ¶ 146.

383. The Respondent also maintains that the Tribunal should focus on applying the denial of justice test to the discrete judicial decisions, and criticizes the references of the Claimant to raider actions as unhelpful and used only to elicit sympathy for the Claimant's case.⁶³⁶
384. In response to the Claimant's reliance on the award in *Frontier Petroleum v. Czech Republic* for the proposition that the proper test under the fair and equitable treatment standard is whether court decisions contain a "plausible interpretation" of the relevant law or were "reasonably tenable," the Respondent clarifies that, even in *Frontier Petroleum*, the denial of justice was equated with procedural propriety and due process.⁶³⁷ Even so, the Respondent points out that a breach of due process does not automatically equate to a violation of the fair and equitable treatment standard,⁶³⁸ unless such breach is fundamental.⁶³⁹

ii. Application of the "Fair and Equitable Treatment" Standard to the Facts

385. The Respondent contends that it has not breached the fair and equitable treatment standard in this case. First, it argues that the standard of fair and equitable treatment was not breached by the 26 September 2007 court decisions that led to the reinstatement of Mr. Ovcharenko because the Claimant has not provided any evidence that these decisions resulted in any grave and manifest injustice.⁶⁴⁰ Nor did the decisions in Case 17/178, which led to the invalidation of the Claimant's direct shareholding in Ukratnafta, or Cases 28/198 and 28/199, which led to the invalidation of the Ukratnafta shares of both AmRuz and Seagroup, and Case 17/60, which ordered the auction of these invalidated shares, entail a breach of fair and equitable treatment, because the Claimant has not shown that these decisions were "manifestly unfair and unreasonable."⁶⁴¹
386. Second, the Respondent contends that the invalidation of the Claimant's shareholdings in Ukratnafta did not violate the basic requirements of procedural propriety and due process. It first states that the awards cited by the Claimant to support its position were based on "the egregiousness of the acts constituting denial of due process," which cannot be shown for the

⁶³⁶ Second Counter-Memorial, ¶ 147.

⁶³⁷ Second Counter-Memorial, ¶¶ 156-157.

⁶³⁸ Transcript (19 March 2013), 15:1-3.

⁶³⁹ Transcript (19 March 2013), 15:10-12.

⁶⁴⁰ Counter-Memorial, ¶ 253-257.

⁶⁴¹ Counter-Memorial, ¶¶ 258-282.

Ukrainian courts cases with which the Claimant has taken issue.⁶⁴² In the present case, the Respondent states that the Claimant has not proven that the Prosecutor or the Ukrainian courts were biased against it or otherwise corrupt,⁶⁴³ and any allegation of impropriety on the part of Ukratnafta would not alter this conclusion, as no liability can be imposed on a host State for the actions of private parties that were not acting under the State's control or direction.⁶⁴⁴ Pointing out that the substance of the decisions about which the Claimant complains conform to both Ukrainian law and judicial practice,⁶⁴⁵ the Respondent states that the Claimant has not proven that the conduct of the relevant courts constituted "a demonstrated miscarriage of justice" or "a manifest failure of natural justice in judicial proceedings,"⁶⁴⁶ and in fact cannot do so, given that the complex issues of both Ukrainian substantive and procedural law were fully litigated before the courts.⁶⁴⁷ Lastly, the Respondent points out that the damage that the Claimant has identified as caused by the Respondent's alleged failure to uphold procedural regularity or due process—namely, the deprivation of the "control, management and ownership of Ukratnafta"—is implausible as such control, management and ownership was never the Claimant's to begin with, given its minority shareholding.⁶⁴⁸

387. Apart from arguing that the merits of the above-cited cases do not violate the denial of justice standard, the Respondent also points out that the merits of the said cases do not violate the "reasonably tenable" test, which the Claimant argues should apply.⁶⁴⁹ The Respondent moreover argues that the decisions renewing the cassation appeal term or reopening the prescription term did not violate this standard, as they were in line with both Ukrainian procedural law and court practice.⁶⁵⁰
388. Third, the Respondent contends that its response to the Claimant's version of the judicial decisions that facilitated the reinstatement of Mr. Ovcharenko and invalidated the direct and indirect shareholdings of the Claimant in Ukratnafta show that these decisions do not constitute

⁶⁴² Counter-Memorial, ¶ 291.

⁶⁴³ Counter-Memorial, ¶ 293.

⁶⁴⁴ Counter-Memorial, ¶ 294.

⁶⁴⁵ Counter-Memorial, ¶ 295.

⁶⁴⁶ Counter-Memorial, ¶ 296.

⁶⁴⁷ Counter-Memorial, ¶ 296.

⁶⁴⁸ Counter-Memorial, ¶ 296.

⁶⁴⁹ Transcript (19 March 2013), 16:9-25 to 17:1-17.

⁶⁵⁰ Transcript (19 March 2013), 15:21-25 to 16:1-4.

a denial of justice.⁶⁵¹ It also notes that the Claimant has not provided any evidence in support of its “sweeping accusations” that Ukrainian courts play a pivotal role in the completion of corporate raider attacks.⁶⁵²

389. Fourth, the Respondent argues that the Claimant’s invocation of the “predictable, consistent and stable legal framework” standard for judicial decisions is misplaced, because this standard applies solely to administrative acts, with the standard for assessing judicial treatment being that of a denial of justice or a “pretence of form to achieve an internationally unlawful end.”⁶⁵³

390. Fifth, the Respondent contends that it did not discriminate against the Claimant’s investments because the Claimant was not singled out as a defendant in Case 32/1, which was brought against all Ukratnafta shareholders. Case 32/1 sought the liquidation of Ukratnafta, which is inconsistent with the motive that the Claimant would ascribe to the proceedings, namely to take the investment of the Tatarstan shareholders and give it to Korsan. In the Respondent’s view, the Claimant cannot and should not be allowed to impose on the Respondent the burden of disproving unfounded allegations of discrimination.⁶⁵⁴

(c) The Tribunal’s Findings in Respect of the Fair and Equitable Treatment Standard

391. The Tribunal has explained above that denial of justice, at least from a procedural point of view and the availability of access to the courts, is not a finding that could be supported by the facts of this case in spite of the fact that the judicial process has evidenced shortcomings, some serious. It has also noted the agreement in considering that mere errors of fact or law on the part of the domestic courts do not breach the standard of denial of justice. This finding, however, does not dispose of the question concerning the eventual existence of a “substantive denial of justice”.

392. The Tribunal is also mindful of the discussion about whether denial of justice is an expression of the customary law “international minimum standard” and how this customary standard relates to present day treaty standards of protection. What is certain is that the “international minimum standard” has not been frozen at the time when it was first formulated in the *Neer* case in the 1920s. In spite of the fact that findings of “egregious” conduct and similar high

⁶⁵¹ Counter-Memorial, ¶ 299.

⁶⁵² Counter-Memorial, ¶¶ 300-301.

⁶⁵³ Counter-Memorial, ¶¶ 302-310.

⁶⁵⁴ Counter-Memorial, ¶¶ 311-316.

standards of review have been often associated with the operation of the international minimum standard and denial of justice thereunder, it is today accepted that customary law has evolved with time in this respect and that its own standard of protection is not necessarily different from the widespread treaty protection available at present.

393. The Parties to this case, while not disagreeing on the fact that the FET standard is applicable in light of treaty protection, maintain different views about the meaning of this standard as far as judicial review is concerned. The Claimant asserts that the FET standard constitutes an autonomous treaty standard which offers protection beyond customary international law. The Respondent states that it is not requesting the Tribunal to apply the international minimum standard of customary international law, but argues that the FET standard prescribes no more than a prohibition of denial of justice when applied to judicial decisions.
394. In examining the content of this standard under investment protection treaties and their interpretation by numerous tribunals it is not difficult to ascertain that it encompasses today at least: (a) protection against arbitrary and unreasonable measures, discrimination, and denial of justice, (b) the right to procedural propriety and due process, and (c) the assurance of a predictable, consistent and stable legal framework.
395. Although some manifestations of this standard might not be specific to an examination of judicial conduct they are nonetheless indicative of the intention to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights. The concepts of fairness and equitableness are the reflection of this intended requirement and show that in reality there is no reason to consider that the situation would need to be different under customary law as presently understood. This also explains why it is most difficult to separate the treaty standards of full protection and security and complete and unconditional legal protection from the FET standard as they all point in the same direction.
396. In assessing the facts of this case the Tribunal has concluded that the events of 19 October 2007 at the Kremenchug refinery were not as peaceful as maintained by the Respondent and certainly went beyond any normal enforcement of court decisions, particularly from the point of view of the use of force and physical occupation, including the subsequent participation of the Ministry of the Interior's troops to secure the occupation of the plant.
397. These facts in themselves raise important questions about whether the FET standard was adequately observed. This determination is, however, inseparable from the discussion of the

judicial decisions that intervened in connection with the reinstatement of Mr. Ovcharenko. The Tribunal has considered above the issues arising from the decision of the Aftozavodsky District Court of 9 November 2004 ordering the reinstatement of Mr. Ovcharenko, as well as those concerning the *ex parte* supplementary judgment and the *ex parte* interim measures issued by the Kriukivskiy District Court on 26 September 2007. It is necessary to keep in mind in this respect that in *Deutsche Bank* the tribunal, as noted by the Claimant, specifically found a breach of FET in respect of an *ex parte* court order based on limited evidence and where the affected party was not given the opportunity to respond as due process had not been observed. The testimony of Mr. Pryscheпа at the hearing also confirms that the resolution on interim measures did not stipulate the voluntary period for compliance associated with enforcement proceedings.⁶⁵⁵

398. As a result of these various proceedings the powers of the company's governing bodies to have dismissed, reinstated and dismissed Mr. Ovcharenko again, were obliterated to the benefit of those interests competing for the control of Ukratnafta on the basis of an interpretation of the Ukrainian Labor Code that stands in contrast with the provisions of more pertinent legislation, such as the Civil Code and the Company Law
399. Such approach could well fall within the ambit of judicial error and hence not compromise the court's and the State's responsibility for breach of the internationally guaranteed forms of protection relevant in this case. The problem was, however, compounded by procedural defects that also tend to cast doubt on the observance of the due process requirements of the applicable standards, particularly in connection with the unclear way in which the four resolutions initiating enforcement proceedings were allegedly served on Ukratnafta, until then still under the effective control of Tatneft and related interests. The view of one witness to the effect that no service is required under Ukrainian law in respect of requests for the reopening of cases⁶⁵⁶ is untenable as a matter of due process.
400. The 2007 decisions were also directly geared toward facilitating the powers of the incoming management as far as the organizational, operational, economic, financial and other activities of the company were concerned. As noted above, the complete takeover of the company's management was thus achieved and the complete reorganization of the company to reflect this fact immediately followed. Nor were the criminal investigations of the events at the refinery carried out. Whether such developments were the outcome of a black raider's action or not is

⁶⁵⁵ Witness Testimony of Pryscheпа, Transcript (21 March 2013), 93:1-9.

⁶⁵⁶ Witness Testimony of Belyanovich, Transcript (26 March 2013), 5:6-15.

irrelevant to the conclusion that the trend thus far was with each step leading farther away from the faithful observance of the FET standard.

401. Had that been the end of the matter the Tribunal might have had difficulty in reaching a wholly satisfactory determination regarding the observance of FET. But it was not the end of the matter; in fact it was rather just the beginning. The court proceedings and decisions in connection with the validity of the Claimant's direct and indirect shareholdings in Ukratnafta introduced other disquieting factors in respect of the observance of this standard.
402. The Tribunal has noted above that in spite of the modification of the capital structure of Ukratnafta having been unanimously agreed by its shareholders, with the concurrent participation of high level Ukrainian government officials, the Prosecutor commenced proceedings before the Kyiv Economic Court on 19 December 2007 resulting in Case 32/1. It must be recalled that this official had already investigated Ukratnafta's foundation in the period 2002-2003, and that its renewed efforts to reexamine the modifications in question coincides with the fact that Korsan, the company controlled by the Privat Group, had acquired in January 2007 a 1% shareholding in Ukratnafta. The Tribunal's concerns regarding FET are not appeased by the increasingly questionable role of the Prosecutor and the connection in time between the proceedings initiated and the interests of Korsan or related companies in expanding their control of Ukratnafta.
403. The examination of the various complaints the Claimant makes about the breach of FET allows the Tribunal to conclude that in some respects this was indeed the case. The Claimant was beyond doubt deprived of the control and management of Ukratnafta, and ultimately of its ownership. First, it claims that the Respondent subjected the investments of the Claimant to arbitrary and unreasonable measures, including the deprivation of control, management, and ownership of Ukratnafta. The Respondent's argument to the effect that such deprivation is implausible as such control, management and ownership was never the Claimant's to begin with, given its minority shareholding, is formally correct, but the reality of the corporate arrangements that had been put into effect by agreement of the shareholders proves otherwise. It was Tatneft that had been entrusted with the task of managing the company and while new corporate arrangements are always possible, in the instant case these did not follow the normal corporate decision-making process but were the result of judicial intervention and the reinstatement of Mr. Ovcharenko. In any event, even if only the status of a minority shareholder is considered, that Claimant was deprived of ownership is not open to question.

404. This situation is in itself contrary to the fairness that could be expected in terms of the treatment of a foreign investor, irrespective of whether such acts might originate in the judiciary or the government itself, including the role of the Prosecutor therein, particularly in light of the Prosecutor's office being an executive organ under the authority of the Presidential Administration. Due process issues and procedural propriety were, as the Claimant argues, also compromised in the development of this process before the courts, especially in view of the again questionable role of the Prosecutor, particularly as far as the reopening of cases beyond the limits of the statute of limitations is concerned, as this was not an isolated event but a continuing one. The Tribunal is mindful of the Claimant's argument to the effect that the overly powerful role of the Prosecutor in Ukraine has been a matter of criticism because of non-compliance with European standards on democracy and the rule of law.⁶⁵⁷
405. The discussion about whether these various decisions amounted to a denial of justice is immaterial because what this Tribunal has to determine in the end is whether they were manifestly unfair and unreasonable. Although the qualification of such decisions being "manifestly" unfair and unreasonable, on which the Respondent relies in support of its position, is not always easy to establish in individual cases, if the process is considered as a whole in light of the approach explained above, it certainly could not be concluded that it is fair and reasonable. No decision invalidating direct and indirect ownership of a company could be so considered unless the reasons for it are overwhelming and unequivocally based on the law having been gravely breached unless the reasons for it are based on a serious breach of the law. A case which began on an alleged breach of the Labor Code and escalated to massive deprivation of ownership does not appear to be justified on these grounds.
406. The many procedural defects that have intervened in the judicial proceedings discussed also cast important doubt on the degree of compliance with the FET standard. This is particularly noticeable in respect of the various *ex parte* decisions noted and the questions concerning proper service of some such decisions, with particular reference to the cassation appeal in Cases 28/198 and 28/199. The overall observance of due process throughout these cases cannot be thus considered satisfactory.

⁶⁵⁷ European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, Opinion No. 539/2009 of October 27, 2009, ¶ 5 (CLA-354); European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor of Ukraine, Opinion No. 667/2012 of October 15, 2012, ¶ 6 (CLA-355); Claimant's Post-Hearing Submission, ¶ 26.

407. A further claim concerning the breach of FET relates to the frustration of legitimate expectations by the Respondent of a predictable, consistent and stable legal framework for the Claimant's investments, as considered, for example, in *CMS* and *Biwater*. The Respondent's argument to the effect that such requirement of FET only applies to administrative acts is not convincing. A predictable, consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability as is well recognized under international law in the context of attribution of wrongful acts. It does not matter, as the tribunal held in *EnCana*,⁶⁵⁸ whether such breach originates in the executive branch of government, which is the most common occurrence in contemporary practice given the sweeping powers of administration, or in autonomous services, such as the Public Prosecutor, or eventually in the courts themselves,
408. Discrimination is a ground for an additional claim concerning the breach of FET as the Claimant maintains that the different treatment accorded to Naftogaz and Korsan evidences the intention to target Tatneft, and later its associated interests, as the holders of rights to be affected by the measures taken. Whether some such judicial proceedings had Ukratnafta as a company, including all its shareholders, as defendants does not diminish the seriousness of a situation in which every single step was geared towards forcing the exit of the interests originally associated with the Republic of Tatarstan, in particular Tatneft followed by AmRuz and Seagroup. The finding of discrimination in such a situation is unavoidable. Even if such measures would not have entailed nationality-based discrimination, the fact that given identifiable interests are targeted indicates a discriminatory treatment as compared to that accorded to other interests in the venture.
409. Particularly telling is in this respect the argument on which the whole process of deprivation was started, namely the breach of the parity requirement as originally envisaged, which was forgotten as soon as the Ukrainian-related interests took over the company, including therein Naftogaz and Korsan, as if the parity requirement no longer had any relevance.
410. The Respondent's counterarguments to such claims of breach of the FET are premised on the understanding that under the international minimum standard, either as expressed in customary law or as associated to FET, the governing element of a finding of liability is "the egregiousness of the acts constituting denial of due process,"⁶⁵⁹ which cannot be shown for the Ukrainian court cases concerned, as the Claimant has proven neither that the Prosecutor nor that the Ukrainian

⁶⁵⁸ *EnCana Corp. v. Ecuador*, LCIA Case UN3481, Award of 3 February 2006, ¶ 158 (*RLA-Douglas-19*).

⁶⁵⁹ Counter-Memorial, ¶ 291.

courts were biased against it or otherwise corrupt. It must also be recalled that in the Respondent's view any allegation of impropriety on the part of Ukratnafta would not alter this conclusion, as its actions are those of a private party that was not acting under the State's control or direction.

411. To the extent that the international minimum standard can be understood in isolation from its contemporary association to FET, and furthermore understood as it was expressed at its origins, the Respondent's view is correct as a number of tribunals have in fact identified the egregious conduct as the source of liability in this context. Judicial impropriety, grave and manifest injustice and bad faith are concepts closely associated to that understanding and indeed have a very important role to play in the consideration of liability for breach of the FET. But as has been noted, such high standard is not the only one relevant in the present protection of rights under the FET. Conduct which might not be as grave as to amount to egregiousness or bad faith but which nonetheless interferes with the legitimate exercise of rights of the protected individual might equally qualify as a kind of conduct resulting in liability. This does not alter the conclusion that the mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention.
412. In light of the above considerations the Tribunal finds that the standard of FET has in fact been breached in this case, first on the ground of deprivation of the investor's management and control of the company and ultimately based on the deprivation of its ownership rights, not excluding discriminatory treatment, coupled with questions of due process rights and the manner of how what had been a predictable, consistent and stable legal framework resulted in the opposite. This finding relates not just to Tatneft's direct interests in Ukratnafta but also to those held indirectly through AmRuz and Seagroup, a matter on which the Tribunal recalls that in its Partial Award on Jurisdiction it found that there had been a composite act of deprivation in respect of the latter companies that culminated after Tatneft acquired its interests in them. The Respondent's argument to the effect that the events concerning AmRuz and Seagroup occurred before Tatneft had made its investment in those companies, and thus that the damages claimed were not proximately caused by such prior events,⁶⁶⁰ is not tenable in light of the finding on the existence of a composite act that links all such events together.
413. The aggregate of the events discussed can only be considered as amounting to arbitrariness and unreasonableness as far as the treatment of the Claimant's rights are concerned.

⁶⁶⁰ Respondent's Post-Hearing Memorial, ¶ 51; Transcript (19 March 2013), 24:10-25.

2. Full Protection and Security

(a) The Claimant's Position

i. The Claimant's Interpretation of the "Full Protection and Security" Standard

414. As previously stated, Article 2(2) of the Agreement between the Government of the United Kingdom, Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 10 February 1993 ("UK-Ukraine BIT")⁶⁶¹ obliges the Respondent to accord investments of investors of the other Contracting Party the following treatment:

Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party. (emphasis added)

415. The Claimant defines the "full protection and security" standard as requiring the Respondent to provide both physical and legal protection and security to the investments of the Claimant.⁶⁶² It states that the term "legal security" refers to "the quality of the legal system which implies certainty in its norms, and, consequently, their foreseeable application."⁶⁶³ With specific regard to judicial decisions, this means that the host State must "make a functioning system of courts and legal remedies available to the investor"⁶⁶⁴ and that procedural and substantive actions of the judiciary that are not "reasonably tenable" would violate this standard.⁶⁶⁵

ii. Application of the "Full Protection and Security" Standard to the Facts

416. The Claimant argues that the Respondent breached this provision by failing to protect the Claimant's investments from the alleged criminal seizure and unlawful control and management of Ukratnafta, pointing specifically to the participation of the authorities of Ukraine in the

⁶⁶¹ Agreement between the Government of the United Kingdom, Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 10 February 1993 (C-24).

⁶⁶² Memorial, ¶ 433; Transcript (18 March 2013), 82:1-3, 82:23-25; Claimant's Post-Hearing Submission, ¶ 3.

⁶⁶³ Memorial, ¶ 434, citing *Siemens A.G. v. The Argentine Republic*.

⁶⁶⁴ Memorial, ¶ 434, citing *Frontier Petroleum Services Ltd. v. Czech Republic*.

⁶⁶⁵ Memorial, ¶ 434, citing *Frontier Petroleum Services Ltd. v. Czech Republic*.

alleged raider action and the failure of the Respondent to establish a proper legal framework and secure environment for the investments of the Claimant.⁶⁶⁶

417. The Claimant rejects the Respondent's argument that any breach of full protection and security would require a demonstration that the State had encouraged or fostered the acts relating to the alleged Kremenchug seizure. The Claimant argues that the State did more than merely encourage or foster the acts relating to the Kremenchug seizure and in fact authorized and legitimized them.⁶⁶⁷ In any event, the Claimant contends that the proposition of the Respondent is unsupported by legal authority.⁶⁶⁸ The Claimant contends that the responsibility of the Respondent results from a combination of omissions and acts from its executive and judiciary branches, which made the conduct of the Respondent fall significantly below the standard of protection that the Claimant could have reasonably expected.⁶⁶⁹

(b) The Respondent's Position

i. The Respondent's Interpretation of the "Full Protection and Security" Standard

418. While conceding that some tribunals have held that the full protection and security standard requires host states to provide not only physical but also legal protection and security, the Respondent states that many tribunals have refused to extend this obligation to include legal protection—presumably to avoid confusing this standard with that of fair and equitable treatment.⁶⁷⁰
419. After a review of the relevant case law, the Respondent concludes that Article 2(2) of the UK-Ukraine BIT only requires Ukraine to protect the relevant foreign investment from physical harm or violence.⁶⁷¹
420. But if the full protection and security standard extends to non-physical harm, the Respondent argues that the requirement of extending legal protection and security is satisfied for as long as the courts have acted in good faith⁶⁷² and in accordance with domestic law.⁶⁷³

⁶⁶⁶ Memorial, ¶¶ 432-449; Transcript (18 March 2013), 82:7-22, 83:9-12.

⁶⁶⁷ Second Memorial, ¶ 361; Transcript (18 March 2013), 55:4-13.

⁶⁶⁸ Second Memorial, ¶ 362, *citing Tecmed v. Mexico*.

⁶⁶⁹ Second Memorial, ¶ 363.

⁶⁷⁰ Counter-Memorial, ¶¶ 319-321.

⁶⁷¹ Counter-Memorial, ¶ 322; Transcript (19 March 2013), 6:18-20.

ii. Application of the "Full Protection and Security" Standard to the Facts

421. In line with its position that the full protection and security standard only protects the Claimant's investment from physical harm or violence, the Respondent first clarifies that the Claimant can invoke this provision only in connection with its allegation that Ukratnafta was forcibly taken over by Mr. Ovcharenko.⁶⁷⁴ However, in relation to these allegations, the Respondent reiterates its position that the events of 19 October 2007 constitute the enforcement of valid court decisions upholding Mr. Ovcharenko's employment rights.⁶⁷⁵ It also argues that, even if the Claimant could show that an illegal level of force was used in reinstating Mr. Ovcharenko and that the Respondent participated in this, the Claimant cannot equate the force used on 19 October 2007 with forcible damage to its investment, because the alleged harm about which the Claimant complains was a direct result of court decisions.⁶⁷⁶
422. If the full protection and security standard was held to oblige the Respondent to provide legal protection in addition to physical protection, the Respondent states that the Claimant has failed to demonstrate that the Ukrainian judiciary did not act in good faith or that the court decisions relating to the reinstatement of Mr. Ovcharenko or to the invalidation of share purchases by the Claimant, Seagroup, and AmRuz were not reasonably tenable.⁶⁷⁷

(c) The Tribunal's Findings in Respect of the Full Protection and Security Standard

423. The Parties' arguments on this particular standard of BIT protection raise the traditional divide between those who understand full protection and security as encompassing only physical protection⁶⁷⁸ and those who believe, as the Claimant does, that in addition to physical protection it extends also to legal protection and security in terms of both the quality of the legal system and the functioning of the court system.
424. The Tribunal is mindful that the jurisprudence of arbitration tribunals is divided. While in some cases, notably *Saluka v. Czech Republic*, *BG Group v. Argentina*, and *Rumeli Telekom v.*

⁶⁷² Counter-Memorial, ¶¶ 324-325.

⁶⁷³ Transcript (19 March 2013), 6:23-25 to 7:1-7.

⁶⁷⁴ Counter-Memorial, ¶ 322.

⁶⁷⁵ Counter-Memorial, ¶ 322.

⁶⁷⁶ Counter-Memorial, ¶ 322.

⁶⁷⁷ Counter-Memorial, ¶ 325.

⁶⁷⁸ Transcript (19 March 2013), 6:18-25 to 8:1-5.

Kazakhstan, which the Respondent invokes in support of its position, this standard has been identified with police protection, on the opposite end other cases have adopted a broader interpretation and extended the standard to include legal protection, as is the case in *Azurix v. Argentina*, *Biwater Gauff v. Tanzania*, *Vivendi v. Argentina*, *Siemens v. Argentina*, and *Parkerings v. Lithuania*, all of which are cited by the Claimant in support of its own views.

425. In this case the text of Article 2 2. of the Ukraine-Russia BIT provides greater clarity on this discussion as it guarantees unconditional legal protection of Claimant's investments "in accordance with its legislation". There is here a specific link to the legal protection of the investment which is not often found in BITs. While the legislation in itself might not amount to a breach of this guarantee, this is something that might happen in the context of how the legislation is implemented or applied, which is in some respects the case here.
426. Another aspect which the Tribunal must note in the context of this discussion is that the issue of failure to guarantee the legal protection envisaged might equally bring in a close relationship with fair and equitable treatment. Article 2(2) of the Ukraine-UK BIT, also applicable in this case by virtue of the operation of the most favoured nation clause under Article 3. 1. of the Ukraine-Russia BIT (MFN) appears to have this link in mind when guaranteeing both "fair and equitable treatment" and "full protection and security".
427. This link between the various standards of protection explains still a third line of jurisprudence in which the obligation to provide legal protection is subsumed into the concept of fair and equitable treatment, as discussed, for example, in *Enron v. Argentina*, *Sempra Energy International v. Argentina*, and *PSEG v. Turkey*, the latter also cited by the Respondent in support of its position. These cases do not exclude the possibility that both standards might have a standing of their own while mutually reinforcing each other. Issues concerning the role of the judiciary are particularly difficult to distinguish as to whether they should be treated under one standard or the other, or both.
428. The Tribunal has discussed in connection with the facts of this case the events surrounding the seizure of the Kremenchug refinery and the change in the company's management that followed, which is the basis for the Claimant's assertions about the breach by the Respondent of full protection and security. The participation of Ukrainian authorities in those events and the issue of the discontinued investigation by the Prosecutor have also been discussed above. The anomalies that the Tribunal has noted in this respect, in spite of the evidence being in some respects incomplete, are sufficient to conclude that indeed the Respondent failed to provide the appropriate police protection to the officials at the refinery at the time. Particularly telling are

the subsequent participation of the Ministry of the Interior's troops in such events and the scant credibility of the argument that they intervened in the capacity of private security at the service of the company.⁶⁷⁹ The forceful entry into the premises of the refinery and the retention of certain officials in their offices, just like the carrying of weapons, are all pointing in the direction of a breach of full protection and security in the realm of police protection and physical security.⁶⁸⁰

429. As noted above, the Parties have also argued about the meaning of this standard in terms of its extension to legal protection, with particular reference to the Claimant's views that the courts failed to provide adequate remedies and the Respondent's assertion that this other kind of breach would require evidence that the courts proceeded in bad faith or that the decisions adopted were not legally tenable. The Tribunal considers that these other allegations are inseparable from the context of fair and equitable treatment discussed above as they are intertwined with the contents of this other standard.

430. It should be noted that the role of a prosecutor in connection with full protection and security has also been specifically discussed in *Spyridon*, where the claim concerned a request by such official to the Romanian Supreme Court to reverse and remand an earlier decision and its acceptance by that court.⁶⁸¹ The claim was rejected as the tribunal found that the request was reasoned, as also was the decision, and that due process was observed in light of adversarial hearings and the availability of the opportunity to challenge such request. These very aspects of due process are those that are prominently required by FET as discussed above.

3. "Effective Means for the Assertion of Claims and the Enforcement of Rights"

(a) The Claimant's Position

i. The Claimant's Interpretation of Article 10(12) of the ECT

431. The Claimant contends that the Respondent breached its obligation under Article 10(12) of the ECT to "ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights." The obligation to provide such "effective means" is, in the Claimant's view, distinct from and less demanding than the denial of justice standard of customary international law. The Claimant argues that this obligation requires the host State to

⁶⁷⁹ Witness Testimony of Liapka, Transcript (25 March 2013), 44:3-25 to 49:1-25.

⁶⁸⁰ Second Memorial ¶ 34.

⁶⁸¹ *Spyridon Roussalis v. Romania*, ICSID Case ARB/06/1, Award of December 7, 2011, ¶ 359 (CLA-287).

establish a proper and effective legal and institutional system encompassing property and contract laws as well as procedural rules that facilitate the enforcement of such laws in domestic courts.⁶⁸² The standard of effectiveness implies some measure of success, which can only be assessed on a case-to-case basis.⁶⁸³

432. To support its position, the Claimant cites *Chevron v. Ecuador*, and explains that the tribunal in that case defined the “effective means” standard as “distinct [from] and [a] less-demanding test” than the denial of justice test and as requiring the host State to establish a proper and effective legal institution.⁶⁸⁴

ii. Application of Article 10(12) of the ECT to the Facts

433. The Claimant argues that the Respondent failed to ensure that the Claimant had the “effective means” to protect its rights arising out of its Ukrtatnafta shareholdings including its shareholder right to have Ukrtatnafta managed by the lawfully elected Chairman.
434. With regard to the former, the Respondent’s failure to provide effective means was manifested in Cases 32/1, 28/198, and 28/199, when the Prosecutor brought, and the courts accepted, time-barred claims that had previously been decided in favor of AmRuz and Seagroup—in violation of the principles of *res judicata* and extinctive prescription. The Claimant argues that the Respondent’s failure to provide effective means was exacerbated by the court’s denial of Seagroup’s request for evidence that would have established that the claims in Case 32/1 were time-barred, the Supreme Court’s subsequent decision to proceed *ex parte* in reopening Cases 28/198 and 28/199, and the denial of the right to challenge these decisions.⁶⁸⁵
435. To substantiate the Respondent’s alleged failure to ensure that the Claimant had the “effective means” to protect its shareholder right to have Ukrtatnafta managed by the lawfully elected Chairman, the Claimant points to the 26 September 2007 decisions, which were arrived at in *ex parte* proceedings initiated on the basis of allegedly false allegations. In the Claimant’s view, these decisions contravened the legal requirements attaching to interim measures and supplementary judgments. Moreover, the courts in these decisions refused to consider Ukrtatnafta’s compliance with the 9 November 2004 judgment and the shareholders’ removal of

⁶⁸² Second Memorial, ¶¶ 416-417.

⁶⁸³ Transcript (18 March 2013), 88:11-16, 89:7-10.

⁶⁸⁴ Second Memorial, ¶ 416; Transcript (18 March 2013), 89:24-25 to 90:1-5, citing *Chevron v. Ecuador*.

⁶⁸⁵ Second Memorial, ¶¶ 421-422; Transcript (18 March 2013), 91:2-8.

Mr. Ovcharenko and rejected the Claimant's and Mr. Glushko's challenges seeking to restore the company's allegedly lawful management.⁶⁸⁶ The Claimant submits that, as a result, "no Ukrainian court *ever* considered whether Mr. Ovcharenko had a right to be reinstated after his November 2004 dismissal by UTN's [General Shareholders Meeting]."⁶⁸⁷

436. In the alternative the Claimant submits that, if Ukrainian law was correctly applied in these cases as the Respondent argues, the Respondent would have failed to protect the rights of the Claimant by failing to establish a proper legal system that would have protected the Claimant's interests. Specifically, the Claimant argues that it was entitled to invoke the statute of limitations to protect its interests in the context of a legal system based on law and not judicial fiat; interpreted as proposed by the Respondent, Articles 71, 76, and 80 of the Ukrainian SSR Civil Code would be inconsistent with Article 10(12) of the ECT.⁶⁸⁸ Similarly, the Claimant contends that it is entitled to the protection of the principle of *res judicata*; interpreted as proposed by the Respondent, Articles 111(15)-3, 111(16), and 53 of the Ukrainian Code of Commercial Procedure would be inconsistent with Article 10(12) of the ECT.⁶⁸⁹ The Claimant also considers that it was entitled to remove or replace the chief executive officer of the company which was under its control and to have its shareholder rights protected by safeguards; as interpreted by the Respondent, Article 99(3) of the Civil Code and Articles 76, 151, 152(3), 212, and 213 of the Code of Civil Procedure would be inconsistent with Article 10(12) of the ECT.⁶⁹⁰

(b) The Respondent's Position

i. The Respondent's Interpretation of Article 10(12) of the ECT

437. Relying on *Amto v. Ukraine*, the Respondent claims that Article 10(12) can only be breached by the failure of the host state to establish legislation providing a fair and efficient 'judicial system.'⁶⁹¹ It thereby rejects the Claimant's reliance on *Chevron v. Ecuador* and *White Industries* on the basis that these cases applied a different "effective means" provision, which was breached by the undue delays and inaction of the state courts in considering the claimants'

⁶⁸⁶ Second Memorial, ¶¶ 423-424.

⁶⁸⁷ Claimant's Post-Hearing Submission, ¶ 23 (emphasis in the original).

⁶⁸⁸ Second Memorial, ¶¶ 426-427.

⁶⁸⁹ Second Memorial, ¶ 428.

⁶⁹⁰ Second Memorial, ¶ 429.

⁶⁹¹ Second Counter-Memorial, ¶¶ 204-208; Transcript (19 March 2013), 18:7-15.

claims.⁶⁹² Those facts thus distinguish these cases from the case at hand, where the Claimant does not allege being subjected to undue delays in the Ukrainian courts.⁶⁹³

ii. Application of Article 10(12) of the ECT to the Facts

438. The Respondent argues that the assertion by the Claimant of its rights and defenses in several court proceedings, many of which involved multiple levels of review, prevents it from asserting that the Respondent has breached Article 10(12).⁶⁹⁴

439. In relation to the various proceedings at issue, the Respondent explains that the courts in Cases 17/178, 28/198, and 28/199 considered but rejected the argument that Ukratnafta's claims were time-barred, a decision that was subjected to three levels of appeal.⁶⁹⁵ In Cases 28/198 and 28/199, the Supreme Court found it reasonable to grant the Prosecutor's application to set aside the lower court's judgment, and once these cases were remanded, AmRuz and Seagroup presented their arguments at three levels of court review.⁶⁹⁶ And in the proceedings relating to the reinstatement of Mr. Ovcharenko, the court's decision to proceed *ex parte* was based on the failure of Mr. Glushko to appear. Apart from the fact that these court decisions were sound on the merits, they were also subject to appeal all the way to the Supreme Court, coinciding with a lawsuit by Mr. Glushko against Ukratnafta and Mr. Ovcharenko in this same matter.⁶⁹⁷

440. In response to the Claimant's argument that the application of Ukrainian law in the stated instances proves the Respondent's failure to establish a proper legal system that meets the requirements of Article 10(12) of the ECT, the Respondent states that the Claimant's dissatisfaction with certain court decisions cannot support its claim for breach of Article 10(12) given the ability of the Claimant, Seagroup, and AmRuz to invoke their rights before the courts under proper procedures. The "effective means" standard does not guarantee results in individual cases. As the Respondent points out, the present Tribunal cannot act as an appellate court and must defer to the decisions of the lower courts.⁶⁹⁸

⁶⁹² Transcript (19 March 2013), 19:17-22.

⁶⁹³ Second Counter-Memorial, ¶¶ 209-210.

⁶⁹⁴ Second Counter-Memorial, ¶¶ 215; Transcript (19 March 2013), 19:23-25 to 20:1-5.

⁶⁹⁵ Second Counter-Memorial, ¶ 210.

⁶⁹⁶ Second Counter-Memorial, ¶ 211.

⁶⁹⁷ Second Counter-Memorial, ¶¶ 212-214.

⁶⁹⁸ Second Counter-Memorial, ¶ 215.

(c) The Tribunal's Findings in Respect of the Effective Means Standard

441. The Tribunal has discussed above the factual and legal questions concerning both denial of justice and the availability of effective means for the assertion of claims and enforcement of rights. As liability has already been found in the light of the fair and equitable treatment and full protection and security standards, there is no need to examine the question of effective means separately, which is to a large extent subsumed under that standard.
442. There is, however, a broader question concerning how deferential arbitral tribunals should be in respect of court decisions. As this issue permeates the whole discussion on liability it will be considered separately further below.

D. THE PROHIBITION ON UNLAWFUL EXPROPRIATION

443. Article 5(1) of the Russia-Ukraine BIT states as follows:

The investments of investors of one of the Contracting Parties, carried out in the territory of the other Contracting Party, will not be expropriated, nationalized, or subject to measures equal in consequences to expropriation (hereinafter referred to as "expropriation") except for cases in which such measures are applied in the public interests in accordance with procedures established by legislation, are not discriminatory and accompanied by the payment of prompt, adequate and effective compensation.

1. The Claimant's Position

444. The Claimant argues that the Respondent committed a creeping expropriation or an expropriation through a composite act by pointing to the series of actions and omissions of the executive and judicial branches of the Respondent in assisting with the takeover of the refinery on 19 October 2007 and with the allegedly unlawful management of Ukratnafta, which eventually led to the loss of the Claimant's investment in the Company.⁶⁹⁹ Specifically, the following events allegedly form part of such a composite act: the 26 September 2007 court decisions that paved the way for the alleged Kremenchug seizure; the participation of the Respondent in the seizure and its actions to protect the raiders thereafter; the court decisions reinstating Mr. Ovcharenko; the initiation of the Prosecutor and the acceptance of the court of the time-barred claim in Case 32/1; the initiation of the Prosecutor and the acceptance of the court of the time-barred application to reopen Cases 28/198 and 28/199, respectively; and the

⁶⁹⁹ Transcript (18 March 2013), 95:16-25 to 95:1-2.

court decisions in Cases 17/178, 28/198, and 28/199 that resulted in the invalidation of the title of the Claimant, AmRuz, and Seagroup to their the Ukratnafta shares.⁷⁰⁰

445. The Claimant rejects the Respondent's insistence that the Claimant is required to establish that each and every act or omission individually was in and of itself expropriatory⁷⁰¹ or that each of the court decisions in Cases 17/178, 28/198, and 28/199 amounted to a denial of justice,⁷⁰² although it argues that Ukraine's conduct would breach even this standard.⁷⁰³
446. While clarifying that there is no requirement under international law for property to be transferred to the state for it to be expropriated,⁷⁰⁴ the Claimant argues that the Respondent did in fact benefit from the expropriation in this case, in that all of Ukratnafta's shares are now owned by Ukrainian entities, and that the Respondent, through Naftogaz, is working with Privat Group to create a jointly controlled vertically integrated oil empire.⁷⁰⁵
447. The Claimant also states that the alleged expropriation was not accompanied by "prompt, adequate and effective compensation," as required by Article 5(1) of the Russia-Ukraine BIT, alleging that the Respondent has always refused and continues to refuse to pay such compensation.⁷⁰⁶ The Claimant further argues that the text of Article 5(1) rebuts the Respondent's assertion that an expropriation without prompt compensation can be "provisionally lawful."⁷⁰⁷
448. Characterizing the Respondent's reliance on *General Ukraine v. Ukraine* as inapposite,⁷⁰⁸ the Claimant rejects the Respondent's argument that AmRuz and Seagroup should have first sought restitution from the courts, stating that it could not have asserted a claim in Cases 17/178, 28/199, and 29/199 for reparation for the Respondent's violation of the Russia-Ukraine BIT in

⁷⁰⁰ Second Memorial, ¶ 431; Transcript (18 March 2013), 39:7-16, 97:16-21.

⁷⁰¹ Second Memorial, ¶ 432; Transcript (18 March 2013), 31:4-16, 39:10-25 to 40:1-24.

⁷⁰² Second Memorial, ¶¶ 433-439.

⁷⁰³ Second Memorial, ¶ 440.

⁷⁰⁴ Second Memorial, ¶¶ 441-442, citing *Amco v. Indonesia* and *Rumeli v. Kazakhstan*.

⁷⁰⁵ Second Memorial, ¶ 443.

⁷⁰⁶ Transcript (18 March 2013), 98:3-13.

⁷⁰⁷ Second Memorial, ¶ 447.

⁷⁰⁸ Second Memorial, ¶¶ 448-451.

the specific form of the restitution of its shareholdings in Ukratnafta, as it is doing in this arbitration.⁷⁰⁹

449. While stating that the non-payment of “prompt, adequate and effective compensation” alone would render the expropriation unlawful, as the conditions of expropriation are cumulative,⁷¹⁰ the Claimant further argues that the expropriatory conduct was also not in the public interest, because the alleged black raider action threatened public order;⁷¹¹ was inherently discriminatory as Ukratnafta is now owned entirely by Ukrainian interests in violation of the parity principle;⁷¹² and was not in compliance with Ukrainian domestic law, as required by Article 5(1) of the BIT.⁷¹³

450. The Claimant also states that the State’s intent to expropriate is not a necessary element of a claim of expropriation, but if it were, then the initiation by the Prosecutor of Cases 32/1, 28/128, and 28/129 was meant precisely to deprive the Tatarstan shareholders of their shares.⁷¹⁴

2. The Respondent’s Position

451. Because the Claimant’s shareholdings in Ukratnafta were invalidated by specific and identifiable court decisions—namely Cases 17/178, 28/198, and 28/199—the Respondent rejects the Claimant’s characterization of the alleged wrongdoing as a creeping expropriation.⁷¹⁵ In doing so, it states that there is no link between either the reinstatement of Mr. Ovcharenko and the initiation of Case 17/178, which was not done by the Respondent and was in any case triggered by the failure of the Claimant to contribute properly for its Ukratnafta shares⁷¹⁶ or the reinstatement of Mr. Ovcharenko and the alleged non-payment by Ukratnafta of its oil purchases.⁷¹⁷

⁷⁰⁹ Second Memorial, ¶ 448.

⁷¹⁰ Second Memorial, ¶ 452.

⁷¹¹ Second Memorial, ¶ 454.

⁷¹² Second Memorial, ¶ 455; Transcript (27 March 2013), 12:22-25 to 13:1-2.

⁷¹³ Second Memorial, ¶¶ 456-457; Transcript (18 March 2013), 101:18-23.

⁷¹⁴ Second Memorial, ¶ 444.

⁷¹⁵ Second Counter-Memorial, ¶¶ 218-219, 222.

⁷¹⁶ Second Counter-Memorial, ¶ 220.

⁷¹⁷ Second Counter-Memorial, ¶ 221.

452. The Respondent argues that the denial of justice standard is embedded in the concept of expropriation, and rejects the Claimant's contention that a stricter standard is warranted.⁷¹⁸ It explains that Cases 32/1, 17/178, 28/198, and 28/199, which resulted in the invalidation of the Claimant's shareholdings in Ukratnafta, did not constitute a denial of justice, and even were the Claimant to persuade the Tribunal that these decisions were incorrectly decided as a matter of Ukrainian law, this determination would not be per se conclusive as to a violation of Article 5.⁷¹⁹
453. Relying on the decision in *Swisslion*, the Respondent states that it was entitled to form the view that the Claimant, AmRuz, and Seagroup had failed to make the investment contributions required of them and to put that view before the Ukrainian courts.⁷²⁰ It further states that the invalidation of the Claimant's shareholdings in the said cases does not constitute an expropriation, because the decisions were not illegal.⁷²¹
454. Even if the Claimant could prove that the relevant court decisions constituted an expropriation (which is denied), the Respondent argues that it meets the requirements for a lawful expropriation.
455. First, the court in Case 32/1 did not act in a discriminatory manner as it in fact rejected the Prosecutor's claim based on a violation of the parity requirement (which the Claimant alleges was discriminatory).⁷²² The Claimant does not even explain how the Prosecutor's allegedly discriminatory intention in Case 32/1 could extend to the entirely separate court decisions in Cases 17/178, 28/198, and 28/199.⁷²³
456. Second, the court decisions were issued "in accordance with procedures established by legislation" because they conformed to Ukrainian law and to the regular practice of the Ukrainian courts and did not in any case lead to grave and manifest injustice.⁷²⁴ Moreover, the

⁷¹⁸ Second Counter-Memorial, ¶¶ 223-228, discussing *RosInvest Co v. Russian Federation*, *Saipem v. Bangladesh*, *Rumeli v. Kazakhstan*, and *Oil Fields of Texas*; Transcript (19 March 2013), 20:20-22.

⁷¹⁹ Second Counter-Memorial, ¶ 230.

⁷²⁰ Second Counter-Memorial, ¶¶ 231-233.

⁷²¹ Second Counter-Memorial, ¶ 234.

⁷²² Transcript (19 March 2013), 22:20-21.

⁷²³ Counter-Memorial, ¶¶ 355-357.

⁷²⁴ Transcript (19 March 2013), 22:21-22.

reinstatement of Mr. Ovcharenko, which the Respondent denies was part of a raider action, had no causal link with the events said to have caused expropriation.⁷²⁵

457. Third, the courts did not violate the “public interest” requirement⁷²⁶ because the ultimate beneficiary of the impugned judicial decisions was a private party that was neither owned nor controlled by the Respondent, the premise that the Ukrainian court system is corrupt is unsupported by evidence,⁷²⁷ the multi-layered judicial process proves that the court decisions were rendered for a public purpose, the post-decision share transfers were carried out in accordance with Ukrainian law, and the decisions actually served a public interest, which was to enforce the terms that conditioned the contribution of the Kremenchug refinery to Ukratnafta.⁷²⁸
458. Fourth, the courts did not breach the compensation requirement of Article 5(1) because the Claimant, AmRuz, and Seagroup did not, in the first place and as a condition for claiming the denial of compensation, seek restitution from the Ukrainian courts for the cash that they paid for their invalidated shareholdings. In other words, the Claimant was not compensated for its shareholdings because it did not seek to be.⁷²⁹

3. The Tribunal’s Findings in Respect of the Standard Governing Expropriation

459. The prohibition of unlawful expropriation commonly found in contemporary investment agreements is mainly concerned with the protection of property rights against the government abusing its legislative or executive power. It is thus mostly related to administrative and legislative acts. The issue of whether in addition an act of expropriation can also originate in the judiciary, while not in principle excluded under international law and BIT protection, is not a common occurrence and therefore views on the matter are less elaborated.
460. The discussion of judiciary expropriation has been inevitably intertwined with that concerning denial of justice and related standards, such as complete and unconditional legal protection or the “effective means” for the assertion of claims and the enforcement of rights. All such standards are closely associated with judicial conduct, although not exclusively so, and have

⁷²⁵ Counter-Memorial, ¶¶ 358-360.

⁷²⁶ Transcript (19 March 2013), 22:22-23.

⁷²⁷ Transcript (19 March 2013), 22:24-25.

⁷²⁸ Counter-Memorial, ¶¶ 361-366.

⁷²⁹ Counter-Memorial, ¶¶ 367-374; Second Counter-Memorial, ¶¶ 236-243; Transcript (19 March 2013), 22:25 to 23:1-4.

been discussed above. It should also be noted that interactions with other standards can be more complex. The tribunal in *Loewen*, for example, without sufficient explanation, concluded that the expropriation claim in that case could not succeed if a breach of FET had not been previously established, thus introducing a further interaction of expropriation with other standards of protection. The *Saipem* tribunal in contrast was of the view that a finding of judicial expropriation did not presuppose a denial of justice.

461. Specific instances of judicial expropriation, in which a court decision causes the loss of an asset in certain contexts, or of court decisions forming part of a process of creeping expropriation through the intervention of composite acts, have been identified in contemporary jurisprudence and practice. *Saipem v. Bangladesh* is one such relevant case; there, the tribunal concluded that the taking of the investor's residual rights as a result of the Supreme Court decision annulling an ICC award was tantamount to measures having effects similar to an expropriation, although it cautioned that a finding of illegality in this case was of a rather exceptional nature and did not depart from the "sole effects" doctrine that requires total or substantive deprivation. Similarly in the *Sistem* case the abrogation of contractual rights by a court decision was equated to a measure tantamount to expropriation irrespective of the State organ that took possession of those rights. In the context of other jurisprudential developments, in addition to the illegality test, other tests concerning unreasonableness and proportionality have been applied, as held in *Occidental* (2012) or in the jurisprudence of the European Court of Human Rights.
462. To the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability under Article 15(1) of the Articles even if each of such acts individually might not be sufficient for that finding of wrongful conduct. Examples of specific instances of conduct assessed as a whole, as opposed to isolated aspects, are found in the decisions in *RosInvestCo v. Russian Federation* and *Kardassopoulos v. Georgia*, although not dealing with the conduct of the judiciary in particular. In *Amto v. Ukraine*, however, the tribunal specifically applied this holistic assessment to the decisions of courts and considered them in their entirety, holding in respect of the effective means standard under the ECT that the failure to offer guarantees in individual cases are not in themselves a breach of the standard but might be evidence of systemic inadequacies.⁷³⁰

⁷³⁰ *Limited Liability Company Amto and Ukraine*, SCC Case 080/2005, Final Award of 26 March 2008, ¶¶ 75, 88 (CLA-198).

463. In the present case, the Claimant relies on both *RosInvestCo v. Russian Federation* and *Amto v. Ukraine* to support its claim of creeping expropriation, while the Respondent believes the claim concerns only a situation of direct expropriation, which it denies having taken place.
464. The facts of this case are difficult to assess in connection to the claim of expropriation. Two things, however, are certain. The first is that judicial decisions were the specific acts that in the end resulted in the total deprivation of the Claimant's rights as a shareholder of Ukrtatnatfa, first by annulling the share purchase agreement with Tatneft and next by ordering the return of the shares held by AmRuz and Seagroup, with all shares being held today by Ukrainian-related interests. The shareholders related in interest to Tatarstan were thus completely eliminated from the company. Whether these events were linked in their origin to the reinstatement of Mr. Ovcharenko and the taking over of the refinery is immaterial from the point of view that deprivation is a fact of the case, whatever the reasons or causes of those decisions.
465. The second certainty is that the judicial intervention was not given in isolation but was a part of the complex network of acts that led one way or another to the courts' determinations. Such acts include a role of the Respondent's government in their genesis and development. In spite of the confusing events surrounding the reinstatement of Mr. Ovcharenko, which also originates in judicial decisions, sufficient evidence exists to believe that a government hand was involved, with particular reference to the role of bailiff Pryshchepa, and, secondarily, the support evidenced by the subsequent presence on the premises of Ministry of Interior troops, in facilitating and securing, respectively, the takeover of the refinery. More important than that has been the unequivocal and questionable role of the Prosecutor in the events that followed. Most of the judicial decisions relevant in this dispute originated in the proceedings directly or indirectly initiated by such official. Although the Prosecutor's motion seeking the invalidation of Tatneft's direct shareholding was prompted by the 2007 letter of the Minister of Fuel and Energy ahead of the reinstatement of Mr. Ovcharenko, which in the Respondent's view proves that the claimed losses were not proximately caused by the alleged treaty breaches arising from Mr. Ovcharenko's reinstatement,⁷³¹ the Tribunal cannot fail to note that in spite of their chronology these events are all interrelated. It must also be noted that irrespective of the autonomy of the Prosecutor's office it is a governmental service whose conduct is attributable to the Respondent.
466. In light of these elements of certainty the Tribunal is convinced that the role of judicial decisions in this case forms an integral part of acts of greater complexity, which evidences the

⁷³¹ Respondent's Post-Hearing Memorial, ¶ 52 (REX-145).

existence of composite acts. The precise composition of each series of acts is difficult to establish, but again here is where their consideration as a whole leads inevitably to a finding on the existence of conduct, which in isolation might not be enough to engage liability, but in the aggregate is.

467. There are, however, other aspects where it is uncertainty that prevails, either in law or in fact. While there are cases in which it has been held that expropriation need not result in the transfer of title to property to the State, these are not common occurrences. In the instant case, the Respondent's argument to the effect that the State has not benefited from the reorganization of the capital composition of Ukratnafta is convincing as the true successor in interest has been the private company Korsan although the increased participation of Ukrainian interest might result in an indirect benefit to the State.
468. The same uncertainty characterizes the question of the intent to expropriate. Whether this is a strict requirement as argued by the Respondent or one in which it is not the intent but the results that matter as maintained by the Claimant is again something which in the context of this case does not come up with enough clarity. Certainly the results are those the Claimant complains about but in the Tribunal's mind the intention of all the acts intervening in this case cannot be established accurately. If intent were to be a required element of expropriation, as Respondent asserts, the Tribunal has difficulty discerning whether such intent would have been that of the Respondent, as opposed to it residing elsewhere.
469. The same holds true of the requirements concerning non-discriminatory expropriation. The fact that not only Tatneft's interests were affected but also that AmRuz and Seagroup hold different nationalities would appear to support the Respondent's argument to the effect that no discrimination intervenes in the cases complained about. On the other hand, it is quite evident that with or without intent all the affected interests were those related to the Tatarstan side of the equation leading to the formation of Ukratnafta and thus the argument that discrimination was very much present cannot be excluded to the extent that the recomposing of the capital structure is considered as a whole.
470. The Parties have also discussed whether public interest has or has not been complied with for the purpose of qualifying an expropriation as lawful, taking positions that are dramatically different in what public interest means in this context. Whether all of the above might or might not amount to a justification of public interest in the context of expropriation is another aspect where uncertainty prevails. While for the Claimant the public interest requirement has not been met in the context of the claimed expropriation, the Respondent's position as noted is that there

can be no question of public interest involved as there has simply been no expropriation and the beneficiary of the impugned judicial decisions was a private party. But, the Respondent further maintains, even if considered relevant, the public interest was anyhow complied with since the aim of such decisions was to enforce the terms that conditioned the contribution of the Kremenchug refinery to Ukratnafta.

471. It is also to be noted that no compensation has been paid in the present case and that the situation is no different than a case of direct taking or one concerning the compulsory redemption of shares, as decided in *Rumeli* in respect of the latter. The Respondent's argument to the effect that the Claimant, AmRuz, and Seagroup did not seek restitution from the Ukrainian courts for the cash that they paid for their invalidated shareholdings is not convincing.⁷³² The Respondent maintains in this respect that in spite of the fact that Article 48 of the Civil Code provides in case of an invalid agreement for the obligation of restitution in kind or money that each party has, this has to be specifically requested from the court.⁷³³ The general principle that the courts must decide on the specific petitions of the parties as laid down in Article 83 of the Economic Procedure Code⁷³⁴ does not mean that a specific provision such as that of Section 2 of Article 48 of the Civil Code in respect of the consequences of an invalidation of the agreement cannot be applied by the courts on their own initiative as they have to decide not just on the invalidation but also on its consequences.

472. On balance the Tribunal must conclude that there are too many uncertainties in the consideration of expropriation, with some elements pointing towards a positive finding and others in a negative direction. Even if an expropriation were found to have occurred it would be of a rather unusual kind. In the circumstances the Tribunal does not consider it necessary to pass upon the claim of expropriation, especially because it has already found that the Respondent's liability under the Ukraine-Russia BIT is engaged because of the breach of other standards of protection under the BIT, with particular reference to FET and the subsumed role therein of full protection and security and the complete and unconditional legal protection of the investment as envisaged in Article 2.2 of the Russia-Ukraine BIT.

⁷³² Second Expert Report of Toms, at 69; Respondent's Post-Hearing Memorial, ¶ 26, with reference to the Witness Testimony of Toms.

⁷³³ First Expert Report of Belyanovich, ¶ 10; Transcript (26 March 2013), 18:13-25 to 19:1-21; Respondent's Post-Hearing Memorial, ¶ 27, with reference to the Transcript (25 March 2013), and the discussion of the *Dekon* case.

⁷³⁴ Letter of High Commercial Court of April 11, 2005 (REX-122); Second Expert Report of Toms, at 69; C-551; 2005 Supreme Court Ruling, VEB-9; Transcript (25 March 2013), 101:17-25.

473. It must also be kept in mind that the Claimant withdrew its claim for reparation in the specific form of restitution of its shareholdings in Ukratnafta and opted for the claim of compensation concerning BIT breaches. The Respondent maintains in this context that a party is not prevented from seeking recovery in a separate claim.⁷³⁵ Remedies will be discussed further below.

4. The Tribunal's Conclusions on Liability and the Discussion of the Standard of Review

474. Because the claims in this case arise for the most from the decisions of courts the standard of review to be applied is still one important aspect the Tribunal needs to consider in finalizing its discussion on liability. The Tribunal is mindful that in examining judicial conduct as engaging the State's liability for the breach of an international obligation there are limits to be observed. The Tribunal is not an appellate court. Its powers are confined to the finding of whether certain conduct amounts to a breach of an international obligation and, if so, what are its consequences and remedies. The decisions in *Azinian v. Mexico* and *Chevron v. Ecuador* have rightly identified these limits, either under general international law, NAFTA standards or some specific kinds of protection, such as the "effective means" requirements discussed above.

475. There are, however, certain clarifications that need to be made in this context. That international tribunals ought to be deferential to domestic courts is a generally accepted proposition which this Tribunal readily accepts. While deference has been occasionally understood as finding its limits only in cases amounting to "denial of justice," and the latter has been again interpreted in light of the high standards of egregiousness, manifest injustice, lack of due process, offending judicial propriety, arbitrariness, bad faith and clear and malicious application of the law, this understanding is again related to the issue of the international minimum standard discussed above. In the ambit of FET, deference is further limited by a variety of considerations arising from equitableness and reasonableness. In this sense a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned, and still eventually engage liability for the breach of the FET standard.

476. A second important clarification is that deference on the part of international tribunals requires the clear perception that domestic courts are independent, competent and above all clear of suspicion of corruption. While this perception will be many times well supported by the facts and the reputation of the court system, it has also known exceptions.

⁷³⁵ First Expert Report of Belyanovich, ¶ 25.

477. Tribunals have hesitated to consider the merits of a particular judicial decision for a determination of the breach of an international obligation and the engagement of liability related thereto, a case in point being that of *Frontier Petroleum Services Ltd.* in connection with the full protection and security standard, and have rather opted for the test that if it is believed the courts have acted in good faith and its decisions are reasonably tenable there should be no finding of liability. And even where a tribunal has considered the merits of a court decision, as in *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, the reasonably tenable test has prevailed.
478. A further elaboration of deference is found in the case of *Chevron v. Ecuador* and its reliance on the test of whether a decision has resulted in "manifest injustice", in which case deference might not be justified, a concept which in turn is measured in light of what can be regarded as "reasonably tenable" or a conclusion that can be "legitimately reached" or that is "juridically possible". But even then deference might not extend to other defects of a court decision, such as undue delay. These distinctions suggest that different standards of review might apply in relation to different types of wrong.
479. This Tribunal, having examined the various court decisions complained of and the arguments on which they are based, is not at ease with an unrestricted application of the standard of deference. Some aspects of such decisions can be considered reasonably tenable, but these are rather exceptional. For the most part, the explanation given by the courts in support of their findings have not been convincing and appear rather as an endorsement of the Prosecutor's arguments, not unrelated to those of the interests behind such arguments. This does not necessarily mean that bad faith might have intervened, at least not in all cases, but it certainly requires that the standard of deference be appropriately qualified.
480. The Tribunal accordingly has followed an approach in which the merits of the various decisions have in fact been examined in order to determine whether they can be considered as fully compliant with the BIT standards of protection, a test which in some respects has been successful but in others not. Deference is thus not automatic and certainly does not require that extreme forms of misconduct, such as egregiousness, be found to establish that breaches have occurred as a consequence of those decisions. Moreover, the process as a whole must also be taken into account for reaching a determination on whether manifest injustice has occurred in the end. In light of this broader perspective, deference cannot stand in the way of safeguarding treaty standards of protection, and where total deprivation of the Claimant's capital

contributions and of its corresponding shares and rights has been the result of the process, deference in no way precludes a finding of liability.

481. The Tribunal has concluded above that in this case there are no sufficient reasons to justify a finding of denial of justice. However, it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions. In this respect such standard has a broader meaning than the strict denial of justice as understood under traditional customary international law. Even though fair and equitable treatment is not always regarded as an integral part of customary law, it reflects the evolution that the very rules of customary law have experienced in the light of current treaties and jurisprudence. Denial of justice thus becomes inseparable from fair and equitable treatment and both standards will supplement each other to the point that they may be considered as expressions of the updated contents of customary law as presently understood.

E. THE ALLEGED DEBT FOR PAST OIL PURCHASES

482. The Parties are also in disagreement as to whether the Respondent owes the Claimant any payment for oil purchases. This dispute relates to dealings involving Suvar-Kazan, the commission agent of the Claimant, and Avto, a Ukrainian company that imported Tartar oil into Ukraine.
483. On 23 April 2007, Suvar-Kazan and Avto entered into Contract No. 3-0407,⁷³⁶ which was a framework agreement for the supply of oil to the Kremenchug refinery for the period from April to December 2007.⁷³⁷ Ukratnafta, in turn, purchased oil from Taiz, a Ukrainian company that had purchased oil from Avto for sale to the Kremenchug refinery, both directly during the period from May to July 2007 and indirectly in September 2007, through Technoprogress Research and Production ("Technoprogress"), another Ukrainian intermediary.⁷³⁸ The oil was delivered from the Claimant to the Kremenchug refinery through a pipeline.⁷³⁹
484. Pursuant to an agreement with the Claimant, in January 2008, Technoprogress assigned its claims for oil payments to Taiz, a Ukrainian intermediary, which then assigned all its claims for

⁷³⁶ Memorial, ¶ 136.

⁷³⁷ Counter-Memorial, ¶ 130.

⁷³⁸ Memorial, ¶ 137; Counter-Memorial, ¶ 130; Transcript (13 March 2013), 48:14-20.

⁷³⁹ Memorial, ¶ 510; Transcript (18 March 2013), 133:19-24.

oil payments against Ukratnafta to Suvar-Kazan, which accepted the assignment on 18 April 2008.⁷⁴⁰

485. On 7 May 2008, Suvar-Kazan informed Ukratnafta of the assignment and requested payment of the amount due.⁷⁴¹ In response to this, Ukratnafta initiated proceedings in the Economic Court of the Poltava Region to invalidate the assignment agreement, on the basis that the relevant oil supply agreements between Ukratnafta and Taiz and Technoprogress, respectively, as well as the commission agreement between Taiz and Avto, contained prohibitions on the assignment of rights.⁷⁴² The Economic Court for the Poltava Region invalidated these assignments on 2 September 2008.⁷⁴³ The Supreme Court of Ukraine upheld the finding of invalidity on 26 March 2009.⁷⁴⁴
486. Meanwhile, Suvar-Kazan filed a claim in the Tatar courts to recover the amounts owed to it.⁷⁴⁵ On 5 September 2008, the Tatar court granted Suvar-Kazan's claims and ordered Ukratnafta to pay the Claimant UAH 2.5 billion.⁷⁴⁶ In December 2008, the Tatar courts ordered the seizure of Ukratnafta's shares in Tatneftprom, which was the contribution of the Republic of Tatarstan for its shares in Ukratnafta, which shares in Tatneftprom were sold at auction.⁷⁴⁷
487. Between 12 and 16 June 2009, Ukratnafta paid Taiz and Technoprogress the amount that was due to them under the Contract.⁷⁴⁸

1. The Claimant's Position

488. The Claimant alleges that payment was made through an inter-group transfer that was carefully orchestrated so as to render both Taiz and Technoprogress, which had by then been liquidated, unable to fulfill their debt obligations to the Claimant.⁷⁴⁹

⁷⁴⁰ Memorial, ¶ 513; Second Memorial, ¶ 66; Counter-Memorial, ¶ 382; Transcript (19 March 2013), 49:21-25 to 26:1.

⁷⁴¹ Second Memorial, ¶ 67; Transcript (19 March 2013), 50:2-4.

⁷⁴² Second Memorial, ¶ 67; Counter-Memorial, ¶ 132.

⁷⁴³ Second Memorial, ¶ 68; Counter-Memorial, ¶ 135.

⁷⁴⁴ Transcript (19 March 2013), 51:2-4.

⁷⁴⁵ Transcript (19 March 2013), 50:4-8.

⁷⁴⁶ Transcript (19 March 2013), 50:9-13.

⁷⁴⁷ Transcript (19 March 2013), 50:14-21.

⁷⁴⁸ Second Memorial, ¶ 78; Second Counter-Memorial, ¶ 383; Transcript (19 March 2013), 51:5-6.

⁷⁴⁹ Second Memorial, ¶¶ 64-98; Transcript (18 March 2013), 138:25 to 139:1-13.

489. In broad strokes, the alleged inter-group transfer or siphoning strategy, which the Claimant alleges to be typical of raider actions, operated as follows.
490. On 22 April 2009, both Taiz and Technoprogress opened bank accounts with PrivatBank.⁷⁵⁰ On 23 April 2009, Optima Trade LLC, which was alleged to have been a member of the Privat Group, entered into Service Provision Agreements with Taiz, Technoprogress, and Avto.⁷⁵¹
491. On 3 June 2009, Taiz was authorized by its management to acquire shares in 18 companies for the sum of UAH 1.470 billion.⁷⁵² On 8 June 2009, Taiz was authorized to resell these shares.⁷⁵³ These shares were ultimately purchased by Renalda Investments, Ltd, which was allegedly controlled by the Privat Group, for roughly the same amount.⁷⁵⁴
492. On 4 June 2009, Technoprogress was authorized by its management to acquire shares in five companies for a total price of around US\$ 561 million.⁷⁵⁵ On 8 June 2009, Taiz was again authorized by its management to acquire shares in six other companies.⁷⁵⁶ Also on 8 June 2009, a sale of these securities was authorized.⁷⁵⁷ These shares were ultimately purchased by Duxton Holdings Ltd, which was allegedly controlled by the Privat Group.⁷⁵⁸
493. Ukratnafta paid Taiz and Technoprogress the debts owed between 15 June and 17 June 2009.⁷⁵⁹
494. On 18, 22, and 27 June 2009, Optima Trade requested payment under the Service Provision Agreements from Taiz, Technoprogress, and Avto, respectively.⁷⁶⁰ These three companies requested a delay in payment, until September 2009.⁷⁶¹
495. On 24 July 2009, Optima Trade submitted payment orders to PrivatBank, which were eventually rejected for lack of funds.⁷⁶²

⁷⁵⁰ Second Memorial, ¶ 71; Transcript (18 March 2013), 141:7-8.

⁷⁵¹ Second Memorial, ¶ 72; Transcript (18 March 2013), 141:9-16.

⁷⁵² Second Memorial, ¶ 75; Transcript (18 March 2013), 141:22-25 to 142:1-2.

⁷⁵³ Second Memorial, ¶ 75.

⁷⁵⁴ Second Memorial, ¶ 75.

⁷⁵⁵ Second Memorial, ¶ 77; Transcript (18 March 2013), 141:22-25 to 142:1-2.

⁷⁵⁶ Second Memorial, ¶ 76.

⁷⁵⁷ Second Memorial, ¶ 77.

⁷⁵⁸ Second Memorial, ¶ 77.

⁷⁵⁹ Second Memorial, ¶ 79; Transcript (18 March 2013), 144:2-5.

⁷⁶⁰ Second Memorial, ¶ 80; Transcript (18 March 2013), 144:6-10.

⁷⁶¹ Second Memorial, ¶ 80; Transcript (18 March 2013), 144:11-15.

496. On 21 August 2009, the Economic Court of the Poltava Region accepted Optima Trade's filing of bankruptcy claims against the three intermediaries.⁷⁶³ On 1 October 2009, this Court issued decisions deeming these three companies bankrupt.⁷⁶⁴
497. It is the Claimant's position that Ukratnafta artificially accumulated debts to these intermediaries and continually withheld the payments for the oil deliveries owed to Tatneft through Taiz and Technoprogress until the Privat Group took over these entities.⁷⁶⁵ By 22 October 2007, the debts owed to Taiz and Technoprogress amounted to approximately UAH 2.2 billion.⁷⁶⁶ After his reinstatement on 17 October 2007, Mr. Ovcharenko consciously decided not to pay these debts due to alleged risks associated with the contracts with those companies.⁷⁶⁷ However, only one and a half years later, in June 2009, Ukratnafta did pay UAH 2.2 billion to Taiz and Technoprogress.⁷⁶⁸ The Claimant's explanation is that the alleged raiders had, in the meantime, taken control of these intermediaries, putting mechanisms in place to ensure that no money could be passed to the Claimant.⁷⁶⁹
498. The Claimant disputes the Respondent's allegation that Tatneft's losses for unpaid oil deliveries are not compensable because Ukraine did not direct or order the delay of payment or the non-payment of Taiz and Technoprogress, which means that such losses are not a "natural and normal consequence" of any treaty violations by Ukraine.⁷⁷⁰ It first points out that whether or not Ukraine directed or ordered non-payment is irrelevant since there is "a transitive, but clear and uninterrupted, causal chain" connecting Ukraine's violation of the BIT and Tatneft's losses for the unpaid oil deliveries. In the Claimant's view, UTN's non-payment to the Ukrainian intermediaries results from Mr. Ovcharenko's control over UTN, which is a result of Ukraine's facilitation of and support for the Kremenchug seizure.⁷⁷¹

⁷⁶² Second Memorial, ¶ 81; Transcript (18 March 2013), 144:15-18.

⁷⁶³ Second Memorial, ¶ 81; Transcript (18 March 2013), 145:1-4.

⁷⁶⁴ Second Memorial, ¶ 81; Transcript (18 March 2013), 145:5-7.

⁷⁶⁵ Transcript (27 March 2013), 27:1-9.

⁷⁶⁶ Transcript (25 March 2013), 33:10-12.

⁷⁶⁷ Transcript (25 March 2013), 33:10-12.

⁷⁶⁸ Transcript (25 March 2013), 35:1-3.

⁷⁶⁹ Second Memorial, ¶ 70; Judgment of the Economic Court of the Poltava Region of 3 November 2009, Case 17/178 at pp. 7-8, 12; Claimant's Post-Hearing Submission, ¶¶ 67-71.

⁷⁷⁰ Claimant's Post-Hearing Submission, ¶ 72, *referring to* Transcript (19 March 2013), 51:9-12.

⁷⁷¹ Claimant's Post-Hearing Submission, ¶ 73.

499. Citing the ILC's Commentary on Article 31 of the Articles on State Responsibility, the Claimant further argues that, in a case where an injury is caused by the concurrent actions of a State and a private party, international practice does not support the reduction or attenuation of the State's duty of reparation.⁷⁷²
500. Finally, the Claimant disputes the Respondent's allegation that foreseeability is a further requirement of finding liability, in addition to having a sufficient causal link between Ukraine's treaty violation and Tatneft's consequential damages, and submits that even if foreseeability were to be considered a relevant test, it was foreseeable that UTN, after a raider action facilitated and supported by Ukraine, would not make the payment of oil deliveries owed to the shareholders that had just been ousted.⁷⁷³

2. The Respondent's Position

501. The Respondent in turn states that the Claimant has no contract with either Ukraine or Ukratnafta for the delivery of oil that gives rise to this claim.⁷⁷⁴ Moreover, the Respondent points out that the Claimant's claim on this specific issue is based on private transactions among private entities, and that the Claimant does not otherwise allege involvement by State organs.⁷⁷⁵ The payment by Ukratnafta to Taiz and Technoprogress, the two Ukrainian importers, via the parties' respective commission agents between 12 and 16 June 2009, should relieve Ukratnafta of all responsibility, accordingly extinguishing its debts for the oil purchases. The Respondent highlights that "it is undisputed that in June 2009 Taiz and Technoprogress received full payment from UTN for the oil in question, but they never used those proceeds to pay Tatneft."⁷⁷⁶, ⁷⁷⁷ The only possible involvement of the Respondent would be through the court proceedings declaring the involved companies bankrupt, but the Respondent alleges that this took place only after the completion of the so-called siphoning strategy.⁷⁷⁸ The Respondent further notes that "[t]he Ukrainian bankruptcy courts, in any case played no role in Tatneft's

⁷⁷² Claimant's Post-Hearing Submission, ¶ 74, referring to *El Paso v. Argentina*, ¶ 687 (CLA-289), *CME v. Czech Republic*, Partial Award, ¶ 580 (CLA-39), *Alexandrov and Robbins*, Proximate Causation in International Investment Disputes, p. 333, (RLA-101), and *Samoan Claims*, Joint Report No. II of August 12, 1904, pp. 1779, 1780.

⁷⁷³ Claimant's Post-Hearing Submission, ¶ 77-79, referring to Respondent's Counter-Memorial, ¶¶ 459-462, Second Counter-Memorial, ¶¶ 407-410, and Transcript (19 March 2013), 55:2-3 and 56:23-24.

⁷⁷⁴ Transcript (19 March 2013), 48:11-13.

⁷⁷⁵ Transcript (19 March 2013), 48:11-13.

⁷⁷⁶ Respondent's Post-Hearing Memorial, ¶ 57.

⁷⁷⁷ Transcript (19 March 2013), 52:1-9.

⁷⁷⁸ Transcript (19 March 2013), 52:10-13.

alleged losses,” and this is because the alleged siphoning scheme occurred prior to the bankruptcy proceedings regarding Taiz and Technoprogress and the subsequent order that they be liquidated.⁷⁷⁹

502. The Respondent particularly highlights the importance of establishing causation for the Claimant’s claim for unpaid oil deliveries. The Respondent submits that it cannot be established that any breach of the BIT by the Respondent resulted in the Claimant’s loss of payment for its oil deliveries.⁷⁸⁰ In particular, the Respondent argues that the Claimant cannot show that the reinstatement of Mr. Ovcharenko (even assuming that such was a treaty breach, which is denied) was the “efficient and proximate cause” of the losses⁷⁸¹ or that the Ukrainian courts or bailiffs involved in it could have reasonably foreseen that losses would be suffered by the Claimant and in that particular way.⁷⁸² As regards the former issue, the Respondent points out that the current liabilities of Tatneft exceeded its current assets as of 19 October 2007, which means that its financial position was poor and was worsening.⁷⁸³ It also notes that the claim of Tatneft actually arises out of events that are additional to and separate from the reinstatement of Mr. Ovcharenko and, as further explained below, can be attributed to private parties, which means that the State cannot be liable for them.⁷⁸⁴

503. The Respondent also notes that the issues of proximity and causation are linked.⁷⁸⁵ In relation to the issue of proximity, it clarifies that the damages claimed must have been reasonably foreseeable in accordance with an objective standard, or that “the claimed losses would have been foreseeable to a reasonable man in the position of the wrongdoer.”⁷⁸⁶ The Respondent then contends that no reasonable person could have foreseen the chain of events that the Claimant contends led to its unpaid oil sales.⁷⁸⁷

504. The Respondent also points out that Ukratnafta entered into the oil delivery contracts with Taiz and Technoprogress before Mr. Ovcharenko was reinstated and had therefore never assumed

⁷⁷⁹ Respondent’s Post-Hearing Memorial, ¶ 69.

⁷⁸⁰ Transcript (19 March 2013), 53:25 to 54:1-6; Respondent’s Post-Hearing Memorial, ¶ 61.

⁷⁸¹ Transcript (19 March 2013), 54:7-16, 58:4-18; Respondent’s Post-Hearing Memorial, ¶ 60.

⁷⁸² Transcript (19 March 2013), 55:2-22.

⁷⁸³ Transcript (19 March 2013), 55:2-22; Respondent’s Post-Hearing Memorial, ¶ 60.

⁷⁸⁴ Respondent’s Post-Hearing Memorial, ¶¶ 63-64.

⁷⁸⁵ Transcript (19 March 2013), 56:23-25 to 57:1-12.

⁷⁸⁶ Respondent’s Post-Hearing Memorial, ¶¶ 66-67.

⁷⁸⁷ Respondent’s Post-Hearing Memorial, ¶ 68.

responsibility with respect to Tatneft, which had entirely assumed the risk of non-payment by Taiz and Technoprogress.⁷⁸⁸

505. Discussing *Samoan Claims*, the Respondent reiterates that it is insufficient for the Claimant to show that the Respondent created the opportunity for the misdeeds of private actors.⁷⁸⁹ It clarifies that this case limits the losses for which a State must be held accountable to those that immediately result from the State's international misconduct.⁷⁹⁰ The Respondent argues that the siphoning strategy—which consisted of entirely private transactions that were not connected to the State—described by the Claimant actually constitutes an intervening event that breaks the chain of causation between the alleged BIT breaches of the Respondent and the harm complained of here.⁷⁹¹

3. The Tribunal's Consideration of the Facts and Liability Concerning the Oil Purchase Claim

506. The Tribunal must now consider the facts concerning this separate but related claim that Tatneft has submitted, namely whether the Respondent is responsible for others' failure to pay for the oil that Tatneft had delivered to the Kremenchug refinery, and what the role of the various intermediaries that had intervened in these transactions was. The recourse to intermediaries was apparently justified by tax benefits,⁷⁹² related to VAT particularly,⁷⁹³ a policy that has been criticized by the Respondent as being contrary to Ukraine's tax legislation and which appeared to have used to some effect the address of the trade mission of the Republic of Tatarstan in Kyiv.⁷⁹⁴
507. Following transactions entered into in 2007, Technoprogress assigned in 2008 its claims for the payment of delivered oil to Taiz, the latter in turn assigning these claims to Suvar-Kazan, which accepted such assignment. At that point, the rights to such pending payments passed from the hands of Ukrainian companies to the commission agent for the Claimant. Suvar-Kazan soon thereafter, as explained above, requested payment for the amount due from Ukratnafta with the

⁷⁸⁸ Transcript (19 March 2013), 55:23-25 to 56:1-4; Respondent's Post-Hearing Memorial, ¶ 59.

⁷⁸⁹ Transcript (19 March 2013), 57:21-24; 58:19-25 to 59:1-5.

⁷⁹⁰ Respondent's Post-Hearing Memorial, ¶ 65.

⁷⁹¹ Transcript (19 March 2013), 59:6-15; Respondent's Post-Hearing Memorial, ¶ 62.

⁷⁹² Witness Statement of Grafsky, ¶¶ 5-11.

⁷⁹³ Witness Statement of Vilkova, ¶¶ 5-20.

⁷⁹⁴ First Witness Statement of Liapka, ¶ 14; Witness Testimony of Liapka; Transcript (25 March 2013), 25:21-25 to 29:1-8.

latter initiating proceedings to invalidate the assignment agreements. The assignments were subsequently invalidated.

508. The facts of the case on this point show that Ukratnafta proceeded to pay in full the pending amounts to both Taiz and Technoprogress, a step that the Respondent believes should relieve it of all responsibility as it extinguished the debt. The terms of this dispute do not appear, however, to be that simple, for the Claimant alleges that the payments made were orchestrated in a manner such that the amounts due would never reach its accounts. In fact, following payment both Taiz and Technoprogress were liquidated and their assets disbursed by means of inter-group transfers without ever allowing the Claimant to collect.
509. While the legal issues arising from this aspect of the dispute will be discussed below, the Tribunal cannot fail to note at this stage two facts that are of concern. The first is the extensive use of intermediaries. Admittedly this is a common practice in the oil trade, but in the instant case it appears to have been taken beyond normal transactions, particularly in view of the fact that the oil was delivered by means of a single and continuous pipeline. The Tribunal does not draw conclusions from this fact at this point but notes that it certainly raises doubts about the transparency of the process and its eventual propriety.⁷⁹⁵ The second fact to be noted is that at this point the intra-group transactions were indeed most active in view of the interest of some of the Ukrainian shareholders to gain control of Ukratnafta. These transactions were not unrelated to the role of such intermediaries, including their role in receiving and conveying debt payments made to them by Ukratnafta.⁷⁹⁶
510. As explained above, the Claimant believes in this connection that although payments were made to Taiz and Technoprogress as the intermediaries in the oil deliveries, these payments never reached Tatneft as they were orchestrated in such a way as to be diverted by means of intra-group transfers and the liquidation of the intermediary companies.⁷⁹⁷ It is on this basis that the Claimant maintains that the Respondent is liable for payment of the amounts owed to Tatneft. The Respondent believes to the contrary that, as payment was in fact made, it is relieved of all responsibility towards the Claimant and that whatever claim is pending concerns solely the relationship between the supplier and those intermediaries. The Respondent has further noted that Suvar-Kazan holds an enforceable judgment against Ukratnafta and that this judgment has

⁷⁹⁵ Witness Testimony of Fedotov; Transcript (20 March 2013), 24:4-25 to 25:1-16.

⁷⁹⁶ Witness Testimony of Liapka; Transcript (25 March 2013), 33:10-25 to 40:1-3.

⁷⁹⁷ Claimant's Post-Hearing Submission, ¶¶ 67-74; Transcript (27 March 2013), 2:19-25 to 4:1-4.

been in part enforced with the seizure in Tatarstan of Ukratnafta shares in Tatneftprom for an amount of US\$ 105 million.⁷⁹⁸

511. The Tribunal has expressed above its reservations about the role of intra-group transactions in this respect, steps that were not unrelated to the role of such intermediaries. The Respondent also explains that intermediaries significantly marked up prices for the oil sold. This role notwithstanding, both Parties agree that Ukratnafta made the required payments to the intermediary companies. The issue is thus whether such payment extinguished any legal obligation to pay for the oil delivered and thereby relieved the Respondent from liability.
512. The Respondent has convincingly argued that there was no contract between Ukratnafta, or for that matter Ukraine, and Tatneft for the delivery of oil⁷⁹⁹ and that many of the contracts concluded between Ukratnafta and Taiz and Technoprogress were done prior to the reinstatement of Mr. Ovcharenko when Tatneft was in control of the company.⁸⁰⁰ Such payments, the Respondent explains, could not have been made earlier, as the Claimant maintains, because the financial situation of Ukratnafta had been worsening.⁸⁰¹
513. It follows that there is no causal link, certainly not a proximate one, between the wrong eventually suffered by Tatneft and the conduct of Ukratnafta, which fully discharged its obligations in this matter. The Tribunal cannot make a finding of liability in light of the separate legal and contractual relations between the Claimant and the intermediaries, not even in terms of the allegation of consequential damages invoked by the Claimant.
514. To the extent that it could be established that Ukratnafta, and for that matter the Respondent, orchestrated such payments with a view to frustrate the Claimant's rights, this might be an appropriate consideration concerning liability in light of the FET. The Tribunal is not insensible to the argument that intra-group transactions intervened in the handling of such payments, but does not believe that Ukraine's intervention has been clearly established as a matter of fact and this therefore remains a presumption that is not sufficient to conclude that liability has been

⁷⁹⁸ Decision of the Arbitrage Court of the Republic of Tatarstan, City of Kazan dated 5 September 2008 (REX-40) and Enforcement Order No. 265221 by the Arbitration Court of Tatarstan dated 3 December 2008 (REX-134).

⁷⁹⁹ Transcript (19 March 2013), 48:11-25 to 49:1-12.

⁸⁰⁰ Audit Report from the Chief Control and Audit Office of Ukraine, 5 May 2008 (REX-26); Transcript (20 March 2013), 18:1-13 and 15-25.

⁸⁰¹ Respondent's Post-Hearing Memorial, ¶ 60.

engaged for Ukraine. The Respondent rightly points out that Ukraine cannot be held accountable for the actions of private parties that might have occurred in this context.⁸⁰²

515. The Parties have also discussed the *Samoan Claims* in this connection. The Claimant relies on this decision in support of its view that State conduct creating an opportunity for private parties' misdeeds is enough to establish a proximate cause linking the damages to the Respondent's conduct, just as it relies in this respect on the ILC Commentary on Article 31 of the Articles on State Responsibility.⁸⁰³ The Respondent asserts to the contrary that what was excluded in that case were the damages which were not the immediate result of military operations by the State.⁸⁰⁴
516. The Claimant believes that Ukraine not only created an opportunity for the alleged raiders to take over Ukratnafta but also that the courts and the executive collaborated with them to achieve this objective and ultimately arranged for the siphoning of oil payments to Privat-controlled companies.⁸⁰⁵ While elements of State participation in facilitating such schemes are present in the evidentiary record of this case, again principally because of the court's decisions on bankruptcy, what is lacking is the evidence concerning the causal link between these elements and the resulting damage as far as the claim for unpaid oil deliveries is concerned. *Samoan Claims* is thus of no avail in this situation.
517. Further arguments have been made in connection with *Alpha Projeckholding v. Ukraine* insofar as liability was found in respect of consequential losses arising from the proven fact that the respondent had ordered the cessation of payments to the claimant in that case, a situation which the Respondent in the instant case believes to be inapposite, and which in fact is different from the insufficient evidence here available.
518. The Parties have also discussed the foreseeability of damages and how this element should relate to the question of liability and compensation for unpaid oil deliveries. The Respondent maintains that no damage arising from these debts was reasonably foreseeable⁸⁰⁶ and hence that the claimed damages amount at most to an indirect or remote damage as far as the Claimant is

⁸⁰² Respondent's Post-Hearing Memorial, ¶ 64.

⁸⁰³ Claimant's Post-Hearing Submission, ¶ 74.

⁸⁰⁴ Respondent's Post-Hearing Memorial, ¶ 65.

⁸⁰⁵ Claimant's Post-Hearing Submission, ¶ 76.

⁸⁰⁶ *Eritrea-Ethiopia Claims Commission*, Decision No. 7 of 27 July 2007, ¶ 13 (RLA-99).

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⁸⁰⁴ Respondent's Post-Hearing Memorial, ¶ 65.

⁸⁰⁵ Claimant's Post-Hearing Submission, ¶ 76.

⁸⁰⁶ *Eritrea-Ethiopia Claims Commission*, Decision No. 7 of 27 July 2007, ¶ 13 (RLA-99).

concerned,⁸⁰⁷ a view which is disputed by the Claimant for whom the liability here is related more to torts than to contractual breaches and who therefore contends that foreseeability is not a basis to limit the recovery of losses.⁸⁰⁸

519. The Claimant's understanding that the unforeseeability of damages does not necessarily limit the recovery of losses is correct and as much was established in the hearing following a question from the Tribunal.⁸⁰⁹ It is of interest to note, however, that in the instant case when Suvar-Kazan, the agent for Tatneft, accepted in 2008 the assignment of the claims Taiz, Technoprogress and Avto had against Ukratnafta, it was not expecting any adverse developments in respect of such payments notwithstanding the fact that Mr. Ovcharenko had already been reinstated in his position.⁸¹⁰ Whether the action of Ukratnafta in this matter amounts to tort or breach of contract is immaterial in this context as in neither case do the damages arise from a proximate cause originating from the Respondent's actions. This remoteness is what the Tribunal does not consider to be compensable.

VI. REMEDIES

520. For the reasons set out above, the Tribunal has concluded that the Respondent bears international responsibility—or liability in principle—toward the Claimant under the Russia-Ukraine BIT as a result of its conduct in the period between 2004 and 2007 and the associated breaches of certain BIT provisions. Accordingly, the Tribunal must next consider the legal consequences of the Respondent's breaches of the Russia-Ukraine BIT.
521. The Parties differ significantly in respect of the standard of reparation that they contend should apply to breaches of the BIT, the forms of reparation (restitution and compensation) that would be owed (until the Claimant withdrew its request for restitution) and, in the event that compensation is owed, the methodology for establishing the appropriate amount of compensation and interest. The Tribunal has carefully reviewed the Parties' pleadings on these points. It has also taken due note of the evidence submitted by both Parties and has found the examination of the quantum experts of both sides at the hearing to be of great assistance in clarifying the differences between the Parties.

⁸⁰⁷ *Bivater-Gauff v. Tanzania*, ICSID Case ARB/05/22, Award of 24 July 2008, ¶ 785 (CLA-171); *Samoa Claims*, Award of 12 August 1904, ¶ 1780 (RLA-103).

⁸⁰⁸ *S.D. Myers, Inc. v. Government of Canada*, Second Partial Award of 21 October 2002, (CLA-271); Claimant's Post-Hearing Submission, ¶ 78.

⁸⁰⁹ Respondent's Post-Hearing Memorial, ¶ 67.

⁸¹⁰ Respondent's Post-Hearing Memorial, ¶ 68.

A. THE STANDARD OF REPARATION

522. A first point of contention between the Parties is the standard of reparation that applies for breaches of the Russia-Ukraine BIT. In short, the Claimant argues that it is entitled to “full reparation” as defined in customary international law, as it was subject to unlawful treatment. In the Claimant’s view, the compensation standard of Article 5(2) of the BIT applies only in cases of lawful expropriation. The Respondent, on the other hand, argues that, should the Tribunal find liability in principle, the standard of compensation to be applied, whether there has been a lawful or unlawful expropriation, is that defined by Article 5(2) of the BIT, which replaces customary international law as a *lex specialis*.

1. The Claimant’s Arguments

523. In the Claimants’ view, the standard of “full reparation” under customary international law applies to its claims for damages. In this regard, the Claimant recalls the pronouncement by the International Court of Justice in the *Chorzów Factory* case that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁸¹¹ The Claimant argues that the same standard of full reparation is now codified in Article 31 of the ILC Articles on State Responsibility,⁸¹² and has been adhered to by the International Court of Justice,⁸¹³ regional courts,⁸¹⁴ and arbitral tribunals.⁸¹⁵

⁸¹¹ Memorial, ¶ 488, referring to *Case Concerning the Factory at Chorzów, Claim for Indemnity (Germany v. Poland)*, PCIJ, Judgment on the Merits of 13 September 1928, Series A, No. 17, p. 47 (CLA-240). See also Transcript (18 March 2013), 107:10-17.

⁸¹² Article 31 of the ILC Articles on State Responsibility provides: “1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.” See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2), Yearbook of the International Law Commission (2001), vol. II(2), pp. 26, 28, Article 31 (CLA-270). See also Transcript (18 March 2013), 107:12-13.

⁸¹³ Memorial, ¶ 490 n. 539, referring to *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment of 25 September 1997, ICJ Reports (1997), p. 7, ¶¶ 148-150 (CLA-244); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, Judgment of 14 February 2002, ICJ Reports (2002), p. 3, ¶ 76 (CLA-148); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, ICJ Reports (2004), p. 1, ¶ 152 (CLA-85).

⁸¹⁴ Memorial, ¶ 490 n. 540, referring to *Case of Papamichalopoulos and others v. Greece*, ECHR, Application No. 14556/89, Judgment of 31 October 1995, ¶ 36 (CLA-245).

524. By contrast, the Claimant asserts that the standard set forth in Article 5(2) of the Russia-Ukraine BIT is limited to lawful expropriations and is therefore inapplicable here. Such becomes clear, in the Claimant's view, through the plain language of Article 5(2), which provides:

The amount of such compensation should correspond to the market value of expropriated investments immediately prior to such expropriation or immediately prior to the official announcement of such expropriation; furthermore, such compensation will be paid immediately, taking into account interest charged from the date of expropriation until the date of payment at the interest rate for three months' deposits in US dollars at the London interbank market rate (LIBOR) plus 1%, and will be in liquid, marketable form and freely transferable.⁸¹⁶

525. According to the Claimant, the phrase "such compensation" in Article 5(2) refers to "prompt, adequate and effective compensation that needs to accompany any expropriatory measure, for such a measure to be lawful under Article 5(1)."⁸¹⁷
526. The Claimant argues that the legal consequences of unlawful expropriations and breaches of the BIT other than expropriation—for which the Russia-Ukraine BIT does not specify standards of reparation—should be determined according to the customary international law of State responsibility⁸¹⁸ in the absence of "such *lex specialis*."⁸¹⁹

⁸¹⁵ *Id.*, ¶ 490 n. 541, referring to *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, ¶¶ 503-514 (CLA-218); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award of 24 December 2007 ¶¶ 422-429 (CLA-246); *Siemens A.G. v. The Argentine Republic*, ICSID Case ARB/02/8, Award of 6 February 2007, ¶ 353 (CLA-42); *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case ARB/03/16, Award of the Tribunal of 2 October 2006, ¶¶ 483-494 (CLA-134); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case ARB/97/3, Award of 20 August 2007, ¶¶ 8.2.5-8.2.7 (CLA-170); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Award of 13 November 2000, International Legal Materials (2001), vol. 40, p.1408, ¶ 311 (CLA-241); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case ARB/01/8, Award of 12 May 2005, ¶¶ 399-400 (CLA-196); *Petrobart Limited v. The Kyrgyz Republic*, SCC Case 126/2003, Award of 29 March 2005, pp. 77-78 (CLA-208); *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 310-56-3 of 14 July 1987, Iran-U.S. Claims Tribunal Reports (1988), vol. 15, p. 189, pp. 246-247 (CLA-247); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case ARB/01/7, Award of 25 May 2004, ¶ 238 (CLA-173).

⁸¹⁶ Russia-Ukraine BIT (C-23). This is based on the English version as translated from Russian, which was provided by the Claimant.

⁸¹⁷ Second Memorial, ¶ 468.

⁸¹⁸ *Id.*

⁸¹⁹ Memorial, ¶ 483. See also Transcript (18 March 2013), 106:18-23.

527. The Claimant contends that the distinction between lawful expropriation and unlawful acts, as set out in the *Chorzów Factory* case, has been widely accepted by investment treaty tribunals.⁸²⁰

In this regard, it refers to the analysis of the tribunal in *Vivendi v. Argentina*:

The Treaty thus *mandates* that compensation for *lawful* expropriation be based on the *actual value* of the investment, and that interest *shall* be paid from the date of dispossession. However, it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent. In the *Chorzów Factory* Case, the Permanent Court of International Justice (PCIJ) set out the following principles of compensation for *unlawful* acts by states: [...]. There can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations.⁸²¹

528. The Claimant also alleges that it would be “unjust”⁸²² to apply the same standard to lawful and unlawful expropriations as this would render “a lawful and an unlawful taking indistinguishable in its financial consequences.”⁸²³
529. In addition, the Claimant submits that, even if Article 5(2) of the Russia-Ukraine BIT were to extend to wrongful expropriations and other breaches of the BIT, Article 3(1) of the BIT would mandate the application of customary international law, which provides a “more favorable”⁸²⁴ compensation standard than that set forth in Article 5(2).⁸²⁵ In this context, the Claimant rejects the Respondent’s argument that an application of the most-favored nation clause would exclude

⁸²⁰ Memorial, ¶ 484, referring to *Case Concerning the Factory at Chorzów, Claim for Indemnity (Germany v. Poland)*, PCIJ, Judgment on the Merits of 13 September 1928, Series A, No. 17, p. 47 (CLA-240).

⁸²¹ Memorial, ¶ 484, referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case ARB/97/3, Award of 20 August 2007, ¶¶ 8.2.3-8.2.5 (CLA-170) [italics in original]. See also *Waguih Elie Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case ARB/05/15, Award of 1 June 2009, ¶¶ 539-540 (CLA-191); *Saipem S.p.A. v. Bangladesh*, ICSID Case ARB/05/7, Award of 30 June 2009, ¶ 201 (CLA-231); *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case ARB/03/16, Award of the Tribunal of 2 October 2006, ¶¶ 481-483 (CLA-134); *Siemens A.G. v. The Argentine Republic*, ICSID Case ARB/02/8, Award of 6 February 2007, ¶ 349 (CLA-42); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Award of 13 November 2000, International Legal Materials (2001), vol. 40, p. 1408, ¶ 308 (CLA-241); *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 425-39-2 of 29 June 1989, Iran-U.S. Claims Tribunal Reports (1990), vol. 21, p. 79, pp. 122 (CLA-242).

⁸²² Memorial, ¶ 485.

⁸²³ *Id.*, referring to *Case Concerning the Factory at Chorzów, Claim for Indemnity (Germany v. Poland)*, PCIJ, Judgment on the Merits of 13 September 1928, Series A, No. 17, p. 47 (CLA-240); Irmgard Marboe, *Compensation and Damages in International Law: The Limits of “Fair Market Value”*, Journal of World Investment and Trade (2006), vol. 7, p. 723, pp. 726-728 (CLA-243).

⁸²⁴ Memorial, ¶ 486.

⁸²⁵ *Id.*

the application of Article 5(2), as “it is in the very nature of a most-favored-nation clause that less favorable treatment standards are indeed disregarded in favor of more favorable standards of protection.”⁸²⁶

530. The Claimant contends that the Respondent relies on “a single article by one practitioner”⁸²⁷ to counter the plain language of the BIT. Moreover, so the Claimant argues, the cases cited by the Respondent⁸²⁸ do not support its position that Article 5(2) applies to unlawful expropriations because three of these cases—*Wena v. Egypt*, *Tecmed v. Mexico*, and *Middle East Shipping v. Egypt*—do not refer to the standard of full reparation, and the fourth case—*Goetz v. Burundi*—left the lawfulness of the expropriation open.⁸²⁹
531. The Claimant also challenges the Respondent’s contention that the “Claimant claims losses only in respect of its claim pursuant to Article 5(1).”⁸³⁰ Rather, the Claimant suffered one and the same injury—namely “the complete loss of its investment and non-payment for oil deliveries”⁸³¹—as a result of each of the Respondent’s breaches of the Russia-Ukraine BIT.⁸³² The Claimant further argues that “ample authority supports this approach,”⁸³³ referring to *Vivendi v. Argentina II*, where the tribunal found that breaches of different treaty articles triggered by the same measures “caused more or less equivalent harm.”⁸³⁴ It also refers to *Rumeli v. Kazakhstan*, where the tribunal awarded compensation to the claimants without determining whether their losses were “characterized as an expropriation calling for

⁸²⁶ *Id.*, ¶ 472.

⁸²⁷ *Id.*, ¶¶ 468-469, referring to Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, World Arbitration and Mediation Review (2008), vol. 1, no. 1-2, pp. 137, 139 (RLA-91), who states: “[W]here a claim is brought under an investment treaty in respect of an expropriation, and that treaty prescribes a standard of compensation, the question of compliance or non-compliance with the conduct requirements should be immaterial to the standard of compensation and the treaty standard should apply.”

⁸²⁸ See Counter-Memorial, ¶¶ 394-397, referring to *Wena v. Egypt*, *Tecmed v. Mexico*, *Middle East Shipping v. Egypt* and *Goetz v. Burundi*.

⁸²⁹ Second Memorial, ¶ 471.

⁸³⁰ Second Memorial, ¶ 461; Counter-Memorial, ¶ 377.

⁸³¹ *Id.*, ¶ 462.

⁸³² *Id.*

⁸³³ *Id.*, ¶ 463. See also *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, ¶¶ 532-534 (CLA-218); *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, ¶¶ 615-618 (CLA-39).

⁸³⁴ *Id.*, ¶ 463, referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal SA v. Argentine Republic*, ICSID Case ARB/97/3, Award of 20 August 2007, ¶¶ 8.2.7-8.2.8 (CLA-170).

compensation under the BIT, or merely as the consequence of some other internationally wrongful act, such as a breach of the obligation of fair and equitable treatment.”⁸³⁵

532. The Claimant maintains that the Respondent’s position is “in direct conflict with a large body of investment treaty awards,”⁸³⁶ as it addresses “exclusively”⁸³⁷ the standard of reparation for violations of Article 5(1).

2. The Respondent’s Arguments

533. The Respondent stresses that the Claimant has “no basis” to seek any reparation because the Respondent has not breached the Russia-Ukraine BIT.⁸³⁸ But in any case, the Respondent observes that “the Claimant claims losses only in respect of its claims pursuant to Article 5(1), i.e., the alleged expropriation of its direct and indirect shareholdings in Ukratnafta.”⁸³⁹
534. The Respondent explains that the Claimant’s alleged losses in respect of the breaches of Articles 2(2) and 3(1) largely rely on the court decisions regarding Mr. Ovcharenko’s reinstatement.⁸⁴⁰ Since Mr. Ovcharenko’s reinstatement was “lawful,” there is no “plausible cause” for the Claimant’s claims in respect of breaches under these articles.⁸⁴¹ The Respondent also asserts that after Mr. Ovcharenko’s reinstatement in 2007 “the Claimant continue[d] to enjoy all of its rights and property in the shareholdings” until its shareholdings were eventually cancelled by the Ukrainian courts.⁸⁴²

⁸³⁵ *Id.*, ¶ 464, referring to *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case ARB/05/16, Award of 29 July 2008, ¶ 793 (CLA-133).

⁸³⁶ *Id.*, ¶ 467, referring to the cases cited in Memorial, ¶ 484 n. 535, including *Vivendi v. Argentina II*, *Siag and Vecchi v. Egypt*, *Saipem v. Bangladesh*, *ADC v. Hungary*, *Siemens v. Argentina*, and *S.D. Myers v. Canada*. See also *El Paso Energy International Company v. The Argentine Republic*, ICSID Case ARB/03/15, Award of 31 October 2011, ¶¶ 700-703 (CLA-289); *Señor Tza Yap Shum c. La República del Perú*, ICSID Case ARB/07/6, Award of 7 July 2011, ¶¶ 253-254 (CLA-330).

⁸³⁷ *Id.*, ¶ 466.

⁸³⁸ Counter-Memorial, ¶ 377.

⁸³⁹ Counter-Memorial, ¶ 377. See also *Id.*, ¶ 381 stating “[n]ot surprisingly, the Claimant does not claim for damages in relation to the alleged breaches of Article 2 and 3 of the Russian—Ukraine BIT.”; *Id.*, ¶ 382 stating “[w]hile the Claimant has alleged breaches of Article 2(2) and 3(1) of the Russian—Ukraine BIT, in fact its claim solely rests on the alleged expropriation of its direct and indirect shareholdings in Ukratnafta in alleged breach of Article 5(1).”

⁸⁴⁰ Counter-Memorial, ¶ 381.

⁸⁴¹ *Id.*

⁸⁴² *Id.*

535. Moreover, in the Respondent's view, the standard of compensation for any alleged expropriation in breach of Article 5(1) is set forth in Article 5(2) (cited above). The Respondent claims that Article 5(2) should apply even to an unlawful expropriation (assuming that such were proven by the Claimant) because "Article 5 does not distinguish between lawful and unlawful expropriation."⁸⁴³ The Respondent also refers to an article by an experienced practitioner, Mr. Sheppard, to argue that "[t]he compensation payable [for both lawful and unlawful expropriation] is that prescribed by the treaty provision."⁸⁴⁴ Following Mr. Sheppard's argument, the Respondent maintains that the standard prescribed in the investment treaty as "a *lex specialis*" supersedes "the *lex generalis*" of customary international law in all cases of expropriation.⁸⁴⁵
536. Moreover, the Respondent contends that Article 5(2) should not be disregarded in favor of Article 3(1)—the most-favored nation clause—because such an approach would ignore what has been carefully negotiated between and agreed to by Russia and Ukraine: Article 5 does not entitle investors to "full reparation."⁸⁴⁶ According to the Respondent, "[t]he Tribunal should not be enticed 'to stray from the path' ⁸⁴⁷ in deciding what compensation, if any, to grant the Claimant."⁸⁴⁸ As regards the application of Article 3(1) more specifically, the Respondent argues that the standard of compensation under customary international law does not qualify as "a regime provided for investors of any third state" in Article 3(1).⁸⁴⁹
537. In addition, the Respondent points out that the Claimant's reliance on the Chorzów Factory case is inapposite because the circumstances in that case differ from those in the present case. Under the 1922 Geneva Convention that was applicable in the Chorzów Factory case, expropriation was prohibited with very limited exceptions, "which were not equivalent to the conduct

⁸⁴³ *Id.*, ¶ 384.

⁸⁴⁴ Counter-Memorial, ¶ 384.

⁸⁴⁵ *Id.*, ¶ 385, referring to Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, World Arbitration and Mediation Review (2008), vol. 1, no. 1-2, p. 158 (RLA-91).

⁸⁴⁶ *Id.*, ¶¶ 386-388.

⁸⁴⁷ *Id.*, ¶ 388, referring to *Amoco*, 15 Ir-USCTR 289, 14 July 1987, p.298, (CLA-247).

⁸⁴⁸ *Id.*

⁸⁴⁹ Second Counter-Memorial, ¶ 419.

requirement in most modern BITs.”⁸⁵⁰ Moreover, the 1922 Geneva Convention did not specify any standard of compensation.⁸⁵¹

538. The Respondent also claims that the Claimant’s reliance on the *Amoco* case is erroneous, as the Claimant actually refers to a concurring opinion of one of the judges of the Iran-US Claims Tribunal who concluded that a treaty standard of compensation applied to both lawful and unlawful expropriation.⁸⁵² It further cites a series of awards by investment tribunals, which allegedly follow a similar approach.⁸⁵³

3. The Tribunal’s Findings

539. In view of the fact that the Tribunal has not relied on the claim of expropriation in reaching its findings on liability, the discussion on its alleged lawfulness or unlawfulness and the applicable standards of reparation are not relevant for the Tribunal’s conclusions in this case.

B. FORMS OF REPARATION

540. Having found that the Respondent has breached the BIT under other grounds and bearing in mind that the BIT does not specify any particular remedy for such breaches, the Tribunal will apply the “full reparation” standard under customary international law as described in the *Chorzow Factory* case referred to above by the Parties. As mentioned by the Claimant, that standard has now been codified in Article 31 of the ILC Articles on State Responsibility and applied consistently by the International Court of Justice, regional courts, and arbitral tribunals.
541. The Parties also disagree on the form of reparation that should be awarded by the Tribunal, if it so finds the Respondent to be in breach of the Russia-Ukraine BIT. In particular, the Respondent challenges the Claimant’s view that restitution is available under the BIT. In its Post-Hearing Brief, the Claimant withdrew its request for restitution of its direct and indirect shareholdings in UTN, together with the control and management rights associated with these

⁸⁵⁰ Counter-Memorial, ¶ 390, referring to Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, World Arbitration and Mediation Review (2008), vol. 1, no. 1-2, p.148 (RLA-91).

⁸⁵¹ *Id.*

⁸⁵² *Id.*, ¶ 391, referring to *Amoco*, 15 Ir-USCTR 289, 14 July 1987, p.298, (CLA-247).

⁸⁵³ *Id.*, ¶¶ 394-395, referring to *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award, 8 Dec. 2000, ¶¶ 118, 125. (RLA-76); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case ARB (AF)/00/2, Award, 29 May 2003, ¶¶ 187-188. (CLA-156); *Goetz v. Burundi*, ICSID Case ARB/95/3, Award, 10 Feb. 1999, ¶¶ 134-136, (CLA-150); and *Middle East Cement Shipping and Handling Co. SA v. Egypt*, ICSID Case ARB/99/6, Award, 12 April 2002, ¶ 104, (CLA-206).

shareholdings, due to “the apparent practical impossibility of restitution”.⁸⁵⁴ In the event that the Tribunal awards compensation, the Parties differ greatly as to its quantification.

1. Restitution

542. The Tribunal notes that, during the course of the Hearing on the Merits, the Claimant did not pursue its argument on restitution, and, in its Post-Hearing Brief, after indicating in footnote 146 that it is withdrawing its request for restitution, its claim for full reparation calls exclusively for the payment by the Respondent of damages in the amount of US\$ 1.144 billion.
543. In order to remove any ambiguity, the Tribunal wishes to state that it does not consider the present case as one where restitution would be an appropriate means to ensure appropriate reparation to the Claimant.

2. Compensation

544. As the Tribunal has already ruled that there is no breach of the BIT by the Respondent in connection with the non-payment of oil deliveries, it needs only to address the claim for the loss of shares (with interest).
545. The Claimant requests an award of compensation for losses arising from the Respondent’s breaches of the Russia-Ukraine BIT.⁸⁵⁵ As noted above, the Claimant initially requested direct and consequential damages of “at least” US\$ 741 to 842 million.⁸⁵⁶ It subsequently totaled its losses at US\$ 793 million to US\$ 1.073 billion, “depending on the applicable rate of interest.”⁸⁵⁷ At the oral hearing, the Claimant requested compensation in an amount of US\$ 1.073 billion, composed of 536 million for the loss of shares (with interest) and 537 million for the alleged unpaid oil deliveries.⁸⁵⁸ In its Post-Hearing Brief, the Claimant requests compensation in an amount of US\$ 1.444 billion, comprising US\$ 591 million for losses related to Tatneft’s shareholdings in UTN (including US\$ 358 million for the value of Tatneft’s allegedly

⁸⁵⁴ Claimant’s Post-Hearing Submission, footnote 146.

⁸⁵⁵ The Claimant had sought compensation for the alleged loss of its role as the principal supplier of oil to the Kremenchug refinery in its First Memorial (*see* Memorial, ¶ 503), but did not quantify its loss in subsequent submissions and during the Hearing.

⁸⁵⁶ Memorial, ¶¶ 482, 527.

⁸⁵⁷ Second Memorial, ¶ 460.

⁸⁵⁸ Transcript (18 March 2013), 12:10-17.

expropriated shares and US\$ 233 million in interest⁸⁵⁹) and US\$ 533 million for losses related to the unpaid oil deliveries (including US\$ 334 million for outstanding payment on the oil deliveries, RUR 1,569,351,070 of tax fees (VAT and associated default interest) and US\$ 143 million in interest).⁸⁶⁰ In presenting its arguments, the Claimant relies principally on two expert reports by Mr. Mark Bezant of FTI Consulting (the “First Bezant Report” and the “Second Bezant Report”).

546. The Respondent argues that the actual fair market value of the Claimant’s direct and indirect shareholdings is between US\$ 7.9 million to US\$ 9.6 million.⁸⁶¹ In its Post-Hearing Brief, the Respondent estimates the fair market value of Tatneft’s shareholdings to be no more than US\$ 15.8 million to US\$ 19.2 million.⁸⁶² In support of its argument, the Respondent relies principally on two expert reports by Baker & O’Brien (the “First Baker & O’Brien Report” and the “Second Baker & O’Brien Report”). The Respondent also argues that the Claimant’s claim for compensation in respect of unpaid oil deliveries is “entirely without merit” since the Respondent is not liable for any allegedly unpaid oil deliveries.⁸⁶³
547. At first, the Claimant estimated that the fair market value of its direct and indirect shareholdings in Ukratnafta is “at least” US\$ 204 to 305 million (in its Memorial)⁸⁶⁴ and, subsequently, US\$ 222 million to US\$ 358 million without interest or US\$ 536 million with interest (in its Second Memorial).⁸⁶⁵ At the hearing, the Claimant again estimated that its loss of the shares is US\$ 536 million (the same figure as in its Second Memorial, including interest).⁸⁶⁶ In its Post-Hearing Brief, this amount rose to US\$ 591 million (US\$ 358 million for the losses related to the Claimant’s shares and US\$ 233 million in interest).

⁸⁵⁹ Interest figures are calculated up to May 27, 2013, Claimant’s Post-Hearing Submission, footnote 144.

⁸⁶⁰ Claimant’s Post-Hearing Submission, ¶ 66.

⁸⁶¹ Counter-Memorial, ¶¶ 378, 435; Second Counter-Memorial, ¶ 449; First Baker & O’Brien Report, Table 7.7.

⁸⁶² Respondent’s Post-Hearing Memorial, ¶ 78, *referring to* Baker & O’Brien Letter dated 25 March 2013, with corrections to Second Baker & O’Brien’s Report.

⁸⁶³ Counter-Memorial, ¶ 380. *See also* Respondent’s Second Counter Memorial, ¶¶ 450, 456.

⁸⁶⁴ Memorial, ¶ 526; First Bezant Report, Table 2.6.

⁸⁶⁵ Second Memorial, ¶ 539; Second Bezant Report, Table 1.1. *See also* Transcript (18 March 2013), 124:17 to 125:2.

⁸⁶⁶ Second Memorial, ¶ 532; Transcript (18 March 2013), 12:10-15.

548. The Respondent first estimated the value of the Claimant's shareholdings to be within a range of US\$ 7.9 million to US\$ 9.6 million.⁸⁶⁷ Following certain corrections to its report as made by the Respondent's expert during the hearing, the Respondent adjusted its estimates to a range of US\$ 15.8 million to US\$ 19.2 million, with a midpoint value of US\$ 17.6 million.⁸⁶⁸

(a) Date of Valuation

i. The Claimant's Arguments

549. The Claimant argues that the date of valuation must be determined in accordance with the customary international law standard of full reparation, pursuant to which the Claimant "is entitled to be compensated for any increase [in the] value of its investments between the date of expropriation and the date of the award."⁸⁶⁹ It contends that this method of calculation has been endorsed by investment tribunals, such as those in *Siemens v. Argentina* and *ADC v. Hungary*.⁸⁷⁰ Accordingly, the Claimant identifies two relevant valuation dates—the date of the breach of the BIT and the date of the award, and states that the Tribunal should use the date that would lead to a greater amount of compensation, as the Respondent "would be enriched by the consequences of its wrongful acts" otherwise.⁸⁷¹
550. Moreover, the Claimant argues that the date of breach in cases of expropriation is "the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events,"⁸⁷² adding that "this is a matter of fact for the Tribunal to assess in light of circumstances of the case."⁸⁷³

⁸⁶⁷ Counter-Memorial, ¶ 378, ¶ 435; Second Counter-Memorial, ¶ 449; First Baker & O'Brien Report, Table 7.7.

⁸⁶⁸ Second Baker & O'Brien Report (as amended on 25 March 2013), Table ES-1, p.3.

⁸⁶⁹ Memorial, ¶ 520 n. 579, citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case ARB/03/16, Award of the Tribunal of 2 October 2006, ¶¶ 495-499 (CLA-134); *Siemens A.G. v. The Argentine Republic*, ICSID Case ARB/02/8, Award of 6 February 2007, ¶¶ 352-353 (CLA-42); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases ARB/05/18 and ARB/07/15, Award of 3 March 2010, ¶ 514 (CLA-218); *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 310-56-3 of 14 July 1987, Iran-U.S. Claims Tribunal Reports (1988), vol. 15, p. 189, pp. 300-301 (CLA-247). See also *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 425-39-2 of 29 June 1989, Iran-U.S. Claims Tribunal Reports (1990), vol. 21, p. 79, p. 122 (CLA-242). See also Transcript (18 March 2012), 112:1-7.

⁸⁷⁰ Memorial, ¶¶ 521-522 n. 580-582.

⁸⁷¹ Memorial, ¶ 523.

⁸⁷² Second Memorial, ¶ 527 n. 869, citing *Reza Said Malek v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 534-193-3 of 11 August 1992, ¶ 114 (CLA-335); *Compañía*

551. The Claimant suggests that the dates of breach in the present case are 12 May 2009 and 27 January 2010 for its indirect and direct shareholdings, respectively, since “[the Respondent’s] wrongful actions and omissions ripened into an irreversible deprivation when Tatneft’s title to its shareholdings was cancelled.”⁸⁷⁴ It states that the Respondent agrees with the designation of these dates as the relevant valuation dates.⁸⁷⁵

ii. The Respondent’s Arguments

552. The Respondent criticizes the Claimant for its lack of specificity in explaining the valuation date underlying its analysis, and points out that the Claimant’s approach to valuation in its Memorial appears to conflict with that of its expert.⁸⁷⁶ It claims that the First Bezant Report assesses the fair market value of the Claimant’s shareholdings as of the date of the alleged “black” raid, 19 October 2007, and subsequently decreases that value to reflect a decline in the relevant industry so as to provide a valuation on the date of the Report. This approach contradicts the Claimant’s contention that it “should be compensated as at the date of the award, if [the calculated compensation is] higher than any amount that might be calculated as at an unspecified date of expropriation.”⁸⁷⁷

553. The Respondent argues that the Claimant’s approach ignores the provision of Article 5(2) of the Russia-Ukraine BIT, which provides that “compensation shall correspond to the market value of the expropriated investments, prevailing immediately before the date of expropriation or when the fact of expropriation has become officially known.”⁸⁷⁸ It submits that, pursuant to Article 5(2), the relevant valuation dates should be the dates of transfer of ownership of the shares—

del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case ARB/96/1, Final Award of 17 February 2000, ICSID Review (2000), vol. 15, no. 1, p. 169, pp. 193-195, ¶¶ 76-78 (CLA-336) (“[t]he date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless”); *Azurix Corp. v. The Argentine Republic*, ICSID Case ARB/01/12, Award of 14 July 2006, ¶¶ 417-418 (CLA-223); *Waguih Elie Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case ARB/05/15, Award of 1 June 2009, ¶ 533 (CLA-191).

⁸⁷³ Second Memorial, ¶ 527 n. 870 citing *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case ARB/05/16, Award of 29 July 2008, ¶ 788 (CLA-133).

⁸⁷⁴ Second Memorial, ¶ 528; Counter-Memorial, ¶ 419. See also Transcript (18 March 2013), 111:16-23.

⁸⁷⁵ Second Memorial, ¶ 528; Counter-Memorial, ¶ 419. See also Transcript (18 March 2013), 111:16-23.

⁸⁷⁶ Counter-Memorial, ¶ 416.

⁸⁷⁷ Counter-Memorial, ¶¶ 415-416.

⁸⁷⁸ Id., ¶ 417 (emphasis by the Respondent), referring to BIT Article 5(2) (REX-2).

namely, 27 January 2010 and 12 May 2009, for the Claimant's direct and indirect shareholdings, respectively.⁸⁷⁹

554. As a result of the exchange of a first round of Memorials, both Parties therefore now agree that the relevant dates of valuation for the loss of the Claimant's direct and indirect shareholdings are 27 January 2010 and 12 May 2009, respectively.⁸⁸⁰

iii. The Tribunal's Findings

555. While there is a huge difference between the Parties as to the actual fair market value of the Claimant's direct and indirect shareholdings in Ukratnafta, they agree at least on the following points: (a) that the Claimant's damages have to be measured with reference to the fair market value of its shareholdings as of the dates on which the shares were taken⁸⁸¹ (it has to be noted however that the Claimant also argues that the value of its shares on those dates sets the floor for its losses and that it is entitled to be compensated for any increase in the value of its investments between the dates of the breach of the BIT and the date of this award⁸⁸² and for its part, the Respondent argues that the Claimant has not adduced any evidence of any such increase);⁸⁸³ (b) that the general definition of fair market value set forth in Mr. Bezan's first report, to the effect that an estimate of fair market value should be "unaffected by factors specific to, or actions taken as a result of, this dispute but reflecting all relevant factors such as macroeconomic trends, the oil price and fuel emissions standards, for example" should be used;⁸⁸⁴ and (c) that the subject of the valuation is Ukratnafta as a whole rather than the Kremenchug refinery only.⁸⁸⁵

556. The Tribunal sees no reason not to concur with the joint view of the Parties concerning the valuation dates and the definition of fair market value. As to the argument of the Claimant concerning its alleged entitlement to any increase in the value of its investments between 12 May 2009 and 27 January 2010 and the date of this award, the Tribunal is of the view (as

⁸⁷⁹ Counter-Memorial, ¶ 419.

⁸⁸⁰ Second Memorial, ¶¶ 528-529; Counter-Memorial, ¶ 419; Second Counter-Memorial, ¶ 528. *See also* Transcript (18 March 2013), 111:16-23.

⁸⁸¹ Transcript (18 March 2013), 111:16-23; Respondent's Post-Hearing Memorial, ¶ 77.

⁸⁸² Transcript (18 March 2013), 111:23-25 to 112:1-4.

⁸⁸³ Respondent's Post-Hearing Memorial, ¶ 77 n. 205.

⁸⁸⁴ Respondent's Post-Hearing Memorial, ¶ 77; First Bezan Report, ¶ 4.5; Transcript (18 March 2013), 107:23-25 to 108:1-18.

⁸⁸⁵ Respondent's Post-Hearing Memorial, p. 36 n. 202.

elaborated on below) that it has not received adequate evidence to conclude that any such increase ever did occur. The Tribunal will therefore establish the fair market value of the Claimant's direct and indirect investment as of 12 May 2009 for the Claimant's indirect shareholding through AmRuz and Seagroup of 14.09% of Ukratnafta and as of 27 January 2010 for its 8.61% direct shareholding.

(b) Valuation Method

i. The Claimant's Arguments

557. In the First Bezant Report, the Claimant's expert assesses the value of its shareholdings in a "but for" scenario, projecting the value that the Claimant's shareholdings would have had as of 15 June 2011, the date of his report, under the hypothesis that the Respondent had not breached its treaty obligations.
558. According to the Claimant, the analysis in the First Bezant Report employs a six-step approach:⁸⁸⁶ (a) deriving indicative valuation ranges of the whole of Ukratnafta as of October 2007 by using a number of generally accepted valuation methods;⁸⁸⁷ (b) adjusting the indicative valuation ranges obtained in (a) where appropriate to ensure that the implied value of Ukratnafta reflects 100% of the value of Ukratnafta to a shareholder with control;⁸⁸⁸ (c) assessing the appropriateness of applying a premium or a discount to reflect the potential of the shareholdings to impart greater influence or control on a strategic shareholder and/or the effect of illiquidity and other risk factors associated with minority interests in unquoted entities;⁸⁸⁹ (d) analyzing the relative strengths and weaknesses of the valuation methods to derive an estimated evaluation range for Ukratnafta as of October 2007;⁸⁹⁰ (e) adjusting this valuation range to 15 June 2011, taking account of the general decline in the value of refining assets in emerging Europe and Turkey since October 2007;⁸⁹¹ and (f) calculating the combined

⁸⁸⁶ Memorial, ¶ 530.

⁸⁸⁷ First Bezant Report, ¶¶ 4.27-4.69. The valuation methods employed in this part include valuation based on transactions in Ukratnafta shares (¶¶ 4.27- 4.34), investment analyst valuations (¶¶ 4.35-4.37), valuation using replacement cost as a benchmark (¶¶ 4.38-5.53), valuation based on quoted Ukrainian refineries (¶¶ 4.54-4.62), valuation based on European refineries (¶¶ 4.63-4.67), valuation based on transactions in comparable refineries (¶¶ 4.68- 4.69). *See also* Transcript (18 March 2013), 112:14-21, 113:1 to 119:20.

⁸⁸⁸ First Bezant Report, ¶¶ 4.70- 4.86.

⁸⁸⁹ First Bezant Report, ¶¶ 4.87-4.94. Mr. Bezant has decided not to apply any discount or premium while estimating the fair market value of the Claimant's shareholdings in Ukratnafta.

⁸⁹⁰ *Id.*, ¶ 4.96.

⁸⁹¹ *Id.*, ¶¶ 4.97-4.104

fair market value of Tatneft's 22.7% shareholdings (including Tatneft's indirect shareholding through AmRuz and Seagroup of 14.09% and Tatneft's 8.61% direct shareholding) in Ukratnafta on the basis of the adjusted June 2011 valuation range.⁸⁹² On this basis, the First Bezant Report estimates that the fair market value of Tatneft's 22.7% shareholdings in Ukratnafta as of 15 June 2011 is US\$ 204 to 305 million, without accounting for the modernization of the Kremenchug refinery.⁸⁹³

559. Mr. Bezant subsequently updated his assessment of the value of Tatneft's shareholdings in his Second Report on the basis of additional information and industry reports that became available after the submission of his First Report. He also adjusted the valuation dates to 12 May 2009 for Tatneft's indirect shareholdings and to 27 January 2010 for Tatneft's direct shareholding, using the same standard valuation methods.⁸⁹⁴ Based on these adjustments the Second Bezant Report estimates the value of Ukratnafta as ranging from US\$ 900 million to US\$ 1,500 million in May 2009 and US\$ 1,100 million to 1,700 million in January 2010. Accordingly, the value of Tatneft's 22.7% stake in Ukratnafta on these dates would be US\$ 222 million and US\$ 358 million.⁸⁹⁵ Mr. Bezant was instructed to add to these amounts the interest that would be due to Tatneft from the time that had elapsed between the respective valuation dates and the date of his Second Report; which results in total losses of between US\$256 million and US\$ 536 million, depending on which of three interest calculations he was instructed to use.⁸⁹⁶
560. The Claimant argues that it provides a "but-for" valuation in accordance with the applicable legal standard for full reparation.⁸⁹⁷ In the Claimant's view, the preferred valuation method, particularly for difficult valuations, is to utilize and compare for consistency the results of several methodologies.⁸⁹⁸ The Claimant contends that Mr. Bezant correctly applied this method

⁸⁹² *Id.*, ¶¶ 4.105-4.106 and Table 4.17

⁸⁹³ Memorial, ¶ 541; First Bezant Report, Tables 2.2 and 4.17.

⁸⁹⁴ Second Memorial, ¶¶ 535-536.

⁸⁹⁵ *Id.*, ¶ 539; Second Bezant Report, Table 1.1. *See also* Transcript (18 March 2013), 124:4-8.

⁸⁹⁶ Second Bezant Report, ¶¶ 1.10, 1.28.

⁸⁹⁷ Claimant's Post-Hearing Submission, ¶ 82.

⁸⁹⁸ Claimant's Post-Hearing Submission, ¶¶ 85-86, *referring to Case Concerning the Factory at Chorzów*, p. 53 (CLA-240), *Amoco v. Iran*, ¶ 220 (CLA-247), and Judge Brower's comments at the Hearing, Transcript (22 March 2013), 231:23-25 to 232:1-6.

in his two expert reports by using five discrete methodologies⁸⁹⁹ to determine the value of UTN at the valuation dates.⁹⁰⁰

561. The Claimant argues that four out of these five valuation methodologies converge in the valuation range of US\$ 900 million to US\$ 1.5 billion in May 2009 and US\$ 1.1 billion to US\$ 1.7 billion in January 2010, with an outlier suggesting an even higher valuation.⁹⁰¹ The Claimant is therefore of the view that the aforementioned range is a fair and reasonable value for UTN.⁹⁰²
562. The Claimant points out that the 2009/2010 sales transactions⁹⁰³ in UTN shares are “the most compelling evidence” of the value of Tatneft’s shareholdings in UTN⁹⁰⁴, since they were preceded by an expert valuation,⁹⁰⁵ resulted from an auction specially organized “to determine a more or less fair price,”⁹⁰⁶ and involved a willing seller (UTN) and a willing buyer (Korsan and Viloris).⁹⁰⁷ In this context, the Claimant argues that its valuation is consistent with the words and actions of UTN’s current majority shareholder.⁹⁰⁸

⁸⁹⁹ Transactions in comparable refineries (Second Bezant Report, § 7), observed values of comparable quoted refining companies (Second Bezant Report, § 8), analysts’ valuations (Second Bezant Report, § 5), discounted replacement cost (Second Bezant Report, § 6) and transactions in UTN shares (Second Bezant Report, § 4).

⁹⁰⁰ Claimant’s Post-Hearing Submission, ¶¶ 87-93.

⁹⁰¹ Claimant’s Post-Hearing Submission, ¶ 94.

⁹⁰² *Id.*

⁹⁰³ The Privat Group purchased the 55.7% interest of the Tatarstan shareholders in three auctions in 2009 and 2010 for a total of US\$ 697 million. (Second Bezant Report, Table 4.1.) *See also* Transcript (25 March 2013), 124:25 to 125:1-7.

⁹⁰⁴ Claimant’s Post-Hearing Submission, ¶ 97.

⁹⁰⁵ Exhibit C-97, p. 2 (UTN information letter of June 1, 2009 setting the starting price for the auction of the AmRuz and Seagroup shares at 1,517,633,600 hryvnias based on an expert appraisal); Exhibit C-317, p. 2 (UTN information letter of October 29, 2009 setting the starting price for the auction of the Tatarstan shares at 2,570,000,000 hryvnias based on an expert appraisal).

⁹⁰⁶ Mr. Kolomoisky’s testimony: “When the shares were offered for sale, the first right belonged to the existing shareholders, as I know. Alongside that, I think, an auction was held to determine a more or less fair price; and given the fact that the state did not want to increase its stake, we appeared to be the only buyer in those auctions.” Transcript (25 March 2013), 124:3-9.

⁹⁰⁷ Transcript (25 March 2013), 124:25 to 125:1-4.

⁹⁰⁸ Claimant’s Post-Hearing Submission, ¶¶ 101-103, *referring to* Mr. Kolomoisky’s hearing testimony, Transcript (25 March 2013), 129:21-25 to 130:1-3 and 140:23; Mr. Kolomoisky’s public statements, C-359 (press article of March 30, 2011); and Mr. Yaroslavsky’s public statements, C-261 (press article of January 28, 2011).

563. The Claimant considers the Respondent's approach to valuation as "fundamentally flawed" ⁹⁰⁹ in the following aspects.
564. First, the Respondent has valued the wrong entity. It is Ukratnafta, and not the Kremenchug refinery, that should be the object of the valuation, since the claims are based on the loss of its direct and indirect shareholdings in Ukratnafta. ⁹¹⁰
565. Second, the Respondent's expert has included an estimation of the Kremenchug refinery's performance after the (alleged) wrongful conduct, ⁹¹¹ which is contrary to the "well established rule" that the effects on a claimant's investment by the respondent's wrongful conduct must be disregarded when assessing a claimant's damages. ⁹¹² In this respect, the Claimant points out that the approach employed by the Respondent's expert was rejected by the tribunal in *Amco v. Indonesia*. ⁹¹³
566. Third, the use of valuation methodologies and relevant information in the Respondent's expert report is "selective." ⁹¹⁴ The Claimant points out that the conclusion of the Respondent's expert with respect to the value of Ukratnafta was actually not drawn from any valuation methods employed in his reports, ⁹¹⁵ and there are no documents to support the Respondent's calculation that the net salvage value of the Kremenchug refinery is 2%, or 5-10% in a reconfiguration scenario, of its replacement cost on a salvage value basis. ⁹¹⁶ The Claimant argues that the

⁹⁰⁹ Second Memorial, ¶ 568.

Second Memorial, ¶ 568; Respondent's Counter-Memorial, ¶ 411; First Baker & O'Brien Report, ¶ 1.1. The Second Baker & O'Brien Report had made certain adjustments to reflect the value of Ukratnafta rather than the Refinery.

⁹¹¹ Second Memorial, ¶ 569; First Baker & O'Brien Report, ¶¶ 6.56 to 6.78, 7.41 to 7.58; Transcript (18 March 2013), 125:8-16, 127:3-11; Transcript (22 March 2013), 69:13-19; Transcript (27 March 2013), 31:20-24.

⁹¹² Second Memorial, ¶¶ 530, 569; Second Bezant Report, ¶¶ 2.15-2.20.

⁹¹³ Second Memorial, ¶ 569, referring to *Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case ARB/81/1, Award of 31 May 1990 (Resubmitted Case), ICSID Reports (1993), vol. 1, p. 569, pp. 618-619, ¶¶ 206, 210 (CLA-337).

⁹¹⁴ Second Memorial, ¶ 570; Second Bezant Report, Appendix 3. See also, for example, Transcript (22 March 2013), 2:1-8:8 for the Claimant's questions with regard to the selection of valuation methods and Transcript (22 March 2013), 27:23-25 to 35:1-4, 40:2-25 to 42:1-13 for the Claimant's questions regarding data collection.

⁹¹⁵ Transcript (22 March 2013), 7:13-25 to 8:1-8. See also Claimant's Post-Hearing Submission, ¶ 108.

⁹¹⁶ *Id.*, 8:9-25 to 17:1-4. See also Claimant's Post-Hearing Submission, ¶¶ 144-150.

Respondent's expert has disregarded some valuation methods "because they would provide a valuation of Ukratnafta, rather than the Kremenchug Refinery."⁹¹⁷

567. The Claimant also argues that assessing the Kremenchug refinery on the basis of net salvage value is "wholly unreasonable," as confirmed by another expert report by Jacobs Consultancy (the "Jacobs Report").⁹¹⁸ In this context, the Claimant asserts that the conclusions in the Baker & O'Brien Reports, "which imply that 'it would be more favorable, financially, for the refinery to be closed, and the inventory liquidated,'" are diametrically opposed to reality.⁹¹⁹ The Claimant points out that not only has the refinery not been closed but there has also been significant new investment in UTN.⁹²⁰ The Claimant argues that the likely "real world" future of UTN is to become an important part of a vertically integrated oil company created by the Privat Group.⁹²¹
568. With respect to the refinery transactions methodology applied in the Baker & O'Brien Reports, the Claimant argues that the seven refinery transactions selected⁹²² were not fairly comparable and therefore this approach was rejected by its own expert.⁹²³ The Claimant also contends that Baker & O'Brien erroneously excluded the refinery's leased units in the course of valuation.⁹²⁴
569. The Claimant further argues that the deferred replacement value ("DRV") methodology adopted by Baker & O'Brien is "unknown to the industry."⁹²⁵ The Claimant first contends that Baker & O'Brien used a generic manual instead of performing an assessment of the condition or serviceability of the refinery's process units in calculating the remaining life, despite its visit to

⁹¹⁷ Second Memorial, ¶ 570.

⁹¹⁸ Second Memorial, ¶ 571; Jacobs Report, ¶ 9.5. *See also* Transcript (22 March 2013), 10:1-25 to 12:1-3; Jacobs Report, ¶ 9.2.

⁹¹⁹ Second Memorial, ¶ 572; First Baker & O'Brien Report, ¶ 7.66, *referring to* Oleg Gavrish, *Vertical Take-Off of Oil*, Kommersant Ukraine, No. 214 (1262), 8 December 2010 (C-479) and Graham Stack, *Ukrnafta still in Privat hands*, Business New Europe, 18 March 2011 (C-262); Second Bezan Report, ¶¶ 4.5, 4.8 and Table 4.1. *See also* Transcript (18 March 2013), 120:6-25 to 123:1-25 and 128:20-25 to 129:1-20; Transcript (22 March 2013), 167:14-25 to 168:1-25, 177:25 to 178:1-15; and Transcript (27 March 2013), 33:8-16.

⁹²⁰ Claimant's Post-Hearing Submission, ¶ 106.

⁹²¹ Claimant's Post-Hearing Submission, ¶ 107.

⁹²² First Baker & O'Brien Report, Table 7.1 and Appendix G (7 refinery transactions within the 2009/2010 period).

⁹²³ Claimant's Post-Hearing Submission, ¶ 109, *referring to* First Baker & O'Brien Report, ¶ 7.25; Second Baker & O'Brien Report, ¶ 3.8.

⁹²⁴ Claimant's Post-Hearing Submission, ¶ 110.

⁹²⁵ Claimant's Post-Hearing Submission, ¶ 111, *referring to* Jacobs Report, ¶¶ 8.2, 8.5-8.6.

the refinery.⁹²⁶ This application leads to “unreasonably short” remaining life figures that had already been exceeded not merely by the time of the hearing, but by the time of Baker & O’Brien’s own visit to the refinery.⁹²⁷ Second, the Claimant argues that Baker & O’Brien understated the starting point for its analysis by approximately one-third and that merely correcting the starting value and fixing the incorrect assumed remaining life would yield a calculated value for the refinery in excess of US\$ 2 billion even on Baker & O’Brien’s own DRV methodology.⁹²⁸

570. With respect to Baker & O’Brien’s Discounted Cash Flow (“DCF”) analysis, the Claimant points out that there are many uncertainties with respect to the data on which the Respondent’s expert relied to conduct a DCF valuation⁹²⁹ and this valuation approach is unable to explain the interest shown by Privat Group in Ukratnafta.⁹³⁰ The Claimant also argues that despite having a unique opportunity to obtain non-public information to aid its valuation, Baker & O’Brien in fact either chose not to request critical documentation or was refused access to it by the Respondent or UTN.⁹³¹ Furthermore, the Claimant contends that Baker & O’Brien assigned a 100% probability to its worst case outcome and did not give any weight to the possibility of other scenarios.⁹³² Finally, the Claimant submits that, in contrast to Mr. Bezant’s utilization of five different methodologies, Baker & O’Brien’s valuation is unsupported by a single alternative analysis and is otherwise unrealistic.⁹³³
571. Fourth, the Claimant argues in addition that Baker & O’Brien’s application of a minority discount is wrong since in the present case no shareholder held a majority but control could

⁹²⁶ Claimant’s Post-Hearing Submission, ¶ 112, *referring to* First Baker & O’Brien Report, ¶¶ 6.11, 6.16, Transcript (22 March 2013), 38:19-25 to 39:1-9, 39:24, 40:10-19, 157:16-22, and 158:9-13.

⁹²⁷ Claimant’s Post-Hearing Submission, ¶ 113, *referring to* Transcript (22 March 2013), 145:22-25 to 146:1, 154:22-25 to 155:1-2, 156:10-25 to 157:1-5, and First Baker & O’Brien Report, Appendix H.

⁹²⁸ Claimant’s Post-Hearing Submission, ¶ 115.

⁹²⁹ Claimant’s Post-Hearing Submission, ¶¶ 118-128. *See also* Transcript (21 March 2013), 211:9-25 to 219:1-11 and Transcript (22 March 2013), 52:2-25 to 65:1-8 for questions put to Mr. Waguespack regarding the data which form the basis of a DCF valuation.

⁹³⁰ Transcript (27 March 2013), 31:25 to 33:1-7. *See also* Claimant’s Post-Hearing Submission, ¶¶ 101-103.

⁹³¹ Claimant’s Post-Hearing Submission, ¶¶ 129-132.

⁹³² Claimant’s Post-Hearing Brief, ¶¶ 133-135.

⁹³³ Claimant’s Post-Hearing Brief, ¶¶ 139-143.

anyhow be obtained through Tatneft's shareholding; as such, Mr. Bezant correctly decided not to apply any discount.⁹³⁴

572. In response to the Respondent's contention that the Claimant cannot claim losses attributable to events that occurred prior to December 2007 (such as the alleged raider action of October 2007) in respect of its indirect shareholdings,⁹³⁵ the Claimant contends that this is "a fundamental misunderstanding of Tatneft's case," because "[t]his case is not about a single specific event, but rather a series of actions and omissions."⁹³⁶

573. In this context, the Claimant argues that any damage caused by December 2007 was reversible because Ukraine need only have allowed the Tatarstan shareholders to return to the refinery and reinstate the lawful management of UTN as indicated in the public statements of high-ranking Ukrainian officials, and therefore, the Claimant did not anticipate and cannot be expected to have anticipated the events of October 2007.⁹³⁷

ii. The Respondent's Arguments

574. The Respondent argues that the First Bezant Report contains "a number of serious flaws," mostly because it has failed to apply "the most relevant of all valuation approaches—the DCF method," which according to the Respondent might have resulted in a negative valuation of the Kremenchug refinery.⁹³⁸ The Respondent also claims that the Bezant Report has made "selective use of high-level valuation metrics to determine value" without considering any discount for the Claimant's minority shareholding.⁹³⁹ The Respondent is of the view that the non-application of such a discount is contrary not only to standard industry practice but also to analysts' valuations of Tatneft's shareholding on which Mr. Bezant has himself relied.⁹⁴⁰

⁹³⁴ Claimant's Post-Hearing Brief, ¶ 151. *See also* Transcript (22 March 2013), 257:14-25 to 269:1-13 for discussion on minority discount issue at the Hearing.

⁹³⁵ Transcript (19 March 2013), 24:10-18; Transcript (27 March 2013), 140:9-25 to 141:1-14.

⁹³⁶ Claimant's Post-Hearing Submission, ¶ 152.

⁹³⁷ Claimant's Post-Hearing Submission, ¶ 153.

⁹³⁸ Counter-Memorial, ¶ 423. *See also* Second Counter-Memorial, ¶ 433.

⁹³⁹ Counter-Memorial, ¶ 424. *See also* Second Counter-Memorial, ¶¶ 434-436, 438; Transcript (19 March 2013), 73:11 to 74:1; and Transcript (21 March 2013), 133:3 to 154:25 (for questions put to Mr. Bezant by the Respondent's counsel regarding the use of valuation methods and data).

⁹⁴⁰ Respondent's Post-Hearing Memorial, ¶ 79, *referring to* Baker & O'Brien Exhibitions 44-48 and FTI-37, Deutsche UFG report, dated July 10, 2007, p. 5, applying a 30% minority discount to Tatneft's stake in UTN.

575. The Respondent argues that there are two “fundamental difficulties” with Mr. Bezant’s valuation.⁹⁴¹ First, Mr. Bezant has chosen to disregard the overwhelming evidence of UTN’s deteriorating financial performance during the period preceding the events of October 2007.⁹⁴² The Respondent points out that the range of values for UTN on 12 May 2009 (US\$ 900 million to US\$ 1.5 billion) estimated by Mr. Bezant are 33 to 56 times greater than UTN’s EBITDA in 2006 (US\$ 26.9 million), the last year in which UTN earned a profit.⁹⁴³ Second, Mr. Bezant’s valuation has been developed on the basis of “indicators of value” that are not only unreliable but also artificial as they bear no conceivable relationship to the reality of UTN’s financial circumstances.⁹⁴⁴
576. In particular, the Respondent argues that the Tribunal should not have any regard to the amounts paid by Privat Group in three share transactions during the 2009/2010 period, which are one of the “indicators of value” that Mr. Bezant and the Claimant heavily relied on. First, little information is available with respect to these transactions.⁹⁴⁵ Second, these three transactions enabled Privat to obtain more than 50% of UTN’s shares, while Tatneft’s shareholdings (22.7%) alone would not have enabled Privat to take control of UTN.⁹⁴⁶ Third, on the Claimant’s “but-for” theory, these transactions are part of the alleged “black raider” scheme that are at the heart of this dispute and are therefore of no assistance in determining what a third party would have been willing to pay for Tatneft’s stake had those “breaches” not occurred.⁹⁴⁷ And fourth, neither Mr. Bezant nor Tatneft (or even Mr. Kolomoisky) has provided any economically rational basis for the sums that are stated to have been paid for the shares in question.⁹⁴⁸
577. The Respondent argues that a DCF valuation is preferable in the present case.⁹⁴⁹ To counter the Claimant’s evidence, the Respondent submits expert reports by Baker & O’Brien, which deploy a DCF method. In the course of their assessment, the two Baker & O’Brien Reports consider the Kremenchug refinery’s historical financial performance, the outlook for refinery yields, product

⁹⁴¹ Respondent’s Post-Hearing Memorial, ¶ 82.

⁹⁴² Respondent’s Post-Hearing Memorial, ¶¶ 83-90.

⁹⁴³ Respondent’s Post-Hearing Memorial, ¶ 83.

⁹⁴⁴ Respondent’s Post-Hearing Memorial, ¶¶ 92-93.

⁹⁴⁵ Respondent’s Post-Hearing Memorial, ¶ 97.

⁹⁴⁶ Respondent’s Post-Hearing Memorial, ¶ 98.

⁹⁴⁷ Respondent’s Post-Hearing Memorial, ¶ 99.

⁹⁴⁸ Respondent’s Post-Hearing Memorial, ¶¶ 100-102.

⁹⁴⁹ Counter-Memorial, ¶¶ 428-429.

pricing, operating costs, and reported financial losses. The First Baker & O'Brien Report estimates that the present value of the refinery is negative on a DCF method.⁹⁵⁰

578. Given the negative result of the DCF approach, the First Baker & O'Brien Report determines the value of the refinery on the basis of its net salvage value and concludes that the value of the refinery is between its net salvage value after closure—US\$ 50 million—and the value of US\$ 190 million under a scenario that involves the reconfiguration of the operation to improve profitability.⁹⁵¹ Accordingly, the value of the Claimant's 22.7% shareholding falls within a range from US\$ 7.9 million⁹⁵² to US\$ 36.7 million⁹⁵³. Certain adjustments were made in the Second Baker & O'Brien Report to reflect the value of Ukratnafta rather than the refinery assets alone. As a result of this adjustment, the value of Tatneft's direct and indirect shareholding was estimated to be in a range between US\$ 25.8 and 31.3 million.⁹⁵⁴ However, according to the Second Baker & O'Brien Report, the adjustments are "far from precise" and do not affect the expert's opinion of the value of the Kremenchug refinery on the valuation dates.⁹⁵⁵ Following the examination of Mr. Waguespack and before the conclusion of the hearing, Baker & O'Brien informed the Tribunal about a calculation error.⁹⁵⁶ According to Baker & O'Brien the corrections were to reflect the exclusion of the Ukratnafta balance sheet item "deferred tax assets", which was inadvertently included in its previous reports. In its view, it is unlikely that this item could be monetized by a buyer and it should therefore be excluded in estimating a value for Ukratnafta. This results in a negative value of US\$ 16-28 million for Ukratnafta's tangible assets and a range of US\$ 22-174 million for the Ukratnafta share value. After the application of a 15-30% minority discount, the corrected range for the value of the Claimant's shareholdings was US\$ 15.8- 19.2 million, rather than US\$ 25.8-31.3 million.

579. In respect of the "reconfiguration scenario" presented by Baker & O'Brien, the Respondent points out that "there is no evidence that this might possibly occur, its likelihood is low and in

⁹⁵⁰ Counter-Memorial, ¶¶ 430-431; Baker & O'Brien Report, ¶¶ 7.40-7.65. The Second Baker & O'Brien Report confirms the result of the First Baker & O'Brien Report (Second Baker & O'Brien Report, ¶ 1.2).

⁹⁵¹ First Baker & O'Brien Report, ¶¶ 7.74-7.75 and Table 7.6.

⁹⁵² First Baker & O'Brien Report, ¶ 7.83 and Table 7.7. This number reflects 22.7% of the salvage value and a 30% discount for minority interests.

⁹⁵³ First Baker & O'Brien Report, ¶ 7.83 and Table 7.7. This number reflects 22.7% of the value of the refinery in a reconfiguration scenario and a 15% discount for minority interests.

⁹⁵⁴ Second Baker & O'Brien Report, Table ES-1.

⁹⁵⁵ Second Baker & O'Brien Report, ¶¶ 1.2 and 1.4.

⁹⁵⁶ Letter from Baker & O'Brien to the Respondent dated 25 March 2013 and transmitted to the Claimant and the Tribunal on the same day.

any case this assessment does not represent the [fair market value] of the refinery at the relevant valuation dates.”⁹⁵⁷ The Respondent accordingly estimates that, on a net salvage value, the fair market value of the Claimant’s direct and indirect shareholdings in Ukratnafta on the relevant dates is between US\$ 7.9 million (based on a salvage value of US\$ 50 million and a 30% discount for its minority interest) and US\$ 9.6 million (based on a salvage value of US\$ 50 million and a 15% discount⁹⁵⁸ for its minority interest)⁹⁵⁹. With respect to the value of the refinery, the Respondent claims that it remains in the range of US\$ 50 million to US\$ 90 million at both valuation dates.⁹⁶⁰ The Respondent adjusted its estimates for the value of Tatneft’s shareholdings to US\$ 15.8 million to 19.2 million based on certain corrections to its report made by the Respondent’s expert following his examination at the hearing.⁹⁶¹

580. The Respondent argues that the Tribunal should distinguish between Tatneft’s direct shareholding and indirect shareholdings, as the Claimant’s indirect shares were acquired only after the (alleged) wrongful acts.⁹⁶² The Respondent also argues that its valuation is consistent with the market trend during the valuation period.⁹⁶³ Moreover, it is not appropriate to take into account post-valuation date events in valuing Ukratnafta, including Mr. Kolomoisky’s opinion with respect to the value of Ukratnafta.⁹⁶⁴
581. In the Respondent’s view, only Baker & O’Brien has provided a reasonable assessment of Ukratnafta’s value, based on its actual financial condition and respecting the valuation dates. The Respondent also points to Baker & O’Brien’s considerable industry experience.⁹⁶⁵ In this context, the Respondent argues as follows: first, valuing Ukratnafta on a DCF basis produces a negative value;⁹⁶⁶ second, there is insufficient information concerning European refining transactions to permit a meaningful comparison with Ukratnafta for valuation purposes;⁹⁶⁷

⁹⁵⁷ Counter-Memorial, ¶ 433 n. 714.

⁹⁵⁸ The figure had erroneously read “30% discount” in the Counter-Memorial, ¶ 435, and was corrected in the Second Counter-Memorial, ¶ 449.

⁹⁵⁹ Counter-Memorial, ¶ 435; Second Counter-Memorial, ¶ 449.

⁹⁶⁰ Transcript (27 March 2013), 138:15-20.

⁹⁶¹ Baker & O’Brien Letter dated 25 March 2013, referring to corrections in Second Baker & O’Brien’s Report, p.3 and p. 39.

⁹⁶² *Id.*, 140:9-16.

⁹⁶³ *Id.*, 141:15 to 142:25. *See also* Transcript (19 March 2013), 65:11 to 69:10.

⁹⁶⁴ Transcript (27 March 2013), 143:1 to 144:15. *See also* Second Counter-Memorial, ¶ 437.

⁹⁶⁵ Transcript (27 March 2013), 148:1-5.

⁹⁶⁶ *Id.*, 146:10-12, 148:9 to 169:18.

⁹⁶⁷ *Id.*, 146:13-16, 169:23 to 174:11.

third, valuations based on quoted European and Ukrainian refineries do not provide a reliable indicator;⁹⁶⁸ fourth, analysts with less access to data than Baker & O'Brien have consistently overvalued Ukratnafta;⁹⁶⁹ fifth, replacement cost is not a direct indicator of value;⁹⁷⁰ sixth, the transactions in Ukratnafta shares upon which Tatneft relies also do not provide a reliable indicator;⁹⁷¹ and seventh, there is no valid basis for including the Tatnefteprom shares in the value of Ukratnafta.⁹⁷²

582. In response to Tatneft's criticisms of the Baker & O'Brien Reports, the Respondent first argues that the fact that UTN and the refinery continue to operate today does not undermine Baker & O'Brien's valuation in any way since UTN and the refinery have lost hundreds of millions of US dollars since the valuation dates and continue to operate at a loss.⁹⁷³
583. The Respondent also argues that Tatneft fails to specify what evidence, other than UTN's financial statements, Baker & O'Brien should have considered in assessing UTN's profitability and cash flows, and that it would not only have been wrong but also reckless had Baker & O'Brien not relied on financial statements to determine profitability and cash flows in the view of established practice.⁹⁷⁴
584. With respect to the Claimant's assertion that Baker & O'Brien's position is "incongruous" since it has attributed a positive value to UTN while arriving at a negative value on a DCF basis, the Respondent contends that the rationale of that position has been set out in the Baker & O'Brien Reports: in order for UTN to have any prospect of providing a positive return to an acquirer on its investment, significant investment would be required to modernize and restructure the refinery, which cannot be guaranteed.⁹⁷⁵ In this context, the Respondent further argues that this is an entirely conventional approach to take with respect to a company with an unprofitable

⁹⁶⁸ Transcript (27 March 2013), 146:17-19, 174:12 to 175:2.

⁹⁶⁹ *Id.*, 146:20-22, 175:3 to 176:3.

⁹⁷⁰ *Id.*, 146:23-24, 176:4-15.

⁹⁷¹ *Id.*, 146:25-147:2, 176:16 to 184:21.

⁹⁷² *Id.*, 147:5-25. *See also* the Second Baker & O'Brien Report, ¶¶ 1.5, 5.3, and 5.4.

⁹⁷³ Respondent's Post-Hearing Memorial, ¶ 108.

⁹⁷⁴ Respondent's Post-Hearing Memorial, ¶ 109.

⁹⁷⁵ Respondent's Post-Hearing Memorial, ¶ 110, *referring to* Transcript (27 March 2013), 30:10-25 and First Baker & O'Brien Report, ¶ 1.23.

business, namely to assume either that operations will be discontinued or that they will be continued if a way can be found to operate the business profitably.⁹⁷⁶

585. In response to the Claimant's contention that Baker & O'Brien's assessment is in fact based on nothing but its own experience, the Respondent submits that "it is an unfortunate truth that some questions can only be answered, and some assessments can only be made, on the basis of experience" and "[i]t is precisely for that reason—because the answers are not available from public sources—that it is sometimes necessary to consult experts, such as Baker & O'Brien and Mr. Waguespack, i.e., to provide us with the benefit of their experience, and that is what Baker & O'Brien has done".⁹⁷⁷ The Respondent contends that the Claimant fails to demonstrate or allege that Baker & O'Brien's assessment is not honest, professional or independent or that it is otherwise unreliable.⁹⁷⁸
586. Finally, in response to the assertion of the Claimant that the Respondent failed to provide a valuation in accordance with the "but-for" theory, the Respondent argues that since there is no showing that UTN's cash flow would have turned positive in the "but-for world," there is no basis to criticize Baker & O'Brien's valuation in this regard.⁹⁷⁹

iii. The Tribunal's Analysis

587. Having reviewed the Parties' arguments and evidence in relation to the quantum of the claim, the Tribunal wishes to emphasize, at the outset, several significant points of convergence between the Parties' positions. First, there is consensus that the damages to which the Claimant is entitled in the event that the Tribunal finds liability must be measured by reference to the fair market value of its shareholdings as of the dates on which its shares were allegedly taken. Second, both Parties agree, and have instructed their experts accordingly, that these valuation dates are 12 May 2009 for the 14.09% indirect shareholding of Tatneft in Ukrtatnafta, which it held through AmRuz and Seagroup, and 27 January 2010 for Tatneft's 8.61% direct shareholding in Ukrtatnafta. Third, it appears undisputed that an estimate of fair market value should be "unaffected by factors specific to, or actions taken as a result of, this dispute but reflecting all relevant factors such as macroeconomic trends, the oil price and fuel emissions

⁹⁷⁶ Respondent's Post-Hearing Memorial, ¶ 111.

⁹⁷⁷ Respondent's Post-Hearing Memorial, ¶ 112.

⁹⁷⁸ *Id.*

⁹⁷⁹ Respondent's Post-Hearing Memorial, ¶ 113.

standards”.⁹⁸⁰ Fourth, while it is evident that the Kremenchug Refinery constitutes Ukratnafta’s principal asset, there is agreement that the valuation of the shareholdings is a function of the value of Ukratnafta as a whole, and not only of the Refinery.

588. That being said, the Parties’ experts arrive at starkly divergent conclusions when assessing the value of Ukratnafta. While the Claimant’s expert, Mr. Bezant, ascribes to the shareholdings of Tatneft a value between US\$ 222 million and US\$ 358 million, the Respondent’s experts, Baker & O’Brien, quantify Tatneft’s shareholdings to be between US\$ 15.8 million and US\$ 19.2 million. It is evident to the Tribunal that both Mr. Bezant and Baker & O’Brien have produced extensive and well-reasoned reports, accompanied by a considerable number of documentary exhibits in support of their conclusions on valuation. The stark discrepancy in figures cannot be ascribed to any failure or omission on the part of one or the other expert; it results from a reliance on different valuation methodologies, which in turn require different inputs and assumptions.

589. In the Tribunal’s view, none of the valuation methodologies deployed by the Parties’ experts is inadequate per se. The problem lies, rather, in a lack of reliable data—including information regarding Ukratnafta’s financial performance, the technical state of repair of the Refinery and the economic prospects of refining businesses in Ukraine—to enter into the equation.

Shortcomings of the Claimant’s Approach

590. In a situation of factual uncertainty, the Tribunal can understand the general approach taken by Mr. Bezant, which involved the juxtaposition of various valuation methodologies with a view to identifying a valuation range in which they converged. However, the Tribunal makes the following more specific observations that cast doubt on the reliability of the conclusions that Mr. Bezant reaches when applying these various methodologies in his report.

591. First, the Tribunal has doubts as to whether the approach of referring to market valuations of three Ukrainian oil refineries, conducted between 2004 and 2006, and eight European refining companies, developed in 2007, permits reliable conclusions as to the value of the Kremenchug Refinery (Ukratnafta’s principal asset). The Tribunal is not aware of the specific economic, technical and financial conditions of those comparator refineries and assumes that the Parties’ experts were in a similar position when preparing their reports.⁹⁸¹ While refineries are no doubt

⁹⁸⁰ First Bezant Report, ¶ 4.5.

⁹⁸¹ The Tribunal notes that the three Ukrainian refineries were quoted on the Ukrainian stock exchange only until 2006, and observes that the market value of these refineries in 2006 are of limited use in determining

subject to comparable challenges, their market opportunities may differ starkly, depending on the types of crude oil available, geography, political and regulatory conditions, and the prospect of synergies with companies up-stream and down-stream in the supply chain. Without a detailed analysis of the conditions under which the comparator projects operate, the Tribunal is not willing to base its valuation of Ukratnafta on a supposed similarity in value of such refineries.

592. Second, the various valuations of Ukratnafta by third-party analysts are of limited probative value. The valuations published prior to the agreed valuation dates of May 2009 and January 2010 “are not well documented,”⁹⁸² as Mr. Bezant himself concedes, while the valuations published in 2011 are necessarily incomplete. In all likelihood, the valuations, which are all very short, were based on limited financial data and prepared without knowledge of the conditions on-site. Presumably, none of the analysts was provided, by Ukratnafta or its shareholders, with any inside perspective of the company. It is thus somewhat paradoxical to seek to corroborate an informed valuation of Ukratnafta, as Mr. Bezant’s clearly is, by reference to a series of fairly superficial ones.
593. Third, as both Parties have noted, a valuation based on a refinery’s deferred replacement cost “is typically not used by buyers and sellers of refineries.”⁹⁸³ The deferred replacement cost of the technical installation says little about the value of Ukratnafta in the specific economic context of the Ukrainian refining market, with its significant geographic and geopolitical challenges and equally significant business opportunities.
594. Fourth, the valuation of Ukratnafta through transactions by Privat Group in, altogether, 55.7% of Ukratnafta’s shares in 2009 and 2010⁹⁸⁴ has its own problems, although the Tribunal believes that these transactions should not be completely disregarded as indicators of value. When a buyer purchases a majority stake of a company, it will typically pay a significant premium on top of the share value to account for the acquisition of control (or at least influence) and for economic synergies that it intends to realize with other companies in its group. The Tribunal would not rule out that the amounts paid by Privat Group included a substantial

the value of Ukratnafta in for the agreed valuation dates. Moreover, one of the these refineries stopped operations in 2005, the second operated only periodically in recent years, and the processing history of the third is unclear but, in any event, it was not operating at the time of the expert’s report of 2012. (Jacobs Report, ¶ 4.9) As to the European refineries, Mr. Bezant himself states that none of them “provides a close comparable to use to value Ukratnafta (and the Kremenchug Refinery).” (Second Bezant Report, ¶ 7.4).

⁹⁸² Second Bezant Report, ¶ 9.14.

⁹⁸³ Transcript (22 March 2013), 5:14-19.

⁹⁸⁴ First Bezant Report, ¶ 2.13.

premium for control, although precise figures in this connection are difficult to establish. Privat Group may also have been able to generate unique synergies between the Refinery and other Privat Group companies, comprising an extensive network of filling stations, that would not be available to a typical buyer. It is arguable that such unique business advantages should be excluded as “factors specific to a particular buyer or seller of the asset.”⁹⁸⁵

595. The Tribunal is also concerned that these acquisitions may have been driven by rather idiosyncratic motivations that would not be shared by typical buyers. While the extent of Privat Group’s involvement in the facts underlying the present proceedings remains opaque, the Claimant’s whole case turns on the proposition that Privat Group was the beneficiary of a complex “black raider scheme”, in which all composite events need to be viewed together. If that is the case, the purchase price paid by Privat Group in the sole-bidder auctions of 2009 and 2010 does not necessarily indicate fair market value, which should “exclude[s] factors specific to a particular buyer or seller of the asset”⁹⁸⁶ and rely only on considerations that are “unaffected by factors specific to... this dispute”.⁹⁸⁷

596. Finally, the Tribunal disagrees with a central economic assumption that seems to underlie Mr. Bezant’s analysis—that the negative financial results generated by Ukratnafta from the date of its incorporation in 1995 to the seizure of the Refinery in October 2007 can be omitted from the analysis. The Claimant has sought to explain its own, and Mr. Bezant’s, refusal to rely on Ukratnafta’s financial statements for that period by alleging their lack of reliability, referring to the “common understanding that financial statements do not necessarily reflect the value of refining assets and companies in Ukraine”⁹⁸⁸ and stating that “there were considerable indications that profits were far higher than the sums disclosed in the financial statements.”⁹⁸⁹

597. The Tribunal must of course consider with particular caution the overall proposition that the financial statements of Ukratnafta might not accurately reflect the reality of the business of the company. However, the Tribunal equally notes that the Claimant, who was responsible for the production of these financial statements from 2002 to 2007, cannot now convincingly argue that these financial statements should not be relied upon.⁹⁹⁰ Specifically, the Claimant’s witness,

⁹⁸⁵ First Bezant Report, ¶ 4.4.

⁹⁸⁶ First Bezant Report, ¶ 4.4.

⁹⁸⁷ First Bezant Report, ¶ 4.5.

⁹⁸⁸ Claimant’s Post-Hearing Brief, ¶ 123.

⁹⁸⁹ Claimant’s Post-Hearing Brief, ¶ 119. See also Claimant’s Post-Hearing Brief, ¶¶ 118-129.

⁹⁹⁰ Transcript (Day 3), 156.

Mr. Fedotov, confirmed that he was in charge of the economic planning and financial departments of Ukratnafta from August 2001 to October 2007, thus assuming the functions of “financial director by modern academic definition.”⁹⁹¹ Mr. Fedotov certainly did not suggest in his written or oral testimony that he deliberately misstated Ukratnafta’s financial performance. The Claimant forcefully asserted, but provided no evidence of, such misstatements. On the other hand, if it were true that the financial statements prepared during that period were indeed unreliable, then the Claimant should bear the consequences of its own actions insofar as it cannot now completely disavow the credibility of these statements in the context of this arbitration.

598. Even assuming that Ukratnafta’s financial statements are not completely accurate, the Tribunal sees no reason not to believe the Claimant’s fact witness, Mr. Fedotov, in so far as he confirmed that Ukratnafta did lose money during the whole period in which the Claimant was in control.⁹⁹² The Tribunal is unconvinced by the Claimant efforts to explain the negative cash flow during this period by reference to allegedly significant capital investments for the modernization of the Refinery. As far as the Tribunal can tell, the money allegedly spent seems to relate more to the maintenance of the plant than to its modernization or upgrade.⁹⁹³

599. In consequence the Tribunal considers that the dire financial condition of Ukratnafta up to 2007, as evidenced by Ukratnafta’s financial records and the testimony of the Claimant’s fact witness, Mr. Fedotov, is a relevant factor in the valuation of Ukratnafta. That Mr. Bezant did not account for it in any of the alternative methodologies it employed is an evident shortcoming, which is likely to have resulted in a higher value for the company than objectively justified.

Shortcomings of the Respondent’s Approach

600. Turning to the Respondent’s approach to valuation, the Tribunal wishes to record, as a preliminary matter, its agreement with the Respondent that the valuation results of the “comparable sales methodology” are too speculative on account of there being no truly comparable transactions.⁹⁹⁴ The Tribunal therefore concurs with the Respondent that the deferred replacement value (DRV) methodology arrives at too high a valuation. The Tribunal regards it as proper that the Respondent has set aside these two methodologies.

⁹⁹¹ Transcript (19 March 2013), 156:15.

⁹⁹² Transcript (Day 3), 6-12.

⁹⁹³ Transcript (Day 5), 148.

⁹⁹⁴ First Baker & O’Brien Report, ¶ 7.25.

601. However, the Tribunal does have significant concerns in respect of the analysis of Baker & O'Brien, which are a mirror image of its criticism of Mr. Bezant's analysis. While Mr. Bezant makes too little of the available financial records, the Respondent's experts rely too heavily, and uncritically, on the financial statements of Ukratnafta, without factoring in any potential inaccuracy or incompleteness. In the Tribunal's view, Ukratnafta's financial statements should be approached with some caution instead of being taken at face value.⁹⁹⁵ The Tribunal finds that enough doubt about these financial statements has been introduced by the Claimant itself in view of its responsibility in the management of the company during the relevant period, which was far from satisfactory.
602. While the Tribunal believes that Ukratnafta's financial records do provide some indication of the financial situation of the company (indicating, as noted above, whether it was a profit-making or loss-making business), it would hesitate to opt for any valuation method that entirely depends on the accuracy of these statements. The Tribunal therefore shares Mr. Bezant's view that the DCF methodology is unsuitable in the present case, as it is too reliant on the financial statements of Ukratnafta.
603. The Tribunal recognizes that the DCF methodology ultimately does not form the primary basis of Baker & O'Brien's valuation. As for the methodology supporting the valuation actually employed—that of valuing Ukratnafta somewhere in between its “net salvage value after closure” and the reconfiguration of the operation to improve its profitability⁹⁹⁶—the Tribunal is not convinced about the accuracy of the estimate given to the salvage value of the Kremenchug Refinery. While recognizing that Mr. Waguespack and one of his colleagues visited the Kremenchug Refinery to conduct an independent evaluation of the condition of the refinery equipment,⁹⁹⁷ the Tribunal also notes that Mr. Waguespack had limited access to the physical premises and equipment of the Kremenchug Refinery, as well as to other non-public documentation that would have aided its valuation.⁹⁹⁸ For example, Mr. Waguespack conceded that in addition to “the physical viewing of the facilities, and how they operate, we would have preferred to see more and we asked to see more.”⁹⁹⁹

⁹⁹⁵ Transcript (22 March 2013), 237:15-20.

⁹⁹⁶ First Baker & O'Brien Report, ¶ 1.26.

⁹⁹⁷ Transcript (22 March 2013), 157:16-23.

⁹⁹⁸ Transcript (22 March 2013), 157:6 to 159:14. See also Claimant's Post-Hearing Brief, ¶¶ 129 to 132.

⁹⁹⁹ Transcript (22 March 2013), 159:7-14.

604. A limited site inspection might not be in itself a problematic factor. However, if the condition of the technical installations of the Refinery itself is supposed to form the basis of the valuation, an in-depth inspection is called for. In the absence of such an in-depth inspection, the Tribunal must conclude that Baker & O'Brien made a less than fully informed estimate of the salvage value of the Kremenchug Refinery.
605. As regards the quantification of the net salvage value of the Kremenchug Refinery at approximately 2% of its replacement cost new, and at 5-10% of its replacement cost new in a "reconfiguration scenario", the Tribunal refers to the explanation of Mr. Waguespack that the valuation of a refinery is based not only on financial documents but also on judgment and experience, as valuation experts may not always receive all the information they think necessary in order to carry out a valuation.¹⁰⁰⁰ The Tribunal acknowledges that uncertainty is a constant in any valuation exercise and that the outstanding experience of Baker & O'Brien in the refining industry entitles it to use its professional judgment on these matters. However, the Tribunal also believes that it cannot rely solely on the professional judgment and experience of the Respondent's experts, without substantial other evidence in support, to quantify the Claimant's damages.
606. A last comment on the different methodologies is appropriate. The Tribunal finds that the calculation of the equity value of Ukratnafta – namely, the market value of the Kremenchug refinery plus the total tangible assets, exclusive of the book value of refinery and related assets, intangible assets, and deferred tax assets of US\$ 60-70 million – is compromised by the limited reliability of the financial statements in this case. The Tribunal cannot ignore the fact, however, that such limited reliability is as noted in good measure the making of the Claimant itself and accordingly should not exculpate the Claimant from the more limited compensation the Tribunal shall award.

The Tribunal's Findings

607. The Tribunal is not persuaded that any of the methodologies that the Parties' experts propose result in an accurate calculation of the value of the Claimant's direct and indirect shareholding in Ukratnafta as of the agreed valuation dates. The factual uncertainty in the present case is so great that none of these methods, which all depend on different inputs of reliable data, can be deployed effectively.

¹⁰⁰⁰ Transcript (22 March 2013), 187:23 to 189:8.

608. In the face of such uncertainty, the Tribunal must base its valuation on the best available evidence. Such an approach is corroborated by commentators¹⁰⁰¹ and well established in the case law of international tribunals¹⁰⁰², including the Iran-US Claims Tribunal.¹⁰⁰³ While many aspects of the financial and economic situation of Ukratnafta remain unclear, there are nonetheless some “hard facts” that provide appropriate direction in respect of the value of Ukratnafta. The Tribunal attaches particular importance to the transactions through which the Claimant purchased its shares in Ukratnafta. Neither side has questioned the fact that these transactions took place or the amounts involved. In the absence of better evidence, the Tribunal thus takes guidance from the Claimant’s own contemporaneous estimate of what Ukratnafta was worth, as it is implicit in the price that the Claimant found appropriate to pay for Ukratnafta shares.
609. Accordingly, the Tribunal decides to use the amounts of the share transactions through which the Claimant acquired direct and indirect ownership as a measure of value for Ukratnafta. As a result, the Claimant will essentially be reimbursed for what it has paid. This approach, in the Tribunal’s view, most fairly and accurately reflects the value that was lost to the Claimant on account of the Respondent’s breach of the BIT.
610. Specifically, in 2000, the Claimant paid US\$ 31 million for 8.613% of Ukratnafta’s shares.¹⁰⁰⁴ The Claimant also acquired 49% of AmRuz for US\$ 23,940,000 on 18 December 2007¹⁰⁰⁵ and

¹⁰⁰¹ As explained by Sergey Ripinsky and Kevin Williams, “[i]n circumstances in which the precise calculation is difficult or impossible, for example due to inconclusive evidence, tribunals may exercise discretion and resort to ‘approximations’. Approximations are based on arbitrators’ collective sense of what is reasonable and equitable in the circumstances of the case. One should also appreciate that an approximation can serve to reconcile disagreements between arbitrators.” (DAMAGES IN INTERNATIONAL INVESTMENT LAW 121 (2008)).

¹⁰⁰² *Compañía De Aguas Del Aconquija S.A. and Vivendi Universal S.A. V. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007), 247; *Franz Sedelmayer v. The Russian Federation*, SCC, Award, (7 July 1998); *Compania Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica*, Final Award (17 February 2000); *Petrobart Limited v. The Kyrgyz Republic*, SCC, Award (29 March 2005); *Southern Pacific Properties (Middle East) Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, (20 May 1992); *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award, (15 March 1963).

¹⁰⁰³ *William J. Levitt and The Government of the Islamic Republic of Iran et al.*, Award No. 297-209-1 (22 April 1987) 14 Iran-U.S. C.T.R. 191; *Starrett Housing Corporation et al. and The Government of the Islamic Republic of Iran et al.*, Award No. 314-24-1 (14 August 1987) 16 Iran-U.S. C.T.R. 112; *Seismograph Service Corporation et al. and National Iranian Oil Company et al.*, Award No. 420-443-3 (31 March 1989) 22 Iran-U.S. C.T.R. 3, 80; see also *Hakim v. Iran*, Award No. 587-953-2 (24 June 1998) 34 Iran-U.S. C.T.R. 67, 100.

¹⁰⁰⁴ Memorial, ¶ 21; Counter-Memorial, ¶ 46; Transcript (18 March 2013), 14:19-21.

¹⁰⁰⁵ Share Purchase Agreement between Osta Corporation Limited and Tatneft of 18 December 2007 (C-484).

100% of Seagroup for US\$ 57,120,000 on 24 December 2007.¹⁰⁰⁶ Through the December 2007 transactions, the Claimant paid US\$ 81,060,000 million for the acquisition of the Ukratnafta shares of Seagroup and AmRuz. The Tribunal observes that this results in roughly US\$ 112 million in damages for the Claimant, excluding the necessary interest adjustments to account for the time value of money up to the date of the award.

611. The Claimant has argued that it is entitled to any increase in value between the shareholdings as of the agreed valuation date and the date of the award. However, the Tribunal notes that it has not received adequate evidence to conclude that any such increase has in fact occurred. In relation to the amount of US\$ 31 million that the Claimant paid in 2000, specifically, the Tribunal reiterates its finding that for most of the period before October 2007, when the Claimant was effectively managing Ukratnafta, Ukratnafta did not generate profits. It is thus likely that there has been no increase in the value of the Claimant's shareholding from 2000 to 2007. The Tribunal does not have before it any reliable data that would document an increase in value after 2007.
612. As regards the US\$ 81,060,000 million that the Claimant paid in 2007 for the shares of AmRuz and Seagroup, the Tribunal considers that this amount represented a fair price for the Claimant, together with the other Tatarstan shareholding, to assume majority control of Ukratnafta.
613. The Tribunal notes that these amounts are in fact not too dissimilar to the amounts paid by Privat Group in 2009 and 2010 provided that one takes into consideration the break-down offered at the hearing by Mr. Kolomoisky. Mr. Kolomoisky testified that Privat Group had paid a total of about US\$ 720 million for its 55.7% stake of Ukratnafta, out of which only around US\$ 200 million was paid in consideration of the shares themselves.¹⁰⁰⁷ The remaining amount was described as a sort of "emergency cash flow" contribution, made to allow the company to meet its immediate payment needs. There was no suggestion by Mr. Kolomoisky that any proportion of this cash flow contribution was invested by Ukratnafta in ways that would ensure that its value was retained in the company.
614. While the Tribunal acknowledges that the figure of US\$ 200 million, corresponding to a 55.7% equity stake, was merely an estimate by Mr. Kolomoisky, the Tribunal does consider that it confirms the plausibility of its own valuation of the Claimant's 22.7% equity stake at US\$ 112 million.

¹⁰⁰⁶ Share Purchase Agreement between Osta Corporation Limited; Seagroup International, Inc. and Tatneft of 24 December 2007 (C-485).

¹⁰⁰⁷ Transcript (25 March 2013), 125:5-24.

615. To conclude, the Tribunal is satisfied that the Claimant's shareholdings in Ukrtatnafta are most adequately valued by reference to the Claimant's purchase price for these shareholdings. The Tribunal finds that the total value of these shareholdings amounts to US\$ 112 million.
616. The Tribunal also highlights that one arbitrator takes exception to compensation at this last figure and considers that the alternative methodological valuations could not result in a figure greater than US\$ 52.3 million.
617. As it has been noted above, the Claimant in its First Memorial included claims for compensation for damages arising from unpaid oil deliveries in the amount of US\$ 414.4 million. As the Tribunal has already concluded above that the Respondent could not be held liable for the non-payment by Ukrtatnafta for oil deliveries, the claim for compensation in this respect shall not be considered.

C. INTEREST

618. The Claimant requests an award of compound interest on any amounts awarded by the Tribunal in relation to the loss of its direct and indirect shareholdings and to the outstanding debt of the Respondent for oil deliveries and the Claimant's payment of tax penalty fees.
619. The Respondent objects to (a) the interest rates proposed by the Claimant, (b) the start dates for the accrual of interest proposed by the Claimant, and (c) the Claimant's request for an award of compound interest.

1. Interest Rates

(a) The Claimant's Arguments

620. The Claimant asserts that the principle of full reparation also governs payment of interest. Citing Article 38 of the ILC Articles on State Responsibility¹⁰⁰⁸ as well as arbitral case law,¹⁰⁰⁹

¹⁰⁰⁸ Memorial, ¶ 545. Article 38 of the ILC Articles on State Responsibility provides:

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), Yearbook of the International Law Commission (2001), vol. II(2), p. 26, p. 29, Article 38 (CLA-270).

the Claimant states that it is entitled to interest “at an appropriate rate” on the entire value of its investments in Ukratnafta and the sum due for oil deliveries.¹⁰¹⁰

621. The Claimant contends that the interest rate provided for in Article 5(2) of the Russia-Ukraine BIT—the three-month US\$ LIBOR Rate plus 1%—is inappropriate for the reparation of the Respondent’s breach of treaty obligations. As the Claimant explains, the rate in Article 5(2) presumes that “prompt, adequate and effective” compensation has been made in the event of a lawful expropriation, which is not the situation at present.¹⁰¹¹ The Claimant also argues that the interest rate is to be set in accordance with the currency “in which the investment was made, the harm was caused and compensation is to be awarded.”¹⁰¹²
622. With regard to its lost investment in Ukratnafta, the Claimant argues that the “investment alternative” approach should be applied, as it has been adopted by many investment tribunals.¹⁰¹³ It therefore claims that the applicable interest rate should be determined using 10-year US\$-denominated Ukraine bonds, 30-year US\$-denominated Russian bonds in the case that the Tribunal should consider that an investment alternative in the Russian Federation would be more appropriate, or the applicable rates on US\$ deposits in the Russian Federation, in the

¹⁰⁰⁹ Memorial, ¶ 545 n. 605, referring to *Continental Casualty Company v. Argentine Republic*, ICSID Case ARB/03/9, Award of 5 September 2008, ¶ 308 (CLA-269) (“As a general principle, almost invariably, justice requires that the wrongdoer who has deliberately failed to pay compensation should pay interest for the period during it [sic] has withheld that compensation unlawfully.”); *Pope & Talbot Inc v. Canada*, UNCITRAL, Award in Respect of Damages of 31 May 2002, ¶ 89 (CLA-203) (“Of course, applicable rules of international law [...] also call for the award of appropriate interest [...] as one of the elements of compensation.”)

¹⁰¹⁰ Memorial, ¶¶ 545-547.

¹⁰¹¹ Memorial, ¶ 548.

¹⁰¹² *Id.*, ¶ 549.

¹⁰¹³ Second Memorial, ¶ 649 n. 883, referring to *Sola Tiles, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 298-317-1 of 22 April 1987, Iran-U.S. Claims Tribunal Reports (1988), vol. 14, pp. 223, 242, ¶ 66 (CLA-268); *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case ARB/96/1, Final Award of 17 February 2000, ICSID Review (2000), vol. 15, no. 1, pp. 169, 202, ¶ 104 (CLA-336); *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award No. 180-64-1 of 27 June 1985, Iran-U.S. Claims Tribunal Reports (1987), vol. 8, pp. 298, 320-322 (CLA-338). See also Charles N. Brower and Jason D. Brueschke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998), p. 622 (CLA-339); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal SA v. Argentine Republic*, ICSID Case ARB/97/3, Award of 20 August 2007, ¶ 9.2.8 (CLA-170) (“[T]he tribunal concludes that a 6% interest rate represents a reasonable proxy for the return Claimants would otherwise have earned on the amounts invested and lost in the Tucumán Concession.”); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case ARB/02/1, Award of 25 July 2007, ¶ 104 (CLA-340) (“[I]nterest compensates Claimants for the impossibility to invest the amounts due.”); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award of 24 December 2007, ¶ 455 (CLA-246); *Waguih Elie Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case ARB/05/15, Award of 1 June 2009, ¶ 596 (CLA-191) (“[I]nterest should expressly be tied to the loss of opportunity to invest [...]. The Tribunal will award interest on an investment basis.”).

event that the Tribunal believes that government bonds are not an appropriate investment alternative.¹⁰¹⁴

(b) The Respondent's Arguments

623. The Respondent argues that the only interest rate that should be applied in this case is the three-month US\$ LIBOR Rate plus 1%, as provided in Article (2) of the Russia-Ukraine BIT. According to the Respondent, "to do otherwise would be to ignore the BIT carefully negotiated and agreed between Russia and Ukraine."¹⁰¹⁵ The interest rate specified in the BIT should prevail over any interest rates defined under customary international law or Russian law.¹⁰¹⁶

(c) The Tribunal's Analysis

624. It is true, as argued by the Respondent, that Article 5(2) of the Russia-Ukraine BIT provides specifically for the interest rate to be applied in the case of expropriation.
625. However, the Tribunal notes that no similar provision concerning interest can be found in connection with damages resulting from other breaches of the BIT. The Tribunal has already found in favor of the Claimant concerning breaches on grounds other than expropriation. The Tribunal is therefore free to define the interest rate that should apply in the present circumstances.
626. While the Tribunal agrees with the Claimant that the interest rate mentioned in Article 5(2) of the BIT is restricted to circumstances of expropriation, it does not share the Claimant's view that the applicable interest rate should be established by reference to Ukrainian or Russian bonds or to US\$ deposits in the Russian Federation. The "investment alternative" approach mentioned by the Claimant and its reference mentioned above to a number of investment awards does not limit the Tribunal to such alternatives. The Tribunal is of the view that the parties to the BIT have indicated in Article 5(2) their preferred standard and, while the Tribunal is not bound by such standard for the reason mentioned above, it considers that reference to the LIBOR rate would be justified in the present case and notes that such standard has been regularly used in investment awards. The Tribunal is of the view however that an addition of

¹⁰¹⁴ Second Memorial, ¶ 553. *See also* Transcript (18 March 2013), 148:19 to 149:2.

¹⁰¹⁵ Counter-Memorial, ¶¶ 467-469.

¹⁰¹⁶ Second Counter-Memorial, ¶¶ 459-461; Counter-Memorial, ¶¶ 385, 391-392, 471-472.

3% to that rate would be more appropriate than the 1% mentioned in Article 5(2) of the BIT and more in line with what is generally awarded.

627. The Tribunal therefore decides that the interest rate to be paid by the Respondent shall be the interest rate for three months' deposits in US dollars at the London interbank market rate (LIBOR) plus 3%.

2. Starting Date for the Accrual of Interest

(a) The Claimant's Arguments

628. With regard to its lost investment in Ukratnafta, the Claimant argues that 27 January 2010 and 12 May 2009 should be the starting dates for the accrual of interest for its loss of direct and indirect shareholdings, respectively.¹⁰¹⁷

(b) The Respondent's Arguments

629. The Respondent submits that interest should accrue from the date of the Award, which is the date "when the amount of the sum due has been fixed and the obligation to pay has been established."¹⁰¹⁸
630. The Respondent disagrees that 27 January 2010 and 12 May 2009—the agreed valuation dates—should also be used to determine the accrual of interest in respect of the Claimant's claim for direct damages, asserting that this proposal "is misguided and ignores established arbitral practice."¹⁰¹⁹

(c) The Tribunal's Analysis

631. The Tribunal decides that the interest shall run from the taking of the shares. The Tribunal recalls that there is consensus between the Parties that the taking of these shares occurred on two dates – namely, 12 May 2009 for the 14.09% indirect shareholding of Tatneft in Ukratnafta, which it held through AmRuz and Seagroup, and 27 January 2010, for Tatneft's 8.61% direct shareholding in Ukratnafta. The Tribunal therefore holds that interest shall begin

¹⁰¹⁷ Second Memorial, ¶ 554.

¹⁰¹⁸ Second Counter-Memorial, ¶ 462 n. 869, referring to S.S. "Wimbledon", (UK v. Japan), Judgment, 1923 PCIJ (Ser. A) No. 1, 17 August 1923, ¶ 56 (RLA-128).

¹⁰¹⁹ *Id.*, ¶ 463.

to accrue on the amount of US\$ 68.44 million on 12 May 2009, and on the amount of US\$ 43.56 million on 27 January 2010.

632. To better enable the Respondent to make full payment, the Tribunal decides that the accrual of interest shall be suspended from the date of the issuance of the Award to sixty (60) days thereafter.

3. Compound Interest

(a) The Claimant's Arguments

633. The Claimant states that it is the "norm" in investment arbitration to order compound interest, and requests the Tribunal do so here.¹⁰²⁰
634. Relying on a significant number of investor-state cases,¹⁰²¹ the Claimant argues that "[i]t is [...] well established that a tribunal may order compound interest to ensure full reparation."¹⁰²² In

¹⁰²⁰ Second Memorial, ¶ 559. See also Transcript (18 March 2013), 149:11 to 150:24.

¹⁰²¹ Second Memorial, ¶ 559 n. 896, referring to *Waguih Elie Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case ARB/05/15, Award of 1 June 2009, ¶ 595 (CLA-191) ("The Tribunal has no hesitation in ruling that interest should run from the date of the expropriation, and that it should be compounded. The Claimants submitted that since 2000, no less than 15 out of 16 BIT tribunals have awarded compound interest on damages in investment disputes. Whether or not that statistic is correct, the Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation."); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case ARB/07/16, Award of 8 November 2010, ¶ 514 (CLA-265); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, ¶¶ 662-664 (CLA-218); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case ARB/05/16, Award of 29 July 2008, ¶ 818 (CLA-133); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award of 24 December 2007, ¶¶ 454-457 (CLA-246); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case ARB/02/1, Award of 25 July 2007, ¶ 103 (CLA-340); *PSEG Global Inc. and Konya Ilgin Elektrik Üretimve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case ARB/02/5, Award of 19 January 2007, ¶ 348 (CLA-192); *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case ARB/03/16, Award of the Tribunal of 2 October 2006, ¶ 522 (CLA-134); *Azurix Corp. v. The Argentine Republic*, ICSID Case ARB/01/12, Award of 14 July 2006, ¶ 440 (CLA-223); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case ARB/01/7, Award of 25 May 2004, ¶ 251 (CLA-173); *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case ARB(AF)/00/2, Award of 29 May 2003, International Legal Materials (2004), vol. 43, p. 133, p. 185, ¶ 196 (CLA-156); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award of 21 October 2002, ¶ 306 (CLA-271); *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Award in Respect of Damages of 31 May 2002, ¶ 89 (CLA-203); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case ARB/99/6, Award of 12 April 2002, ¶¶ 174-175 (CLA-206); *Siemens A.G. v. The Argentine Republic*, ICSID Case ARB/02/8, Award of 6 February 2007, ¶¶ 399-401 (CLA-42); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award of 8 December 2000, ¶ 129 (RLA-76); *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case ARB/97/7, Award of 13 November 2000, ¶ 96 (RLA-30); *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case ARB/96/1, Final Award of 17 February 2000, ICSID Review (2000), vol. 15, no. 1, p. 169, pp. 200- 202, ¶¶ 96-106 (CLA-336);

particular, the Claimant refers to *Santa Elena v. Costa Rica*, where the tribunal stated that “the amount of compensation should reflect the additional sum that the money would have earned if [it] had been reinvested each year at generally prevailing rates of interest.”¹⁰²³ The Claimant also refers to *Wena Hotels*, where the tribunal confirmed that compound interest was required in order to give the claimant full reparation.¹⁰²⁴

635. The Claimant further argues that many tribunals have awarded compound interest because it “reflects the reality of financial transactions [today], and best approximates the value lost by an investor.”¹⁰²⁵

(b) The Respondent’s Arguments

636. The Respondent rejects the Claimant’s request for compound interest, observing that the practice of investment arbitration tribunals with regard to compound interest is “far from unanimous.”¹⁰²⁶ The Respondent points out that compound interest has been declined in many investment arbitration cases¹⁰²⁷ and states that international law “does not favor the award of compound interest.”¹⁰²⁸

Government of Kuwait v. American Independent Oil Company (Aminoil), Award of 24 March 1982, International Legal Reports (1984), vol. 66, pp. 519, 613, ¶ 178 (CLA-42). See also Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 387 (CLA-329) (“As far as international investment law is concerned, there has been a reversal of the presumption of simple interest: a significant number of recent tribunal decisions provide a strong indication that compound interest has come to be treated as the default solution.”).

¹⁰²² Second Memorial, ¶ 556.

¹⁰²³ *Id.*, ¶ 557, referring to *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case ARB/96/1, Final Award of 17 February 2000, ICSID Review (2000), vol. 15, no. 1, pp. 169, 202, ¶ 104 (CLA-336).

¹⁰²⁴ *Id.*, referring to *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award of 8 December 2000, ¶ 129 (RLA-76).

¹⁰²⁵ *Id.*, ¶ 558, referring to *Azurix Corp. v. The Argentine Republic*, ICSID Case ARB/01/12, Award of 14 July 2006, ¶ 440 (CLA-223). See also awards cited in *supra* n. 165; John Y. Gotanda, *Compounding Interest in Interest: The Global Economy, Deflation, and Interest*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009 (2010), vol. 3, p. 261, p. 286 (CLA-343) (“In any event, the approach taken by these investment arbitration tribunals better compensates claimants for the loss of the use of money; compound interest more accurately reflects what the claimant would have been able to earn on the sums owed if they had been paid in a timely manner.”).

¹⁰²⁶ Second Counter-Memorial, ¶ 467 n. 879.

¹⁰²⁷ Second Counter-Memorial, ¶ 467 n. 880, referring to *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case ARB/04/19, Award, 18 August 2008, ¶ 491 (RLA-131); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case ARB/05/17, Award, 6 February 2008, ¶¶ 295-298 (CLA-139); *CMS Gas Transmission Company v. Argentina*, ICSID Case ARB/01/8, Award, 12 May 2005, ¶ 471 (CLA-196); *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, LCIA Case UN 3467, Final Award, 1 July 2004, ¶¶ 211, 216 (8, 9, 13) (CLA-204); *Marvin*

637. The Respondent further argues that the cases on which the Claimant relies “have failed to articulate a proper justification [...] in favor of compound interest.”¹⁰²⁹ Relying on commentary by two practitioners, the Respondent specifically asserts that *Santa Elena v. Costa Rica*, *Wena Hotels v. Egypt*, and *Middle East Cement v. Egypt* were “incorrectly” decided with regard to the award of compound interest.¹⁰³⁰
638. According to the Respondent, compound interest should only be awarded in three circumstances: (a) when the parties have expressly agreed to the payment of compound interest, (b) when the respondent’s failure to fulfill its obligations caused the claimant to incur financing costs on which it paid compound interest, or (c) when the claimant can prove that it would have earned compound interest in the normal course of business on the money owed, had it been paid in a timely manner.¹⁰³¹ The Respondent asserts that the Claimant failed to plead any such circumstances that may warrant compound interest.¹⁰³²

Feldman v. Mexico, ICSID Case ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 205-206 (CLA-221); *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 June 1990, 95 ILR 211 pp. 230-231 (RLA-132); *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran and The National Iranian Copper Industries Company*, Award No. ITL 65-167-3, 10 December 1986, 13 I.U.S.C.T.R. 199, ¶¶ 138-142 (RLA-133); and *R.J. Reynolds Tobacco Company v. The Government of the Islamic Republic of Iran and Iranian Tobacco Company (ITC)*, Award No. 145-35-3, 6 August 1984, 7 I.U.S.C.T.R. 181, Section IV.4 (RLA-134).

¹⁰²⁸ Second Counter-Memorial, ¶ 467, referring to *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case ARB/04/19, Award, 18 August 2008, ¶ 473, RLA-131. See also ILC Articles, Art. 38, Commentary ¶ 8, p. 108:

The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. [...] But given the present state of international law it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation. (RLA-84).

¹⁰²⁹ Second Counter-Memorial, ¶ 467.

¹⁰³⁰ *Id.*, referring to Charles N. Brower and Jeremy K. Sharpe, “Awards of Compound Interest in International Arbitration: The Aminoil Non-Precedent,” December 2006, 3(5) TDM 155 pp. 159-160, 176-178, (RLA-135).

¹⁰³¹ Second Counter-Memorial, ¶ 468, referring to John Y. Gotanda, Compound Interest in International Disputes, 34 LAW & POL’Y IN INT’L BUS. (2002-2003) 393, 440, (RLA-136). See also *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case ARB/07/23, Award, 29 June 2012, ¶ 281 (“The Tribunal observes that the determination of whether or not a compound interest rate is applicable needs to be justified by the Tribunal as any other determination.”) (RLA-137).

¹⁰³² Second Counter-Memorial, ¶ 469.

(c) The Tribunal's Analysis

639. The Tribunal is of the view that the time value of money should be fully recognized and notes that the Claimant has cited several previous awards which reached the same conclusion. The Respondent shall therefore pay interest compounded every three months on amounts owing at the rate mentioned above.

VII. COSTS

640. In accordance with Article 38 of the UNCITRAL Rules, the costs of the arbitration are fixed as follows:

<i>Arbitrator fees and expenses</i>	
Professor Francisco Orrego Vicuña	
<i>Fees:</i>	US\$ 612,100.00
<i>Expenses:</i>	US\$ 27,317.47
Professor Rudolf Dolzer	
<i>Fees:</i>	US\$ 26,395.50
<i>Expenses:</i>	US\$ 1,779.61
The Honorable Charles N. Brower	
<i>Fees:</i>	US\$ 432,679.50
<i>Expenses:</i>	US\$ 5,854.39
The Honorable Marc Lalonde, P.C., O.C., Q.C.	
<i>Fees:</i>	US\$ 459,075.00
<i>Expenses:</i>	US\$ 23,122.80
<i>Registry fees of the PCA</i>	US\$ 206,323.51
<i>Expenses</i>	
Court reporter:	US\$ 67,327.78
Catering:	US\$ 55,266.78

Interpreters:	US\$ 41,011.26
Equipment rental:	US\$ 33,622.70
Technical support:	US\$ 20,905.70
Courier expenses:	US\$ 10,992.35
PCA travel and accommodation:	US\$ 7,483.25
Other expenses <i>(including for IDRC hearing facilities, office supplies, currency translation variances, bank fees, and communication costs):</i>	US\$ 9,050.52
TOTAL COSTS OF THE ARBITRATION	US\$ 2,040,308.12

641. The Tribunal decides that each Party shall bear its own costs and that each Party shall pay one half of the arbitration costs.

VIII. DISPOSITIF

642. For the foregoing reasons, the Tribunal decides and orders as follows:

- (1) The Respondent shall pay the Claimant the amount of US\$ 112 million as compensation for its breaches of the Russia-Ukraine BIT.
- (2) The Respondent shall pay the Claimant interest on the amount awarded in subparagraph (1) at the interest rate for three months' deposits in US dollars at the LIBOR rate plus 3%. Interest shall begin to accrue on the amount of US\$ 68.44 million on 12 May 2009, and on the amount of US\$ 43.56 million on 27 January 2010, and shall continue, except as provided in (3) below, until the date of final payment. Interest shall be compounded every three months.
- (3) The accrual of interest shall, however, be suspended from the date of the issuance of the Award to sixty (60) days thereafter.
- (4) All other claims by the Claimant are dismissed.
- (5) Each Party shall bear its own costs.
- (6) Each Party shall pay half of the costs of this arbitration, which total US\$ 2,040,308.12.

Done at the place of arbitration, Paris, France on 29 July 2014

Charles N. Brower
The Honorable Charles N. Brower

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

F. Orrego
Professor Francisco Orrego Vicuña
President