INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

GEA GROUP AKTIENGESELLSCHAFT

Claimant

and

UKRAINE

Respondent

AWARD

ARBITRAL TRIBUNAL
Professor Albert Jan van den Berg, President
Mr Toby Landau QC, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms Aïssatou Diop

Date of dispatch to the Parties: 31 March 2011

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I. THE PARTIES

1. Claimant:

GEA Group Aktiengesellschaft
Dorstener Strasse 484
44809 Bochum
Germany

hereinafter referred to as "**GEA**" or the "**Claimant**."

2. GEA is a company incorporated under the laws of Germany, and is represented in this arbitration by Mr Barton Legum, Ms Brenda Horrigan, Ms Anne-Sophie Dufêtre, Mr Gauthier Vannieuwenhuyse, and Mr George Burn, of the law firm Salans.

3. Respondent:

Ukraine
c/o Ministry of Justice of Ukraine
13, Horodetskogo Street
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hereinafter referred to as "**Ukraine**" or the "**Respondent**."

4. Ukraine is represented in this arbitration by Mr Sebastian Seelmann-Eggebert, Mr Charles Claypoole, Mr Jan Erik Spangenberg, Mr Robert Volterra (until 28 February 2011), Mr Hussein Haeri and Ms Michelle Bradfield, of the law firm Latham & Watkins; and Mr Serhii Sviriba and Mr Dmytro Marchukov of the law firm Magisters.

5. The Claimant and the Respondent are hereinafter collectively referred to as the "**Parties**."

II. PROCEDURE

6. On 24 October 2008, GEA filed a Request for Arbitration (the "**Request**" or "**RfA**") against Ukraine with the Acting Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**"). The Request was filed pursuant to Article 13(2) of the Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments, dated 15 February 1993 (the "**BIT**") and pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the "**ICSID Convention**").

7. According to the Request, the dispute arose from the Claimant's alleged investment in Ukraine in the form of capital loans to a former state-owned entity, or *kombinat*, known as OJSC Oriana ("**Oriana**"). The Claimant alleges that Ukraine violated its rights under the BIT in connection with that investment.

8. On 21 November 2008, the Acting Secretary-General of ICSID registered the Request.

9. By letter of 11 December 2008, the Claimant invoked Article 11(2) of the BIT. That Article provides that the appointment mechanism for members of arbitral tribunals applicable in State-to-State disputes, set forth in Article 10(3) –10(5) of the BIT, shall be applied by analogy to investor-State disputes. Article 10(3) provides that each Party "shall appoint one member [of the tribunal] and these two members shall agree on a national of a third state to serve as the tribunal's chairman, who shall then be appointed [by the Parties]."

10. By letter of 5 January 2009, the Claimant informed the Centre that it was appointing Mr Toby Landau, QC, a national of the United Kingdom, as arbitrator in this case.

On 21 January 2009, the Centre sought Mr Landau's acceptance of his appointment after clarifying its understanding of the Parties' agreement on the method of constituting the Tribunal. On 17 February 2009, the Respondent advised ICSID that it was appointing Professor Brigitte Stern, a national of France, as arbitrator. On 19 March 2009, the Parties notified ICSID that they had agreed to appoint Professor Albert Jan van den Berg, a national of The Netherlands, as President of the Tribunal.

11. On 20 March 2009, the Acting Secretary-General of ICSID notified the Parties that the Tribunal was deemed to have been constituted, and the proceedings to have commenced, on that day. Further, the Tribunal and the Parties were informed that Ms Aïssatou Diop would serve as Secretary of the Tribunal.

12. On 12 May 2009, the Tribunal held its first session at the World Bank's offices in Paris. A procedural calendar was established for the conduct of the remainder of the proceedings. The Parties were unable to agree whether, in the event of the Respondent's raising preliminary objections, the proceedings should be bifurcated. The Respondent sought bifurcation in those circumstances. The Tribunal set two timetables, one to apply in the event that preliminary objections were raised, and the other to apply in the event that no such objections were raised. In the case of the former timetable, the Tribunal indicated that it would make the decision whether to bifurcate when such preliminary objections were received.

13. On 1 July 2009, the Claimant filed its Memorial, along with exhibits, legal authorities and the witness statements of Dr Manfred Döss, Dr Detlef B. Krüger, Dr Harald Rieger and Dr Klaus-Peter Kissler.

14. On 12 October 2009, the Respondent informed the Tribunal that the Parties had reached an agreement on the timetable to be followed in the remainder of the proceedings, and that the Parties had agreed that if the Respondent were to raise preliminary objections, such objections would be joined to the merits of the case.

The content of the letter was confirmed on the same date by the Claimant.

15. On 15 October 2009, the Secretary of the Tribunal informed the Parties that the Tribunal accepted the Parties' revised timetable.

16. On 11 January 2010, the Respondent filed its Counter-Memorial, along with exhibits and legal authorities.

17. Thereafter, the Parties made their respective requests for production of documents, and filed objections and replies thereto. On 19 February 2010, the Tribunal issued Procedural Order No. 1 containing its rulings on each Party's document production requests.

18. On 22 February 2010, the Respondent sent to the ICSID Secretariat copies of supplementary materials relating to certain of the exhibits to the Respondent's Counter-Memorial.

19. On 23 February 2010, the Claimant sought from the Tribunal clarification of Procedural Order No. 1. The Claimant queried the Tribunal's ruling on certain of the Respondent's document requests. In its objections to those requests, the Claimant had stated that it would produce the requested documents if the Respondent produced corresponding documents. The Claimant asked whether the Tribunal's granting of the Respondent's requests should be read as requiring the Respondent to produce the corresponding documents referred to by the Claimant.

20. On 24 February 2010, the Respondent wrote to the Tribunal stating its understanding that Procedural Order No. 1 was not ambiguous, and that the Tribunal's granting of certain of the Respondent's requests did not require production of "corresponding documents" referred to by the Claimant.

21. Also on 24 February 2010, the Tribunal issued Procedural Order No. 2, confirming that in granting certain of the Respondent's document requests, the Tribunal did not

intend to grant the Claimant's requests for "corresponding documents."

22. The same day, the Claimant sent to the ICSID Secretariat supplementary materials relating to certain of the exhibits to the Claimant's Memorial.

23. On 15 April 2010, the Claimant filed its Reply, along with exhibits.

24. On 15 June 2010, the Respondent filed its Rejoinder, along with legal authorities and exhibits, as well as the witness statement of Mr Oleksiy Golubov.

25. On 22 June 2010, the Parties provided notification of the witnesses to be examined at the hearing.

26. Also on 22 June 2010, a pre-hearing telephone conference was held to discuss certain final procedural and logistical issues in advance of the hearing.

27. The hearing was held from 5 to 9 July 2010 at the World Bank's offices in Paris.

28. On 29 October 2010, the Parties exchanged their respective Submissions on Costs.

29. On 15 November 2010, the Respondent provided its Comments on the Claimant's Submission on Costs.

30. On 25 November 2010, the Claimant provided its response to the Respondent's Comments on the Claimant's Submission on Costs.

31. *References.* In this Award, the Tribunal adopts the following method of citation:

- "**Request**" or "**RfA**" refer to GEA's 24 October 2008 Request for Arbitration;
- "**Memorial**" refers to GEA's 1 July 2009 Memorial;
- "**Counter-Memorial**" refers to Ukraine's 11 January 2010 Counter-Memorial;

- "**Reply**" refers to GEA's 15 April 2010 Reply;
- "**Rejoinder**" refers to Ukraine's 15 June 2010 Rejoinder;
- "**Tr.**" refers to the Transcript made of the 5 – 9 July 2010 hearing (e.g.: "Tr. 1/p. 1" means Day 1 at page 1);

III. FACTUAL BACKGROUND

32. The factual background to this dispute is divided into five parts, which the Tribunal will set out in the following order: (i) the companies involved; (ii) the initial business with Oriana; (iii) the later agreements made with Oriana; (iv) the ICC arbitration against Oriana; and (v) the attempts to collect on the ICC award against Oriana.

33. (i) *The Companies Involved.* GEA was founded in 1881 as Metallgesellschaft AG ("**Metallgesellschaft**"). In 2000, it changed its name to "MG Technologies AG"[1] and in 2005 it adopted its present name, GEA Group Aktiengesellschaft ("**GEA**").[2]

34. On 2 November 1995, Klöckner & Co Aktiengesellschaft ("**Old Klöckner**") spun off its chemical business to Klöckner Chemiehandel GmbH ("**KCH**").[3]

35. On 17 November 1995, a company called Klöckner & Co Handel – another member of the Klöckner Group – was transformed from a GmbH to an Aktiengesellschaft, or AG.[4]

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1 The Tribunal notes that the name of "MG Technologies AG" is officially all in lower case letters. However, for ease of reading, the Tribunal has decided to capitalise this name in this Award, as well as all other companies whose names are officially expressed in lower case letters.

2 C-0036.

3 C-0038; C-0155; R-0003; R-0004.

4 C-0152.

36. On 24 November 1995, Old Klöckner was merged into another company and thereby ceased to exist as a separate entity.[5] Old Klöckner was deleted from the commercial register in Germany as of that date.[6]

37. On 6 December 1995, Klöckner & Co Handel Aktiengesellschaft changed its name to Klöckner & Co Aktiengesellschaft ("**New Klöckner**").[7]

38. By agreement dated 5 December 1997, GEA's wholly-owned subsidiary, "MG Trade Services," acquired all the shares of KCH from SF Beteiligungs-GmbH. SF Beteiligungs-GmbH was, in turn, a wholly-owned subsidiary of New Klöckner.[8]

39. On 15 August 2000, "MG Trade Services AG" changed its name to "Solvadis AG."[9] KCH, in turn, was renamed "Solvadis International GmbH" ("**Solvadis International**") on 27 October 2000.[10] On 22 October 2003, Solvadis International merged into "Solvadis Chemag AG" and thereby ceased to exist as a separate legal entity.[11]

40. By agreement dated 28 June 2004, Solvadis Chemag AG (formerly KCH) assigned all of its rights deriving from its business with Oriana (more on Oriana below) as well as all rights in the underlying transactions to MG Technologies AG which, as mentioned in ¶ 33 above, became GEA in 2005.[12]

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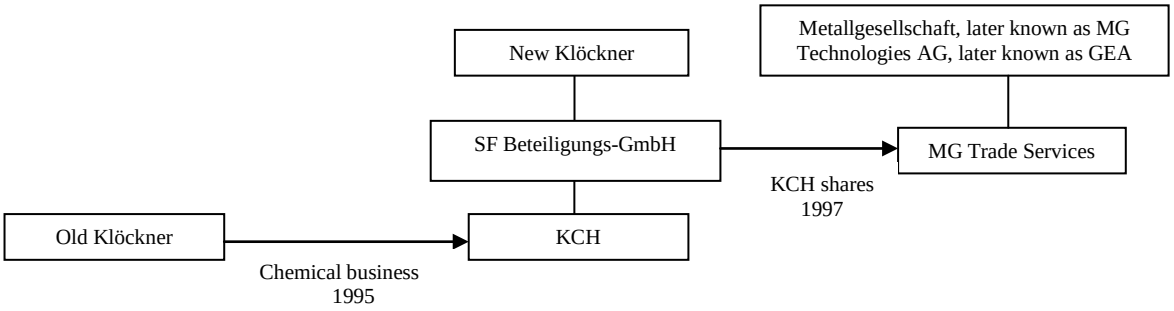
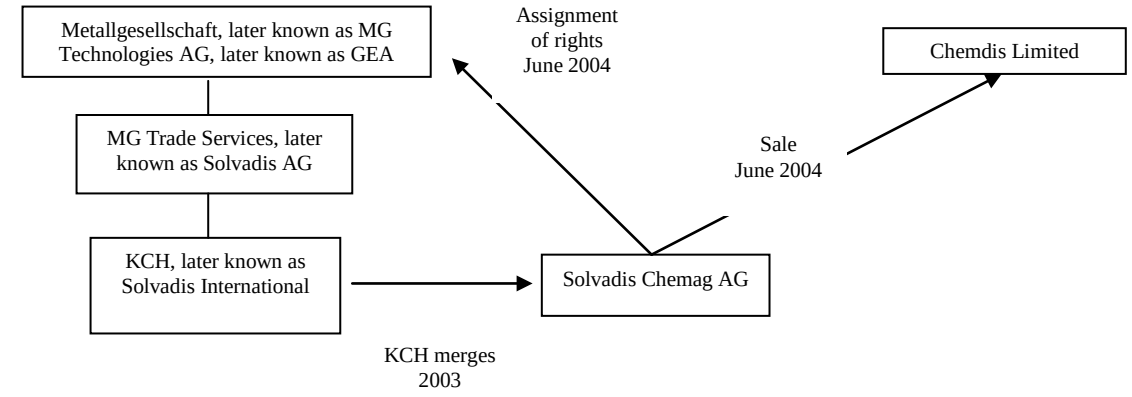
5 R-0003.
6 R-0003.
7 C-0152.
8 C-0152; C-0153.
9 R-0002.
10 C-0038; R-0004.
11 C-0035 R-0004.
12 C-0002.

41. At around the same time, the merged entity, Solvadis Chemag AG, was sold to Chemdis Limited.[13]

42. By way of summary, for the period 1995 – 1997, the corporate structures described above were as follows:



43. For the period 2000 – 2004, this diagram evolved as follows:



[13] C-0042; R-0025.

44. (ii) *The Initial Business with Oriana.* On 13 December 1995, New Klöckner and the Ukrainian *kombinat* Oriana entered into an agreement under which New Klöckner would provide Oriana each year with 200,000 tons of naphtha fuel for conversion (the "**Conversion Contract**").[14]

45. Over the course of 1996 – 1998, Oriana and KCH, as a subsidiary of New Klöckner, entered into 147 (out of a total of 154) amendments to the Conversion Contract.[15]

46. In December 1997, an individual responsible for periodically inspecting work at the Oriana plant, Dr Vsevolod Chperoun, was shot in the kneecap.[16]

47. According to the Claimant, in the months following the shooting, discrepancies were discovered between the quantity of raw materials shipped to Oriana and the quantity of finished products. An audit report in July 1998 identified that more than 125,000 metric tons of finished products were missing (the "**Products**").[17]

48. In the meantime, Oriana contracted with a German company, Linde AG, to build a polyethylene plant for approximately DM 250,000,000. The purchase price was largely financed by Bayerische Vereinsbank AG ("**BV**"), a German bank.

49. During July and August 1998, correspondence was exchanged, and discussions took place, between representatives of KCH/Klöckner, Oriana and the Ukrainian and German Governments concerning, among other things, the alleged misappropriation.[18]

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14 C-0006.

15 C-0156.

16 Memorial, ¶ 49; Rejoinder, ¶ 53.

17 R-0041.

18 *See, e.g.,* C-0011; C-0012; C-0013; C-0065; C-0078.

50. At around the same time, bankruptcy proceedings were initiated against Oriana by a Canadian-owned company, Shelton.[19] From October 1998 to July 1999, Shelton assumed management of Oriana.[20]

51. (iii) *The Later Agreements with Oriana.* Ultimately, on 7 August 1998, Oriana and KCH signed a settlement agreement, pursuant to which Oriana acknowledged, among other things, that it was indebted to KCH for the difference in value between the products that should have been delivered under the Conversion Contract, and the products actually delivered, or currently available to be delivered (the "**Settlement Agreement**"). The Settlement Agreement provided that KCH and Oriana would agree the value of the shortfall and that any disputes arising out of the Settlement Agreement would be referred to arbitration under the ICC Rules in Vienna, Austria.[21]

52. On 29 September 1998, Oriana and KCH negotiated and signed an agreement pursuant to which Oriana agreed to pay "at least USD 27.6 million" to KCH (the "**Repayment Agreement**").[22] The Repayment Agreement provided that the final amount to be paid by Oriana to KCH would be assessed by 30 September 1998. Of the approximately USD 27.6 million referred to as the minimum amount to be paid, USD 21 million related to "Undelivered Products."[23] The amounts owing were in principle to be paid as finished products, rather than cash, although payments in cash were "not excluded."[24]

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19 C-0077.

20 R-0019; C-0096.

21 C-0015.

22 C-0018.

23 *Id.*

24 *Id.*

53. Like the Settlement Agreement, the Repayment Agreement provided for dispute resolution by ICC arbitration in Vienna.[25]

54. The Repayment Agreement was signed by Drs Krüger and Schöber for KCH, and by Messrs Sljuzar, Gabel and Haber for Oriana. The authority of Messrs Sljuzar, Gabel and Haber to enter into the Repayment Agreement on behalf of Oriana is disputed by the Respondent, and whether the Repayment Agreement was validly executed by those persons is a matter of dispute between the Parties (discussed in ¶¶ 58 – 61 below).[26]

55. The Repayment Agreement provided for four pledge agreements over Oriana's assets to secure Oriana's indebtedness. According to the Claimant, three of those pledge agreements were concluded.[27] However, the fourth pledge agreement, relating to fixed assets, was never entered into. Its execution required the approval of the State Property Fund of Ukraine, which approval was not given.[28]

56. (iv) *The ICC Arbitration against Oriana.* Between late 1998 and mid-2001, further attempts were made to resolve the dispute between KCH and Oriana. Oriana was restructured and certain of its assets spun off into a joint venture with Lukoil Petroleum. There were also further developments in bankruptcy proceedings brought against Oriana by a certain Pryvatbank.

57. On 27 June 2001, KCH (by then renamed as Solvadis International) commenced an ICC arbitration against Oriana pursuant to the arbitration clause in the Repayment Agreement.

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25 *Id.*

26 Rejoinder, ¶¶ 79 – 84. In this Section, Respondent also disputes the validity of the execution of the Settlement Agreement, for the same reasons.

27 Memorial, ¶ 73.

28 C-0018.

58. Although it did not participate fully in the arbitration, Oriana challenged the tribunal's jurisdiction, alleging that the Repayment Agreement had not been validly executed. Oriana also disputed Solvadis International's case on the merits. The tribunal observed in its award of 25 November 2002 as follows:[29]

> The parties to this arbitration have submitted pleadings and numerous documents and an expert opinion in support of their respective arguments. Although Respondent did not participate in the proceedings as foreseen by the Rules, Respondent's arguments were brought forward in their undated letter to the Chairman (received on January 25, 2002), in a submission addressed to the ICC, dated April 30, 2002 and a letter to the Chairman dated September 25, 2002 and were duly considered in this arbitration. Respondent was granted all possibilities to present its case.

59. Oriana's challenge to jurisdiction was unsuccessful, and the tribunal declared that it had jurisdiction to hear the dispute.

60. The tribunal found as a fact that Mr Sljuzar was the President of Oriana as at the date of signing the Repayment Agreement based on the evidence of witnesses concerning the manner in which Mr Sljuzar was introduced to them, the fact that Oriana subsequently sealed documents signed by Mr Sljuzar without correcting the designation "President," and the fact that contracts signed by Mr Sljuzar as President were also signed by Messrs Gabel and Haber without objection being raised by the latter two.[30]

61. In light of this, the tribunal determined that "pursuant to Art. 8.4.5 of Respondent's statutes (Exhibits C 48, 48a) [Mr Sljuzar] therefore was empowered to represent the company, without needing special authorisation by the supervisory board, the shareholders assembly or any other body."[31] Further, the tribunal stated that "[t]he

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29 C-0028.

30 *Id.*

31 *Id.*

president also has the power to authorise a vice president (Mr Haber, Mr Gabel) to represent the company in negotiations or to conclude contracts."[32]

62. The tribunal's award of 25 November 2002 was largely in favour of Solvadis International. The tribunal awarded Solvadis International USD 30,381,661.44 as primary compensation, plus 3% interest per annum from 28 December 2000, USD 273,000 in arbitration costs and EUR 141,689.38 in legal fees and expenses.

63. (v) *The Attempts to Collect on the Award against Oriana.* On 11 March 2003, Solvadis International (formerly KCH) requested recognition and enforcement of the ICC Award before the Appellate Court of the Ivano-Frankivsk Region.[33]

64. On 23 April 2003, Oriana submitted objections to Solvadis International's request for recognition and enforcement[34], to which Solvadis International replied.[35]

65. On 28 May 2003, the Appellate Court rejected Solvadis International's request for recognition and enforcement.[36] The Appellate Court found the Repayment Agreement was invalid as it had been concluded by unauthorised persons. The Appellate Court stated in its reasoning as follows:

> Considering the case, the court ascertained that the [Repayment Agreement] was concluded and signed in contradiction to the Ukrainian effective legislation by the representatives of OJSC "Oriana" without duly authorized powers. The court came to such conclusion basing on the following grounds.

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32 *Id.*

33 C-0115.

34 C-0118.

35 C-0119.

36 C-0120.

Article 6 of the Law of Ukraine "On Foreign Economic Activity" provides for: on behalf of legal entities - subjects of foreign economic activities, a foreign economic agreement (contract) shall be signed by two persons: a person who has this right according to his position under the statutory documents and a person having a power of attorney, signed by a head of foreign economic entity.

The Charter of the OJSC "Oriana" establishes that only [the] Chairman of the Board (president) has the right without the power of attorney to carry out actions on behalf of Company. The Charter does not provide the other members of the Board with the right to represent the company.

It is found out that the Agreement for Repayment of Debts dated 29.09.1998 was signed on behalf of OJSC "Oriana" by three representatives: Mr Sljusar, Mr Haber and Mr Gabel. It is also set out that Mr Sljusar held the post of Chairman of Board of OJSC "Oriana."

According to the Order of State Property Fund of Ukraine No.2073 dated November 3, 1998 this post was held by Mr Chernik and not by Mr Sljusar.

Besides, the two other person[s] - Mr Haber and Mr Gabel were not duly authorized for the conclusion of the mentioned agreement.

Taking into account the above-mentioned circumstances the Court of Appeal considers the Agreement for Repayment of Debts dated 29.09.1998 to be invalid pursuant to the article 48 of the Civil Code of Ukraine, since it was concluded by unauthorized persons in contradiction to the procedure, established by the Law of Ukraine "On Foreign Economic Activity" and by the foundation documents of the OJSC "Oriana."

Thus the case had to be the subject to final regulation at the International Commercial Arbitration Court at Ukrainian Chamber of Commerce and Industry in Kiev, Ukraine, but not at the International Court of Arbitration

> of the International Chamber of Commerce in Vienna, as it was provided by the original Conversion Agreement dated 13.12.1995.[37]

66. On 25 June 2003, Solvadis International filed a cassation complaint with the Supreme Court of Ukraine.[38]

67. On 15 April 2004, the Supreme Court of Ukraine rejected the cassation complaint.[39]

68. While the enforcement proceedings were underway, Solvadis International also attempted to claim under the ICC award in bankruptcy proceedings brought by Pryvatbank against Oriana in 2002. On 4 February 2003, Solvadis International filed a claim in the bankruptcy based on the ICC Award. That claim provided, in part, as follows:[40]

> Creditor's claims of the company "Solvadis International GmbH" are confirmed (attested) by the Arbitral Award of the International Court of Arbitration of the International Chamber of Commerce, rendered in Vienna, Austria in case No 11645/DK on November 25, 2002 (hereinafter referred to as the "Arbitral Award") in accordance with arbitration clause, agreed by the parties (duly legalized copy of the Arbitral Award with notary certified translation into Ukrainian is contained in Annex No 3 thereto). According to the Arbitral Award the Debtor - open joint stock company "Oraina" [sic] shall pay to "Solvadis International GmbH":
>
> . . .
>
> According to the Arbitral Award the creditor's claims against open joint stock company "Oriana" are based on the Conversion Contract No 804-276-05473160/79-299 as of December 13, 1995, numerous annexes thereto, Settlement Agreement as of August 7, 1998, Agreement for

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37 *Id.*

38 C-0121.

39 C-0125.

40 C-0126.

> Repayment of Debts as of September 29, 1998, as well as other documents submitted upon the International Court of Arbitration.
>
> The above-mentioned Arbitral Award clearly confirms the indebtedness of open joint stock company "Oriana" before the company "Solvadis International GmbH." The facts, established therein do not require further examining and proving under Article 35 of the Commercial Procedural Code of Ukraine. Pursuant to Article 35 of the said Code: "The facts, established by judgement of commercial court (other authority competent to resolve disputes) in one litigation, are not subject to proving in another litigation involving the same parties."

69. On 25 November 2003, the Commercial Court of the Ivano-Frankivsk Region dismissed Solvadis International's claim on the basis that the Ivano-Frankivsk Appellate Court had refused enforcement of the ICC Award on 28 May 2003.[41]

70. On 6 February 2004, Solvadis International appealed the decision of the Commercial Court of Ivano-Frankivsk to the Appellate Commercial Court of Lviv, arguing, among other things, that the judgment of the Appellate Court dated 28 May 2003 refusing recognition and enforcement of the ICC Award was not final, and that the Commercial Court's finding to the contrary was itself contrary to law.[42]

71. On 15 March 2004, the Appellate Commercial Court of Lviv affirmed the judgment of the Commercial Court of Ivano-Frankivsk.[43]

72. On 14 April 2004, Solvadis International filed a cassation complaint with the Highest Commercial Court of Ukraine.[44]

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41 C-0130.

42 C-0131.

43 C-0132.

44 C-0133.

73. On 25 August 2004, the Highest Commercial Court of Ukraine allowed the cassation complaint, cancelling the judgments of the Appellate Commercial Court of Lviv and the Commercial Court of Ivano-Frankivsk.[45]

74. On 30 September 2004, Oriana filed a cassation complaint against the judgment of the Highest Commercial Court of Ukraine with the Supreme Court of Ukraine.[46] It appears that, on 11 November 2004, the Supreme Court of Ukraine rejected this complaint.[47]

75. On 17 March 2005, Solvadis Chemag AG (by then named Solvadis GmbH), as claimed successor to Solvadis International, filed a "Creditor's Explanation of monetary claims in the bankruptcy case No. B-11/283" (the Oriana bankruptcy) with the Commercial Court of Ivano-Frankivsk.[48]

76. Oriana filed objections to what it described as Solvadis International's claims.[49]

77. On 15 April 2005, the Commercial Court of Ivano-Frankivsk issued its judgment on Solvadis Chemag AG's claim, having accepted the application to allow Solvadis Chemag AG to substitute for Solvadis International as creditor. The Commercial Court noted that it had heard Solvadis Chemag AG's claim as a result of the 25 August 2004 judgment of the Highest Commercial Court of Ukraine remanding the matter to it.[50]

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45 C-0134.
46 C-0135.
47 C-0136.
48 C-0137.
49 C-0138.
50 C-0140.

78. The Commercial Court of Ivano-Frankivsk rejected Solvadis' repayment claim on the basis that it had been filed outside the statutory limitation period, and the ICC Award did not toll that period "since that decision was not properly legalized in Ukraine, and it therefore has no entitling legal force."[51]

79. On 25 April 2005, Solvadis Chemag AG appealed the decision of the Commercial Court of Ivano-Frankivsk to the Lviv Appellate Commercial Court. In its appeal, Solvadis Chemag AG stated that the running of the limitation period against it had been suspended by the filing of arbitration proceedings on 27 June 2001, and that the court had wrongly held that this was not the case.[52]

80. Solvadis Chemag AG also suggested that the ruling of the Commercial Court of Ivano-Frankivsk had been based in part on that court's view that it had not filed its claim in time *vis-à-vis* the publication date of the bankruptcy announcement – that is, within 30 days. Solvadis Chemag AG's position was that as its original claim had been filed on 4 February 2003, it was filed in time.[53]

81. On 22 June 2005, the Lviv Appellate Commercial Court agreed with the reasoning of the Commercial Court of Ivano-Frankivsk, and rejected Solvadis Chemag AG's appeal.[54]

82. The Lviv Appellate Commercial Court further noted that Solvadis Chemag AG had not filed in support of its original claim "primary documents that would prove the existence of the debt . . . except the base refining agreement and addenda thereto."[55]

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51 *Id*.
52 C-0141.
53 *Id*.
54 C-0143.
55 *Id.*

83. On 15 July 2005, Solvadis Chemag AG applied for cassation of the Lviv Appellate Commercial Court judgment and the Commercial Court of Ivano-Frankivsk judgment to the Superior Commercial Court of Ukraine. Solvadis Chemag AG challenged as contrary to law the findings that the limitation period had expired prior to the filing of its claim against Oriana and that it had not filed primary documents proving the existence of the debt owed.[56]

84. On 30 November 2005, the Superior Commercial Court of Ukraine dismissed Solvadis Chemag AG's cassation complaint, and Solvadis International's final appeal in the bankruptcy proceedings was rejected by the Superior Commercial Court of Ukraine on 30 November 2005.[57]

85. The foregoing has led GEA to file the present arbitration. An overview of GEA's position, and Ukraine's response thereto, is set out in the following section.

IV. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT

A. GEA's Position

86. The Claimant's position is that the Respondent failed to honour its "repeated promises" to ensure that GEA would be paid for its Products, and has taken "multiple steps" in intervening years to ensure that no compensation would be paid.[58]

87. In ¶ 361 of its Reply, GEA asks the Tribunal to make the following award in its favour:

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56 C-0144.

57 C-0145.

58 Memorial, ¶ 6.

(i) Declaring that Ukraine has breached its obligations under the Treaty owed to GEA and its investments;

(ii) Ordering Ukraine to pay damages to GEA in the principal amounts of USD 30,654,661.44 and EUR 141,689.38;

(iii) Ordering Ukraine to pay interest on that amount at the LIBOR three-month US Dollar rate plus 5 percent (or at such other rate as the Tribunal deems to be appropriate) from January 1, 1999, compounded monthly until the date of the award;

(iv) Ordering Ukraine to pay the costs of this arbitration, including all fees and expenses of the Tribunal and the legal costs incurred by GEA in this arbitration;

(v) Ordering Ukraine to pay interest at that same interest rate, compounded monthly, on all amounts awarded until the full payment thereof; and

(vi) Ordering such other and further relief as this Tribunal deems just and proper.

B. Ukraine's Position

88. The Respondent denies the Claimant's claims in their entirety.

89. In ¶ 447 of its Rejoinder, the Respondent asks the Tribunal to:

(i) dismiss all of the Claimant's claims as inadmissible for lack of jurisdiction;

in the alternative,

dismiss all of the Claimant's claims as unfounded;

in the alternative,

reject the Claimant's claim for damages.

> (ii) order the Claimant to bear the costs of this arbitration, including all fees and expenses of the Tribunal as well as the Respondent's reasonable costs (including but not limited too [sic] its reasonable legal fees and expenses), payable forthwith.

V. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS

90. The Tribunal has carefully reviewed the pleadings, evidence and legal authorities submitted by the Parties and has relied exclusively on those in the analysis below. This applies in particular to legal authorities, as the Tribunal adheres to the principle that it should remain within the confines of the debate between the Parties. Thus, this Award is a decision in the dispute as pleaded between the Parties, and the Tribunal will not address arguments that have not been raised by them.

VI. JURISDICTION

A. The Parties' Positions

91. Ukraine argues that this Tribunal lacks jurisdiction to hear the case brought by the Claimant because (i) the alleged investment vested not in KCH but in Klöckner,[59] which the Claimant never acquired, (ii) the Claimant did not make an "investment" in Ukraine under the BIT or the ICSID Convention and, in any event, (iii) any alleged

[59] The Tribunal notes that for much of the proceedings, it was not clear that there were two Klöckner entities with the same name. It was ultimately clarified that, despite their identical names, there was a difference between Old Klöckner and New Klöckner (*see* ¶¶ 33 – 37 *supra*). However, as this difference was only clarified at the hearing, the Parties' submissions just refer to "Klöckner," without differentiating between "Old" and "New." Accordingly, when setting forth the Parties' positions, the Tribunal maintains the reference to "Klöckner." The Tribunal will differentiate between "Old" and "New" in its discussion, as necessary.

BIT violations occurred before the alleged investment was made, and (iv) any claims against Ukraine for breach of the BIT now belong to Chemdis and not the Claimant.[60]

92. GEA disagrees and submits that it did indeed acquire rights to the investment under the Conversion Contract (i) by virtue of its indirect control of KCH at the time of the BIT violations and (ii) as successor-in-interest to KCH.[61] GEA also submits that it made an investment in Ukraine "under any applicable test," whether under the ICSID Convention or the BIT[62], and that the dispute "meets the temporal requirements of the ICSID Convention and the Treaty."[63]

B. The Tribunal's Analysis

93. In light of the Parties' positions set forth above, the Tribunal must determine (1) whether GEA has standing to bring claims in this arbitration, (2) whether GEA made an "investment" in Ukraine, and (3) whether the alleged BIT violations occurred before GEA made any investment in Ukraine, which issues the Tribunal will now address in that order.

(1) Does GEA Have Standing?

94. Ukraine objects to GEA's standing in this arbitration on two grounds, namely that (i) the Conversion Contract, as the core of the alleged investment, vested not in KCH but in Klöckner, and (ii) any claims against Ukraine now belong to Chemdis Limited and not the Claimant.

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60 Counter-Memorial, ¶ 113.

61 Reply, ¶ 31.

62 Reply, ¶ 42.

63 Reply, ¶ 83.

95. (i) *Vesting of the Conversion Contract.* The Tribunal first addresses whether the Conversion Contract, as the core of the alleged investment, vested not in KCH but in Klöckner.

96. Ukraine alleges that extracts from the commercial register reveal that the spin-off of Klöckner's chemical business to KCH occurred on 29 May 1995, prior to Klöckner's entry into the Conversion Contract, and thus that the spin-off cannot have included any rights pertaining to the Conversion Contract.[64] Further, Ukraine states that there is no evidence that KCH replaced Klöckner as a party to the Conversion Contract at any time such as to validly acquire rights thereunder.[65]

97. GEA rejects the allegation that KCH acquired no such rights at the time Klöckner spun off its chemical assets to KCH in 1995.[66] GEA argues that Ukraine's argument is "contrary to the conduct and understanding of all of the actors involved at the time, as reflected in contemporaneous documents."[67] Specifically, GEA points to almost 150 amendments to the Conversion Contract executed between KCH and Oriana, and contends that "KCH *itself* was a party to these additional agreements and amendments, which were all valid and binding on the parties" (emphasis in the original).[68]

98. In addition, GEA argues that KCH was identified as Klöckner's successor to the Conversion Contract in the Settlement Agreement and in the protocol signed after a

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64 Counter-Memorial, ¶¶ 27 – 28; Rejoinder, ¶ 121.

65 Rejoinder, ¶ 125.

66 Reply, ¶ 30.

67 Reply, ¶ 30.

68 Reply, ¶ 32.

meeting on 13 August 1998[69], and that Ukrainian officials at various times acknowledged KCH's rights deriving from the Conversion Contract.[70]

99. For the reasons that follow, the Tribunal agrees with the Claimant that the alleged investment – the Conversion Contract – vested in KCH.

100. The Tribunal notes that it was clarified over the course of the hearing that it was Old Klöckner that spun off its chemical business to KCH before merging into another company (Bayernwerk Aktiengesellschaft), whereas it was New Klöckner that entered into the Conversion Contract with Oriana.[71]

101. While it is true that there is no one particular document in the record that states outright that KCH acquired rights from New Klöckner under the Conversion Contract, the evidence adduced over the course of the proceedings, taken together, leads to the conclusion that it did indeed acquire such rights.

102. First, in Article 3.3 of the Settlement Agreement, Oriana expressly acknowledged that KCH was a party to the Conversion Contract, and that Oriana was indebted to KCH thereunder:

> Oriana hereby reconfirms and agrees that KCH is a party to the Conversion Contract as successor to Kloeckner & Co. Aktiengesellschaft . . . with which Oriana initially concluded the Conversion Contract. Oriana hereby agrees that KCH acquired all of the rights and benefits, and assumed all of the obligations and liabilities, which were initially provided in the Conversion Contract for [Kloeckner & Co. Aktiengesellschaft].[72]

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69 Reply, ¶¶ 33 – 34.

70 Reply, ¶ 36.

71 Chronology and Companies Involved (part 1), distributed at the hearing.

72 C-0015.

103. Second, on 13 August 1998, representatives of, among others, Ukraine, Oriana and KCH's parent company met to discuss the "state of cooperation" between Oriana and KCH in light of Oriana's "indebtedness to KCH." The results of that meeting were recorded in a protocol of the same date, in which it was recorded that Oriana's indebtedness to KCH arose "under the above specified Contract for the Conversion of Raw Materials," *i.e.*, the Conversion Contract.[73]

104. Third, on 27 August 1998, representatives of, among others, Ukraine, Germany, Oriana and KCH's parent company met to discuss the relationship between Oriana and KCH (*see generally* ¶ 49 above). This meeting was recorded in a protocol of the same date, in which KCH's rights under the Conversion Contract were acknowledged. For example, Dr Rieger noted "the problem of missing raw materials and products and the insoluble connection between the KCH/Oriana agreement and the ability of Oriana to repay the BV loan," and Vice Minister President Tyhypko noted that "although KCH could break away from Oriana, it would have to write off the DM 40 million from the missing raw materials and products."[74]

105. Finally, it is undisputed that KCH entered into 147 out of a total of 154 amendments to the Conversion Contract.[75] Article 11.4 of the Conversion Contract provides that "[a]ny amendments or additions" to the Conversion Contract "become valid and binding if they are in writing and signed by authorised persons." The Tribunal has not been made aware of any particular objections to the validity or binding nature of these subsequent agreements, and the Tribunal considers it reasonable to conclude from KCH's consistent involvement in executing those agreements, without objection, that it had an interest in the underlying contract.

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73 C-0016.

74 C-0065.

75 C-0156; Chronology and Companies Involved (part 1).

106. In light of the foregoing, the Tribunal concludes that the rights in the Conversion Contract did indeed vest in KCH. Accordingly, Ukraine's contentions to the contrary are rejected.

107. (ii) *Vesting of the Claims.* With respect to Ukraine's second objection, *i.e.*, that any claims against Ukraine now belong to Chemdis Limited and not the Claimant, Ukraine alleges that any rights the Claimant may have had in relation to an investment were transferred in 2004, when the Claimant sold KCH and its parent company to Chemdis Limited, a private equity fund. Ukraine argues that, due to this sale, any claims that KCH may have had either "continued to vest in KCH or tagged along with it to Chemdis."[76]

108. GEA disagrees and argues that it retained the KCH rights that are in dispute in this arbitration. In support of this contention, GEA relies on Article 2.2 of the "Sale and Purchase Agreement" between Solvadis Chemag AG (formerly KCH) and MG Technologies AG (later renamed GEA) of 28 June 2004 under which, GEA argues, KCH assigned its rights to GEA against Oriana and other entities, including Ukraine, deriving from the Conversion Contract and all related transactions.[77]

109. Ukraine asserts that GEA's argument that it retained KCH's claims against Oriana is inconsistent with the fact that KCH continued to prosecute those claims before the courts of Ukraine after the apparent date of sale.[78] While GEA argues that it was not possible to change the identity of the creditor in bankruptcy to reflect that situation[79],

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[76] Counter-Memorial, ¶¶ 159 – 164.

[77] Reply, ¶¶ 84 – 94.

[78] Counter-Memorial, ¶ 161.

[79] Reply, ¶ 91.

Ukraine states that "KCH did in fact successfully apply for a change of creditors in the third Oriana bankruptcy proceedings, after Chemdis had acquired its shares."[80]

110. The Tribunal notes that Article 2.2 of the Sale and Purchase Agreement provides as follows:

> [KCH] assigns and transfers to [GEA] and [GEA] accepts the assignment and transfer of all rights, title and interest held by [KCH] in and to all claims of [KCH] against Oriana deriving from [KCH's] business relations to Oriana as described in more detail in Section 1 as well as all rights, title and interest in and to the belonging underlying transactions, including all rights thereunder.[81]

111. It would seem from the language of the Sale and Purchase Agreement that Solvadis Chemag AG (*i.e.*, KCH) may have assigned, among other things, its claims against Oriana to MG Technologies AG (*i.e.*, GEA). At around the same time, it would seem that Solvadis Chemag AG (*i.e.*, KCH) was sold to Chemdis Limited (*see* ¶ 41 above).[82]

112. The Claimant's most recent position with respect to the timing of these transactions is that while the Sale and Purchase Agreement between KCH and GEA was concluded on 28 June 2004, the actual assignment took place after 30 June 2004, the date on which the agreement was signed for the sale of KCH shares to Chemdis. However, the Claimant submits that the assignment took place before the closing date of the KCH/Chemdis sale, as the "Effective Date" under German law.[83]

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80 Rejoinder, ¶ 134.

81 C-0002.

82 *See* Chronology and Companies Involved (part 2).

83 Claimant's Closing, Tr.4/p. 30:

"Ms DUFÊTRE: So the assignment of rights between KCH and GEA was an intra-group transfer and it was dated June 28th 2004, and it took place after the signature of the share purchase agreement for (footnote cont'd)

113. The Respondent disputes the fact that the shares in KCH were disposed of after the assignment to GEA on the basis that the Claimant has not provided a copy of the share purchase agreement between Solvadis Chemag AG and Chemdis Limited, or any other documents, to support this assertion.[84]

114. The Tribunal considers that the Respondent's objection regarding the missing copy of the share purchase agreement between Solvadis Chemag AG and Chemdis Limited is misplaced. In the early stages of these proceedings, the Tribunal had rejected a request from the Respondent for the production of this document on the basis that no such document was available.[85]

115. This being said, the Tribunal is of the view that the other documents in the record do not support the Claimant's position regarding the timing of the sale versus the assignment.

116. Indeed, the only other document submitted by the Claimant in support of the timing of the sale versus the assignment is a print-out from the website of the Solvadis Group, which does not indicate the date of any purported sale or closing of the Solvadis Chemag AG/Chemdis Limited deal. It simply states that, at some point in 2004, "[t]he [S]olvadis group is taken over by Chemdis Limited" at which time its form was changed to Solvadis GmbH.[86]

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the sale of KCH shares, but before the closing date. As I was told by my German clients, the closing date is the effective date under German law."

84 *See, e.g.*, Respondent's Closing, Tr. 5/pp. 61-64.

85 *See* Procedural Order No. 1, Annex B, request 17.

86 C-0042.

117. In light of this, the Tribunal is of the view that the Claimant has not met its burden of proving that it retained KCH's claims arising under the Conversion Contract, or any other interest in the alleged investment underlying this dispute, after 30 June 2004. For the Tribunal to determine otherwise would be to take a decision based on assertions unsupported by evidence.

118. Accordingly, the Tribunal concludes that the Claimant does not have standing to bring any claims arising from the Conversion Contract after 30 June 2004.

119. In light of the Tribunal's decision that the Sale and Purchase Agreement cannot be taken into account as a basis for the Claimant's claims after this date, the Tribunal need not address the questions raised by the Respondent regarding the assignment's validity.[87]

120. In addition, the Tribunal need not address the Respondent's argument that, as a matter of principle, KCH could not have assigned its treaty rights under the Sale and Purchase Agreement to GEA.[88] While at the hearing there was an extensive discussion as to whether, as a matter of general theory, treaty rights can ever be assigned, the Tribunal notes that this broader question is ultimately irrelevant in this case, as Article 1 of the Sale and Purchase Agreement ("Description of Sold Claims") only provided for an assignment of <u>contractual</u> claims, as opposed to an assignment of treaty rights. Having carefully considered the various arguments of construction and interpretation advanced by the Claimant, the Tribunal concludes that this

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[87] The Respondent had disputed the validity of the assignment under German law (by which it is governed) on the basis that the €1 paid by GEA for the assignment of KCH's claims was below value, in violation of Sections 76(1) and 93(1) of the German Stock Corporations Act and Section 266(1) of the German Criminal Code, thereby rendering the entire agreement void under Section 134 of the German Civil Code. Rejoinder, ¶ 133.

[88] The Respondent had disputed the Claimant's ability to be assigned KCH's treaty rights under the Sale and Purchase Agreement. *See, e.g.*, Respondent's Closing, Tr.5/pp. 25 – 58.

provision does not extend to rights or obligations under international law, and nor was this intended at the time.

121. However, the Tribunal does need to address the Respondent's argument that GEA did not have the right to bring this arbitration because it no longer had control of KCH when the Request was registered.

122. The Respondent relies on the case of *Československa Obchodní Banka, a.s. v. Slovak Republic* ("***CSOB***") in support of its position, citing the following passage of the tribunal's decision on jurisdiction:[89]

> [I]t is generally recognised that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.

123. In response, the Claimant contends that the Respondent "misses the point," taking into account that Article 25(1) of the ICSID Convention does not require that an investment "exists or is controlled by the national of another contracting state at the time of registration."[90]

124. The Tribunal agrees with the Claimant. The Respondent, in effect has attempted to create a standing requirement (*i.e.*, a requirement of ownership or control of the investment at the time of registration of the Request) that does not otherwise exist under the BIT, ICSID Convention or ICSID Rules. Indeed, such a requirement, if it existed, would exclude a significant range of cases where claims are made in respect of the divestment or expropriation of an investment. What is more, the Respondent

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[89] ICSID Case No. ARB/97/4, Decision on the Objections to Jurisdiction, 24 May 1999. Respondent's Opening, Tr.1/pp. 64 – 65, citing *CSOB* at ¶ 31.

[90] Claimant's Closing, Tr.4/pp. 40 – 41.

quotes the *CSOB* tribunal out of context, as the next paragraph of the award in fact supports the Claimant's position in these proceedings:[91]

> [A]bsence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding.

125. In light of the foregoing, the Tribunal concludes that even though GEA does not have standing with respect to claims arising after 30 June 2004, GEA did have the right to file the Request when it did.

(2) Did GEA Make an Investment?

126. Having determined that GEA has standing to pursue claims accruing up to 30 June 2004, the Tribunal must next determine whether GEA actually "invested" in Ukraine at all, within the meaning and scope of the BIT and the ICSID Convention.

127. *The Parties' Positions.* According to the Claimant, "[t]he current dispute concerns an "investment" both within the meaning of the [BIT] and the ICSID Convention,"[92] but the Tribunal need only look to the language of the BIT to determine this issue, and need not consider any different definition in the context of Article 25 of the ICSID Convention. The Claimant submits that this is because where a BIT providing only for ICSID arbitration gives a definition of "investment," "there is no occasion for an arbitral tribunal to apply a different definition of the term."[93]

128. In support of this, the Claimant notes that since ICSID arbitration is the only form of investor-State dispute resolution provided for in the BIT, "if jurisdiction were found absent under the ICSID Convention while the relationship at issue would otherwise

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91 *CSOB* at ¶ 32.

92 Memorial, ¶ 131.

93 Memorial, ¶ 144.

qualify as an investment under the [BIT], the [BIT]'s dispute resolution clause would be deprived of any effectiveness, which is contrary to basic principles of treaty interpretation."[94]

129. The Claimant adds, in any event however, that "the evidence establishes the existence of an 'investment' within the meaning of Article 25 of the ICSID Convention."[95] It notes that "[t]he jurisprudence to date reveals a wide variety of approaches to what constitutes an investment under the ICSID Convention,"[96] but asserts that whatever test is applied, it qualifies on the facts of this case:

> Taking the six-part test in *Phoenix Action*[97] as the most comprehensive: *first*, GEA contributed assets of economic value to the territory of Ukraine. These took the form of over one million metric tons of diesel and naphtha delivered to Ukraine over a three-year period, as well as catalysts and other materials, and its know-how on logistics and marketing and its ability to mobilize repair and other services. *Second*, GEA was exposed to market risk due to the duration of time between when it purchased diesel for delivery to Oriana and the time when it was able to realize a return by selling finished products converted by Oriana. The arrangement amounted to some DM 100 million of working capital financing for Oriana precisely because of this commitment of resources over time.. A certain duration is evident. *Third*, multiple elements of risk were present in the form of market risk, credit risk and political risk – as demonstrated by the fact that no other companies were willing to supply Oriana with diesel without advance payment. *Fourth*, GEA's relationship with Oriana kept Oriana's factories running at a time when they would otherwise have closed and thereby supported the only substantial economic activity in the Ivano-Frankivsk region at the time. The sustained attention at the highest levels of the Ukrainian and German Governments to the GEA-Oriana relationship is compelling evidence of its importance to the development of economic activity in Ukraine. *Fifth*, there is no question that GEA's assets were invested in accordance with

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94 Reply, ¶ 56.

95 Memorial, ¶ 138.

96 Memorial, ¶ 139.

97 *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

> Ukrainian law. *Sixth,* there is no question as to the *bona fides* of GEA's investment.[98]

130. The Respondent, on the contrary, considers that "[t]he 'investment' which the Claimant invokes is not an investment for the purposes of Article 1(1) of the Treaty and Article 25 of the ICSID Convention . . . Common to the jurisdictional requirements of both Article 25(1) of the ICSID Convention and Article 1(1) of the Treaty is the meaning of the term 'investment.'"[99]

131. As far as Article 1(1) of the BIT is concerned, the Respondent maintains that the Conversion Contract was no more than a sales agreement, which did not confer on GEA any "rights to the exercise of an economic activity."

132. Moreover, the Respondent also argues that the definition of "investment" in the BIT does not control the issue in any event, since this can only operate within the confines of Article 25 of the ICSID Convention: "[t]he definition of the term 'investment' contained in the Treaty cannot extend beyond the requirements of the ICSID Convention if the Tribunal is to retain jurisdiction. The definition of 'investment' in the Treaty does not provide parties and the Tribunal a *carte blanche* to re-write the ICSID Convention."[100] The Respondent relies in this regard on the decision in *Phoenix*:

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98 Memorial, ¶ 145. Citations omitted.

99 Counter-Memorial, ¶ 122 and ¶ 124.

100 Counter-Memorial, ¶ 131.

> There is nothing like a total discretion, even if the definition developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment.[101]

133. According to the Respondent, the term "investment" has "an identifiable inherent core meaning" in ICSID matters, and the Tribunal is required to ensure that any definition of the term "investment" provided by the BIT accords with this objective meaning.[102] It cites several decisions in which this concept of an objective definition has been articulated.

134. The Respondent also prays in aid Zachary Douglas' textbook, in which the author states that "the use of the term 'investment' in both instruments [investment treaties and the ICSID Convention] imports the same basic economic attributes of an investment derived from the ordinary meaning of that term."[103]

135. Whereas the Claimant argues that the imposition of an objective definition of "investment" in circumstances where a BIT only provides for ICSID arbitration risks frustrating the BIT's dispute resolution clause, the Respondent counters that if a BIT provides a choice between several forms of dispute resolution (e.g., ICSID and UNCITRAL arbitration), it would be a curious result if, by virtue of a "subjective" definition agreed in the BIT itself, an "investment" could be established under the UNCITRAL Rules, but not under the ICSID Convention.

136. In conclusion, the Respondent argues that "the Claimant has not made an investment since (a) no contribution of economic value has been made to Ukraine, (b) no profits or returns have resulted from such a contribution and (c) the Claimant assumed no

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101 N. 97 *supra*, ¶ 82.

102 Counter-Memorial, ¶ 134.

103 Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press, 2009), p. 165.

investment risk. These principles underpin the definition of the term "investment" under both Article 25(1) of the ICSID Convention and Article 1(1) of the [BIT]."[104]

137. *The Tribunal's Analysis.* It is well known that the ICSID Convention contains no definition of the term "investment" used in its Article 25.

138. Article 1 of the BIT defines "investment" as follows:

> For purposes of this agreement
>
> 1) the term "investments" means assets of any kind, in particular
>
> a) movable and immovable property and other rights in rem such as mortgages and security interests;
>
> b) equity interests and other stakes in companies;
>
> c) claims to funds used to create material or immaterial values and claims to performances having such value;
>
> d) intellectual property rights such as, in particular, copyrights, patents, utility models, industrial designs and models, trademarks, trade names, company and business secrets, technological processes, know-how and goodwill;
>
> e) rights to the exercise of an economic activity including rights to the search for and the exploration, extraction and utilisation of natural resources on the basis of statutory provisions or granted under an agreement concluded in accordance with such statutory provisions.
>
> Any change to the form in which assets are invested shall not affect their nature as investments.

[104] Counter-Memorial, ¶ 146.

139. In a number of well-known cases, tribunals have articulated objective criteria for the definition of the term "investment" that are said to flow from the ICSID Convention, and have concluded that such criteria cannot be set aside by a consent that may have been given in another legal instrument, such as a BIT. A good example of such an approach is the one taken by the *ad hoc* Committee in the *Patrick Mitchell v. Congo* annulment proceeding, which expressed the limits of the notion of investment in clear terms:

> The parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.[105]

140. The same position has been followed in *Phoenix*:

> At the outset, it should be noted that BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement. As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition. For example, if a BIT would provide that ICSID arbitration is available for sales contracts which do not imply any investment, such a provision could not be enforced by an ICSID tribunal.[106]

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[105] *Patrick* Mitchell *v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 31.

[106] N. 97 *supra*, ¶ 96. Citation omitted. See also ¶ 82.

141. However, it is not so much the term "investment" in the ICSID Convention than the term "investment" *per se* that is often considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT. For example, the tribunal in *Romak S.A. v. Uzbekistan*, conducting its proceedings on the basis of the UNCITRAL Arbitration Rules, observed as follows:

> The term "investment" has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT.
>
> . . . . The Arbitral Tribunal therefore considers that the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk . . . . By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment." In the general formulation of the tribunal in *Azinian*, "*labelling ... is no substitute for analysis*."[107]

142. On the other hand, insofar as BIT arbitration under the ICSID Convention is concerned, it has also been held in a number of (again well-known) cases that, because the ICSID Convention provides no definition of the term "investment," the limits of this concept are susceptible to agreement, or a subjective definition by the State Parties in legal instruments such as BITs or national laws, which embody their consent to ICSID jurisdiction. As the Tribunal in *Biwater v. Tanzania*[108] noted, for example:

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[107] *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award, 26 November 2009, ¶ 180 and ¶ 207. Emphasis in the original.

[108] *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 312 – 316.

312. … it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of "investment" were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States.[109] Hence the following oft-quoted passage in the Report of the Executive Directors:

> "No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."[110]

313. Given that the Convention was not drafted with a strict, objective, definition of "investment," it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes. . . .

314. Further, the *Salini Test* itself is problematic if, as some tribunals have found, the "typical characteristics" of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria[111] are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of "investment" (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of "investment" more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.

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[109] Footnote reference to Ch. Schreuer, THE ICSID CONVENTION: A COMMENTARY (2001), pp. 121-125, ¶¶ 80 – 88.

[110] Footnote reference to International Bank for Reconstruction and Development, REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (18 March 1965), in 1 ICSID Reports 28 (1993), ¶ 27.

[111] The Tribunal notes that the *Salini Test* refers only to four criteria, the earlier Fedax decision referring to five criteria (*Fedax N.V. v. The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997).

> 315. Equally, the suggestion that the "special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged" [footnote omitted] does not, in this Arbitral Tribunal's view, lead to a fixed or autonomous definition of "investment" which must prevail in all cases, for the "type of investment" which the Contracting States to the Convention in fact envisaged was an intentionally undefined one, which was susceptible of agreement.
>
> 316. The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of "investment" is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.

143. In the circumstances of this case, this is a controversy that need not be resolved. Out of an abundance of caution, the Tribunal has considered all potentially applicable criteria and, as set out below, each leads to the same conclusion with respect to each of the alleged "investments" in question.

144. The Claimant has identified its investment in Ukraine as its contractual and property rights under the Conversion Contract, "formalised in the settlement agreement and the repayment agreement with respect to the amounts that are at dispute, and ultimately […] crystallised in the ICC award."[112]

145. The Tribunal notes that, after considerable discussion at the hearing, the Claimant elaborated its case on this issue, asserting (as its final position) that (i) the Conversion Contract, together with the property rights in the products delivered under the Conversion Contract, may constitute an investment; (ii) the Settlement Agreement, together with the Repayment Agreement, may constitute an investment; and (iii) the

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[112] Reply, ¶ 41; Claimant's Closing, Tr.4/p. 9.

ICC Award, on its own, may constitute an investment.[113] In light of this, the Tribunal will analyse these elements individually.

146. (i) *The Conversion Contract and the Products.* The Tribunal accordingly starts with an examination whether the Conversion Contract may constitute an investment, together with the property rights in the products delivered under the Conversion Contract, under the BIT and/or the ICSID Convention.

147. In terms of the BIT, it is the Claimant's case, among other things, that the Conversion Contract falls within the definition of investment in Article 1(1)(e), as it confers "rights to the exercise of an economic activity" and involves "movable property" in the form of Products within the meaning of Article 1(1)(a).[114]

148. The Respondent disagrees, and argues that the Conversion Contract "does not confer any rights upon the Claimant to exercise economic activities in Ukraine;" instead, the Respondent argues that the Conversion Contract was a service contract, under which "Klöckner/KCH simply undertook to deliver a certain amount of goods to Oriana for conversion against payment of a tolling fee."[115] Further, the Respondent disputes that the Products can be considered an investment, in and of themselves, under Article 1(1)(a), and argues that "movable property" must be considered "in the light of its context (the reference to investment)."[116]

149. The Tribunal notes that in the present case, according to the BIT itself, its terms have to be interpreted in the broader context of an investment operation, as is clear from the last sentence of Article 1(1) stating that "(a)ny change to the form in which *assets are invested* shall not affect *their nature as investments.*" (emphasis added) The

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113 Claimant's Closing, Tr.4/pp. 16 – 19.

114 Memorial, ¶¶ 137, 135.

115 Counter-Memorial, ¶ 143; Rejoinder, ¶ 156.

116 Counter-Memorial, ¶ 125; Rejoinder, ¶ 155.

question therefore is whether the Conversion Contact fits within the nature of an "investment," as understood in the BIT. In this context, the Tribunal considers that, on its face, the Conversion Contract conveyed the right for GEA, through KCH, to exercise an economic activity in Ukraine at the relevant time. In addition, contrary to the Respondent's contentions, the Conversion Contract was more than just goods against a tolling fee – it established a relationship of "common interest" whereby KCH (and, ultimately GEA) would, among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials.[117]

150. Accordingly, the Tribunal is satisfied that the Conversion Contract constitutes an investment within the meaning of Article 1(1)(e) of the BIT, in that it confers "rights to the exercise of an economic activity." Further, the Tribunal is satisfied that the Products constitute an investment under Article 1(1)(a), as they form an integral part of the investment under the Conversion Contract.

151. Turning then to Article 25 of the ICSID Convention (in deference to the view of some, outlined above, that Article 25 places a limit on the State Parties' ability to define "investment" in their BIT for the purposes of ICSID jurisdiction), the Tribunal has no doubt that the Conversion Contract also meets this test. In particular, it satisfies all the elements of the "objective definition" that are commonly applied under Article 25: the Claimant has provided some contribution to Ukraine, during a certain period of time, while assuming the risks of the economic operation it was performing.

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[117] WS Döss, ¶ 6.

152. The Conversion Contract entailed a contribution in kind, in the form of over one million metric tons of diesel and naphtha, catalysts and other materials, delivered to Ukraine as part of a broad economic operation, as well as the contribution of the Claimant's know-how on logistics, marketing, and the mobilisation of repairs and other services. This was clearly a complex relationship going far beyond a simple sale of raw materials. The relationship extended over a certain duration (a three year period if one considers only the time period when the Claimant was involved). Further, it is unquestionable that the foreign investor, as it has itself emphasised in its own Memorial,[118] undertook multiple risks, in the form of market risk, credit risk and political risk, in particular since Oriana was supplied with diesel without advance payment.

153. The Tribunal therefore concludes that, with respect to the Conversion Contract and the Products, the Claimant made an "investment" in Ukraine, both within the meaning of Articles 1(1)(e) and 1(1)(a) of the BIT and (if needed) Article 25 of the ICSID Convention.

154. (ii) *The Settlement Agreement and the Repayment Agreement*. The Tribunal next turns to the Settlement Agreement, together with the Repayment Agreement, being the second category of alleged "investment" on which the Claimant relies.

155. The Claimant contends that, following the taking of its property, the form of its investment changed into "claims to performance having [material or immaterial] value" within the meaning of Article 1(1)(c) of the BIT. Specifically, the Claimant argues that the Settlement Agreement "recognised the validity of the claims to

[118] Memorial, ¶ 145.

performance," while the Repayment Agreement "quantified the minimum value of the claims and set out a mechanism for the value of the claims to be materialised."[119]

156. The Respondent disagrees, and argues that neither agreement created rights under Ukrainian law, which governs them. The Respondent contends that the Settlement agreement "merely established an inventory of undelivered goods and recorded the difference as a debt owed by Oriana to KCH," while the Repayment Agreement "established a means for the repayment by Oriana to KCH of Oriana's debts."[120]

157. The Tribunal agrees with Respondent that neither the Settlement Agreement nor the Repayment Agreement – *in and of themselves* – constitute "investments" under Article 1 of the BIT or (if needed) Article 25 of the ICSID Convention. As legal acts they are not the same as the investment in Ukraine itself. In particular, (a) the Settlement Agreement merely established an inventory of undelivered goods and recorded the difference as a debt owed by Oriana to KCH; and (b) the Repayment Agreement merely established a means for the repayment by Oriana to KCH of Oriana's debts.

158. (iii) *The ICC Award.* Finally, the Tribunal turns to the ICC Award, being the third category of alleged "investment" on which the Claimant relies.

159. The Claimant argues that the ICC Award, in and of itself, falls under Article 1(1)(c) of the BIT because it liquidated the amount due under the Settlement Agreement and Repayment Agreement as of 2002.[121]

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119 Memorial, ¶ 136.
120 Rejoinder, ¶ 158.
121 Memorial, ¶ 136.

160. The Respondent disputes this, asserting that the ICC Award cannot be an investment because it "is not an asset that was contributed to Ukraine, it was not made in Ukraine, and therefore it does not fall within the definition of an investment."[122]

161. The Tribunal agrees again with the Respondent. Whether tested against the criteria of Article 1 of the BIT or Article 25 of the ICSID Convention, the ICC Award – *in and of itself* – cannot constitute an "investment." Properly analysed, it is a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an "investment" – see ¶¶ 154 – 157 above).

162. Even if – *arguendo* – the Settlement Agreement and Repayment Agreement could somehow be characterised as "investments," or the ICC Award could be characterised as directly arising out of the Conversion Contract or the Products, the Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – *itself* – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention. For the same reason, the Settlement Agreement and Repayment Agreement, as well as the Award, cannot be considered as falling within the terminal proviso of Article 1 of the BIT ("Any change to the form in which assets are invested shall not affect their nature as investments").

163. It may be noted that in the Decision on Jurisdiction in *Saipem S.p.A. v. The People's Republic of Bangladesh* (a case heavily relied upon by the Claimant), the Tribunal made statements that are difficult to reconcile, *i.e.*, that the ICC arbitration is part of

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[122] Tr.5/ p. 84.

the investment (under the heading: "Has Saipem made an investment under Article 25 of the ICSID Convention?"); that the ICC award is not part of the investment (under the heading "Does the dispute arise directly out of the Investment?"); and that it is unnecessary to decide whether the ICC award is part of the investment (under the heading "Jurisdictional objections under the BIT").[123]

164. The Tribunal therefore concludes that with respect to the Settlement Agreement and the Repayment Agreement as well as the ICC Award, the Claimant has not made an "investment" in Ukraine, both within the meaning of the BIT and (if needed) the ICSID Convention.

(3) Did the Alleged Violations Occur Before the Alleged Investment?

165. Having determined that the Claimant made at least some "investment" in Ukraine within the meaning of the BIT and the ICSID Convention (namely the Conversion Contract and the Products), the Tribunal must next determine whether the violations alleged by the Claimant occurred before the relevant investment was made.

166. It is Ukraine's position that, to the extent any alleged breaches of the BIT took place prior to the claimed acquisition by GEA's subsidiary of shares in KCH, the Tribunal lacks jurisdiction.[124]

167. The Claimant disagrees, contending that the dispute meets the temporal requirement of the BIT and the ICSID Convention because both "were applicable to both Ukraine and GEA during the whole period relevant to the current dispute." The Claimant

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123 ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, ¶¶ 110; 113; 127.

124 Counter-Memorial, ¶ 149.

further specifies that the BIT applies to investments made both before and after the BIT's entry into force.[125]

168. Furthermore, GEA claims that in any event "as a legal matter, an international claim can hardly accrue before the claimant learns of the acts that give rise to it."[126]

169. Ukraine rejects this argument on the basis that it is a "novel" theory for which the Claimant has provided no legal authority.[127]

170. The Tribunal agrees with Ukraine that in order for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed. Contrary to the Claimant's assertions, the Tribunal's analysis cannot hinge on whether the Claimant knew of Ukraine's purported treaty violations. The principle put forth by Ukraine has been consistently applied in investment arbitrations[128], and has been articulated by Zachary Douglas in his treatise as follows:[129]

> Rule 32. The claimant must have had control over the investment in the host contracting state party at the time of the alleged breach of the obligation forming the basis of its claim.

171. With this in mind, the Tribunal must determine as of what date the Claimant had an interest in the alleged investment.

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125 Memorial, ¶ 147.

126 Reply, ¶ 102.

127 Rejoinder, ¶ 185, referring to Reply, ¶ 102.

128 See, e.g., *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 48(c); *Saluka Investments BV* (The Netherlands) *v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶ 244; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 67.

129 Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press, 2009), p. 165, cited in Counter-Memorial, ¶ 150.

172. There is no dispute between the Parties that GEA indirectly owned and controlled KCH when one of GEA's wholly-owned subsidiaries purchased KCH from SF Beteiligungs GmbH under the agreement dated 5 December 1997 (*see* ¶ 38 above). However, the Parties do not agree as of what date GEA effectively gained ownership of KCH.

173. Ukraine alleges that the Claimant's acquisition of KCH took effect on 9 February 1998, and in any event no earlier than 29 January 1998, the date on which the European Commission granted merger control approval to GEA's acquisition of KCH (a condition precedent to the share assignment taking effect).[130]

174. GEA disagrees, arguing that it acquired the share capital of KCH through the agreement dated 5 December 1997, which took effect on 31 December 1997.[131]

175. The Tribunal notes that Article 2.2 of the agreement dated 5 December 1997 provides for GEA to acquire KCH's shares subject to the fulfilment of certain conditions, as follows:[132]

> [SF Beteiligungs-GmbH] hereby already assigns to [GEA], subject to the condition precedent of the occurrence of the condition described in § 21.1 (hereinafter referred to as the "Cartel Condition") as well as the payment of the purchase price pursuant to § 3.1, all of the KCH Shares with effect as of midnight December 31, 1997 (hereinafter referred to as the "Effective Date"). [GEA] hereby accepts the assignment. The time at which the Buyer shall have acquired the KCH Shares unconditionally and free of encumbrances is hereinafter referred to as the "Closing Date."

130 Rejoinder, ¶¶ 41 – 44.

131 Reply, ¶ 95.

132 C-0153.

176. Article 21.1 of the 5 December 1997 agreement, referred to in Article 2.2, sets forth the details of the so-called "Cartel Condition," which involves, among other things, approval from the European Commission of the transaction foreseen by the Parties.

177. The Tribunal notes that, at the end of the agreement dated 5 December 1997, the Parties' notary advised that the agreement would not become "effective" until "all consents required by law and the articles of association have been given and are legally effective."[133]

178. The Tribunal also notes that there are two concepts contained in Article 2.2 of the 5 December 1997 agreement, namely, that of an "Effective Date" and that of a "Closing Date."

179. In the Tribunal's reading, once the European Commission granted approval of GEA's purchase of KCH – which it did – and the requisite purchase price was paid, the conditions were fulfilled for the effective transfer of KCH shares on the Effective Date of 31 December 1997.

180. As to whether the Tribunal should look to the Effective Date or the Closing Date as the operative moment for determining ownership, the Tribunal observes that the Claimant seems to take contradictory positions, requesting the Tribunal to look to the Effective Date with respect to the 5 December 1997 agreement (*see* ¶ 174 above) and the Closing Date with respect to the Sale and Purchase Agreement (*see* ¶ 112 above).

181. This being said, the Tribunal notes that the Respondent, like the Claimant, argues with reference to the Effective Date regarding the 5 December 1997 agreement. As both Parties make this argument with reference to the Effective Date, the Tribunal will accordingly take the Effective Date into account for purposes of determining

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133 *Id.*

when GEA acquired KCH. The Tribunal thus concludes that GEA owned KCH as of 31 December 1997.

182. In light of the foregoing, the Tribunal determines that GEA had an interest in the Conversion Contract as of 31 December 1997, when it gained an interest in KCH, and up to 30 June 2004, when it lost its interest in KCH and any claims KCH had against Oriana (*see* discussion in ¶¶ 94 – 118 above).

183. Having determined that GEA acquired its interest in the Conversion Contract as of 31 December 1997, the Tribunal must now determine whether the alleged treaty violations occurred before or after that date.

184. The alleged violations consist of (i) the alleged misappropriation of 125,000 metric tons of the Claimant's Products; (ii) Ukraine's alleged failure to investigate and prosecute the shooting of Dr Chperoun; (iii) Ukraine's alleged failure to recognise and enforce the ICC Award; and (iv) Ukraine's alleged failure to recognise GEA's claims in bankruptcy proceedings.[134] The Tribunal will examine these points in turn.

185. (i) *Alleged Misappropriation of Products*. With respect to the alleged misappropriation of 125,000 metric tons of the Products, Ukraine submits that the alleged misappropriation took place in 1997, prior to the purported acquisition of KCH shares.[135]

186. In response, GEA submits that "there is no support in the record" for Ukraine's assertion that the alleged misappropriation occurred in 1997. The Claimant contends that Ukraine's assertion is based on the notes of a conversation with Mr Chernyk, where he initially indicated that the taking took place in October/November 1997, but

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134 Reply, ¶¶ 95 – 101.

135 Counter-Memorial, ¶¶ 153 – 157.

that those notes record that "Chernyk quickly crossed out the months," suggesting that the misappropriation extended after November 1997.[136]

187. Instead, GEA argues that "major deliveries of products" from GEA to Oriana were scheduled between 1 January 1998 and 31 December 1998, such that "[l]ogically, these products could not have been taken from Oriana's premises before they were delivered to Oriana." In any event, GEA is of the view that Ukraine bears the burden of proving its allegation that the taking took place in 1997, which it has failed to do.[137]

188. The Tribunal notes that the Claimant has not submitted any documents that speak directly to the timing of any alleged taking. Instead, it relies principally on Supplementary Agreement no. 57 to the Conversion Contract, dated 18 December 1997, which provides for the supply of large amounts of raw materials to Oriana over the course of 1998.[138] The Claimant also relies on an interview dated 12 July 1998 of the economic director of Oriana, who confirmed the 1998 deliveries.[139]

189. By contrast, Ukraine has adduced evidence that speaks directly to the timing of the purported taking.

190. For example, Ukraine has submitted the minutes of a meeting between Oriana and the management board of GEA (at the time named Metallgesellschaft AG), dated 10 August 1998, which indicate that the purported taking happened in large part before GEA had obtained an interest in the investment:[140]

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136 Reply, ¶ 98.

137 Reply, ¶¶ 99 – 101.

138 C-0006.

139 C-0053.

140 R-0041.

> [A]ll documents are now to be made available for inspection. Arthur Andersen will resume the examination on 11 August 1998 and continuously provide information. According to the analysis of the documents available so far, product shortages of at least DM 26 million went missing prior to 31 January 1998 (= transfer of KCH to [GEA]).(sic)[141]

191. In addition, Ukraine has submitted the notes of a meeting held on 21 October 1998 between Mr Chernyk, president of Oriana, and Dr Krüger of KCH, among others. The notes of that meeting indicate that the president of Oriana himself indicated that inventories were removed from Oriana during 1997 and in particular during the months of October/November. Contrary to the Claimant's assertion, the Tribunal finds no indication that the fact that "Chernyk quickly crossed out the months" suggests that the purported misappropriation extended after November 1997. It rather seems to the Tribunal that Mr Chernyk scratched out October/November either because he did not want the months he had written to be seen, or because he was ultimately unsure of which months in 1997 to specify.

192. In the Tribunal's view, the balance of the evidence adduced by the Parties militates against the Claimant's contention that "[t]he record indicates that the bulk of the taking took place in 1998, that is, after GEA had acquired control of KCH."[142] To the contrary, the Tribunal considers that the evidence adduced proves that the "bulk of the taking" in fact took place in 1997, before GEA had acquired control of KCH. This being said, the Tribunal is willing to give GEA the benefit of the doubt that, though not the bulk, at least some of the taking took place after GEA had gained control of KCH.

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[141] It should be noted that the sic is in the original document, presumably because the date referred to should be 31 December 1997.

[142] Reply, ¶ 99.

193. The Tribunal therefore concludes that the Claimant did have an interest in the alleged investment when the purported treaty violation occurred under this heading, and the Tribunal accordingly has jurisdiction to hear claims arising in connection therewith.

194. In this regard, the Tribunal emphasises that the sole question in this context is whether it can entertain a claim based on Ukraine's alleged behaviour in connection with the taking of the Products; the Tribunal reaches no conclusion regarding whether such behaviour, if it occurred, actually amounted to a treaty violation.

195. (ii) *Alleged Failure to Investigate Shooting.* With respect to Ukraine's alleged failure to investigate and prosecute the shooting of Dr Chperoun, Ukraine argues that this incident was not Ukraine's fault and, in any event, it took place in December 1997, prior to the Claimant's alleged investment in Ukraine.[143]

196. The Claimant does not contest Ukraine's position that the shooting of Dr Chperoun took place in December 1997. However, the Claimant specifies that it does not assert "that Ukraine's agents shot Dr Chperoun," but rather that Ukraine failed to investigate and prosecute the shooting beyond December 1997.[144]

197. The Respondent answers that this incident appears to have been carried out by "criminal elements" and is, therefore, not attributable to Ukraine. In any event, the Respondent generally contends that the Claimant's claims cannot be heard because they "all relate directly or indirectly to its allegation that the Respondent expropriated products allegedly belonging to the Claimant."[145]

198. The Tribunal notes that the Claimant's assertion focuses not on the shooting of Dr Chperoun in December 1997, but rather on the behaviour of Ukraine thereafter. The

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143 Counter-Memorial, ¶ 155.

144 Reply, ¶ 97.

145 Counter-Memorial, ¶ 245; Rejoinder, ¶ 177.

Claimant therefore makes an allegation of a treaty violation that, on its face, would have occurred after it had gained an interest in the Conversion Contract. While the Tribunal agrees with Ukraine that this allegation relates to the alleged taking of the bulk of the Claimant's products in 1997, it is nonetheless a separate contention. Accordingly, the Tribunal considers that it may hear claims related to this alleged violation in these proceedings.

199. In this connection, once again, the Tribunal emphasises that the sole question in this context is whether it can entertain a claim based on Ukraine's alleged behaviour following the shooting of Dr Chperoun; the Tribunal reaches no conclusion regarding whether the alleged behaviour actually occurred, and if it occurred, whether it amounted to a treaty violation.

200. (iii & iv) *Alleged Failure to Recognise ICC Award/GEA's Claim in Bankruptcy.* With respect to Ukraine's alleged failure to recognise and enforce the ICC Award and Ukraine's alleged failure to recognise GEA's claims in bankruptcy proceedings, the Claimant alleges that the former occurred over the course of 2003 – 2004, while the courts' refusal to accept GEA's claims in bankruptcy occurred over the period 2003 – 2005.[146]

201. Here, Ukraine generally contends that the Claimant's claims cannot be heard because they "all relate directly or indirectly to its allegation that the Respondent expropriated products allegedly belonging to the Claimant."[147]

202. In the Tribunal's view, these purported violations, on their face, would have taken place after the Claimant had gained an interest in the Conversion Contract (*i.e.*, after 31 December 1997). Taking this into account, and to the extent that these purported

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146 Reply, ¶ 96.

147 Rejoinder, ¶ 177.

violations also occurred before the Claimant lost its interest in the Conversion Contract on 30 June 2004, the Tribunal considers that it may hear claims related to these alleged violations in these proceedings.

203. Again, the Tribunal emphasises that the sole question in this context is whether it can entertain a claim based on Ukraine's alleged behaviour during the enforcement of the ICC Award and the bankruptcy proceedings; the Tribunal reaches no conclusion regarding whether such behaviour, if it occurred, actually amounted to a treaty violation.

In light of the foregoing, on the issue of timing alone (and without reference to the separate question as to the existence of, or nexus to, an "investment") the Tribunal concludes that it has jurisdiction to entertain claims based on the alleged violations regarding the taking of the Claimant's Products; Ukraine's behaviour following Dr Chperoun's shooting and its behaviour in the enforcement of the ICC Award and in the bankruptcy proceedings.

VII. LIABILITY

204. GEA claims that Ukraine has violated its obligations under the provisions of the BIT relating to expropriation; full protection and security; fair and equitable treatment; arbitrary and discriminatory measures; national treatment and most-favoured nation treatment; and adherence to obligations. The claims relating to each of these various provisions are discussed, in turn, in this section.

205. The Tribunal recalls that, in accordance with its decision in ¶ 125 above, the Claimant does not have standing to bring claims arising out of the Conversion Contract that accrued after 30 June 2004. It is not clear to the Tribunal, which, if any, of the Claimant's claims arise after this date. Indeed, such has not been specified by either side over the course of these proceedings. Accordingly, out of an abundance of caution, the Tribunal will address the merits of all of the Claimant's claims in this

section.

206. Similarly, for the sake of completeness only, the Tribunal also considers claims relating to the Settlement Agreement, the Repayment Agreement and the ICC Award, which the Tribunal has determined in ¶¶ 154 – 161 above did not constitute an "investment" in any event under the BIT or the ICSID Convention.

A. Expropriation

207. Article 4(2) of the BIT protects against expropriation, in pertinent part, as follows:

> Investments by nationals or companies of either Contracting State may not, within the territory of the other Contracting State, be expropriated, nationalized or subjected to such other measures the effect of which would be tantamount to expropriation or nationalization except for the public interest and against compensation. . . .

(1) The Parties' Positions

208. The Claimant alleges that (i) the misappropriation of Products and (ii) the failure of the Ukrainian courts to recognise and enforce the ICC Award constitute expropriations under Article 4(2) of the BIT for which Ukraine is responsible.

209. The Respondent denies having violated Article 4(2) of the BIT, stating that neither the alleged loss of Products nor the refusal of Ukrainian courts to recognise and enforce the ICC award constitute an expropriation by Ukraine of the Claimant's investment.[148]

[148] Counter-Memorial, ¶¶ 179 – 180.

(2) The Tribunal's Analysis

210. The Tribunal will address the Parties' arguments regarding the two alleged expropriations in turn, before setting forth its conclusion.

(i) The Misappropriation of the Products

211. The Claimant alleges that the misappropriation of the 125,000 metric tons of its Products from the Oriana plant constituted an expropriation by Ukraine, rather than a private theft, because the taking could not have been effected without State support.[149] In this regard, it has argued that various points evidence an expropriation on the part of Ukraine.

212. By contrast, the Respondent considers that the Claimant has failed to "particularise the alleged misappropriation or the Respondent's alleged responsibility."[150]

213. The Tribunal has carefully analysed each of the facts relied upon by the Claimant.

214. First, the Claimant contends that GEA's managers, having spent considerable time with the managers of Oriana both before and after the revelation of the taking, were persuaded that these men were not thieves but were acting on orders from the Government.[151] In this connection, the Claimant contends that the managers of Oriana, in contemporaneously memorialised conversations with GEA, indicated that they were acting on orders "from Kiev" in appropriating GEA's property.[152]

149 Memorial, ¶¶ 157 – 158.

150 Counter-Memorial, ¶ 205.

151 Reply, ¶ 115.

152 Reply, ¶ 115.

215. The Respondent rejects as flawed the Claimant's argument that because the Claimant's managers considered Oriana's managers to be honest, the misappropriation of the Products must have been undertaken on Government orders.[153] The Respondent submits that even if Oriana's managers were honest, this does not exclude the possibility that criminal elements unconnected with the State, such as Oriana employees, were responsible for the losses.[154]

216. The Tribunal is of the view that the Claimant has not met its burden of proof on this point. In truth, the Claimant has provided nothing more than a character assessment in support of its contention. In any event, even if the Tribunal were to accept the Claimant's contention, the Tribunal does not consider it sufficient to ground a holding that Ukraine was responsible for the conduct in question.

217. Second, the Claimant argues that the sheer quantity of property taken and its materiality "tends to confirm" the statements by Oriana managers that they were acting on orders from the State. In support of this, the Claimant contends that it is not possible to transport, market and recover the proceeds of the sale of material that would fill a train 50 kilometres long, without Government approval and the involvement of its officials.[155]

218. The Respondent rejects as "mere supposition" the Claimant's allegation that the quantity of the Products taken was so great as to make it "inconceivable" that those responsible for the theft were acting without State approval.[156] Further, the Respondent argues that the Claimant's contentions on this point are inconsistent with

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153 Counter-Memorial, ¶ 215.

154 Rejoinder, ¶¶ 229 – 230.

155 Reply, ¶ 115.

156 Counter-Memorial, ¶ 211; Rejoinder, ¶ 223.

the Claimant's contemporaneous view that the losses may have occurred over a long period.[157]

219. Once again, the Tribunal is of the view that the Claimant has not met its burden of proof here. The Claimant has provided nothing more than speculation in support of this contention. In any event, even if the Tribunal were to accept the Claimant's contention, as before, the Tribunal does not consider that such contention is sufficient to allow a finding that Ukraine was itself responsible.

220. Third, the Claimant submits that the conduct of Ukrainian Government officials was consistent with the taking, and inconsistent with a private theft. The Claimant contends that, had it been a private theft, the Government would have initiated an investigation and distanced itself from Oriana's managers. Instead, the Claimant observes that following the revelation of the taking, the Government and Oriana immediately acted as a single unit.[158]

221. The Respondent rejects the Claimant's contentions, noting that the Claimant itself never filed a criminal complaint in respect of the alleged misappropriation.[159]

222. Again, the Tribunal is of the view that the Claimant has not met its burden of proof, and has again provided nothing more than speculation in support of this contention. In any event, even if the Tribunal were to accept the Claimant's contention, the Tribunal – again – does not consider that such contention could ground a holding as to Ukraine's responsibility.

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157 Rejoinder, ¶ 228.

158 Reply, ¶ 115.

159 Counter-Memorial, ¶¶ 212 – 214; Rejoinder, ¶¶ 225 – 227.

223. Finally, the Claimant submits that the German Government came to the same conclusion as GEA, *i.e.*, that the taking of GEA's property was attributable to Ukraine.[160]

224. In response, the Respondent critically analyses the various statements of the German Government upon which the Claimant relies, and submits that the "statements, allegedly made by junior or unnamed officials, are hearsay and the Respondent has absolutely no way of determining on what basis they were formulated."[161]

225. As with each of the previous points, the Tribunal is of the view that the Claimant has not met its burden of proof. The fact that certain German Government officials may have come to the same conclusion as the Claimant is not evidence that can, on its own, support a finding by this Tribunal as to Ukraine's responsibility.

226. In conclusion, the Tribunal considers that the Claimant has not met its burden of proving that Ukraine expropriated the Claimant's property through the alleged taking of GEA's Products. Accordingly, the Tribunal rejects the Claimant's contentions under this heading.

(ii) The Non-Enforcement of the ICC Award

227. The Claimant asserts that the Ukrainian courts rendered "a travesty of justice in applying a discriminatory law to avoid enforcement of GEA's Award under the New York Convention," such that "their refusal to recognize GEA's ICC Award is tantamount to an expropriation."[162]

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160 Reply, ¶ 115.

161 Rejoinder, ¶ 231.

162 Reply, ¶ 161.

228. In particular, the Claimant invokes the award of the ICSID tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh*, in support of its position that "[n]on-recognition decisions rendered on grossly illegitimate grounds are tantamount to expropriation."[163]

229. The Respondent argues that the Ukrainian courts' refusal to recognise and enforce the ICC Award does not constitute an expropriation, but was rather done "in accordance with Ukrainian law and the New York Convention."[164]

230. The Respondent argues that a finding that "a domestic court's refusal to recognise and enforce an arbitral award under the New York Convention" constitutes an expropriation under international law would create an appellate jurisdiction for the recognition and enforcement of awards, which "would undermine the present international legal system for the recognition and enforcement of arbitral awards."[165]

231. Given the Tribunal's finding that the ICC Award did not itself constitute an "investment," this claim must fail. However, even if the Tribunal had concluded differently on the "investment" issue, the overall result would have been the same.

232. The Tribunal refers to the *Saipem* award, which forms the basis of the Claimant's claim under this heading.

233. In *Saipem*, the Bangladeshi courts annulled an ICC Award in Saipem's favour. In ¶ 133 of its award, the tribunal stated that setting aside an arbitral award cannot, in and of itself, amount to an expropriation:

> [T]he Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient

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163 ICSID Case No. ARB/05/07, Award, 30 June 2009; Reply, ¶ 148.

164 Counter-Memorial, ¶ 218.

165 Counter-Memorial, ¶ 219.

> to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.

234. The tribunal then concluded that, based on the circumstances of that case, the non-enforcement of the ICC Award amounted to an expropriation due to the particularly egregious nature of the acts of the Bangladeshi courts.

235. The Claimant attempts in this case to deploy this standard, contending that Ukraine committed "a travesty of justice in applying a discriminatory law to avoid enforcement of GEA's Award."

236. The Tribunal disagrees with this characterisation. Even assuming (contrary to its earlier finding) that the ICC Award could somehow qualify as an "investment," the Claimant has provided the Tribunal with no reason to believe that the courts of Ukraine were "applying a discriminatory law," only that the Ukrainian courts came to a conclusion different to that which GEA had hoped. Moreover, contrary to *Saipem*, the Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were "egregious" in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA's ability to recover on the ICC Award.

237. Accordingly, the Tribunal does not consider that the non-enforcement of the ICC Award amounts to an expropriation, and rejects the Claimant's contentions under this heading.

(iii) Conclusion

238. In light of the foregoing, the Tribunal concludes that Ukraine has not committed any expropriation in connection with the misappropriation of the Products, or its courts'

treatment of the ICC Award. Therefore, the Claimant's expropriation claim fails.

B. Full Protection and Security

239. Article 4(1) of the BIT guarantees full protection and security to investments:

> Investments by nationals or companies of either Contracting State shall enjoy full protection and security within the territory of the other Contracting State.

(1) The Parties' Positions

240. GEA claims that Ukraine's failure to punish certain criminal acts constitutes a failure to provide full protection and security to GEA's investment. Specifically, GEA alleges that (i) the unpunished theft of GEA's Products; (ii) Ukraine's failure to respond to the shooting of Dr Chperoun; and (iii) the unpunished misrepresentations by Mr Sljuzar as to his status as President of Oriana constitute violations under Article 4(1) of the BIT for which Ukraine is responsible. [166]

241. Ukraine alleges that the Claimant has failed to tie its full protection and security allegations to the wording of Article 4(1) of the BIT, which provides for protection of "[i]nvestments by nationals or companies of either Contracting State."[167] It is Ukraine's position that the Claimant has not established that any of the alleged violations relate to the protection or security of an investment.[168]

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166 Memorial, ¶ 167.

167 Rejoinder, ¶ 268.

168 Rejoinder, ¶ 268.

(2) The Tribunal's Analysis

242. The Tribunal will address the Parties' arguments regarding the three alleged violations of the full protection and security standard in turn, before setting forth its conclusion.

(i) The unpunished theft of GEA's Products

243. The Claimant claims that GEA's Products were "the subject of a taking by the State," and that even if private individuals stole for their personal benefit, "the State's inaction in the face of these events itself constitutes a violation of the Treaty." In the Claimant's view, the fact that "a whole range of Ukrainian State officials were aware of the theft and acknowledged that compensation was due to GEA, yet did absolutely nothing to punish or take disciplinary actions against the persons involved constitutes a blatant breach by Ukraine of the full protection and security standard."[169]

244. The Respondent rejects the Claimant's allegations, arguing that there is no evidence here that the authorities in Ukraine were aware of the alleged taking prior to being informed of it.[170] In addition, Ukraine states that the Claimant "cannot now object to the fact that there was no ensuing criminal investigation," given that KCH itself made no criminal complaint at the relevant time.[171]

245. In response, the Claimant contends that its own decision not to initiate any criminal complaints is irrelevant to the question whether Ukraine breached its obligation to accord full protection and security.[172] The Claimant further alleges that "it was the Ukrainian Government itself that dissuaded GEA from filing such a complaint," and

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169 Reply, ¶¶ 176 – 177.

170 Counter-Memorial, ¶¶ 236 – 238.

171 Counter-Memorial, ¶¶ 239 – 240.

172 Reply, ¶¶ 181 – 183.

that Ukraine's promises that GEA would be compensated for the loss of Products induced GEA to believe that it was unnecessary to file a criminal complaint.[173]

246. In the Tribunal's view, no matter under what legal standard the question is examined, the Claimant's contentions under this heading must fail.

247. The Claimant's case on this issue entails a fundamental double standard. Over the course of its contractual relationship with Oriana, GEA never considered it necessary to file a criminal complaint for the taking of its Products. Yet within the context of this arbitration, GEA now insists that Ukraine has breached its violations under the BIT for doing the very same.

248. What is more, GEA argues as it does in the face of evidence that directly contradicts its allegations, namely that it did not file a criminal complaint because Ukraine dissuaded it from doing so. To the contrary, Ukraine made clear that the issues between KCH and Oriana did not involve the State at all, and that any criminal complaints should be filed by KCH or Oriana. Indeed, in the protocol of a meeting held between the Ukrainian Government, the German ambassador and representatives of GEA on 27 August 1998, Ukraine's Vice Minister President indicated, with respect to KCH's problems, that:[174]

> [T]his is an issue solely between KCH and Oriana. He recommends to initiate criminal proceedings against the guilty parties.

249. The Tribunal concludes, overall, that Ukraine's conduct in response to the taking of GEA's Products does not amount to a violation of its obligations under Article 4(1) of the BIT regarding full protection and security to investments.

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173 Reply, ¶ 183.

174 C-0065.

(ii) Ukraine's alleged failure to respond to the shooting of Dr Chperoun

250. According to the Claimant, Ukraine was aware of the shooting of Dr Chperoun, but did not initiate any investigation or undertake any other action "with respect to this criminal offence." The Claimant submits that this amounts to a breach of Ukraine's obligation under Article 4(1) of the BIT.[175]

251. The Respondent contends that "the shooting of Dr Chperoun did not concern an investment by the Claimant," as required by Article 4(1) of the BIT.[176]

252. In any event, the Respondent contends that the "Claimant has not provided and is unable to provide any evidence that the police authorities of the Respondent could in any way have prevented the shooting of Dr Chperoun."[177] Further, the Respondent refers to a letter from the Lviv prosecutor's office that indicates that the shooting was investigated but that the crime remained unsolved.[178]

253. Even if (which is doubtful) Dr Chperoun's shooting could be construed as an event that concerned an "investment" (*i.e.*, the Conversion Contract), and no matter under what legal standard this question is examined, the Claimant's contentions under this heading must fail. The record disproves the Claimant's contention that Ukraine did not initiate any investigation or undertake any other action with respect to this criminal offence.

254. Specifically, the Tribunal refers to the letter from the Lviv prosecutor's office dated 11 June 2010 addressed to the Deputy Minister of Justice regarding, among other

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175 Reply, ¶¶ 185 – 187.

176 Rejoinder, ¶ 270.

177 Counter-Memorial, ¶ 246.

178 Rejoinder, ¶ 285.

things, the shooting of Dr Chperoun. That letter clearly indicates that the shooting of Dr Chperoun was investigated, but remains unsolved:[179]

> At the same time it was found out that on December 10, 1997, the Investigation Unit of the Frankivskyi District Department of the Lviv Municipal Office of the Main Office of the Ministry of Internal Affairs of Ukraine in Lviv Oblast initiated the criminal case with regard to the infliction of grave bodily injuries to V.M. [Chperoun], Vice-President of Sirka association, who was also the representative of Klockner & Co. Aktiengesellschaft, according to the elements of crime envisaged by part 1 of Article 101 of the Criminal Code of Ukraine (1960 version). During the pre-trial investigation in the case it was established that on December 9, 1997 an unknown person gave a gunshot wound in the left hip by three shots through the window of the first floor of building No. 98 located at Konovalets street in Lviv.
>
> On December 15, 1997 the prosecutor of Frankivsk district of Lviv city re-interpreted the crime in the abovementioned criminal case according to Art. 17, Art. 93 clause "e" of the Criminal Code of Ukraine (in the wording of 1960) and it was accepted for proceedings by the investigator of the abovementioned prosecutor's office. V.M. [Chperoun], the injured person, was questioned during a pre-trial investigation and stated that to his mind the criminal could kill him, however, he did not shoot in vital organs deliberately. V.M. [Chperoun] does not suspect anybody in commitment of the crime.
>
> On July 24, 2007 the abovementioned criminal case was forwarded to the Investigation Unit of the Frankivskyi District Department of the Lviv Municipal Office of the Main Office of the Ministry of Internal Affairs of Ukraine in Lviv Oblast for further investigation. In spite of measures taken during pre-trial investigation at present the crime remains unsolved.

255. Accordingly, the Tribunal concludes that, even if the shooting could be considered as related to an investment, Ukraine's treatment of the shooting of Dr Chperoun does not amount to a violation of its obligations under Article 4(1) of the BIT regarding full protection and security to investments.

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179 R-0060.

(iii) The unpunished misrepresentations by Mr Sljuzar

256. The Claimant argues that Ukraine violated its obligations of full protection and security with respect to Mr Sljuzar's execution of the Repayment Agreement (*see* ¶¶ 54 – 67 above).

257. According to the Claimant, Mr Sljuzar had the authority – and was represented as having the authority – to sign the Repayment Agreement. The Claimant contends that Oriana's indications to the contrary in enforcement proceedings concerning the ICC Award were falsehoods that Ukraine, as Oriana's parent, never tried to correct.[180]

258. Further, the Claimant submits that if Mr Sljuzar in fact had no authority but nonetheless signed the Repayment Agreement on behalf of Oriana, then Oriana made a misrepresentation to GEA to sign the Repayment Agreement, and that Ukraine – as sole shareholder and party responsible for electing and empowering a duly authorised president of Oriana – "was complicit in such misrepresentation through its silence and acquiescence."[181]

259. The Claimant asserts that in either scenario, Ukraine should have initiated investigations and prosecuted wrongdoings "with respect to these criminal offences."[182]

260. According to the Respondent, the Claimant's allegation regarding the failure to prosecute Mr Sljuzar "clearly does not concern the protection or security of an investment" and, therefore, falls outside the scope of Article 4(1) of the BIT.[183]

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180 Reply, ¶¶ 189 – 190.

181 Reply, ¶ 191.

182 Reply, ¶ 193.

183 Rejoinder, ¶ 272.

261. In any event, the Respondent states that if any misrepresentation was made by Mr Sljuzar regarding his status, such misrepresentation was not a criminal matter, and the Respondent could not have prevented the making of the misrepresentation if such was made.[184]

262. In the Tribunal's view, regardless of whether the actions of Mr Sljuzar could be said to concern the protection or security of an "investment" (as to which, see ¶¶ 154 – 157), the Claimant's claim under this heading fails. The Claimant's attempts to make Ukraine liable for the actions of Oriana cannot stand in light of the record, which makes clear that Oriana was a separate legal entity, acting entirely in a commercial capacity, for which Ukraine was not responsible.

263. In a meeting on 27 August 1998 between representatives of the Governments of Ukraine and Germany and representatives of Metallgesellschaft, Vice Minister President Tyhypko made clear that Claimant's problems were "an issue solely between KCH and Oriana."[185]

264. Claimant understood this. Indeed, in his notes of 9 December 1998 on the status of negotiations between KCH, Oriana and Ukraine, Dr Döss wrote that:[186]

> In this context, the Ukrainian side emphasised repeatedly that Oriana was an independent legal entity for the transgressions of which Ukraine was not responsible. This position was also articulated on August 27, 1998 by [Vice] Minister President Tyhypko during a meeting with the German ambassador and members of the board of management of Metallgesellschaft AG.

265. Taking into account that the Repayment Agreement was signed on 29 September 1998 and that the Vice Minister President of Ukraine informed GEA of Oriana's

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184 Counter-Memorial, ¶ 248.

185 C-0065.

independence from Ukraine as early as a month before, the Tribunal considers that there are no grounds to accept the Claimant's argument that Ukraine was responsible for Mr Sjulzar's "unauthorised" signing of the Repayment Agreement.[187]

266. Accordingly, even if the Repayment Agreement could be considered as an investment, the Tribunal concludes that Ukraine's treatment of Mr Sljuzar does not amount to a violation of its obligations under Article 4(1) of the BIT regarding full protection and security to investments.

(iv) Conclusion

267. In light of the foregoing, the Tribunal concludes that there are no grounds to hold Ukraine liable for violating its obligations under Article 4(1) of the BIT to accord the Claimant's investment full protection and security, whether it be with respect to the unpunished theft of GEA's Products; Ukraine's alleged failure to respond to the shooting of Dr Chperoun; or the unpunished alleged misrepresentations of Mr Sljuzar.

C. Fair and Equitable Treatment

268. Article 2(1) of the BIT provides the following guarantee of fair and equitable treatment:

> Either Contracting State shall, if possible, promote within its territory investments by nationals or companies of the other Contracting State and

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186 C-0063.

187 The Respondent has referred to other documents that also provide evidence that Ukraine was not responsible for Oriana. See, e.g., C-0016 (minutes of a meeting dated 13 August 1998, confirming that any debt under the Conversion Contract was Oriana's alone); C-0023 (minutes of a meeting dated 23 February 1999, confirming the same); R-0011 (letter dated 4 September 2000 from the Ministry of Finance to the State Property Fund, confirming that Ukraine was only liable for loans guaranteed by the Government and that all other issues of private debts were to be settled between Claimant and Oriana before the courts).

> shall permit such investments in accordance with its legislation. It shall in any case grant investments fair and equitable treatment.

(1) The Parties' Positions

269. According to the Claimant, the Respondent has violated its obligations to provide fair and equitable treatment to GEA's investment in Ukraine by (i) failing to keep its promise to repay GEA for property wrongfully taken; (ii) thwarting GEA's expectation to recover the amount Oriana owed to it during the bankruptcy proceedings; and (iii) not supporting the enforcement of the ICC Award before the Ukrainian courts, leading to a denial of justice.

270. The Respondent disputes that the Claimant had a legitimate expectation that Ukraine would pay for its property or that it would recover in bankruptcy proceedings. In addition, the Respondent submits that the Claimant has not been denied justice by the Ukrainian courts.

271. Both Parties have pleaded their respective claims and defences relating to fair and equitable treatment under Article 2(1) of the BIT in terms of whether GEA's "legitimate expectations" have been protected.[188]

(2) The Tribunal's Analysis

(i) Ukraine's alleged promise to repay GEA for property wrongfully taken

272. First, GEA contends that Ukraine violated GEA's legitimate expectations that Ukraine would keep its promise that GEA would be repaid within a reasonable time for the property taken.[189]

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[188] Memorial, ¶ 171; Reply ¶¶ 197 et seq.; see generally, Counter-Memorial ¶¶ 249, et seq.

273. Ukraine disagrees, arguing that this is simply a reiteration of the expropriation claim and should accordingly be rejected.[190]

274. Ukraine further argues with respect to "alleged promises made by or on behalf of the Respondent" that (i) the documentary record shows that the Respondent considered that any obligation to pay KCH for missing products lay with Oriana[191]; (ii) "the Claimant purchased the KCH shares long before any of the statements relied on by the Claimant were made"[192]; and (iii) "the losses which the Claimant claims do not relate to any shipments that the Claimant/KCH may have made subsequent to the July-August meetings."[193]

275. GEA rebuts the Respondent's contentions, arguing that the key question is not when Ukraine made its representations, but whether GEA "change[d] [its] position based on the undertakings at issue."[194]

276. In response, Ukraine argues that the "Claimant assumed . . . a substantial risk when it made its alleged investment in Ukraine" with respect to Oriana's financial situation, and that this assumption of risk evidences the "lack of basis in the Claimant's claim that its investment suffered unfair and inequitable treatment."[195]

277. The Tribunal has reviewed all the documents upon which the Claimant relies for the proposition that Ukraine made a promise to repay the Claimant for the lost Products. In the Tribunal's view, it is entirely unclear from the documents that Ukraine in fact made any such promises to the Claimant, or failed to keep any promises made.

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189 Memorial, ¶ 172.

190 Rejoinder, ¶ 288.

191 Counter-Memorial, ¶¶ 273 – 274; Rejoinder, ¶¶ 294 – 308.

192 Counter-Memorial, ¶ 275.

193 Rejoinder, ¶ 321.

194 Reply, ¶¶ 231 – 233.

278. For example, the Claimant refers to the record of a meeting held on 10 July 1998 in Frankfurt. According to the Claimant, this record evidences that the Ukrainian Government promised that specialists would promptly "work out" the amount of misappropriated property and "[t]he form in which repayment is made and the corresponding timetable will also be worked out by the end of July. The Ukrainian side and [GEA] will make the final decision on this problem on 1 August."[196] However, the Tribunal struggles to see how Ukraine's promise to "work out" the amount of misappropriated property and a payment timetable could amount to a promise to pay, particularly in light of the Parties' indication that they would "make a final decision on this problem" at a later date.

279. The Claimant further relies on a letter dated 31 July 1998 from Ukraine's Ministry of Economy, which reads: "[r]egarding the missing quantities identified after the inventory at WAT 'ORIANA', we recommend the preparation of an inventory record . . . , which must then be signed by both contract partners. Immediately upon submission of this record at the Ministry of Economy, the Ministry will take control of the missing quantities noted during the inventory."[197] Here, too, the Tribunal fails to understand how a recommendation to prepare an inventory and a promise to "take control of the missing quantities" could add up to a promise on the part of Ukraine to make any sort of payment to GEA. This is all the more so, taking into account that in that same letter, the Ministry of Economy specified that "[a]ccording to the Ukrainian Law 'On entrepreneurial activities' *the government is not permitted to interfere with the business activities of single companies.*" (emphasis added)

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[195] Counter-Memorial, ¶¶ 277 – 283.

[196] Reply, ¶ 221, quoting from Protocol of a meeting between representatives of the Ukrainian Government, Oriana, BV and KCH signed only by the Ukrainian side on 10 July 1998 (C-0012).

[197] Reply, ¶ 222, quoting from Fax from the Ukrainian Ministry for Economy to GEA dated 31 July 1998 (C-0010).

280. In addition, the Claimant relies on the fact that the 10 July 1998 meeting and the 31 July 1998 letter were followed by the conclusion of the Settlement Agreement on 7 August 1998. In this respect, the Claimant contends that it "legitimately understood . . . that the Settlement Agreement was the direct consequence of Ukraine's earlier promises."[198] The Tribunal considers the signing of the Settlement Agreement to be of no help to the Claimant's position. Not only were there no "earlier promises" from Ukraine, but the Settlement Agreement itself does not include Ukraine as a party – it is only between KCH and Oriana, which Ukraine had always made clear was a separate legal entity (*see* ¶ 263 above).[199]

281. The Claimant also refers to the record of a meeting held on 13 August 1998 between representatives of the Ukrainian Government, Oriana and GEA, which, according to GEA, "records specific obligations of the State, including an express undertaking that 'the Ministry of Industrial Policy would ensure that the provisions of the protocol would be fulfilled by the Ukrainian party.'"[200] While it does indeed seem that the Ministry of Industrial Policy made such an undertaking, the Tribunal notes that the undertaking in question only related to the protocol of that particular meeting which, as the Claimant admits, concerned GEA's "future dealings with Oriana, including the execution of pledge agreements and the termination of the ongoing bankruptcy proceedings against Oriana."[201] In other words, no promises were made, in the terms now asserted by the Claimant, that Ukraine would pay GEA for the lost Products.

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198 Reply, ¶¶ 223 – 225.

199 C-0015.

200 Reply, ¶ 226, quoting from Protocol of a meeting between representatives of the Ukrainian and German Governments dated 13 August 1998 (C-0016).

201 Reply, ¶ 226.

282. Finally, the Claimant refers to the record of a 27 August 1998 meeting between representatives of GEA and Ukraine and the ambassador of Germany, where Vice Prime Minister Tyhypko stated that "he understands that Oriana's high debt level deters investors. Ukraine will do its part to resolve the problem."[202] In the Tribunal's view, the Vice Prime Minister's words cannot be read as a promise that Ukraine would pay for GEA's lost Products, particularly taking into account that he is recorded in the same document as saying that "[a]s for KCH's problem . . . this is an issue solely between KCH and Oriana."

283. Overall, the Tribunal finds that, even on the assumption that there existed a relevant "investment" for the purposes of this claim, there is no basis on the record before it to find that Ukraine breached its obligation to give GEA's investment fair and equitable treatment, by failing to fulfil a promise to pay for the lost Products, as no such promise was ever made.

(ii) Ukraine's alleged thwarting of GEA's expectation to recover the amount Oriana owed to it during bankruptcy proceedings

284. GEA argues that Ukraine violated GEA's reasonable expectations that GEA would be able to recover the monies Oriana owed to it in bankruptcy proceedings. In response, Ukraine submits that GEA cannot have had a legitimate expectation that the debt would be recovered in the bankruptcy, given the Claimant's knowledge of Oriana's financial situation.[203]

285. In the Claimant's view, the Respondent made repayment impossible, in violation of Article 2(1) of the BIT, because (i) the Respondent never terminated the bankruptcy proceedings initiated by Shelton, as promised; (ii) the Respondent allowed the

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[202] Reply, ¶ 228, quoting Protocol of a meeting between representatives of the Ukrainian and German Governments, Oriana and MG dated 27 August 1998 (C-0065).

[203] Counter-Memorial, ¶ 288; Rejoinder, ¶¶ 323 – 325.

transfer of Oriana shares to Shelton; and (iii) once Shelton's custody of Oriana ended, Oriana's assets were stripped (*see* ¶ 50 above). The Tribunal will deal with each of these points in turn, before setting forth (iv) its conclusion.

286. (i) *Alleged Promises by Ukraine to Terminate the Bankruptcy Proceedings.* With respect to the bankruptcy proceedings brought by Shelton, the Claimant contends that shortly after Shelton commenced bankruptcy proceedings against Oriana in July 1998, "Ukraine made specific representations and undertakings to GEA that the bankruptcy proceedings against Oriana would be terminated and that GEA would be repaid" the amount owed by Oriana.[204] The Respondent denies that Ukraine made any "unqualified undertaking" of this nature and denies the Claimant's claim in its entirety. [205]

287. The Tribunal has reviewed all the documents upon which the Claimant relies for the proposition that Ukraine made a promise to terminate the bankruptcy proceedings. In the Tribunal's view, it is entirely unclear from the documents that Ukraine in fact made any promises to the Claimant, or reneged upon any promises made.

288. For example, the Claimant relies on a letter dated 31 July 1998 from the Ukrainian Ministry of Industrial Policy, which states that "the Cabinet of Ministers of Ukraine will pass a document which, under current Ukrainian law, will cancel these bankruptcy proceedings."[206] Similarly, the Claimant relies on the protocol of a meeting between representatives of the Ukrainian Government, Oriana and Metallgesellschaft dated 13 August 1998, in which Ukrainian officials are recorded as stating that "[t]he Ukrainian party shall carry out all acts permitted by applicable

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204 Reply, ¶ 238.

205 Rejoinder, ¶ 332.

206 Reply, ¶ 240, quoting Letter from the Ukrainian Ministry for Industrial Policy to Metallgesellschaft dated 31 July 1998 (C-0014).

legislation of Ukraine in order to terminate the bankruptcy proceedings pending against JSC 'Oriana.'"[207]

289. In addition, the Claimant refers to the protocol of a meeting between representatives of the Ukrainian and the German Governments, Oriana and Metallgesellschaft dated 27 August 1998, in which the Vice Minister President Tyhypko was recorded as stating that "[t]he bankruptcy proceeding will be terminated in any event. In case of doubt, Ukraine would be prepared to satisfy Shelton's claims against Oriana through state funds."[208]

290. In response, the Respondent submits that these statements do not amount to unconditional promises, but rather demonstrate that "the Ukrainian Government officials had emphasised to the Claimant and KCH that Ukrainian law governed the question of the termination of the bankruptcy proceedings and that any termination could only be carried out to the extent permitted by Ukrainian law."[209]

291. The Tribunal agrees with the Respondent. In the Tribunal's view, the statements made by the Respondent cannot be read as unconditional promises for payment. At most, these statements, taken together, may be read as Ukraine engaging to use its best efforts to assist in bringing the bankruptcy proceedings to an end within the scope of Ukrainian law.

292. The Tribunal's understanding is supported by documents that indicate that the Claimant understood the Respondent's statements the same way. For example, it is recorded in the minutes of a presentation to the Claimant's board on 10 August 1998

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[207] Reply, ¶ 241, quoting Protocol of a meeting between representatives of the Ukrainian Government, Oriana and Metallgesellschaft dated 13 August 1998 (C-0016).

[208] Reply, ¶ 242, quoting Protocol of a meeting between representatives of the Ukrainian and the German Governments, Oriana and MG dated 27 August 1998 (C-0065).

[209] Rejoinder, ¶ 327.

that "[t]he government allegedly has no influence on the suspension of the bankruptcy proceeding. This would have to be stopped directly by Oriana."[210] Moreover, the Claimant itself lodged a bankruptcy petition in the Shelton bankruptcy proceedings on 20 August 1998, which is evidence that the Claimant did not expect Ukraine to stop them.[211]

293. Accordingly, assessing all the evidence, and again on the assumption that there existed a relevant "investment" for the purposes of this claim, the Tribunal concludes that the Respondent did not make any promises to the Claimant that it would terminate the Shelton bankruptcy proceedings and, therefore, did not violate Article 2(1) of the BIT on this basis.

294. (ii) *Shelton's Control over Oriana's Assets.* The Claimant objects to the fact that, on 19 October 1998, the Ukrainian Cabinet of Ministers issued a decree, allowing the transfer of the majority of Oriana's share capital to Shelton. The Claimant argues that this transfer was in violation of the Respondent's obligation to give fair and equitable treatment to the Claimant's investment, as Shelton was given preference over other creditors in the face of the Claimant's legitimate expectation that "one creditor would not be granted a majority interest in Oriana and control over all its assets without notice, a hearing or any other manifestation of due process."[212]

295. The Respondent submits that the appointment of Shelton as custodian of Oriana did not amount to a breach of the BIT, as it was done in accordance with Ukrainian law. In any event, the Respondent notes that Shelton's custodianship ended in July 1999, and denies that Shelton's control over Oriana caused any prejudice to the Claimant:

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210 R-0041.

211 C-0168.

212 Reply, ¶¶ 244 – 248.

"[a] creditor of Oriana which had commenced bankruptcy proceedings was simply appointed the temporary custodian of Oriana for a limited period of time."[213]

296. The Tribunal has been presented with no evidence that Ukraine somehow "gave preference" to Shelton by granting it temporary custodianship of Oriana between October 1998 and July 1999. What is more, the Claimant has not denied the Respondent's contentions that Shelton's appointment as custodian was carried out in accordance with Ukrainian law, and has not demonstrated that any damage resulted from this short-term custodianship.

297. In light of this, assuming there existed a relevant "investment," the Tribunal concludes that whatever control the Respondent gave to Shelton over Oriana's assets did not violate the Respondent's obligations to give the Claimant's investment fair and equitable treatment under Article 2(1) of the BIT.

298. (iii) *The Alleged Stripping of Oriana's Assets.* The Claimant contends that Ukraine violated GEA's reasonable expectations that Oriana's assets would not be granted to a new legal entity without making provision for payment of Oriana's debts to GEA.[214]

299. In this respect, GEA refers to representations made by Ukrainian Government officials during a meeting on 24 August 1999, in which GEA and others were told that a new entity – namely, a new petrochemical joint venture – would repay debts owing to GEA on a priority basis.[215] According to the Claimant, however, the resolution subsequently issued by the Cabinet of Ministers on 10 August 2000 "did

213 Counter-Memorial, ¶ 303; Rejoinder, ¶ 335.

214 Memorial, ¶ 173.

215 Reply, ¶ 252.

not provide for repayment of debts to GEA, and instead only provided for the repayment of debts of Oriana that the State had specifically guaranteed."[216]

300. The Claimant submits that, thereafter, a tender was organised to find an investor for the joint venture, pursuant to which Luxoil Petrochemical was selected instead of GEA. The Claimant explains that following this, a subsidiary of Oriana – Lukor – was created, to which Oriana transferred its petrochemical complex as its contribution to the joint entity. The Claimant submits that, as a result of this transfer, the Claimant was left to attempt to enforce its debt against an entity with few assets but substantial liabilities.[217]

301. The Respondent acknowledges that on 10 August 2009, the Cabinet of Ministers issued a resolution that provided that the BV loan to Oriana should be repaid by the new petrochemical venture (*see* ¶ 48 above). However, the Respondent disputes that the purported meeting on 24 August 1999 could have given rise to a legitimate expectation on the Claimant's part that any new petrochemical company would assume all of Oriana's debts, including the KCH debt.[218]

302. Further, the Respondent submits that the creation of Lukor "did not have the effect of somehow defrauding Oriana's creditors, which could and did continue to maintain their claims against Oriana after Lukoil's participation." The Respondent maintains that the shares held by Oriana in Lukor "represented a valuable asset" and that "if KCH had been able to enforce its debt against Oriana, it could still have done so." Thus, "the facts complained of had no material effect on the Claimant's position."[219]

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216 Reply, ¶ 253.

217 Reply, ¶¶ 250 – 261.

218 Rejoinder, ¶¶ 338 – 339.

219 Counter-Memorial, ¶¶ 316 – 318.

303. In the Tribunal's view, it is a mischaracterisation to describe Oriana's part-privatisation as "asset stripping." To the contrary, Oriana retained a 50% interest in the new company, Lukor, valued at approximately US$ 300,000,000.[220] What is more, Oriana's creditors could and did continue to maintain their claims against Oriana after the part-privatisation[221], and the Tribunal has been presented with no basis to conclude that the Claimant could not have done the same.

304. Accordingly, on the basis of all the evidence, and again assuming there existed a relevant "investment" for the purposes of this claim, the Tribunal concludes that Ukraine did not violate GEA's reasonable or legitimate expectations regarding the placement of Oriana's assets and the repayment of its debts to GEA.

305. (iv) *Conclusion.* In light of the foregoing, the Tribunal finds that there is no basis in the record to find that Ukraine breached its obligation to give GEA's investment fair and equitable treatment, in relation to GEA's expectation to recover the amount Oriana owed to it during bankruptcy proceedings.

(iii) Ukraine's alleged failure to support the enforcement of the ICC Award before the Ukrainian courts, leading to a denial of justice

306. The Claimant alleges that Ukraine's actions or omissions led to a denial of justice on two fronts, namely (i) the non-recognition of the ICC Award; and (ii) the legal proceedings relating to the bankruptcy proceedings initiated by Pryvatbank.

307. (i) *The Non-Recognition of the ICC Award.* As regards the ICC Award, GEA's claim can be summed up as follows:[222]

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220 C-0029.

221 *Id.*

222 Memorial, ¶ 174.

> GEA could and did reasonably expect that the Ukrainian courts would respect fundamental principles of due process and international law applicable to the enforcement and recognition of arbitration awards, and that the Ukrainian State would support, as it had promised, and not oppose the recognition of an award for a debt that it had repeatedly promised would be paid in the past. GEA could and did reasonably expect that the Ukrainian courts, if they were to take the extraordinary step of refusing enforcement of an award under the New York Convention, would at least address the arbitral tribunal's grounds for finding an agreement to arbitrate to exist – grounds reiterated by GEA in its application. The Ukrainian judgments offend any sense of judicial propriety.

308. The Respondent replies that to the extent that the Claimant's denial of justice claim is based upon the refusal of Ukrainian courts to recognise and enforce the ICC Award, it is a claim based on "substantive denial of justice." The Respondent denies that the Ukrainian courts misapplied Ukrainian law, and in any event states that the "Claimant has been unable to cite any modern jurisprudence in which the misapplication of national substantive law by a domestic court has been deemed to constitute a denial of justice in public international law" because "no such jurisprudence exists." Further, the Respondent contends that the Claimant has failed to establish that the Tribunal has jurisdiction that would allow "the re-examination of issues of Ukrainian substantive law."[223]

309. To the extent that the Claimant's allegations regarding the ICC Award are procedural in nature, the Respondent disagrees with the Claimant's assertion that the Ukrainian courts did not address all of GEA's arguments. The Respondent submits that there is no obligation under international law requiring courts to address in their decisions every argument made by the Parties. The obligation is to provide reasons for decision, and the Respondent states that this obligation was met. In any event, the

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[223] Counter-Memorial, ¶ 336.

Ukrainian courts did address the question of the existence of the arbitration clause, contrary to the Claimant's assertions.[224]

310. In response, the Claimant argues that the decisions of national courts are not "insulated from international consideration," particularly where, as here, "the decisions of the Ukrainian courts were so manifestly wrong." In the Claimant's view, the Tribunal should examine the "grossly improper decisions in the application of the law" taken by the courts of Ukraine, in light of the fact that they refused enforcement without ever addressing "the arbitral tribunal's grounds for finding an agreement to arbitrate to exist – grounds reiterated by GEA in its application." In the Claimant's view, this gives rise to "justified concerns as to the judicial propriety" of the outcome of the enforcement proceedings.[225]

311. Given the Tribunal's finding that the ICC Award did not itself constitute an "investment," this claim must fail. However, even if the Tribunal had concluded differently on the "investment" issue, the overall result would have been the same.

312. As an initial matter, the Tribunal notes that the Parties agree that the standard by which a denial of justice should be judged is that articulated in *Mondev International Ltd. v. United States of America* ("*Mondev*"):[226]

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level

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224 Counter-Memorial, ¶ 337.

225 Memorial, ¶ 174; Reply, ¶¶ 215, 262 – 265.

226 ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at ¶ 127. Counter-Memorial, ¶ 327; Reply, ¶ 207; Rejoinder, ¶ 348.

> and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.

313. With this agreed standard in mind, the Tribunal turns to its analysis.

314. As the Tribunal understands it, the Claimant's principal complaint is that the courts of Ukraine purportedly refused enforcement of the ICC Award without ever "address[ing] the arbitral tribunal's grounds for finding an agreement to arbitrate to exist – grounds reiterated by GEA in its application" (*see* ¶ 310 above).

315. However, on the Tribunal's review of the record, it is not that the courts of Ukraine never addressed the Claimant's argument, it is simply that the courts heard those arguments and rejected them.

316. Indeed, in its decision of 28 May 2003 refusing enforcement of the ICC Award, the Appellate Court of the Ivano-Frankivsk Region directly dealt with the issue, holding that:[227]

> . . . this original agreement on jurisdiction [*i.e.*, in the Conversion Contract] was replaced by an arbitration agreement in the Agreement for Repayment of Debts dated 29.09.1998, which provides for arbitration under the [ICC Rules].
>
> Considering the case, the court ascertained that the above-mentioned agreement was concluded and signed in contradiction to the Ukrainian effective legislation by the representatives of OJSC "Oriana" without duly authorised powers.

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[227] C-0120.

317. The same goes for the decision of the Supreme Court of Ukraine dated 15 April 2004, in which it rejected the Claimant's cassation complaint on the grounds that the complaint was not one that, under the Civil Procedural Code of Ukraine, was "linked" to allowing a change in an appellate court decision.[228]

318. In light of this, and regardless whether this denial of justice claim is characterised as procedural or substantive, the Tribunal concludes that the Claimant has failed to demonstrate that the Ukrainian courts took their decisions without taking the Claimant's arguments into account. Instead, it appears from the record that the courts took the Claimant's arguments into account and simply rejected them.

319. Taking into account the terms of the *Mondev* test, the Tribunal does not have any "justified concerns as to the judicial propriety of the outcome" of the decisions of the Ukrainian courts in view of "generally accepted standards of the administration of justice." Accordingly, the Tribunal concludes that there is nothing "clearly improper and discreditable" with respect to those decisions, with the result that the Claimant's claim that, if the ICC Award would have been considered as an investment, its investment has not been subject to fair and equitable treatment is rejected.

320. (ii) *The Legal Proceedings relating to the Bankruptcy Proceedings Initiated by Pryvatbank.* Finally, GEA contends that Ukraine violated GEA's reasonable expectations that the Ukrainian courts would recognise the debt claim pursued by KCH in the Oriana bankruptcy proceedings, in particular those that were initiated by Pryvatbank in September 2002.[229] More specifically, the Claimant submits that, in connection with these proceedings, the Ukrainian courts "failed to administer due

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228 C-0125.

229 Memorial, ¶ 175.

process and GEA was deprived of a fair procedure" in violation of the fair and equitable treatment standard.[230]

321. The Respondent explains that KCH initially attempted to register its claim by virtue of the ICC Award which had not been recognised by the Ukrainian courts. Consequently, the claim was dismissed as time-barred. According to the Respondent, no denial of justice was committed, but rather KCH challenged the non-registration of its claim through the appropriate legal channels in Ukraine and was ultimately unsuccessful because of its own strategic decisions and issues of Ukrainian bankruptcy law that were extensively litigated in Ukraine.[231]

322. The Tribunal has not been presented with any evidence that the Ukrainian courts "failed to administer due process" or "deprived" the Claimant of a "fair procedure." To the contrary, the record before it demonstrates that the Claimant was accorded a full hearing by the Ukrainian courts, but that the courts disagreed with the Claimant's point of view.[232] Accordingly, even assuming that there existed a relevant "investment" for the purposes of this claim, the Tribunal rejects the Claimant's contentions under this heading. The Claimant has not met its burden of proving that it was subject to a denial of justice in the context of the bankruptcy proceedings initiated by Pryvatbank.

323. In conclusion, on the basis of its findings under points (i) and (ii) under this heading, the Tribunal has determined that the Claimant was not subject to a denial of justice in the Ukrainian courts and, therefore, was not subject to unfair or inequitable treatment.

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230 Reply, ¶ 280.

231 Counter-Memorial, ¶¶ 351 – 381.

232 See, e.g., C-0120; C-0129; C-0132; C-0134; C-0143.

(iv) Conclusion

324. In light of the foregoing, the Tribunal concludes that there are no grounds to hold Ukraine liable for violating its obligation to give the Claimant's investment fair and equitable treatment in accordance with Article 2(1) of the BIT, whether it be with respect to payment for the Products; GEA's expectation to recover amounts owed by Oriana during the bankruptcy proceedings; or the enforcement of the ICC Award.

D. Arbitrary and Discriminatory Measures

325. Article 2(3) of the BIT provides for protection against arbitrary and discriminatory measures, as follows:

> Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments made by nations or companies of the other Contracting State within its territory.

(1) The Parties' Positions

326. The Claimant contends that its enjoyment of its investment has been impaired because the Respondent has violated its obligations under Article 2(3) of the BIT.

327. Specifically, GEA claims that "[t]he record establishes that 125,000 metric tons of GEA's property was impaired by lawless acts trampling on any sense of due process." In addition, GEA claims that, subsequent to the misappropriation of its property, "Ukraine time and again impaired GEA's residual interest – its claims for compensation – by stripping Oriana of its assets, by baseless assertions as to the

authority of the Oriana officer who signed the Repayment Agreement, and by arbitrary court decisions."[233]

328. The Respondent contends that the Claimant's allegations of breach of the obligation not to engage in arbitrary and discriminatory measures relate to the same events in respect of which the Claimant's allegations of expropriation and breach of the fair and equitable treatment standard are made, and that these allegations must be rejected for the same reasons as invoked by the Respondent to refute those other claims.[234]

(2) The Tribunal's Analysis

329. The Parties agree that the standard of protection against arbitrariness or discrimination is related to that of fair and equitable treatment.[235]

330. In light of this, it is not surprising that the Claimant raises the same grounds for breach under Article 2(3) of the BIT as it did in connection with its claims under Article 2(1) relating to fair and equitable treatment.

331. The Tribunal therefore rejects the Claimant's claims under this heading for the same reasons as the Claimant's claims in respect of the fair and equitable treatment standard were rejected (*see* ¶ 324 above).

E. National Treatment and Most-Favoured Nation Treatment

332. Article 3 of the BIT provides for national treatment and most-favoured nation treatment for the investments and investors protected by the BIT, as follows:

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233 Memorial, ¶ 184.

234 Counter-Memorial, ¶¶ 362 – 363.

235 Memorial, ¶ 179; Counter-Memorial, ¶ 360.

> (1) Neither Contracting State shall subject investments in its territory that are owned or controlled by nationals or companies of the other Contracting State and that have been authorised and made pursuant to Article 2(2) in accordance with the legislation in force in the territory of the given Contracting State to treatment less favourable than it accords to investments by its own nationals or companies of third states.
>
> (2) Neither Contracting State shall subject nationals or companies of the other Contracting State to treatment less favourable than it accords to investments by its own nationals or companies or investments by nationals or companies of third states.

(1) The Parties' Positions

333. GEA states in its Memorial that "there is strong reason to believe that GEA has been the victim of discrimination" in several respects.[236]

334. First, GEA submits that while its claim in Oriana's bankruptcy was rejected as time-barred, a claim brought by a Seychelles company in the case *Regent Company v. Ukraine*, Application No. 773/03, Eur. Ct. H.R. (2008), dating from the same time period, was allowed.[237]

335. Second, in relation to the refusal of the Ukrainian courts to recognise and enforce the ICC Award on the grounds that the Repayment Agreement had not been signed by the president of Oriana, GEA alleges that Oriana had no president between August and November 1998. GEA further alleges that contracts other than the Repayment Agreement must have been signed on Oriana's behalf within that period, and that it was aware of "no other contracts that the Ukrainian courts held to be invalid from this

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236 Memorial, ¶ 191.

237 Memorial, ¶ 192.

time period." On the assumption that such contracts must exist, GEA claims that it was treated less favourably than others of Oriana's contractual counterparts.[238]

336. Finally, GEA submits that Article 6 of the Law on Foreign Economic Activity (*see* the quote of the Appellate Court in ¶ 65 above, setting forth this provision) "was discriminatory on its face since it imposed more burdensome requirements on foreign than national investors."[239] Specifically, the Claimant submits that there was no requirement for a contract to be signed with two signatures (*i.e.*, of "a person who has such right in accordance with his position under the statutory documents and a person authorized by a power of attorney") when an Ukrainian company entered into a contract with an Ukrainian investor.[240]

337. The Respondent contends that the Claimant has failed to establish the existence of nationals or foreigners in a situation similar to that of the Claimant, such that Ukraine's treatment of them can be compared.[241]

338. More specifically, the Respondent rejects the Claimant's suggestion that the Seychelles company referred to in its submissions was in a similar situation as GEA because the Claimant's original claim, based on the ICC Award, was not rejected because it was time-barred, but because the ICC Award had not been recognised in Ukraine.[242]

339. In addition, the Respondent rejects the Claimant's proposition that the Ukrainian courts discriminated against GEA by refusing to recognise the Repayment Agreement on the basis of other contracts that "must have been signed" by Mr Sljuzar and

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238 Memorial, ¶ 193.

239 Reply, ¶ 292.

240 Reply, ¶ 293.

241 Counter-Memorial, ¶¶ 367 – 368.

242 Counter-Memorial, ¶¶ 370 – 371.

purportedly upheld by the Ukrainian courts. The Respondent considers this argument to be unsustainable, as the Claimant does not, among other things, point to any other contracts signed by Mr Sljuzar and upheld by the Ukrainian courts.[243]

340. Finally, with respect to the double-signature requirement of Article 6 of the Law on Foreign Economic Activity, the Respondent submits that this provision applies to Ukrainian individuals and legal entities, not to foreign companies, and thus "cannot be considered as a measure that discriminated against [foreign companies]."[244]

(2) The Tribunal's Analysis

341. The Tribunal is of the view that, even assuming there existed relevant "investments" for these purposes, and whatever standard were to apply to analyse the Claimant's contentions under this claim, the claim would fail for the reasons that follow.

342. With respect to the purported unequal treatment between the Claimant and the Seychelles company, the Tribunal is not convinced that the situation of the Seychelles company is comparable to that of GEA. In the Tribunal's view, the simple fact that the claim of the Seychelles company was not time-barred does not, in and of itself, mean anything, in particular taking into account the differences in the procedural posture between that case and the one at hand.

343. With respect to other contracts that Mr Sljuzar purportedly entered into and that were approved by the Ukrainian courts, the Tribunal notes that the Claimant's contention is based on its "assumption" that such contracts exist. However, the Tribunal has been provided with no evidence of such contracts. Clearly, the Tribunal cannot make a

243 Counter-Memorial, ¶ 373.

244 Rejoinder, ¶¶ 398 – 400.

finding against the Respondent on the basis of mere assumptions, unsupported by the record.

344. With respect to Article 6 of the Law on Foreign Economic Activities, the Tribunal notes, as pointed out by the Respondent, that this provision applies only to Ukrainian physical and legal persons. What is more, while this legislation may create additional formal requirements for foreigners to invest in Ukraine, it does not concern the treatment of investments once made. In light of this, the Tribunal does not consider Article 6 of the Law on Foreign Economic Activities to be discriminatory.

345. Accordingly, the Tribunal rejects the Claimant's claim that it was discriminated against in violation of Article 3 of the BIT.

F. Adherence to Obligations

346. Article 8(2) of the BIT provides that:

> Either Contracting State shall adhere to any other obligation it has assumed with regard to investments of nationals or companies of the other Contracting State in its territory.

(1) The Parties' Positions

347. GEA contends that Ukraine has not adhered to its obligation to pay GEA for the property that was appropriated. According to GEA, this obligation arises from the fact that, "on multiple occasions, Ukraine promised GEA that it would be compensated for the taking."[245]

[245] Memorial, ¶ 199.

348. In response, Ukraine submits that "as in the context of its allegation of breach of the fair and equitable treatment standard, the Claimant fails to cite any evidence where any such promise is actually made."[246]

349. In any event, the Respondent contends that the Claimant has not presented "pertinent legal authority to support its argument that an umbrella clause can be used to elevate a unilateral statement into a binding treaty obligation,"[247] in particular when the Claimant "is unable to point to a unilateral statement of a legal obligation stated in sufficiently clear and specific terms to meet the customary standard under international law."[248]

350. GEA responds that, contrary to the Respondent's assertions, the record is clear that Ukraine made promises "in sufficiently clear and specific terms to meet the standard of customary international law."[249]

(2) The Tribunal's Analysis

351. In support of its claim that Ukraine made promises of payment to GEA, the Claimant refers to a letter from the Ministry of Industrial Policy to Metallgesellschaft dated 31 July 1998[250], as well as the protocol of a meeting between representatives of the Ukrainian Government, Oriana and GEA dated 13 August 1998.[251] For the same reasons as set forth in ¶¶ 288 – 293 above, the Tribunal does not consider that these documents evidence any promises made by Ukraine towards GEA.

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246 Counter-Memorial, ¶ 375.

247 Counter-Memorial, ¶ 377; Rejoinder ¶¶ 414 – 415.

248 Counter-Memorial, ¶ 377.

249 Reply, ¶ 315.

250 Reply, ¶ 317, referring to Minutes of a meeting between the Ukrainian Government, Green Party, Shelton, Oriana, MG and KCH (C-0023).

251 Reply, ¶ 319, referring to Protocol of a meeting between representatives of the Ukrainian Government, Oriana and MG dated 13 August 1998 (C-0016).

352. The Claimant also refers to a statement of Vice Prime Minister Tyhypko, who purportedly said during a meeting between the Ukrainian Government, the Green Party, Shelton, Oriana, MG and KCH on 23 February 1999 "that the government of Ukraine is willing to meet its obligations."[252] In the Tribunal's view, it has been presented with no evidence that such a statement refers to any obligation on the part of the Respondent to pay compensation to the Claimant for the product that KCH had allegedly lost. Within the context of the minutes of that meeting, this statement could just as easily – if not more likely – mean that Ukraine was willing to meet its obligations with respect to the working group that was being formed to "clarif[y] all of the open issues concerning the liabilities of the Oriana Group to KCH.[253]

353. In addition, the Claimant refers to a "clear and unambiguous promise" made by Ukrainian officials that the debts owed to BV and GEA would be transferred to Lukor and treated with priority.[254] However, the Tribunal observes that the paragraph containing this alleged promise does not even refer to the State of Ukraine, aside from its maintaining certain guarantees to parties other than GEA:

> [Lukor] is to become assignee in respect of the receivables and debts from the activities of the old petrochemical division of the concern Oriana. This applies to the foreign debts in relation to Bayerische Hypo- und Vereinsbank/Udeko and Klöckner Chemiehandel and for the remaining, primarily national, debts; the latter are under all circumstances to be considered less important than the Hypo- und Vereinsbank/Udeko and Klöckner debts.
>
> The existence of the Ukrainian state guarantee granted to Hypo- und Vereinsbank/Udeko remains unaffected.

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252 Memorial, ¶ 199, referring to Minutes of a meeting between the Ukrainian Government, Green Party, Shelton, Oriana, MG and KCH (C-0023).

253 C-0023.

254 Reply, ¶ 323, referring to Protocol of a meeting between representatives of the Ukrainian Government, representatives of the German Government, Hermes, Linde, BV, MG and KCH on 24 August 1999 (C-0027).

354. In light of this, there is no basis for the Tribunal to conclude that Ukrainian officials made any "clear and unambiguous promise" to GEA in this context.

355. Finally, the Claimant refers to the record of a 9 April 2003 meeting for the proposition that Ukraine promised to support GEA in obtaining recognition and enforcement of the ICC Award against Oriana.[255] However, the Tribunal notes that the minutes of that meeting in fact state that Ukraine "agreed – insofar as possible – to support Solvadis AG in obtaining the declaration of enforcement and the subsequent enforcement of the international ICC arbitration award against OAO Oriana" (emphasis added).[256] The Tribunal considers it clear that this does not amount to a "promise" of anything on the part of Ukraine, but rather an indication that it would use its best efforts to do what it could.

356. Accordingly, the Tribunal concludes that the Respondent did not violate any of its "other obligations" pursuant to Article 8(2) of the BIT.

VIII. DAMAGES

357. As the Claimant has failed on each of its claims, such that the Tribunal has not found the Respondent liable in any respect, the Tribunal need not address the Claimant's damages claims.

IX. COSTS

358. In its Submission on Costs dated 29 October 2010, the Claimant seeks to recover EUR 1,309,084.74 and USD 315,016.44, plus interest from the date of this Award. The Claimant considers that these amounts are reasonable, and that it should recover

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[255] Reply, ¶ 325, referring to Protocol of a meeting between representatives of the Ukrainian Government, a representative of the German Government, BV, Linde and Solvadis AG dated 9 April 2003 (C-0025).

[256] *Id.*

these amounts in light of the Respondent's behaviour before and during these proceedings.

359. In its Submission on Costs dated 29 October 2010, the Respondent seeks to recover USD 1,595,337.47 and UAH 4,300. The Respondent contends that, in the event the Tribunal declines jurisdiction, or accepts jurisdiction but rejects the Claimant's claims, the Claimant should reimburse the Respondent for the entirety of its costs.

360. There were two further rounds of submissions on costs.

361. Article 61(2) of the ICSID Convention provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.

362. Article 61(2) does not prescribe a particular test for tribunals to assess costs, nor does it place any restrictions on a tribunal's ability to do so. In light of this, the Tribunal understands the power granted under this Article to be broad, allowing the Tribunal discretion in making its determination.

363. The Respondent has articulated its Submission on Costs in terms of "costs follow the event," in that the Respondent asks the Tribunal to award the entirety of its costs should the Claimant lose on jurisdiction and/or liability.

364. It has long been debated whether the "costs follow the event" rule should apply in international investment arbitration. Without entering upon this debate here, the Tribunal considers that this particular case is an appropriate one for the exercise of its discretion under Article 61(2) of the ICSID Convention in the Respondent's favour.

365. Here, the Claimant's case has failed partially on jurisdiction (*see* ¶ 125 above) and entirely on liability. In circumstances where no part of the Claimant's endeavour in commencing these proceedings has been successful, it may fairly be concluded that the Respondent ought to recover its reasonable costs.

366. Having taken into account all the circumstances of the case, the Tribunal concludes that the Claimant should bear the entirety of the costs in this matter. The Tribunal finds the amounts claimed by the Respondent (USD 1,595,337.47 and UAH 4,300) to be reasonable under the circumstances.[257] Accordingly, the Tribunal shall order the Claimant to reimburse the Respondent all of its costs.

[257] The Tribunal notes that the Respondent has not claimed for interest on costs.

X. DECISIONS

367. FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:

(1) DETERMINES that GEA has standing to bring claims arising from the Conversion Contract until 30 June 2004, but not thereafter;

(2) DETERMINES that the dispute is within its competence and ICSID's jurisdiction insofar as the Conversion Contract and the Products are concerned;

(3) REJECTS all of the Claimant's claims within its competence and ICSID's jurisdiction; and

(4) ORDERS the Claimant to reimburse the Respondent all of its costs, being USD 1,595,337.47 and UAH 4,300.

Date: / 28 March / _____ 2011

THE TRIBUNAL:

/ signed /
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Professor Albert Jan van den Berg
President
Date: / 28 March 2011 /

/ signed /
_____
Mr Toby Landau QC
Arbitrator
Date: / 25 March 2011 /

/ signed /
_____
Professor Brigitte Stern
Arbitrator
Date: / 22 March 2011 /