Neutral Citation Number: [2018] EWHC 409 (Comm)

Claim No CL-2017-000174

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN AN ARBITRATION CLAIM

BETWEEN:

GPF GP S.à.r.l.

Claimant/Applicant

-and-

THE REPUBLIC OF POLAND

Defendant/Respondent

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

Date: 02/03/18

Before:

THE HONOURABLE MR JUSTICE BRYAN

- -

Ricky Diwan QC (instructed by **Dentons UKMEA LLP**) for the **Claimant**
Stewart Shackleton (instructed by **Gateley Plc**) for the **Defendant**

Hearing dates: 14 and 15 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Honourable Mr Justice Bryan

MR JUSTICE BRYAN

A. Introduction

1. The parties appear before the Court on the hearing of an application on the part of GPF GP S.à.r.l ("Griffin") under section 67 of the Arbitration Act 1996 (the "1996 Act") challenging on jurisdictional grounds an Award on Jurisdiction dated 15 February 2017 (the "Award") in SCC Arbitration V 2014/168 (the "Arbitration") rendered by a three-member Tribunal (Prof. Gabrielle Kaufmann-Kohler, Prof. David Williams QC, Prof. Philippe Sands QC) (the "Tribunal"), seated in London, pursuant to the Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg of 19 May 1987, but which became binding on 2 August 1991 ("the "BIT").

2. It is well established that a bilateral investment treaty containing an arbitration agreement confers rights on an investor, which it is entitled to invoke (subject to the terms and scope of the arbitration agreement in the bilateral investment treaty), and that where the arbitration agreement is seated in London it is subject to the 1996 Act, and gives either party the right to challenge an award of the arbitral tribunal as to its substantive jurisdiction under section 67 of the 1996 Act (see *Occidental Exploration v The Republic of Ecuador* [2005] 2 Lloyd's Rep 707 (CA) at [16] – [20] and *Czech Republic v European Media Venture SA* [2008] 1 Lloyd's Rep 186).

3. The Respondent seeks to reserve any right to argue the compatibility of the BIT with EU law, and any rights it may have in the context of the pending decision of the European Court of Justice in Case C-284/16 *Achmea v Slovakia*. I say nothing about whether the Respondent does or does not have any such rights. I have heard no argument on any such matters, and it is agreed that I should not address the same.

4. In the present case Article 9.1(b) of the BIT (as translated into English) defines disputes that may be referred to arbitration under Article 9(2) in the following terms:

> "…disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation."

5. The Tribunal found (at paragraph 187) of its Award that the Tribunal had jurisdiction to rule upon one aspect of Griffin's claim in the arbitration, namely whether a judgment of the Warsaw Court of Appeal of 19 December 2014, as confirmed by the Polish Supreme Court on 2 June 2016, constituted an "*expropriation, nationalization*

or any other similar measures affecting investments" in violation of the BIT, but that it lacked jurisdiction to rule on any other measures allegedly in violation of the BIT.

6. On this section 67 application, Griffin submits that the Tribunal had jurisdiction in respect of all the claims it advances in the arbitration, and the Court should so find. In this regard Griffin submits that the Award contains two separate errors as to substantive jurisdiction in respect of the matters that had been submitted to arbitration in accordance with the arbitration agreement contained in Article 9.1(b) of the BIT:-

   (1) The Tribunal's determination that on the proper interpretation of the arbitration agreement contained in Article 9.1(b) of the Treaty, the Tribunal's jurisdiction was limited to claims for expropriation falling within Article 4.1 of the Treaty and did not extend to Griffin's claims for breach of the Fair and Equitable Treatment standard **(**the "FET standard") contained in Article 3.1 of the BIT (Award at paras 76-89, 90-91, 187(ii)), and

   (2) The Tribunal's determination that on the proper interpretation of the arbitration agreement contained in Article 9.1(b) and applying principles of international law, so far as Griffin's claim for indirect expropriation was concerned, the Tribunal's jurisdiction was limited to considering whether the decision of the Warsaw Court of Appeal of 19 December 2014 had effects similar to an expropriation and that the Tribunal did not have jurisdiction to consider any of the Prior Measures (as defined further below) relied upon by Griffin in support of its claim for indirect expropriation. The Tribunal reached this conclusion on the basis, which Griffin challenges (so far as necessary) that:

      (i) A claim for creeping expropriation (a form of indirect expropriation) could not as a matter of international law be put forward given that there was a specific event (the Court of Appeal decision) that was said to be "similar" to an expropriation;

      (ii) the Prior Measures did not have effects "*similar*" to expropriation within the meaning of Article 9.1(b);

      (iii) the Tribunal should assume that Griffin would establish in law that the Warsaw Court of Appeal decision was "*similar*" to expropriation applying a pro tem test.

      (Award paras 90-96 and 187 (i) and (ii)).

7. An issue has arisen between the parties as to the nature of a section 67 hearing, and what arguments may be advanced, and evidence adduced, by the applicant on such a hearing which I address at Section F below. Suffice it to say at this point that I am satisfied that it is well established that the hearing is in the nature of a rehearing, and to the extent that Griffin advances any particular arguments not argued before the Tribunal, or adduces any new evidence, I am satisfied that Griffin may do so, and to

the extent that permission is required to do so, I am satisfied that this is an appropriate case for permission to be granted, the Respondent not having adduced any evidence of prejudice in dealing with the same, and indeed having itself addressed such matters at length in its submissions and evidence.

8. The parties have served evidence in the form of witness statements in support of their respective positions on the section 67 application. In the case of Griffin in the form of the first and second witness statements of Jean-Christophe Honlet (a partner of Dentons Europe LLP, Paris office the firm having conduct of the Arbitration on Griffin's behalf) dated 13 March 2017 and 14 November 2017. In the case of the Respondent in the form of the first and second witness statements of Katarzyna Próchnicka (general counsel to the Respondent) dated 24 October 2017 and 25 January 2018.

9. Those statements identify (and argue) the respective positions of the parties on the application and exhibit associated documentation as well as numerous authorities and arbitral decisions said to be of relevance to the issues that arise. I confirm that I have had regard to such statements and the exhibits thereto. Ultimately, however, and as is common ground, it is for me to interpret the arbitration agreement in the BIT in accordance with international law, and the principles of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") which codifies customary international law – see *Occidental Exploration v The Republic of Equador*, supra, at [33]-[34].

B. The provisions of the BIT

10. The BIT was signed in French, Dutch and Polish with each text being authentic. I set out below what were previously agreed translations from the French text into English. Whilst it had previously appeared that no issues arose between the parties as to appropriate translations (whether from the French or Polish) into English, and the words used in such English translations, it became apparent shortly before the hearing that that was no longer so. I will address such matters (to the extent relevant) when considering the particular provisions under consideration. What is set out below are the translations that were previously agreed between the parties.

11. Article 1 of the BIT (originally agreed translation) defines "*investment*" as follows:

"The term 'investments' shall mean every part of an asset and every contribution both direct or indirect, in all companies or mixed enterprises in any sector of economic activity, and notably, but not exclusively:
(a) personal and real property as well as any other rights in rem;
(b) shares and other forms of participation in enterprises;
(c) debts and rights to any performance having economic value;

(d) copyrights, trademarks, patents, technical processes, trade names and any other industrial property right and goodwill.

Any change to the legal form in which the assets and capital have been invested or reinvested shall not affect their designation as 'investments' within the meaning of this Agreement."

12. Article 3.1 of the BIT (originally agreed translation) sets out a fair and equitable treatment ("FET") standard:

"Each Contracting Party shall accord in its territory to investments by investors of the other Party fair and equitable treatment excluding any unjustified or discriminatory measure that could impede the management, maintenance, use or enjoyment or liquidation thereof."

13. Article 4.1 of the BIT (Griffin's translation, only differing from the Respondent's in the first sentence and not suggested to be a material difference) defines an obligation to compensate for expropriation:

"The investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party shall not be expropriated or subjected to other measures of direct or indirect dispossession having a similar effect, unless the following conditions have been met:

> "(a) the measures were in the public interest and in accordance with legal process;
>
> (b) they are neither discriminatory, nor contrary to any specific commitment such as that described in Article 7, section 2;
>
> (c) they are accompanied by provision for the payment of compensation, the amount of which must correspond to the real value of the investments concerned on the day before the measures were adopted or were made public..."

14. Article 9.1(b) of the BIT (originally agreed translation into English) defines disputes that may be referred to arbitration under Article 9(2) in the following terms:

"… disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation."

C. Griffin's Factual Case

15. I take Griffin's factual case from paragraphs 8 to 25 of Griffin's skeleton argument, from Griffin's chronology and from paragraphs 11 to 27 of Mr Honlet's first statement. It perhaps goes without saying that much of Griffin's factual case is not accepted by the Respondent, although some aspects are uncontroversial and are also recorded in the Award at paragraphs 8 to 25. It nevertheless represents Griffin's case before me, and what Griffin alleges reflects its case before the Tribunal (itself in certain respects in issue). It is necessary to set out Griffin's case as it places in context Griffin's claims in the arbitration and the issue of whether or not those claims are within the scope of the arbitration agreement in Article 9.1(b) of the BIT.

16. However, in setting out Griffin's case, I am not to be taken as accepting Griffin's case. The ultimate determination of particular factual issues (assuming the Tribunal has jurisdiction in relation to any particular claim) will be a matter for the Tribunal at the merits stage of the Arbitration. It is common ground that the merits of the underlying disputes are not issues to be determined by this Court. Both parties have, however, seen fit to make extensive references to the Statement of Case, Statement of Defence, Statement of Reply and Rejoinder in the Arbitration going well beyond what is needed to place Griffin's claims in context.

17. Griffin is a Luxembourg company and part of a private equity group operating in real estate in Central and Eastern Europe. In February 2008, Griffin decided to provide the financing to enable the White Star Property Group, a real estate group operating in Poland, acting through a group company, Parkview Terrace, to acquire 100% of the shares in 29 Listopada.

18. 29 Listopada was the holder of perpetual usufructuary rights for a term of 99 years over a Property comprising two plots of land and a former military residential building located at 29 Listopada Street (the "Property"), in the centre of Warsaw, pursuant to a Perpetual Usufruct Agreement that had been entered into on 6 February 2001 (the "PUA") and which 29 Listopada took over on 13 September 2004. Perpetual usufructuary rights are rights in rem and a form of quasi-ownership as a matter of Polish law. As described below, Griffin subsequently acquired those ownership rights through its subsidiary.

19. The purpose of the PUA was to commercially develop the Property into residential apartments with complementary services.

20. Although the PUA provided for the works to commence by 6 February 2002 and be completed by 6 February 2004, it also contemplated and provided for those deadlines to be extended on the basis of the payment of an additional annual fee. On 15

October 2002, the City of Warsaw issued a resolution extending the deadline to 6 February 2006.

21. Thereafter, and as was required in order to conduct building and development work, on 21 April 2005, the City of Warsaw issued a WZ Decision (the "2005 WZ Decision") specifying the conditions for building and land development and on 11 July 2005 issued a building permit in respect of those works (the "2005 Building Permit") and construction work (involving demolition) began.

22. In 2007, the White Star Property Group considered acquiring 29 Listopada and expanding the development by building 30 apartments and 60 underground parking places. In that context, it applied for and subsequently obtained on 12 April 2007 a recommendation from the Warsaw Monuments Conservator supporting the proposed adaptation of the existing project (on the basis that the Warsaw Monuments Conservator's approval was required for any new WZ decision and permit) (the "April 2007 Recommendation"). It is Griffin's case that this recommendation constituted an administrative promise, which could not be reversed arbitrarily and gave rise to legitimate expectations.

23. Thereafter, the Warsaw Monuments Conservator sought an opinion on the development from the National Centre of Monument Research and Documentation, which issued an opinion approving the development, subject to minor qualifications, in an opinion issued on 20 October 2008 (the "National Centre's Opinion").

24. Thereafter, on the basis of the April 2007 Recommendation and subsequent developments:

(1) Parkview Terrace acquired the shares in 29 Listopada on 15 September 2008.

(2) Griffin (through its subsidiary, PFS) decided to invest in the Property by providing the financing for the White Star Property Group's acquisition of the shares in 29 Listopada. In particular:

(a) On 30 October 2008, PFS and Parkview Terrace entered into a Mezzanine Facilities Agreement by which PFS (being funded by Griffin) would provide two loans (totalling Eur 5.93 million) to Parkview Terrace secured against mortgages over the Property. This was subsequently consolidated into a single restructured loan of over Eur 7,776,689.71 on 26 July 2011.

(b) On 30 October 2008, GPF Cyprus (another subsidiary of Griffin) and Mitsuke Ltd (a company within the White Star Group) entered into a call and put option as security for timely performance of the loan obligations under the

Mezzanine Facilities and an additional benefit, in allowing GPF Cyprus to acquire shares in Parkview Terrace at their nominal value.

(c) On 31 October 2008, PFS entered into pledge agreements with Parkview Terrace and Mitsuke Ltd thereby having security in the form of the shares of both 29 Listopada and Parkview Terrace.

25. Despite the Warsaw Monuments Conservator's April 2007 Recommendation and the National Centre opinion, on 5 January 2009 and then again on 2 March 2009, the same Monument Conservator reversed her prior position and issued two decisions refusing to agree a new WZ decision on the purported basis that the development was unacceptable from a conservation point of view (the "2009 Monuments Conservator's Decision"). It is Griffin's case, in this context, that on 11 March 2009, the Provincial Monuments Conservator confirmed that the Property was not designated a historical site and not entered on the monuments register and that the only restriction on development (arising out of a 1971 Decision of the Monuments Conservator) related to precautions to be taken in construction with respect to certain perimeters where there might be bronze age artefacts. Griffin relies on this in support of its case regarding what it alleges is the arbitrary conduct of the City of Warsaw.

26. On the basis of 2009 Monuments Conservator's Decision, the City of Warsaw declined to issue a new WZ decision by refusal of 1 June 2009 (the "2009 Negative WZ Decision"). Both the 2009 Monuments Conservator's Decision and the 2009 Negative WZ Decision were challenged by Parkview Terrace and this led to a number of administrative and court decisions, in the period 2009-2015 up to the Supreme Court ("Court of Cassation") level.

27. In the meantime, Parkview Terrace carried out demolition works which it alleges it was entitled to do pursuant to the 2005 Building Permit. In the period 2005 to 2010, 29 Listopada made multiple requests for extensions of the contractual deadline, which Griffin submits that the City of Warsaw was obliged to give. It is Griffin's case that these requests were rejected for spurious reasons.

28. On 10 November 2010, the Warsaw Monument Conservator issued a decision ordering the halting of the demolition work and initiated proceedings which Griffin says was aimed at entering the former military barracks on the register of historical monuments. The Provincial Monuments Conservator entered the Barracks on the register of historical monuments in 2011, which they say was a volte face of the position taken by the Provincial Monuments Conservator as of 11 March 2009 as referred to above. Griffin says that all subsequent efforts by Parkview Terrace to put forward modified development proposals for WZ decisions were rejected, with the Warsaw Monuments Conservator issuing further negative recommendations.

29. On 20 December 2011, the City of Warsaw requested the termination of the PUA, and it formally filed an action for termination with the Warsaw Regional Court on 22 March 2012. It is part of Griffin's case that this was discriminatory on the basis that the City of Warsaw, at about the same time, did not request the termination of a separate PUA agreement with a state-owned company (Polski Holding) which also had not met the construction deadlines stipulated in the PUA (of 15 July 2004).

30. In the meantime, because Parkview Terrace had been unable to develop the Property (says Griffin), it defaulted on the Consolidated Loan, and PFS during 2012 took over all shares in 29 Listopada and became the sole shareholder in Parkview Terrace. Griffin's case is that it then became the sole investor in the Project.

31. On 4 June 2013, the Warsaw Regional Court terminated the PUA for failure to develop the Property within the time limits specified. Thereafter, on 19 December 2014, the Warsaw Court of Appeal confirmed the termination of the PUA and dismissed an appeal from the Warsaw Regional Court and on the same date the mortgage under the Mezzanine Facilities Agreement was cancelled. It is Griffin's case that its investment lost its entire value as of that date.

32. It is also part of Griffin's case that the Warsaw Court of Appeal (whose actions are to be attributed to Poland) misapplied Polish law because, it is said, mere non-compliance with a time limit for the development of a property is not sufficient for termination of a PUA. It is said that what is required is: (i) a showing of obvious, gross and unjustified breach; and (ii) bad faith of a particular intensity directed at breach of the PUA. On 2 June 2016, the Supreme Court dismissed any further challenge. On Griffin's case, this is also reinforced by the different treatment of Polski Holding referred to above.

33. Griffin also alleges that the City of Warsaw (whose actions, Griffin says, are to be attributed to Poland) in acting in the manner in which it did, had a hidden agenda, which was to transfer the Property to a State-owned museum - Lazienki Krolewskie Museum (the "Museum") - that neighboured the Property and which wanted to use it as a car parking space for the Museum. In this regard, Griffin relies upon the following matters:-

    (1) On 12 March 2008, the Museum wrote to the City of Warsaw objecting to the development of the Property by Parkview Terrace and expressed its view that the area should be bought back by the state for its purposes.

    (2) On 15 December 2011, five days prior the City of Warsaw's request to terminate the PUA, the Museum issued a public statement to the Polish Press

Agency indicating its support for the termination of the PUA and to acquire it itself.

(3) On 3 February 2012, the Museum formally requested the Property be donated to it by the City of Warsaw. That request was renewed on 20 June 2013 and 16 May 2014.

(4) 29 Listopada was initially successful in obtaining a new WZ Decision in respect of the Property on 1 June 2012 in respect of modified development, but the Museum appealed that decision, and the WZ Decision was eventually overturned by the Supreme Administrative Court on 28 May 2015.

34. The particular actions which Griffin alleges are attributable to the Respondent, the "prior measures" on which Griffin seeks to place reliance are set out at paragraph 23 of Mr Honlet's first statement. For its part the Respondent, at paragraph 15 of Ms Próchnicka's first statement refers to that description of the prior measures as neither, *"correct, complete or objective"*, and at paragraphs 22 to 51 of that statement sets out the Respondent's case in relation to prior measures. In turn Mr Honlet responds in relation thereto at paragraphs 51 to 61 of his second statement, referring to Griffin's Statement of Reply.

35. I have had regard to all such matters, but ultimately the underlying merits of the claims advanced by Griffin are a matter going to the merits for the Tribunal at the substantive hearing on the arbitration in due course. The relevance of such matters at the moment is to place in context those matters which Griffin wishes to rely upon before the Tribunal (prior measures) but which the Tribunal found did not fall within its jurisdiction. The parties are agreed that I should not make any determination on the merits of the prior measures or decide whether, those measures in fact, amount to either expropriation or unfair and inequitable treatment (see paragraph 6 of the Respondents' Reading List, Gateley Plc's letter of 24 October 2017 and Dentons' letter of 6 November 2017).

D. Griffin's claims in the arbitration

36. Griffin advances two separate claims in the arbitration:-

(1) The first is for violation of the FET standard contained in Article 3.1.

(2) The second is a claim for indirect expropriation in breach of Article 4.1.

D1. Claim for Violation of the FET Standard

37. The precise scope of the FET standard in accordance with principles of international law, and Article 3.1 in particular, is not in issue, and is not a matter for determination, on this arbitration application. At its highest level it covers (as it expressly provides for) the accordance of, in its territory to investments made by investors of other contracting parties, fair and equitable treatment excluding any unjustified or discriminatory measure that could impede the management, maintenance, use, enjoyment or liquidation thereof.

38. In relation to the FET standard, and having reviewed numerous tribunal awards that considered the FET standard, the tribunal in *Crystallex International Corporation v Venezuela* (Award 4 April 2016) stated as follows at para 543 of the award:

"Despite the different nuances in the definition of those principles formulated by those and other tribunals, the Tribunal notes that there is a common understanding as to the elements identified above. To the extent that they are relevant to the facts at issue in this case, the Tribunal is of the view that FET comprises, *inter alia*, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency. The Tribunal believes that the state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard. The Tribunal shares the observation made by the tribunal in *Mondev*, whereby "[t]o the modern eye, what is unfair or inequitable need not equate to the outrageous or the egregious. In particular, a state may treat foreign investments unfairly and inequitably without necessarily acting in bad faith."

39. The editors of *McLachlan International Investment Arbitration Substantive Principles 2nd edn.,* identify in the context of the fair and equitable treatment standard, and administrative action, the following at paragraphs 7.174 to 7.176:

> "When the fair and equitable treatment standard is applied to the executive function, international law concerns itself with the State's administrative decision-making… In this context, the international standard performs a function that is also familiar to national systems for the judicial review of administrative action, but with the important distinction that the applicable standard against which the administrative conduct is measured is one of international law not national law.
>
> …
>
> In view of the fact that the standard has to respond to a wide variety of different State measures, a general formulation cannot be expected to cover all situations. Nevertheless, the dictum of the Tribunal in [*Waste Management Inc v Mexico (Award)* ICSID Case No. ARB(AF)/00/03, 11 ICSID Rep 361] has achieved wide acceptation by subsequent tribunals as a useful statement of the standard in its contemporary application, irrespective of the position that they have taken on the connection between the treaty standard and general or customary international law. This formulation expresses the standard as breached by conduct that is:

…arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied upon by the claimant.

This general statement of the standard contains three elements:

(1) *Legitimate expectations*. In the first place, the treatment may be 'in breach of representations made by the host State which were reasonably relied on by the claimant. The protection of legitimate expectations, which had already been introduced in the context of legislative measures, has a particular purchase in the context of the conduct of the administration.

(2) *Due Process*. The second set of situations that have arisen under this head is concerned with whether the administrative decision was reached through a fair process. The standard may be breached by 'a complete lack of transparency and candour in an administrative process' or otherwise by a 'manifest failure of natural justice'.

(3) *Substantive unfairness*. The third category of breach is where the impugned measures are substantively 'arbitrary, grossly unfair, unjust or idiosyncratic…discriminatory [or] exposes the claimant to sectional or racial prejudice'"

40. For present purposes it suffices to note that Griffin's case in relation to FET and Article 3 is that it covers protection of legitimate expectations (arising out of the regulatory environment and/or specific conduct and/or assurances from the State), protection against arbitrary or discriminatory treatment, transparency and consistency or lack of good faith, and is directed at a State's regulatory measures and regulatory conduct.

41. Based on its pleaded case in the arbitration, Griffin alleges that the FET standard under Article 3 has been breached by the Respondent in the following respects:-

(1) There had been violations of Griffin's legitimate expectations arising out of the April 2007 Recommendation, that Parkview Terrace and 29 Listopada would be able to develop the Property in the manner contemplated and that the required authorisations would be granted.

(2) Poland, through the City, the Monuments Conservators and the Lazienki Krolewskie Museum, did not act in good faith in denying authorisations to Parkview Terrace, but instead acted in order to then terminate the PUA, with the hidden agenda of giving the Property to the Lazienki Krolewskie Museum.

(3) Poland breached its obligations not to adopt unjustified, arbitrary and discriminatory measures. In this regard Griffin relied upon its pleaded case that no company placed in a similar position had ever suffered termination of a PUA for non-compliance with development deadlines, and that the treatment of Polski Holding, a Polish State-owned company, was a case in point.

D2. Claim for expropriation in violation of Article 4.1

42. In the Arbitration, Griffin makes a claim for indirect expropriation, in the form of creeping expropriation, on the Respondent's part, in violation of Article 4.1, which claim, it submits, is closely related to its FET claim as identified above. The Respondent has criticised Griffin for what it says is Griffin's failure to identify what act or acts are said, individually or collectively, to amount to indirect expropriation. I address these criticisms in due course below, in Section G.2. In summary, in support of its claim for indirect expropriation, Griffin relies upon the combined effect of both the Warsaw Court of Appeal decision of 19 December 2014 ("the Warsaw Court of Appeal Decision**"**) and all of the prior conduct of Poland ("the Prior Measures") highlighted earlier in the factual section that led to the termination of the PUA by the decision of the Warsaw Court of Appeal. Griffin does so on the basis that as a matter of legal principle, the Prior Measures combined with the Warsaw Court of Appeal Decision constituted a series of acts attributable to Poland and together constituted an indirect expropriation in the form of a creeping expropriation. Griffin's case treats all of the acts, culminating in the final act, as part of a creeping expropriation and that one therefore could not exclude from consideration any of the Prior Measures, because to do so would be to disregard key elements of Griffin's case and the reality of the expropriation as it occurred (see Griffin's skeleton argument at paragraph 31).

43. It is well established in international law that an expropriation can be direct or indirect and that creeping expropriation is a form of indirect expropriation. In this regard *Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, 2015,* provides a helpful overview of expropriation and instances of indirect expropriation. In this regard it is stated at paragraphs 11 and 12 follows:-

> "11. Most treaties do not go beyond a broad generic reference to indirect expropriation or measures equivalent or tantamount to dispossession. The reason is the great variety of possible measures, amounting to a *de facto* taking of foreign owned property, which defies any more specific description. In the words of *Dolzer* and *Stevens*:
>
> > Such apparent reluctance to attempt a definition of "expropriation" in the BITs may be explained by the fact that a host State, as is well known, can take a number of measures which have a similar effect to expropriation or nationalization, although they do not de jure constitute an act of expropriation;

such measures are generally termed "indirect," "creeping," or "de facto" expropriation.

12. The decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking."

44. In relation to indirect expropriation *Newcombe and Paradell, Law and Practice of Investment Treaties*, state as follows at page 339:

"Formulations such as 'tantamount,' 'equivalent' or 'deprivation' reflect the customary international law position that the analysis focusses on the effect of the government measures, not its form. Further, there is no evidence in state practice that states intended to expand the meaning of expropriation beyond that ascribed to it under customary international law. Rather, in light of the uncertainty about the scope of expropriation in customary international law, effects-based definitions have been used out of an abundance of caution to ensure that all possible firms of indirect expropriation are caught."

45. In section G.2 below I address the circumstances in which a claim for indirect expropriation, including creeping expropriation, can be advanced where there are certain events which are in themselves alleged to amount to an expropriation.

E. The interpretation of arbitration agreements within Treaties

46. It is not in dispute between the parties that an arbitration agreement in a bilateral, or multilateral, investment treaty, although a separate agreement, is governed by international law – see the analysis in *Occidental Exploration v Republic of Ecuador*, supra at [33]-[34].

47. As such, it falls to be interpreted in accordance with the principles of interpretation in the Vienna Convention which codify international law. In this regard the United Kingdom acceded to the Vienna Convention on 27 June 1971, and public international law in any event forms part of English law.

G1. Article 31 of the Vienna Convention

48. Article 31 sets out the essential primary, or fundamental, rule of interpretation:

"Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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

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

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

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

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

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

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

49. This rule of interpretation is textual. As was said by the ICJ in *Territorial Dispute case (Libya v Chad)* (1994) ICJ 6 at para 41: *"interpretation must be based above all upon the text of the treaty"* The primacy of this rule reflects the fact that the text is to be presumed to be the authentic expression of the intention of the parties (the textual approach to interpretation) and is not to be substituted for or overridden by the presumed intention of the parties (the teleological approach to interpretation) - see in this regard what was said in *Wintershall v Argentine Republic* (ICSID Case No. ARB/04/14), Award, 8 December 2008 at paragraphs 78 and 79, *Ping An Life Insurance v Belgium* (ICSID Case No. ARB/12/29), Award, 30 April 2015 at paragraphs 165 to 166, and *Oppenheim's International Law*, Vol.1, 9th Edition, pages 1271-1272.

50. A helpful analysis of the correct approach to interpretation, and the reasons for the adoption of such an approach is to be found at paragraphs 15 to 19 of the judgment of Simon J in *Czech Republic v European Media Ventures*, supra (footnotes omitted):

"15 The rules set out in Articles 31 and 32 of the Vienna Convention have been accepted by the International Court of Justice as being an accurate statement of

customary International law; and English courts have applied the rules on the basis that they represent customary International law and are therefore part of English law.

16 It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method). The disadvantages of this latter approach have been described by Sir Gerald Fitzmaurice KCMG QC (former Legal Adviser to HM Foreign and Commonwealth Office, Judge of the International Court of Justice and Judge of the European Court of Human Rights) as follows:

> 'One method (and perhaps the one that has the most direct natural appeal) is to ask the question, 'What did the parties intend by the clause?' This approach has, however, been felt to be unsatisfactory, if not actually unsound and illogical, for a number of reasons …'

One of the reasons that the approach is unsatisfactory is that,

> 'It ignores the fact that the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended.'

Another reason is that

> '… the aim of giving effect to the intentions of the parties means, and can only mean, their *joint* or *common* intentions … This means that, faced with a disputed interpretation, and different professions of intention, the tribunal cannot in fact give effect to any intention which both or all the parties will recognise as representing their common mind.'

17 The search for a common intention is likely to be both elusive and unnecessary. Elusive, because the contracting parties may never have had a common intention: only an agreement as to a form of words. Unnecessary, because the rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party, unless that intention can be derived from the object and purpose of the treaty [Art.31 of the Vienna Convention on the Law of Treaties], its context [Art.31.1 and 31.2] or a subsequent agreement as to interpretation [Art.31.3(a)] or practice which establishes an agreement as to its interpretation [Art.31.3(b)]. As Professor O'Connell has noted:

> '… the 'intentions' of the parties may never have crystallised or been formulated beyond a certain point. Every lawyer knows that the parties to a contract contemplate only performance; they enter into the transaction with optimism, and do not ordinarily advert to the problems raised by, for example, frustration. The courts pretend that the parties intended what they, the court, believe they would have intended had they reflected on the matter. It is clear,

> then that 'intention' is very often a fiction, and even when there was a conscious intention the words designed to be expressive of it may not be particularly helpful for this purpose. The same is true of treaty interpretation with the added difficulty that the parties may never really have wanted to come to an agreement and may have deliberately left the area of operation of the treaty opaque.'

18 A similar point is made by Sir Ian Sinclair KCMG QC (former Legal Advisor to HM Foreign and Commonwealth Office):

> '… a dispute as to treaty interpretation arises only when two or more parties place differing constructions upon the text; by doing so they are in reality professing differing intentions in regard to that text and, of necessity, professing to have had differing intentions from the very start. If this is the case, there can be no common intentions of the parties aside or apart from the text they have agreed upon. The text is the expression of the intention of the parties; and it is to that expression of intent that one must first look.'

19 The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning. This approach, no doubt reflecting the experience of centuries of diplomacy, leaves open the possibility that the parties might have dissimilar intentions and might wish to put different interpretations on what they had agreed. When considering the object and purpose of a Treaty a Court should be cautious about taking into account material which extends beyond what the Contracting Parties have agreed in the Preamble or other common expressions of intent, see Art 31.2(a) and (b)."

51. In this regard, and in a footnote to paragraph 19, Simon J referred to Mr Landau's reference in that case to the subversive epigram: "*a treaty is a disagreement reduced into writing*".

52. At paragraphs 34 to 37 of his judgment Simon J identified that in interpreting a treaty a court must have in mind a number of preliminary matters (adapted to the present Treaty under consideration):

"34 First, the importance of an 'independent' interpretation. A treaty:

> '… must be given independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.'

35 Secondly, it must be borne in mind that, simply as a matter of the wording of [Article 9], the arbitral jurisdiction is the same whether the [Contracting Party]… is [Poland or] Belgium/Luxemburg.

36 Thirdly, the 'ordinary meaning' is the meaning attributed to those terms at the time the treaty is concluded. Sir Gerald Fitzmaurice, expressed the principle (the Principle of Contemporaneity) as follows:

> 'The terms of the treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in light of current linguistic usage, at the time when the treaty was originally concluded.'

37 Fourthly, as a normal principle of interpretation a Court or Tribunal should endeavour to give a meaning to each of the words being interpreted."

G2. Effet Utile: principle of effectiveness (ut res magis valeat quam pereat)

53. The good faith interpretation principle as set out Article 31(1) of the Vienna Convention brings within it the principle of effective interpretation. Under this principle, provisions of treaties are to be interpreted so as render them effective rather than ineffective and therefore meaningless, but without going beyond what the text of the treaty justifies. See, in this regard, the *International Law Commission Draft Articles on the Law of Treaties***,** which subsequently became the Vienna Convention, 1966, where it was noted at page 219 in relation to Article 27 (now Article 31):

"The Commission…took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodies in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."

54. The principle has been recognised by many investment arbitral tribunals. For example, it was said in *Eureko BV v Poland*, 19 August 2005 at paragraph 248:

"…It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."

55. The principle of "effet utile" was also recognised, and applied, by the tribunal in *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, 30 November paragraph 7.83, concluding that the different legal protections under the treaty in

question must have a different scope and role and that therefore the FET standard had a different substantive content to the Full Protection and Security standard under the treaty in question.

G3. Object and Purpose

56. It will be recalled that Article 31 provides that a treaty should be interpreted in accordance with the ordinary meaning of its terms and in the light of its "*object and purpose*". In *Ecuador v Occidental Exploration & Production (No.2)*. supra, at paragraph [28], Sir Anthony Clarke MR, giving the judgment of the court, stated:

> "28 We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see eg the views of the arbitrators in paragraph 116 of their award in *SGS v Philippines (2004) 8 ICSID Reports 515*"

57. In the present BIT there is no particular wording in the preamble that reinforces the purpose of the treaty as including the protection of investors, although this is an inherent feature of the provision for arbitration. Of course the extent of the protection will depend on the width of the arbitration clause on its proper construction.

58. In *Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award 22 June 2006, a three-member ICSID tribunal which included Sir Roy Goode CBE and Arthur Marriott QC declined to draw any inference regarding interpretation from the purpose of a BIT to protect investors stating (at paragraph 95):

> "Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties. There are BITs entered into by a State which provide for reference to arbitration of all disputes, and others entered into by the same State that limit consent to arbitration to specified categories of dispute, such as expropriation…"

59. Any scope for the application of this principle in any event only arises in the event of their being an ambiguity.

G.4 Article 32

60. Article 32 provides as follows:

> "Article 32 Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

61. It is important to note that the supplementary means of interpretation in Article 32 is applicable **only** to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Thus if the meaning resulting from the application of Article 31 is clear (i.e. where there is no ambiguity etc, such as where there are two equally possible meanings) the supplementary means of interpretation in Article 32 **cannot** be used to change or contradict the meaning resulting from the application of Article 31, as was common ground before me, between Ricky Diwan QC on behalf of Griffin, and Stewart Shackleton on behalf of the Respondent.

62. As will become apparent, the Tribunal and the Respondent each place reliance on the negotiating history as a supplementary means of interpretation under Article 32. Griffin submits that the meaning of Article 9.1(b) is clear and that there can, therefore, be no recourse to the supplementary means of interpretation in Article 32, though if regard is to be had to the negotiating history, Griffin submits it is either neutral, or supports Griffin's position that the second clause in Article 9.1(b) is additional to, and not repetitive of, the scope of the first clause of Article 9.1(b).

F. Section 67 of the Arbitration Act 1996 and the nature of an application thereunder

63. The 1996 Act provides at sections 30, 31, 67 and 73 as follows:-

> "30. Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction ...
(2) Any such ruling may be challenged ... in accordance with… this Part."

"31. Objection to substantive jurisdiction of tribunal
[...]
(3) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may -
(a) rule on the matter in an award as to jurisdiction ..."

"67. Challenging the award: substantive jurisdiction
(1) A party to arbitral proceedings may . . . apply to the court -
(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; ...
(2) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order -
(a) confirm the award,
(b) vary the award, or
(c) set aside the award in whole or in part."

"73. Loss of right to object
(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this part, any objection -
he may not raise that objection later, before the tribunal or the court, unless he shows that at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
(2) Where the arbitral tribunal rules that that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling –
(a) by any available arbitral process of appeal or review; or
(b) by challenging the award
does not do so, or does not do so within the time allowed by the arbitration agreement or any provisions of this Part he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

64. There is consistent authority to the effect that a section 67 application is a re-hearing - see, in particular, *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68, approved by members of the Supreme Court in *Dallah Real Estate v Pakistan* [2010] UKSC 46, [2011] 1 AC 763 (a New York Convention case), which the High Court should follow (*Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm), para. 37), as I noted and applied in *The Kyrgyz Republic v Stans Energy Corporation* [2017] EWHC 2359 (Comm). In consequence, whilst the Tribunal's conclusions may be of interest, they have no legal or evidential weight - see *Dallah Real Estate v Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at [30].

65. Thus, in *Dallah* it was stated at paragraph 26 (by Lord Mance), at paragraph 96 (by Lord Collins) and at paragraph 160 (Lord Saville) as follows:

"26 An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996 , just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. *Azov Shipping Co. v Baltic Shipping Co.* [1999] 1 Lloyd's Rep 68. The English and French legal positions thus coincide: see the *Pyramids* case (para 20 above).

…

96 The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67 , should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603) and is plainly right.

…

160 In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself."

66. Thus in *Republic of Ecuador v Occidental Exploration & Production Co (No 2)* at [7] Aikens J stated:

> "It is now well-established that a challenge to the jurisdiction of an arbitration panel under section 67 proceeds by way of a re-hearing of the matters before the arbitrators. The test for the court is: was the tribunal correct in its decision on jurisdiction? The test is not: was the tribunal entitled to reach the decision that it did."

67. This approach was agreed to be the correct approach on a hearing under section 67, and was applied as such by Simon J, in *Czech Republic v European Media Ventures,* supra at para [13].

68. The Respondent submits, however, that, *"The Claimant having already lost its case on jurisdiction before the Tribunal is effectively now having a second bite at the same cherry. In these circumstances there are no grounds for a 'complete rehearing' as the Claimant has suggested is required."* In this regard the Respondent says that *Azov Shipping Co v Baltic Shipping Co* was a case which involved a question of jurisdiction *ratione personae*, i.e., a fundamental issue concerning a claimant who claimed not to be party to the arbitration agreement. Here, in contrast, the issue arising is one of jurisdiction *ratione materiae*, the scope of disputes referred to arbitration. The Respondent also referred to the decision of Toulson J in *Ranko Group v Antarctic Maritime SA* [1998] ADRLN 35 (shortly after *Azov*) in which the learned judge held that on a challenge under s 67, it would be wrong for the courts to rely on new evidence which *"could perfectly well have been put before the arbitrator, but was not placed before him, and with no adequate explanation why it was not".* Toulson J based his decision, in part, on the reduced role of the courts under the Arbitration Act 1996 (see pages 14-15 of the transcript). The Respondent also relies upon the observations of Hobhouse J under the previous arbitration regime in *Dallal v Bank Mellat* [1986] 1 QB 441 at 463, and the spirited attack on the re-hearing approach undertaken by the editors of Arbitration Law 5th edn at pp 296 to 297, who nevertheless recognise that the principle applies to all cases.

69. The Respondent submits that not only is a complete rehearing unjustified where a party fails to raise issues in the arbitration, it must be taken to have waived or lost rights to do so, consistent with the approach of the courts on procedural irregularity under s 68, and the overall intent of the 1996 Act being the support of decisions by specialist tribunals, procedural neutrality, judicial non-intervention, party autonomy, flexibility of procedure and finality. It is said that section 67 must not be allowed to erode the efficacy of international arbitration, but must be considered alongside the stated purposes of the 1996 Act, which include, at section 1, that of *"obtain[ing] the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense,"* and the parties' freedom to *"agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."*

70. I am satisfied that on the current state of the authorities (including not only a wealth of first instance decisions but also *dicta* at appellate level, including in *Dallah*) a hearing under section 67 is a re-hearing, and that is so whether the case involves a question of jurisdiction *ratione personae* or *ratione materiae* (for a recent example of the latter see the judgment of Carr J in *C v D* [2015] EWHC 2126 (Comm)). In each case, where it is said the tribunal has no jurisdiction, it is on the basis that either there is no arbitration agreement between the particular parties, or that there is no arbitration agreement that confers jurisdiction in respect of the claim made. In each case if the submission is proved, the Tribunal has no jurisdiction as no jurisdiction has been conferred upon it by the parties in an arbitration agreement. In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. Ultimately jurisdiction either is, or is not, conferred on the true construction of the arbitration agreement, and that ought not to be fettered by how arguments were advanced below, subject always to the discretion of the court as to the admission of evidence before it. Indeed, experience shows that the arguments on challenge can be, and are, often presented in fresh and different ways (see the observations of Carr J in *C v D*, supra at [72]).

71. However, the fact that a section 67 application is a re-hearing does not mean that the court cannot control the evidence adduced on a section 67 application – it clearly can – see the comments of Gross J in *Electrosteel v Scantrans* [2002] EWHC 1993 (Comm), in particular at paragraphs 22-23 and what was said by Aikens J in *The Ythan* [2006] 1 Lloyd's Rep. 457 at paragraphs 59 to 63 (in the context of the scope of objections under section 73 of the 1996 Act).

72. In the present case, to the extent to which Griffin did not put a case before the Tribunal in relation to the drafting history of the BIT or in relation to aspects of the prior measures (and the parties are not *ad idem* on that), or indeed any other arguments now advanced, the Respondent has not established that Griffin has waived or lost its right to advance arguments in relation to such matters on the application under section 67 before this Court. The requirements for a waiver have not been met (and it is difficult to see how a waiver could arise in circumstances where it is well established that there can be a re-hearing under section 67, a fact parties are taken to know), and in the context of no restriction being set out in section 67 itself restricting what arguments may be re-run, no question of any loss of a right to advance particular arguments on a re-hearing under section 67 can arise. In any event, it is not suggested that the Respondent has suffered any prejudice in having to address such arguments and indeed the Respondent has addressed the arguments advanced by Griffin at very considerable length. In such circumstances, to the extent that it is necessary for me to do so, I grant permission for Griffin to advance such arguments and adduce the associated evidence they rely upon.

G. The Award and The Tribunal's exclusion of Griffin's FET Claim and aspects of Griffin's indirect expropriation claim

G.1 Griffin's FET Claim

73. The Tribunal determined that, on the proper interpretation of the arbitration agreement contained in Article 9.1(b) of the Treaty, the Tribunal's jurisdiction was limited to claims for expropriation falling within Article 4.1 of the Treaty and did not extend to Griffin's claims for breach of FET standard under Article 3.1 of the Treaty (Award at paras 76-89, 90-91, 187(ii)). Griffin says that the Tribunal failed to apply the applicable principles of international law under Article 31 of the Vienna Convention correctly, and in particular that the Tribunal failed to adopt a true textual approach having regard to all the words and phrases in Article 9.1(b) of the Treaty, misinterpreted the words and phrases that were used, failed to apply the effet utile principle and generally failed to give meaning and effect to all the words in Article 9.1(b). The Tribunal should have found that Griffin's FET claim fell within the second part of Article 9.1(b).

74. More specifically, in terms of the Award, the Tribunal held that:-

(1) "*the ordinary meaning of the phrase 'deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation' imposes two cumulative requirements: a state measure must (i) affect property; and (ii) lead to consequences that are analogous to an expropriation.*" (Award, paragraph 82).

(2) "*The first requirement is undoubtedly met, since the Respondent's allegedly wrongful conduct may be said to have affected [Griffin's] property rights*." (Award paragraph 83). This finding is relied upon by Griffin on this application, and is not contested by the Respondent).

(3) "'*consequences similar to expropriation' must necessarily entail a deprivation of a right to property. Measures that produce less intrusive effects, such as a reduction of the value of the investment, may lead to other violations of an investor's rights, e.g., a breach of fair and equitable treatment, but cannot be said to have consequences similar to expropriation. Put differently, as the essence of expropriation is deprivation, any 'similar measure' must result in deprivation or it will not be 'similar.*'" (Award paragraph 84)

(4) "*The term 'restriction' is qualified by the requirement of 'consequences similar to expropriation.' Hence, any 'restriction' must lead to 'consequences similar to expropriation' and must thus entail a deprivation of the investment*." (Award, paragraph 84)

75. The Tribunal rejected Griffin's contention that "*jurisdiction would extend to claims other than expropriation as long as the measure at stake produces an effect similar to expropriation*", stating "*even if one were to accept the Claimant's effects theory, the requirement would still be that the investor be deprived of its property*." (Award, paragraph 86).

76. Ultimately, in relation to Griffin's FET Claim, the following issues arise:-

(1) Whether (applying the international law principles of interpretation that have been identified) any, and if so what, FET claims fall within the scope of Article 9.1(b), and if so

(2) Whether Griffin's FET Claim falls within the scope of Article 9.1(b)?

G.2 Griffin's Creeping Expropriation claim

77. The Tribunal determined that so far as Griffin's claim for indirect expropriation was concerned, the Tribunal's jurisdiction was limited to considering whether the decision of the Warsaw Court of Appeal of 19 December 2014 had effects similar to an expropriation and that the Tribunal did not have jurisdiction to consider any of the Prior Measures relied upon by Griffin in support of its claim for indirect expropriation. Griffin says that the Tribunal again fell into error in its construction of Article 9.1(b) and its application to the fact. The Tribunal should have found that Griffin's indirect expropriation claim fell within the first part of Article 9.1(b) (which in itself impacted upon the meaning of the second part) and that Griffin was entitled to advance its claim including by reference to the Prior Measures, based on its pleaded case, notwithstanding the effect of the decision of the Warsaw Court of Appeal.

78. In this regard the Tribunal held:

(1) That in "*light of its determination that its jurisdiction was limited to acts of expropriation – a deprivation of property rights*" the Tribunal was "*of the view that the only measure complained of that could arguably have such an effect [was] the decision of the Court of Appeal which terminated the Usufruct*." (Award, paragraph 91), it being said that there was no disagreement between the parties that this decision terminated the Usufruct and deprived the underlying mortgage of any value (Award para 92).

(2) That *"… none of the acts of the City, the Monuments Conservator and the National Centre preceding the decision terminating the Usufruct had an effect similar to expropriation as they did not deprive the Claimant of the title and/or value of the Property*" (Award, paragraph 93).

(3) "*The Claimant does not appear to have argued otherwise. Consequently, only the Court of Appeal decision, as confirmed by the Cassation decision, may be capable of constituting a sovereign measure that could be said to have deprived Park Residence of its underlying asset and thus potentially*" (Award, paragraph 94).

(4) "*That said, the Tribunal notes that the Claimant also argued that measures preventing construction – taken together with measures destroying investment in its entirety – amounted to a case of indirect expropriation. In its Closing Statement, the Claimant further specified that Poland's acts from October 2002 until the Court of Appeal decision in 2014 constituted a creeping expropriation… Thus, creeping expropriation is characterised by "a series of acts" rather than any individual act amounting to a measure that is expropriatory. This is not the situation in the present case. In application of the pro tem test, which the Claimant itself puts forward, the Tribunal notes that the Claimant's allegation is that the act that deprived it of its investment was the judicial termination of the PUA… In other words, the previous acts were not of expropriatory nature. Even if they were considered together with the judicial termination of the PUA, these other acts still would not have effects similar to expropriation because they cannot be said to have given rise to a permanent deprivation of the investment that is required for a finding of expropriation which can only be said to have been effected through the decision of the Court of Appeal.*" (Award, paragraph 95).

79. Ultimately, in relation to Griffin's Creeping Expropriation Claim, the following issues arise:-

(1) Is a claim for creeping expropriation precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of direct or indirect expropriation?

(2) Was the Tribunal correct, at the jurisdictional phase, and applying a pro tem test, to assume that Griffin would be able to establish that the Warsaw Court of Appeal Decision was in law similar to an expropriation within the meaning of Article 9.1(b) to thereby foreclose reliance upon the Prior Measures?

(3) Was the Tribunal correct as a matter of jurisdiction, applying Article 9.1(b) of the Treaty, to exclude the Prior Measures from the Claimant's claim for creeping expropriation?

G. The proper interpretation of Article 9.1(b) and Griffin's Claims

G.1 A preliminary matter - issues of translation and meaning

80. As has already been noted, the BIT was signed in French, Dutch and Polish with each text being authentic (and it is those texts which, ultimately, are being interpreted). There was an agreed translation from the French of Article 9.1(b) that was before the Tribunal, that was used by the Tribunal, and that is before me namely:-

> "… disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision **as well as** any other

deprivation or restriction of property rights by state measures **that lead to** consequences similar to expropriation."

(my emphasis)

81. The Respondent point out that the three arbitrators were French speakers, had the French text before them, and would have been aware of the finer nuances of the French text. That is correct, but equally the Tribunal used the agreed translation in the Award, and did so without suggesting that it was not an accurate translation from the French, or that the English words used in that translation (and meanings that such words might carry in the English language) were not appropriate to carry the meaning of the relevant words in French. Equally this agreed translation is used in their witness statements by both Mr Honlet for Griffin and Ms Próchnicka for the Respondent (who, for example, expressly quotes the agreed wording at paragraph 9 of her first statement).

82. However in the Respondent's Skeleton Argument at paragraphs 59 to 61 the Respondent raised issues as to the use of, or at least the meaning to be ascribed in English, to the words "*lead to*" in the agreed translation from the original French, by reference to the original French word "*entraîner*," which it was now said meant *"to bring about", "to entail"* or *"to cause"*. The Respondent says that the French text does not use the verb "*to lead to*" in the sense of "providing an occasion or opportunity," as Griffin suggested in its Skeleton Argument. It is said that in French, that sense of "*to lead to*" is not conveyed by "*entraîner*," but by *"mener à*." For its part Griffin says that it is all too late to be seeking to introduce new translations and that it might have wanted to call expert evidence on the point. In the short time available, however, it has been able to make some submissions on the point, including that even the dictionaries relied upon by the Respondent, include as a possible translation for "*entraîner*" into English as "*lead to*", "*cause*", "*result in*", "*bring about*" (Linguee), and "*to bring about conduct by another*" (Larousse Online). Ultimately (as appears below) I do not consider this difference results in a different interpretation applying the principles in Article 31 of the Vienna Convention to Article 9.1(b) as both parties accept that a causal connection is connoted (although there is a difference between them as to the extent of such connection). I address the question of the textual meaning of the phrase in the French version, in due course below.

83. However even more recently the Respondent also sought to go back on the agreed translation from the French "*ainsi que*" into English as "as well as", suggesting (by reference to an article *Nigel Armstrong (2005) Translation Linguistics, Culture A French-English Handbook, University of Massachusetts (Topics in Translation), Multilingual Matters*) (a copy of which was supplied to me even more recently after the hearing) that if the "*ainsi que*" is translated by "*as well as*" it may suggest a difference of emphasis not intended in the French, and that it may be better to translate it merely as "*and*", in particular where there is a list of homogeneous items such as "*les architects et les médecins font défaut, ainsi que les hommes de science*"

that rather than translate this as "*there is a shortage of architects and doctors, as well as scientists*" it may suffice to translate it as "*there is a shortage of architects, doctors and scientists*." Reference is also made to *Fuller, A Handbook for Translators* at page 10 (a copy of which I was also supplied with after the hearing) in which Fuller opines that "*ainsi que*", *"is frequently used in French merely to avoid a succession of words joined together by 'et' [and]".*

84. Griffin objects strongly to these late attempts to renege on an agreed translation submitting that it would be seriously prejudiced, that it would have wanted to research the point and potentially adduce expert evidence on the point, and that it is now too late to deal with the point. Griffin points out that its witness Mr Honlet does not agree that "*ainsi que*" can only mean "*and*", that there is a perfectly good word "*et*" that can be used where "*and*" is intended and (perhaps most fundamentally for present purpose) Griffin submits that the words and phrases after "*ainsi que*" do not represent a homogenous list with what has gone before but rather have a separate and distinct subject matter rendering a translation of "*as well as*" perfectly apt. It is perhaps fortunate that I do not consider that any difference in translation would ultimately result in a different interpretation applying the principles in Article 31 of the Vienna Convention to Article 9.1(b) as I consider that either way the word or words connote a new clause or sub-clause with its own separate and distinct subject matter, as I address in due course below.

85. I should indicate that where an English court is asked to interpret a text in another language there should either be an agreed translation as there was in this case until very recently or, in the event of any disagreement, expert evidence should be adduced in good time before any hearing. It is neither acceptable, nor satisfactory for a translation to be agreed and then an attempt made at the last minute to go back on that agreement based on submission only, and without applying for permission to adduce expert evidence which can be tested, if necessary, in cross-examination. No such application was made in this case, and it is likely that any such application would have been refused given its timing, the likely prejudice to Griffin, and the impact upon the hearing (not least that arbitration applications are to be progressed with expedition).

G2. The proper interpretation of Article 9.1(b)

86. Griffin divides Article 9.1(b) into what it has referred to as the "first clause" and the "second clause". Without at this point accepting the validity of such division, such a division has featured in the written and oral submissions before me, and it splits Article 9.1(b) into two-parts as follows:-

(1) "*disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision*" (the "first clause")

(2) "*[as well as] any other deprivation or restriction of property rights by state measures that [lead to] consequences similar to expropriation*." (the "second clause").

87. Under Article 31 of the Vienna Convention these words are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

88. Turning to the words in the first clause, "*disputes relating to expropriation, nationalization or any other similar measures affecting investments*". On their ordinary meaning, these words clearly encompass all forms of expropriation be they direct or indirect including creeping expropriation, and I so find. All forms of expropriation are encompassed within the word "*expropriation*". The word "*nationalization*" simply reinforces "*expropriation*" being a form of expropriation The words "*or any other similar measures affecting investments*" ensure that any other similar measures that affect investments are encompassed, which will include all forms of indirect expropriation including "*creeping expropriation*" lest there have been any doubts (which I do not consider there would have been) that this was the case in any event from the opening words.

89. There are many cases in international law in which similar phrases are used and which have been recognised as covering indirect as well as direct expropriation. Thus, as was said in *Telenor Mobile Communications AS v The Republic of Hungary,* ICSID Case No. ARB/04/15, Award 22 June 2006 at paragraph 63:

> "Expropriation can take various forms. Direct expropriation involves the seizure of the investor's property. But expropriation may also be indirect, as where, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. Moreover, it is not necessary to show a single act or group of acts committed at one time. As stated earlier, there may be "creeping" expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation. Phrases such as "equivalent to expropriation" and "tantamount to expropriation" do not expand the concept of expropriation and are usually taken to indicate that the BIT covers indirect as well as direct expropriation, thus looking at the substance of the measure in question rather than the label attached to them by government, and the same is true of "**measures having a similar effect**", which is the phrase used in Article VI of the BIT now under consideration."
>
> (my emphasis)

90. The text of the first clause encompasses all the forms of expropriation that are within Article 4(1), namely, "*the investments…shall not be expropriated or subjected to other measures of direct or indirect dispossession having a similar effect*".

91. The word "*notably*" is then used, just as the word "*notably*" is used in Article 1, in each case the ordinary meaning being "*a notable example*". The two examples given are respectively examples of direct and indirect expropriation. The first, "*the transfer of an investment into public property*", is a classic example of direct expropriation. The second, "*placing it under public supervision*" is a classic example of indirect expropriation (such as that in *Teinver v The Argentine Republic*, 21 July 2017, where there was an indirect expropriation by reason of the management of the airline).

92. Thus, stopping there for a moment, under this BIT a tribunal accordingly has jurisdiction over a claim for creeping expropriation, under the first clause. However, the words of the first clause do not confer jurisdiction in respect of any FET claim, as no FET claim would fall within those words.

93. There are then the words, *"[as well as]/[and] any other deprivation or restriction of property rights by state measures that [lead to]/[cause] consequences similar to expropriation*."

94. It is important to have careful regard to each of the words used (the Tribunal did not endeavour to do so). On the ordinary meaning of these words, they are not, and cannot be, part of a continuing list of examples for a number of reasons. First, whereas what had gone before, being introduced by the word "*notably*" are factual examples, what follows is not a factual example, but a new legal definition, and what follows is not a further example on a homogenous list. For this reason, "as well as" is a more apt translation of "*ainsi que*" than "*and*", though either would introduce a new legal definition, which shows that what follows cannot be another example but is an additional category distinct from what is set out in the first clause.

95. "*Any*" is a widening word, and "*Other*" is an important word as it is referring to something other than that which is covered under the first clause, and the phrase is "*any other deprivation or restriction of property rights by state measures*". The ordinary meaning of a "deprivation or restriction" is of a lesser level of interference than an expropriation. As is stated by *Newcombe and Paradell, Law and Practice of Investment Treaties* at page 339*, "Measures that are restrictive of investment would appear to be broader than those that are expropriatory under customary international law."* Here the "*deprivation or restriction*" is something different and distinct from what has gone before (expropriation), it being followed by the word "*entraîner*" which can be translated into English as "*lead to*" or "*cause*" but either way the

deprivation or restriction is only relevant if it leads to or causes what is then spelt out namely "*consequences similar to expropriation*" i.e. something distinct from expropriation.

96. This second clause is not dealing with all investments within Article 1 (investments being widely defined), but only "*property rights*". This again shows that this second clause is dealing with something separate from, and different to, the first clause which covers "*investments*" (that is all investments within Article 1) which are expropriated.

97. "*Consequences similar to expropriation*" is also different and distinct from the phrase used in the first clause, "*expropriation…or any other similar measures*". In the second clause the phrase is looking to consequences whereas in the first clause the phrase used is looking not at consequences but a measure similar to expropriation.

98. Thus, an FET claim based on measures involving a deprivation or restriction of property rights and which leads to/causes consequences similar to expropriation does fall within the scope of disputes that can be submitted to arbitration under Article 9.1(b) on the ordinary meaning of the words used, and I so find. The second clause of Article 9.1(b) confers jurisdiction over FET claims where there are regulatory measures and conduct that breach the FET standard, and though they do not constitute an indirect expropriation in and of themselves, they lead to similar consequences.

99. Such an interpretation is also consistent with the principle of effet utile – it gives meaning and effect to all the words used, and gives the second clause its own meaning and effect contrary the interpretation of the Tribunal and the Respondent. In this regard the Respondent's stance before the Tribunal was that the second clause was a "*tautology*" because it, *"does not bear any additional meaning above and beyond what was originally agreed upon in the Polish version of the Treaty"*, a stance which is simply untenable given the difference in words used in the second clause. Whilst the Respondent has rowed back from such an extreme stance before this Court, submitting that the second clause ensures that creeping expropriation is caught by Article 9.1(b), that is no more tenable an interpretation. As already identified, the language of the first clause covers all forms of expropriation including creeping expropriation, and the second clause is framed in broader terms, being concerned with measures other than expropriation that lead to/cause consequences similar to expropriation, without them being in of themselves expropriatory.

100. A further aspect of the difficulty with the interpretation of the Respondent and the Tribunal is that it would give rise to a mis-match between Article 4.1 (the provision dealing with the substantive protection against expropriation), and Article 9.1(b). There is no equivalent to the second clause of Article 9.1(b) in Article 4.1, only the

first clause which would mean that the wording of the second clause was redundant. There is no such mis-match if the second clause extends to FET claims where the state measure has an effect similar to expropriation, as it is covering a different type of claim. If this were not the case, it would make no sense for there to be a provision conferring jurisdiction (the second clause), where there was no substantive right being protected. This is a further indication that the second clause is not concerned with expropriation itself.

101. Whilst the Tribunal was right to recognise that under the second clause the state measure must affect property (and was right to recognise that this requirement was met as the Respondent's allegedly wrongful conduct may be said to have affected Griffin's property rights), it went wrong in considering that the state measure must lead to consequences that are analogous to expropriation. The second clause does not say that, and the Tribunal failed to give meaning and effect to the second clause, and all the words used therein. The second clause is concerned with measures other than expropriation (lesser wrongs) that "*lead to*"/cause consequences similar to expropriation as opposed to being in and of themselves expropriatory. As such it is wide enough to cover Griffin's claims for breach of the FET standard, and I so find.

102. The interpretation I have placed on Article 9.1(b) accords with the ordinary meaning of the words in their context, and in the light of its object and purpose which, put at its lowest, is to confer jurisdiction in relation to particular rights as defined in Article 9.1(b). The effect of that interpretation is also that it provides recourse to international arbitration in a wider variety of circumstances than on the Tribunal's interpretation, which would be entirely consistent with one of the objects of the Treaty to provide investor protection to an investor (see *Ecuador v Occidental Exploration & Petroleum (No.2),* supra, at para 28). However, there are two parties to the Treaty, and I have not needed to have recourse to this aspect of the purpose of the Treaty to reach the conclusion I have as to the ordinary meaning. I consider that the ordinary meaning of the words of the Treaty are clear.

103. In circumstances where the meaning of Article 9.1(b) is clear applying Article 31 (and the application of Article 31 does not leave the meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable) there is no scope for Article 32, other than to confirm the meaning resulting from Article 31. I have already noted that the drafting history cannot be used to contradict the ordinary meaning.

104. In the present case I do not consider that an examination of the drafting history of the Treaty sheds any further light on the matters.

105. The Polish version of the Treaty restricted disputes that could be submitted to arbitration to those only relating to expropriation or similar measures. The Belgian version of the Treaty placed no restriction on the types of disputes that could be submitted to arbitration i.e. any violation of the Treaty could be submitted to arbitration.

106. The communications relevant to these negotiations are dated 22 September 1988 (one being a memorandum apparently being communicated to Belgium and the other being an internal Polish note); 14 December 1988; 21 February 1989, 9 March 1989 and 26 July 1989 **(**though they do not appear to be a complete or comprehensive record of the negotiations). I do not consider that the negotiations assist.

107. What is clear is that a time came when Poland proposed that Belgium submit a revised wording for consideration, and that Belgium did so indicating that the version that they proposed was "*the best version that they can accept*" (9 March 1989 internal fax from the Polish Embassy in Brussels to the Polish Ministry of Foreign Affairs). It was this formulation that was agreed, that extended the types of disputes covered from those under the first clause, to those under the second clause (which was not contained in the original Polish version of the Treaty). It is not possible to deduce any "*goal*" of a common intention to limit arbitral jurisdiction to only expropriation claims, or as to the precise nature of any compromise. All that can be said is that the final wording added in what I have referred to as the second clause, and that was the "*best version that [Belgium could] accept*". Certainly, there is nothing to support a conclusion that the new wording was to be treated as no different to the Polish original version or that (as the Tribunal concluded), Belgium proposed the wording to "*preserve a narrow scope of the dispute resolution clause*" (Award paragraph 88). The language may well have been a compromise though no conclusion can be drawn as to the nature of the compromise. What can be said is that the wording agreed was a narrower approach than that which was contained in the French version, but was not as narrow as the Polish version. Ultimately, I do not consider the drafting history assists as a matter of interpretation, the ordinary meaning of the words of Article 9.1(b) in any event being clear as I have found.

108. I accordingly find that Griffin's FET claim falls within the scope of Article 9.1(b) as that claim was premised on Poland interfering with Griffin's property rights (as the Tribunal accepted at paragraph 83 of their Award) and this led to the termination of the PUA through the Warsaw Court of Appeal Decision leading to consequences similar to expropriation because it deprived Griffin of its property rights. Of course, whether that claim succeeds will be a matter for the Tribunal, but I find that the Tribunal has jurisdiction to determine Griffin's claim.

G3. Griffin's Indirect (Creeping) Expropriation Claim

109. I have already found that an indirect expropriation claim (including a creeping expropriation claim) falls within the ordinary meaning of the first clause of Article 9.1(b). The Tribunal were wrong to consider that any claim for creeping expropriation fell not within the first clause but rather within the second clause.

110. The Tribunal determined that so far as Griffin's claim for indirect expropriation was concerned, the Tribunal's jurisdiction was limited to considering whether the decision of the Warsaw Court of Appeal of 19 December 2014 had effects similar to an expropriation and that the Tribunal did not have jurisdiction to consider any of the prior measures relied upon.

111. Before this Court (and in addition to the issues of construction of Article 9.1(b) that I have already addressed) the Respondent has focussed in particular, on what it says are two reasons why Griffin could not advance a claim for creeping expropriation in the arbitration:-

(1) It is said that, a claim for creeping expropriation is precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation, and

(2) It is said that Griffin should have, but has not, pleaded the precise effect of each prior measure.

G3.1 Creeping expropriation in combination with other potential acts of expropriation

112. Griffin submits that there is no limitation in international law that precludes a claim for creeping expropriation in circumstances where one of the acts in the chain might ultimately be established to be a form of expropriation. In contrast the Respondent submits that if there is an act in the chain that constitutes an expropriation there can no longer be a creeping expropriation. Griffin submits that this is simply wrong, and there are many examples in international law in various different scenarios where there can be (and at a pleading stage there can be the possibility of) more than one type of expropriation in play dependent upon the fact that are alleged. This is subject only to the (obvious) fact that you once you have a definitive expropriation such as a direct expropriation, you cannot have another later expropriation of the very same property (see *Victor Pey Casado v Republic of Chile*, ICSID Case No. ARB/98/2, Award 8 May 208, at para 622). Griffin also submits (rightly in my view) that at a jurisdictional phase, it ought not to be assumed that any of the acts will be established to be a form of direct or indirect expropriation at the merits phase, so as to foreclose consideration of all prior acts.

113. It is possible to have an indirect expropriation before a direct expropriation as a matter of logic because it involves something different. It involves a substantial interference, but not a taking of title – see the reasoning in the ICSID case of *Teinver S.A. v The Argentine Republic*, 21 July 2017. In that case the tribunal found there was an indirect expropriation prior to a direct expropriation (those it found it was unable to conclude that there was a creeping expropriation on the facts). The tribunal also had to consider, in addition to the central claim that airlines were illegally expropriated by the respondent, a claim that there was also an indirect or creeping expropriation of their investment by reference to a number of measures (that were also discussed in the context of a claim for breach of the FET standard). At paragraph 937 the tribunal noted that at this stage of the analysis (separate from the issue as to whether the formal taking of the claimant's investment was lawful) the tribunal had to consider whether any other acts in the series of measures in the case – short of the formal taking of their ownership rights – were also expropriatory. The tribunal stated as follows at paragraphs 948 and 949:

"A creeping expropriation is a particular type of indirect expropriation, which requires an inquiry into the particular facts. The use of the term "creeping" to describe this type of expropriation indicates that the entirety of the measures should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own.

…

However, it is still necessary for the individual measures to culminate in a taking or deprivation of property rights. The Tribunal has found that the takeover of the day-to-day management of the Airlines was an indirect expropriation; it was a substantial and permanent deprivation of property rights. This event was expropriatory on its own even without reference to earlier impugned events. In the Tribunal's view, a substantial and permanent deprivation of property rights did not occur until the evets of 2008. In order to conclude that a creeping expropriation took place, the Tribunal must conclude that he earlier impugned events formed part of a chain of events that led to the eventual substantial and permanent deprivation of property rights."

114. Secondly, it is possible to have a creeping expropriation plus an indirect expropriation before a direct expropriation, and the final act in that expropriation can be in and of itself an indirect expropriation, as is also illustrated by the reasoning in the *Teinver case* (though on the facts of that case a creeping expropriation was not found – see paragraph 950 of the Award).

115. Thirdly, it is possible to have a creeping expropriation where the act at the end of the chain is a specific act of direct expropriation. This is illustrated by the case of *Crystallex International Corporation v Venezuela*, supra, which involved a consideration of the various types of possible expropriation including creeping expropriation. The tribunal stated at paragraphs 666 and 667:

"666. In what is a reflection of the standard for expropriation found in numerous investment treaties, Article VII(1) of the Treaty provides, in board terms, that

"investments…shall not be nationalized, expropriated or *subjected to measures having an effect equivalent to nationalization or expropriation."*

667. Arbitral case law has identified several types or forms of expropriations[945]. It is generally understood that a "direct" expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure, whereas an "indirect expropriation" occurs where a state's action or series of actions result in the investor being deprived of the enjoyment or benefit of its investment, although title to the property or the rights remains with the original owner. Furthermore, the expression "creeping expropriation" is used to refer to a specific form of expropriation that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time."

116. At footnote 945 in *Crystallex,* the tribunal referred to the *Tecmed* case (*Tecnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003), and quoted paragraph 114 thereof:

"Generally, it is understood that the term "…equivalent to expropriation…" or "tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation", as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect."

117. *Crystallex* involved a claim by the Canadian company Crystallex against the Bolivarian Republic of Venezuela. Crystallex had entered into a Mine Operation Contract ("MOC") with Venezuela in relation to one of the largest undeveloped gold deposits in the world in an area called "Las Crisinas". In the claim Crystallex argued that Venezuela's actions amounted both to a creeping expropriation and a direct expropriation when the MOC was cancelled. At paragraph 708 of the award the tribunal concluded that the conjunction and progression of acts performed by different governmental organs, starting from actions surrounding a denial of a permit, continuing with announcements that Venezuela would "*take back*" Las Crisinas, and ending with a repudiation of the MOC, had the effect of substantially depriving Crystallex of the economic use and enjoyment of its investment, and ultimately rendered it entirely useless, the tribunal finding and concluding that the cumulative and incremental effect of those measures was, "*equivalent to […] expropriation*" under the treaty. Having thus found indirect or creeping expropriation the tribunal then stated at paragraph 709, *"In the light of this conclusion, the Tribunal may dispense with analyzing whether the MOC termination also constitutes a direct expropriation, as any finding in this respect would have no impact on liability or on quantification of damages."*

118. The case illustrates that there can be creeping expropriation, and a finding of creeping expropriation, by reference to a progression of events culminating in an event that is arguably a direct expropriation in its own right, that final event not rendering irrelevant prior events, or preventing the overall course of events being a creeping expropriation, and allowing a finding of creeping expropriation without a tribunal having to form a view on whether the final event was itself a direct expropriation. This approach is directly contrary to the Respondent's submission that Griffin cannot advance a case based on creeping expropriation on the basis that the Warsaw Court of Appeal judgment amounts, in of itself, to an expropriation thereby trumping, and rendering irrelevant (says the Respondent) the Prior Measures relied upon by Griffin. I reject the Respondent's submission. It is perfectly possible to have a creeping expropriation where the act at the end of the chain is (or is argued to be) a specific act of direct expropriation.

119. In a number of the cases, and in the context of how a creeping expropriation may come to fruition, tribunals have referred *"the last step in a creeping expropriation that tilts the balance in a similar way to the straw that breaks the camel's back".* As the tribunal stated in *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at paragraph 263:

"By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."

120. State responsibility for creeping expropriation is itself reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility as follows:-

"The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."

121. If one stands back for a moment it can also be seen that the doctrine of creeping expropriation is there to assist an investor whose asset, by one means or another (or by multiple means) has (allegedly) been expropriated, whereas if the Respondent was correct in its submission, an investor would be worse off if there was a specific act at the end of the chain, and that act happened to be a court decision where it would be necessary to establish a denial of justice, whereas if it is appropriate to have regard to matters in the aggregate with the prior measures, then the question is whether the

aggregate of the effects amounts to an expropriation in its own right whether or not the last act in the chain might (at a merits stage) be regarded as itself an expropriating act. This approach, which I consider to the right approach as reflected in the authorities, ensures that all potentially relevant facts are capable of being relied upon, and considered by a tribunal, which may be of particular importance in the context of a claim based on creeping expropriation as the individual acts in isolation may not have been be obviously wrongful (as noted further below in Section G.2) and there may be issues as to how the final act is to be characterised (which will ultimately be for the merits stage, and indeed a tribunal might decide – as the tribunal did in *Siemens v Argentina*, that it did not need to determine whether a particular event at the end of the chain was expropriatory in its own right).

122. At footnote 108 in paragraph 95 of the Award the Tribunal made reference to an article by *Reisman and Sloane, Indirect Expropriation and its Valuation in the BIT Generation*, 74 The British Yearbook of International Law at page 123, upon which the Respondent also relies, where they stated, "*if one or two events in [a] series [of measures] can readily be identified as those that destroyed the investment's value, then to speak of a creeping expropriation <u>may</u> be misleading*" (Griffin's emphasis). The authors of the article (righty in my view) do not go so far as to say that there may not be a creeping expropriation in such circumstances.

123. The authors refer to a dissenting opinion of Keith Highet, in *Waste Management Inc v United Mexican State* ICSID Case No. ARB(AF)/98/2, Award of June 2 2000 in which he expressed the view that, "a 'creeping' expropriation is comprised of a number of elements, none of which can-separately-constitute the international wrong". No authority is cited for that proposition and it is contrary to authorities including *Siemens v Argentina, Crystallex* and *Teinver.* It is not an accurate reflection of international law in relation to what may amount to creeping expropriation, which is as recognised in cases such as *Siemens v Argentina, Crystallex* and *Teinver,* as addressed above. The language in the *Reisman* article is in far less categorical terms. Michael Reisman echoed his own language when he sat in *Roussalis v Romania* ICSID Case No. ARB/06/01, Award 7 December 2011 were he stated, at paragraph 329:

"Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. This is frequently characterized as a "creeping" or "constructive" expropriation. In the *Biloune* case the arbitration panel found that a series of governmental acts and omissions which *"effectively prevented"* an investor from pursuing his investment project constituted a *"constructive expropriation*". Each of these actions, viewed in isolation, may not have constituted expropriation. But the sum of them caused an *"irreparable cessation of work on the project*")."

124. Where the Tribunal went wrong in particular, and where the Respondent falls into error in its submissions, is in inverting what is said by Michael Reisman, as if what

was being said was "*if there is an act of expropriation at the end there cannot be a creeping expropriation*". That does not reflect international law and is simply inconsistent with cases such as *Siemens v Argentina, Crystallex* and *Teinver.* In *Siemens v Argentina* itself none of the prior measures could be said to have had a perceptible effect on the investment, only the final act, yet they were still treated as part of the aggregate for the purpose of considering whether there was a creeping expropriation. In the present case the Tribunal perpetuated a viewpoint, expressed by the tribunal chaired by Prof. Gabrielle Kaufmann-Kohler in *Burlington Resources v Republic of Ecuador,* ICSID Case No. ARB/08/05, Decision on Liability 14 December 2012, that "*creeping expropriation only exists when "none" of the challenged measures separately constitutes expropriation*" (para 538). That does not reflect international law.

125. Accordingly, to the extent that it is necessary for me to do so I find that a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation.

126. I would add that I consider that it will be generally inappropriate (save possibly in a very clear case) at an initial hearing in relation to jurisdiction for a tribunal to make any definitive findings as to whether particular acts amount to indirect expropriation (including creeping expropriation) or expropriation generally, or make any findings which would preclude consideration of all facts (including the Prior Measures) being explored at the merits stage in due course, especially where (as here) more than one category of investment is alleged to have been expropriated, and prior measures are being relied upon which may not immediately be obviously expropriatory, and the aggregate picture is best judged at the final merits hearing. Any other course is likely to result in injustice if it has the effect that a party cannot rely upon matters which form part of the overall picture, and may be part of the expropriatory conduct either in isolation, or in the aggregate.

127. In this regard the Respondent also submitted that only rights under the PUA are capable of being expropriated, but that is simply wrong. First, Article 4.1 and Article 9.1(b) gives jurisdiction, and gives substantive protection in respect of investments, and in the present case Griffin had a series of different investments, namely loans, mortgages, pledges, an option agreement, the shares and the perpetual usufructuary rights. It is therefore wrong to talk only about an act of direct expropriation at the end of a creeping expropriation, because many of the investments were not taken – for example the shares were not taken and the loan was not taken, they were simply rendered valueless. So whilst the complete loss of value of the real property rights, created by the PUA occurred with the termination – so this might be said to be an act of direct expropriation, matters such as the loss in value of the loan might be said to be an indirect expropriation. Secondly, it is said in relation to the PUA that only rights under the PUA which are capable of being interfered with so legitimate expectations built on those rights are, by definition not those rights, and therefore cannot be interfered with, but that argument cannot be advanced in respect of other

investments such as the shares and the loans, and everything else being invested on the basis of legitimate expectations, promises as to what would happen, so that where the promises are gradually reneged upon, a time may be reached where your rights have been interfered with, and there has been an expropriation of such investment (as to which see *Siemens v Argentina*, supra).

128. In the application of the *pro tem* test (which Griffin puts forward) the Tribunal at paragraph 95 of the Award stated that Griffin's allegation was that the act that deprived it of its investment was the judicial termination of the PUA. They said that, "*in other words, the previous acts were not of expropriatory nature. Even if they were considered together with the judicial termination of the PUA, these other acts still would not have effects similar to expropriation because they cannot be said to have given rise to a permanent deprivation of the investment that is required for a finding of expropriation which can only be said to have been effected through the decision of the Court of Appeal*." That is not a fair characterisation of Griffin's case which does also extend to a case of creeping expropriation, and that case can co-exist with a case based on a subsequent event which is, or may be expropriatory (for the reasons I have already given above).

129. In this regard the Tribunal also misapplied the *pro tem* test. As Griffin has identified, the purpose of the *pro tem* test is to protect the integrity of the merits phase whilst making preliminary jurisdictional determinations, which is why the question is whether on the facts alleged they could be capable of establishing a violation of the Treaty falling within the jurisdiction of the Tribunal (see the Separate Opinion of Judge Higgins**,** *Oil Platforms,* ICJ Reports 1996 at para 34 and *Saipem v Bangladesh*, ICSID Case No. ARB/05/07, Award 21 March 2007 at paragraphs 84 and 85)

130. In the present case the Tribunal elided the factual and legal issues. Griffin's factual case was that as a matter of fact, the Warsaw Court of Appeal Decision, confirmed the termination of the PUA, and therefore terminated Griffin's property rights. Griffin's legal case was that the Warsaw Court of Appeal Decision and all of the Prior Measures constituted an indirect expropriation in the form of a creeping expropriation taken all together. The question that the Tribunal had to pose was assuming Griffin could establish its factual case was it capable of falling within the Tribunal's jurisdiction? What the Tribunal did instead was to restrict Griffin's case relying upon the Warsaw Court of Appeal Decision on the basis that because that was an event capable of amounting to an expropriatory act in law, Griffin was foreclosed from running a case of creeping expropriation. Not only was this wrong in law for the reasons I have already identified, but it assumed that Griffin would *legally* establish a case of expropriation through the Warsaw Court of Appeal Decision as opposed to factually establishing the effect of that decision, being all that the pro tem test assumes.

131. In all the circumstances, and for the reasons I have identified, the Tribunal erred in concluding that so far as Griffin's claim for indirect expropriation was concerned, the Tribunal's jurisdiction was limited to considering whether the decision of the Warsaw Court of Appeal of 19 December 2014 had effects similar to an expropriation and that the Tribunal did not have jurisdiction to consider any of the Prior Measures relied upon by Griffin in support of its claim for indirect expropriation. The possibility that the decision of Warsaw Court of Appeal might itself amount to an expropriation, does not preclude a consideration of the prior measures relied upon by Griffin as part of its indirect expropriation claim based on an alleged creeping expropriation, assuming it has established a prima facie case, to which I will now turn.

G3.2 (2) Griffin's pleaded case and prior measures

132. In relation to Griffin's claim for indirect expropriation, in the form of creeping expropriation, the Respondent submits that Griffin's has failed to identify what act or acts are said, individually or collectively, to amount to indirect expropriation, and as such has failed to establish a *prima facie* case on jurisdiction, other than in relation to the Warsaw Court of Appeal decision.

133. In this regard the Respondent relies upon the PCA tribunal case of *Achmea BV v Slovak Republic*, PCA Case No 2013-12, 20 May 2014, in which the tribunal noted the test set out by Judge Rosalyn Higgins in the *Oil Platforms case*, supra: *"whether the claims of [the applicant] are* ***sufficiently plausibly based*** *upon the 1955 treaty to accept pro tem the facts as alleged by [the claimant] to be true and… to see if on the basis of [the claimant's] claims of fact there could occur a violation of one or more [provisions of the treaty]*" (and see paragraphs 209-213, 236, 239 and 251 in *Achmea*) (the Respondent's emphasis). The Respondent also refers the ICSID case of *Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No. ARB/04/015, Award 22 June 2006, in which the tribunal found that the claimant in that case had not set out, *"any activity on the part of the Hungarian Government that remotely approaches the effect of expropriation."*

134. In this regard, at paragraph 86 and following of its skeleton argument, the Respondent considers the matters pleaded by Griffin in the arbitration at some length. The main thrust of the criticism of those pleas is that it is said that they fail to identify the acts or acts said to be expropriatory, the date precisely on which they occurred, and the nature of the property right said to have been expropriated. It is submitted that this is because none of the Prior Measures were expropriatory and, until the Court of Appeal decision, Griffin remained in full possession of its investment.

135. I have already addressed aspects of the application of the *pro tem* test above, why it was misapplied by the Tribunal, and why their statement of the law in relation to creeping expropriation and any acts that might themselves ultimately be found to be expropriatory is not an accurate statement of the law.

136. However, I consider there is a further flaw in the tribunal's approach (and that of the Respondent) which is that it fails to recognise that creeping expropriation refers to a process, a series of steps that eventually viewed in the aggregate, and indeed often looking back over events, have the effect of an expropriation – often (as already noted) with the "*last straw breaking the camel's back*". If the process stops before it reaches the point where the aggregate can be seen as an expropriation, there will have been steps which have had an adverse effect, but each step may not itself be significant or be obviously wrongful or illegal. Thus by the very nature of a creeping expropriation, every act may not itself be an exproriatory act (and so cannot be pleaded as such), they, or at least their effect, may take place over time, and they may not have had an immediate effect on a particular property right.

137. Thus, as is said in the *Reisman* article at page 123:

"Discrete acts, analysed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. **Some may not be expropriatory in themselves**. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights."

(my emphasis)

138. The *Siemens v Argentina* case, supra, is a case in point in relation to creeping expropriation. At paragraph 216 the tribunal set out the facts relied upon by *Siemens* in terms of assurances given and obligations undertaken. Paragraph 218 then sets out all the acts and omissions of Argentina that Siemens said constituted measures. There is no plea as to the specific effect of individual measures. At paragraph 219 Siemens plea is set out, which is that the aggregate of these measures amounts to a creeping expropriation of its investment, with the date of the decree in that case, as the date of expropriation. At paragraph 262, Argentina argued that each measure alleged by the claimant to be part of the process that results in a creeping expropriation must have an adverse effect on the investment. The tribunal's response is as follows, at paragraph 263:

"By definition, creeping expropriation refers to a process, to steps that eventually have the effect of expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."

139. The tribunal then refer to the Article 15 of the ILC Articles (which I have already quoted) which support that analysis in the context of a composite act, and conclude at paragraph 271:

"Had it not been for Decree 669/01, and if a revised contract proposal had been agreed, the measures taken previously by themselves might not have had the effect and permanence required to be considered expropriatory, but, as no agreement was reached and the measures were never revoked, they stand as part of a gradual process which, with the issuance of Decree 669/01, culminated in the expropriation of Siemens' investment."

140. So it is clear that each matter relied upon need not be an identifiable act of expropriation and need not in itself have a perceptible impact on the back of it, and against that backdrop it is both artificial, and unnecessary to single out single matters as expropriatory, the date precisely on which they occurred, and the precise property right said to have been expropriated at any particular point in time. Indeed such a submission is inconsistent with the conceptual nature of a creeping expropriation, which has already been addressed. It is also to be borne in mind that the issue of the interconnection of acts, and whether or not the various acts can be aggregated together to produce an identifiable expropriation has not yet been determined, and would be a matter for the merits stage.

141. Griffin has identified its indirect expropriation claim in these terms at paragraph 31 of its Skeleton Argument (the bracketed text incorporates the accompanying footnotes):-

"In support of that claim for indirect expropriation, Griffin relied upon the combined effect of **both** the Warsaw Court of Appeal decision of 19 December 2014 ("**the Warsaw Court of Appeal Decision"**) and all of the prior conduct of Poland ("**the Prior Measures**") highlighted earlier in the factual section that led to the termination of the PUA by the decision of the Warsaw Court of Appeal [Statement of Claim paras 470-472]. Griffin did so on the basis that as a matter of legal principle, the Prior Measures combined with the Warsaw Court of Appeal Decision constituted a series of acts attributable to Poland and together constituted an indirect expropriation in the form of a creeping expropriation because: (i) the Prior Measures prevented construction taking place; (ii) the Warsaw Court of Appeal was the final act which terminated the real property rights on the basis of the delay in construction caused by the Prior Measures [Statement of Claim paras 468-472, Griffin's oral submissions on 6 May 2016 Tr. Day 2/72/16-25, 2/78/22-25 and Griffin's Closing Slides at pp 10-21]. As Griffin pleaded and further submitted in oral argument in answer to questions posed by the Tribunal, Griffin's legal case treated all of the acts, culminating in the final act, as part of a creeping expropriation and that one therefore could not exclude from consideration any of the Prior Measures, because to do so would be to disregard key elements of Griffin's case and the reality of the expropriation as it occurred [Griffin's oral submissions on 6 May 2016 Tr. Day 2/81/1-25 and 82/1-11]. However…this is what the Tribunal has done."

(original emphasis)

142. I have already set out at Section C above the Prior Measures relied upon by Griffin at Section C above. I have also carefully reviewed Griffin's pleaded statement of case in the arbitration, which is before me, and is relied upon by Griffin. I am satisfied that Griffin has pleaded what it needs to plead to establish a prima facie case of creeping expropriation for jurisdictional purposes on a *pro tem* approach. Whether in fact there was a creeping expropriation, having regard to the aggregate effect of the prior measures relied upon, and in what respects, will be a matter for the Tribunal at the merits stage.

143. I would only add that I would deprecate any over analysis of the elements of a claim by a tribunal (or a court) at the jurisdictional stage. Such an approach only increases costs, and almost inevitably leads to a lengthy debate as to the perceived merit of the claim that it is unnecessary to consider at the jurisdiction stage, and is properly to be explored in detail at the merits stage.

H. Conclusion

144. In the above circumstances, and for the reasons I have given, I set aside paragraphs 187(ii) and (iii) of the Award (with all consequential amendments to Award) and order that in substitution for those paragraphs of the Award it is declared that

"(ii) The Tribunal has jurisdiction over:

(a) All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of direct and/or indirect expropriation contrary to Article 4.1 of the BIT, which claim is pleaded at paragraphs 466-479 of the Statement of Claim dated 18 September 2015 (which in turn cross-refers to the entirety of the factual allegations set out earlier in the Statement of Claim);

(b) All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of breach of fair and equitable treatment contrary to Article 3.1 of the BIT, which claim is pleaded at paragraphs 480-507 of the Statement of Claim (which in turn cross-refers to the entirety of the factual allegations set out in earlier in the Statement of Case);

(iii) The Tribunal will take the necessary steps for the continuation of the proceedings towards the liability phase dealing with the measures identified in paragraphs (i) and (ii) above"

145. I trust that the parties will be able to agree an Order consequential upon my judgment including as to costs which, *prima facie*, should follow the event.