Neutral Citation Number: [2018] EWHC 822 (Comm)

Case No: CL-2016-000685

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

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

Date: 16 April 2018

Before :

THE HONOURABLE MR JUSTICE POPPLEWELL

- -

Between :

1. RELIANCE INDUSTRIES LIMITED	**Claimants**
2. BG EXPLORATION AND PRODUCTION INDIA LIMITED	
- and -	
THE UNION OF INDIA	**Defendant**

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- -

Mr Iain Milligan QC and Mr Matthew Gearing QC (instructed by **Allen & Overy LLP**) for the **Claimants**
Mr Vernon Flynn QC, Mr David Wolfson QC and Mr Damien Walker (instructed by **Dentons UKMEA LLP**) for the **Defendant**

Hearing dates: 5, 6 & 7 February 2018

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Judgment Approved

Mr Justice Popplewell:

Introduction

1. In these proceedings the Claimants make nine challenges to parts of an arbitration award dated 12 October 2016 ("the Award"). The challenges are made variously under the provisions of sections 67, 68 and 69 of the Arbitration Act 1996 ("the 1996 Act").

2. The dispute between the parties arises under two Production Sharing Contracts ("PSCs") entered into on 22 December 1994 by which the Union of India (the Defendant to these proceedings, referred to as "the Government") granted to "the Contractor" the exclusive right to exploit petroleum resources discovered in two areas off the west coast of India for a period of 25 years. One area comprises fields known as "Mid Tapti" and "South Tapti"; the other, fields known as "Panna" and "Mukta". For that reason the PSCs have been referred to as the "Tapti PSC" and the "Panna Mukta PSC". The PSCs are in similar, but not identical, terms. Tapti is a gas field, and Panna Mukta is principally an oil field albeit producing some associated natural gas. The "Contractor" comprises the two Claimants and a third entity, Oil & Natural

Gas Corporation Ltd ("ONGC"), for their participating interests of 30%, 30% and 40% respectively. ONGC is controlled by the Government and on the direction of the Government has taken no part in the arbitration.

The PSC terms in outline

3. Article 7.3 of the PSCs obliges the Contractor to carry out the exploitation of the fields at its sole risk, cost and expense, expeditiously and in accordance with good international petroleum industry practice. The work programmes to be carried out under the PSCs are to be approved by the Management Committee (Article 5.6(a)), a body consisting of representatives of each of the four parties (Article 5.2) with the Government representative having an effective power of veto (Articles 5.7 and 5.13). The initial programme for development (as opposed to exploration or production) was to follow the indicative plan annexed as Appendix G. Appendix G sets out a non-exclusive list of matters which were to be included in the development plan. Article 13.1.2 provides that those plans for development would be revised, subject to Management Committee approval, by the Contractor in a "Development Plan first submitted pursuant to this Contract". That initial development plan is also referred to as the "Initial Plan of Development", or "IPOD". Subsequent plans, including variations to previous plans, might then be approved by the Management Committee.

4. Article 13 of the PSCs entitles the Contractor to recover its costs from the total volume of petroleum produced and saved from the fields in each financial year. Article 13.1.2 limits the extent to which development costs may be recovered in this way. It provides that the recovery of "Development Costs" is to be capped by the Cost Recovery Limit, or "CRL". The CRL is US$545 million for Tapti and US$577.5 million for Panna Mukta. Development Costs incurred by the Contractor in excess of these limits fall to be borne by the Contractor. If, in certain specified circumstances, the CRL is exceeded, it can be increased to reflect those circumstances, either by the Management Committee or, in default of agreement by the Management Committee, by an arbitral tribunal (Articles 13.1.4(c) and 13.1.5).

5. The petroleum available to the Contractor for cost recovery is defined as "Cost Petroleum" (Article 1.24). The petroleum produced and saved in excess of that available to the Contractor for cost recovery is defined as "Profit Petroleum" (Article 1.69). Profit Petroleum is to be shared between the Contractor and the Government (Article 14.1). The proportion in which it is shared between the Contractor and the Government is determined by the "Investment Multiple" from one year to another (Articles 1.49, 14.1 and 14.2). The Investment Multiple is worked out by reference to a formula in Appendix D which addresses how profitable the production is, that is to say the extent to which income exceeds costs. In slightly oversimplified terms, the formula has the effect that the more profitable the production, the greater the Government share, by way of step changes rather than a sliding scale.

6. Cost Petroleum or Profit Petroleum was not taken in kind by the Claimants: save in one respect which is relevant to one of the present challenges, in practice all petroleum produced and saved has been sold to Government nominees – gas to GAIL India Ltd ("GAIL") and oil to Indian Oil Corporation ("IOC"), both controlled by the Government – pursuant to provisions in the PSCs in respect of the Contractor's share and a request by the Government in respect of its share. Accounting between the

parties is regulated primarily by Article 25 and the Accounting Procedure set out in Appendix C to the PSCs.

7. The PSCs are governed by Indian law (Article 32.1), save that the arbitration agreement in each of them, found in Article 33, is governed by English law (Article 33.12). The PSCs also state at Article 33.9 that arbitration proceedings are to be conducted in accordance with "the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985"; it is common ground that the date was a mistake and the reference was intended to be to the 1976 UNCITRAL Arbitration Rules. In the event of any conflict between the UNCITRAL Rules and the provisions of Article 33, the provisions of Article 33 are to prevail (Article 33.9). The seat of arbitration was agreed to be London: Article 33.12 originally provided as much, and although the seat was changed to Paris when the Second Claimant became part of the BG Group, it was then changed back to London on an *ad hoc* basis for the purposes of the present arbitral proceedings.

The arbitration proceedings in outline

8. The Claimants commenced arbitration on 16 December 2010. The arbitration is concerned with many disputes between the parties. It has taken a long time and is not yet complete. It is sufficient for the purposes of an introduction to identify the following procedural aspects of the reference, although I shall have to address some aspects in a little more detail in relation to particular challenges.

9. The original Tribunal consisted of Christopher Lau SC (Chairman), Peter Leaver QC (appointed by the Claimants) and Justice BP Jeevan Reddy (appointed by the Government). Justice BP Jeevan Reddy resigned on 4 February 2014 and was replaced by Justice B Sudershan Reddy on 21 March 2014. The Tribunal divided proceedings into a number of phases as a result of the quantity and complexity of the issues arising between the parties. It has made five awards:

   (a) A "Final Partial Consent Award" dated 29 July 2011 (the "Consent Award"). This recorded in particular the *ad hoc* agreement of the parties that London was to be the seat of the arbitration.

   (b) A "Final Partial Award on Arbitrability" dated 12 September 2012 (the "Arbitrability Award"). In this award the Tribunal determined that certain specific matters whose arbitrability had been challenged were arbitrable. The Claimants contend that this award was more wide-ranging in a respect which is relevant to Challenge 6.

   (c) A "Final Partial Award on Issues B, C and D of the May 2012 Issues" dated 10 December 2012 (the "CRL Award"). The CRL Award concerned, among other things, how the CRL cap was to operate on recovery of Development Costs by the Claimants as a matter of the true construction of Article 13.1 of the PSCs. It is important in relation to some of the challenges raised in these proceedings and is accordingly described in more detail below. The CRL Award was made by a majority of the Tribunal; Justice BP Jeevan Reddy also published a Dissenting Final Partial Award on Issues B, C and D.

(d) A "Final Partial Award" dated 12 October 2016 (the Award). This is the award being challenged in these proceedings. The Award was issued after four hearings, in November 2013, September 2014, November 2014 and October 2015. In some respects it is a majority award, with dissenting awards being written by Mr Leaver or Justice B. Sudershan Reddy respectively on certain issues. The dissents were contained in a Dissenting Opinion of Mr Leaver dated 29 September 2016 (the "Leaver Dissent") – which was itself accompanied by an Addendum dated 3 October 2016 – and the Dissenting Opinion of Justice Reddy dated 3 October 2016 (the "Reddy Dissent"). The dissents do not relate to the same issues, which is why the findings in the Award are always those of at least the majority.

(e) A "Final Partial Award" dated 11 January 2018, disposing of disputes relating to certain audit exceptions.

10. The Award runs to 703 pages. It identifies 69 issues and addresses the disputes under the heading of each of those issues in turn. It is important to bear in mind that the definition of these issues, and the arrangement of the Award in this way, was of the Tribunal's making. The argument of the parties was not addressed or compartmentalised under the headings which the Tribunal used to structure its reasons in relation to the many disputes between the parties.

11. With that introduction I turn to the nine challenges raised by the Claimants in these proceedings and address them in turn.

Challenge 1: the meaning of "Development Costs" in the Investment Multiple

The legal framework

12. This challenge is brought under s. 68 of the 1996 Act which provides:

> (1) "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

[…]

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

[…]"

13. Section 68(2)(a) refers to the "general duty" of the tribunal under s.33 of the 1996 Act, which provides:

(1) "The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

14. Both sides accepted that the principles governing the application of s. 68(2)(a) included those which I endeavoured to summarise in *Terna Bahrain Holding Co WLL v Bin Kamel Al Shamzi & others* [2013] 2 CLC 1 at [85] as follows:

(1) "In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:

(a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of s. 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

15. The principle at (3) reflects what was said in the Report on the Arbitration Bill of February 1996 by the Departmental Advisory Committee on Arbitration ("the DAC Report"), namely that "[t]he court does not have a general supervisory jurisdiction over arbitrations"; the parties having chosen arbitration rather than litigation, section 68 is "designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

The issue

16. Appendix D to the PSCs includes the formula for working out the Investment Multiple which in turn governs the respective shares of Profit Petroleum which the parties are to receive. One component of that formula, found in paragraph 3(ii) of Appendix D, is "Development Costs". A dispute as to what "Development Costs" should mean for these purposes was the subject matter of Issue 1. The Claimants

contended that it meant all Development Costs as defined by Article 1.29, namely "those costs and expenditures incurred in carrying out Development Operations, as classified and defined in Section 2 of the Accounting Procedure and allowed to be recovered in terms of Section 3 thereof". The Government contended that it meant only the Development Costs below the cap of the CRL, not those in excess of the CRL, the latter therefore falling to be borne by the Claimants. The Tribunal determined this issue of construction in favour of the Government (by a majority, Mr Leaver dissenting), holding that the term referred only to those Development Costs which fall under the cap imposed by the CRL, rather than referring simply to all Development Costs as defined by Article 1.29 of the PSCs (and uncapped by the CRL). The effect of this decision is that in calculating the Investment Multiple, the net profitable production is higher, because the cost deduction is capped and therefore lower, with the result that the application of the formula provides for a greater share of Profit Petroleum to be enjoyed by the Government.

17. The Claimants submit that the majority reached that conclusion on the basis of an entirely new point which had never been advanced by the Government or explored by the Tribunal with the parties at any stage. The "new point" was as follows.

18. The majority stated in paragraph 5.10 of the Award that:

> "Whilst the wording of paragraph 3(ii) of Appendix D appears to accord with the purpose of the IM [Investment Multiple] as submitted by the Claimants, there is a fundamental difficulty in construing the wording in such manner. That difficulty is the actual outcome (i.e. the 'net effect') were the IM to be calculated by taking into account the entire Development Costs (i.e. uncapped by the CRL) as opposed to taking into account only that part of the Development Costs which is recoverable under Article 13 of the PSCs (i.e. capped by the CRL)."

19. The majority then suggested at paragraph 5.11 that the "fundamental difficulty" it identified was caused by three factors:

(a) The definition of Profit Petroleum in Article 1.69, from which it was said to follow that "all Petroleum which is not Cost Petroleum is Profit Petroleum (i.e. profit) available for sharing" and that "[a]ccordingly, Petroleum that is not Cost Petroleum cannot be used to recover costs. It cannot because it is profit".

(b) Article 13.1 of the PSCs, by which the Contractor agreed it was "entitled to recover Contract Costs out of the total volume of Petroleum produced and saved from the Contract Area in each Financial Year in accordance with the provisions of this Article, and, in respect of sole risk or exclusive operations, Article VII of the Operating Agreement". The majority considered this to show that recovery under Article 13 was the only means for the Contractor to recover its costs, which meant that Profit Petroleum "cannot be used to recover costs".

(c) Article 7.3(a) of the PSCs states that "[t]he Contractor shall: …except as otherwise expressly provided in this Contract, conduct all Petroleum Operations at its sole risk, cost and expense and provide all funds necessary for the conduct of Petroleum Operations…". The Tribunal reasoned that it followed that the Contractor was only entitled to recover such expenses under the provisions in the PSCs; the PSCs provided at Article 13 for the recovery of Development Costs only to the extent that they fell beneath the CRL cap; therefore the Contractor

could not put Profit Petroleum towards otherwise unrecoverable Development Costs.

20. The Tribunal stated at paragraph 5.12 that these three factors were clear, undisputed by the parties and each of "fundamental importance in considering the actual outcome (i.e. the 'net effect') were the IM to be calculated by taking into account the entire Development Costs (i.e. uncapped by the CRL) as opposed to taking into account only that part of the Development Costs recoverable under Article 13 of the PSCs (i.e. capped by the CRL)". This was said (at paragraphs 5.12-5.13) to be because, as the parties agreed, if the "entire Development Costs" were used in the Investment Multiple formula, that would result in a lower Investment Multiple and therefore a larger share of Profit Petroleum for the Claimants. The Tribunal stated at paragraph 5.13 that "[i]t necessarily follows…that…the Claimants [would be] effectively able to recover Development Costs in the form of Profit Petroleum". That result, the majority continued, would be "fundamentally wrong as it is in obvious conflict with the three factors set out in paragraph 5.11 above: by calculating the IM on the basis of the entire Development Costs, the Contractor was effectively able to circumvent the CRL cap in Article 13 of the PSCs".

21. For those reasons, the Tribunal concluded at paragraph 5.14, "the Claimants' construction…cannot be right. It cannot be right and it is not what the parties to the PSCs agreed as such agreement would be contrary to the fundamental principles (here referred to as the three factors) set out in the main body of the PSCs in Articles 1.69, 7.3(a) and 13 of the PSCs". The Tribunal added that Article 34.5 of the PSCs makes it clear that in the event of any conflict between any provision in the main body of the PSCs and any provision in the Appendices, the former would prevail. Therefore "the Contractor, having agreed in Article 13 of the PSCs to recover its costs solely in the form of Cost Petroleum, cannot recover its Development Costs (or at least a part thereof) by way of a larger Profit Petroleum share under Appendix D".

22. The Claimants submit that the essential part of the majority's reasoning which underlay each of the "three factors" was that Profit Petroleum could not be used to recover Development Costs, but that this reasoning is flawed: on either party's suggested construction, the Contractor could use its share of Profit Petroleum to offset otherwise irrecoverable Development Costs. The Government accepts that on either party's suggested construction the Contractor could use its share of Profit Petroleum to offset otherwise unrecoverable Development Costs. However Mr Flynn QC submits that this misses the point which the Tribunal was making, which is that the interpretation of Development Costs for which the Claimants contended meant that the Contractor would have no incentive to control its costs – indeed was incentivised to increase them – because that would alter the denominator in the Investment Multiple formula so as to increase the percentage share of Profit Petroleum which the Contractor received. This was referred to as the "gold plating" argument. The Claimants' interpretation, the Government submits, therefore produces an outcome "which is startling from a commercial perspective", particularly in circumstances where the obvious intention of the parties in agreeing to Article 13 was to cap the recovery of Development Costs.

23. The wording of the Award cannot bear this interpretation. As Mr Milligan QC submitted, the Tribunal's emphasis was plainly on the idea that the effect of the provisions of the PSCs was that the Contractor should not be able to use Profit

Petroleum to recover Development Costs falling outside the CRL and that the Cost Petroleum was the "sole" means by which such costs could be recovered.

24. However the question which arises on this application is not whether the Court agrees with the reasoning of the majority of the Tribunal. The question is whether there has been a serious procedural irregularity. The Claimants' argument is as follows:

(a) the Tribunal reached its conclusion because it perceived a "fundamental difficulty" with the "actual outcome (i.e. the 'net effect')" which would be created if the Claimants' interpretation were adopted;

(b) the concept of the "net effect" was a new point introduced by the Tribunal, as Mr Leaver pointed out at paragraph 30 of his dissenting award;

(c) what the Tribunal has done is seriously unfair to the Claimants because they had no opportunity to address in argument the reasoning which was fundamental to the conclusion; the essential part of the majority's reasoning which underlay each of the "three factors" was that Profit Petroleum could not be used to recover Development Costs, which was not an argument advanced at any stage: the Government had never suggested that the Contractor could not use its share of Profit Petroleum towards the recovery of Development Costs; although the Tribunal asked questions after the closings which led to a further hearing, it did not do so on this point; Mr Leaver drew attention to the reasoning being new in his dissenting award, which was provided to the Tribunal before the Award was published, but that did not prompt the Tribunal to give the parties any opportunity to make further submissions on the point;

(d) this represented a failure by the majority (a) to act fairly, giving each party a reasonable opportunity of putting its case and (b) to act in accordance with the procedure agreed between the parties, on the basis that Article 15(1) of the UNCITRAL Rules obliged the Tribunal to give the Claimants a "full opportunity" to present their case;

(e) accordingly, the Claimants say, there was a serious irregularity causing substantial injustice to the Claimants within section 68(2)(a) or (c) of the 1996 Act, and they seek to set aside the passages in the Award expressing this reasoning, and the conclusion based on it, under s. 68(3)(b), or to have them declared to be of no effect under s. 68(3)(c) or remitted for reconsideration under s. 68(3)(a).

25. The Claimants also argued that the standards of procedural fairness which the Tribunal had to meet in this case were higher than those usually required by the 1996 Act because Article 15(1) of the UNCITRAL Rules requires that "each party is given a full opportunity of presenting his case", rather than simply the "reasonable" opportunity required under s. 33(1)(a) of the 1996 Act. This is also the basis on which the Claimants make their challenge under s. 68(2)(c). While I recognise that the words "full" and "reasonable" can mean different things, I do not regard the difference as imposing any higher burden on the Tribunal so far as relevant to the current challenge. Article 15 is only concerned with the opportunity for a party "to present his case", and does not separately embrace the opportunity to deal with the opponent's case which is addressed in s. 33 of the 1996 Act. The former will not always include the latter, and the Claimants' present challenge is an example of where

it does not do so: the Claimants' complaint is not that they did not have a full opportunity to advance their own construction and all the points they wished to advance in support of that construction; their complaint is that they did not have a fair opportunity to deal with all of the ultimately relevant arguments in support of the construction advanced by the Government and accepted by the Tribunal. In any event, paragraph 165 of the DAC Report identified the reasons why the 1996 Act uses different wording from the UNCITRAL Rules; it suggests that the Committee considered the material difference between the words to be one of timing, i.e. that "full" might entitle a party "to take as long as he likes, however objectively unreasonable". The arbitrators are masters of their own procedure under s. 34 and Article 15 of the UNCITRAL Rules, subject only to the overriding obligations of fairness imposed by s. 33, and it seems to me to be inconsistent with the guiding principles of speedy finality and minimal court intervention enshrined in s. 1 of the 1996 Act to treat Article 15 of the UNCITRAL Rules as requiring arbitrators to give a greater opportunity to the parties to put their case and deal with that of their opponents than that which is reasonable, which is what is required by s. 33.

26. Mr Flynn submitted that there was no serious irregularity. He contended that the decision of Coulson J, as he then was, in *F Ltd v M Ltd* [2009] EWHC 275 established that there is no serious irregularity where a tribunal decides against a party on a point of construction which has not been raised by the other party or ventilated during the proceedings; and that *a fortiori* there can be no serious irregularity where, as in this case, a binary point of construction was identified and addressed by the parties' submissions, and the complaint is merely that there is a point of analysis in support of one of the binary constructions adopted by the tribunal without ventilation. Alternatively, he submitted, all that is necessary to fulfil s. 33 is that the essential building blocks in relation to the point should have been "in play", which they were in the present case. Alternatively and in any event, the Claimants have not established any substantial injustice.

27. I am unable to accept Mr Flynn's first argument that there is a bright line rule that when it comes to points of construction there can be no serious irregularity when the point has never been raised in the proceedings. It is not supported by authority and is contrary to principle.

28. In *F Ltd v M Ltd* the tribunal had found (by majority) that the claimant was not entitled to recover pursuant to a clause (27.3) on which it had relied in making its claim, as a result of a point of construction that had not been argued by the defendant. Coulson J concluded that although "it may have been desirable…for the Tribunal, having reached its preliminary conclusion on clause 27 … to have notified the parties of the point prior to the finalisation of their Award" (at [43]), that was not sufficient to give rise to a serious irregularity (at [29]):

> "On balance, I reject the suggestion that the Tribunal reached that conclusion as a result of a serious irregularity. It cannot be irregular for a Tribunal to consider the pleaded contractual basis of a claim and reject it as a matter of construction. True it is that the defendant did not expressly plead the construction point, but since the claimant was relying on clause 27.3, it always retained the responsibility to ensure that its claim did indeed arise under that clause."

29. The decision was not surprising on the facts of the particular case. I do not read that passage in Coulson J's judgment as seeking to lay down some bright line rule applicable to all questions of construction. In *OAO Northern Shipping Company v Remolcadores de Marin SL* [2007] EWHC 1821 (Comm), Gloster J, as she then was, recognised at [18] that the section 68 threshold is a high one, quoting the second part of the passage from the DAC Report quoted above at paragraph 15. However she also pointed out at [19] that "the DAC, and their lordships in [*Lesotho Development v Impregilo SpA* [2006] 1 AC 221], also recognised that a party's right to a fair and impartial hearing is a fundamental one". She went on to say that the seriousness of the irregularity alleged must be judged in accordance with "fundamental principles" laid down in a series of cases that pre-date the 1996 Act but have been "repeatedly upheld as reflecting the principles enshrined in section 68(2)(a)". She relied in particular on:

(a) *The Vimeira* [1984] 2 Lloyd's Rep 66, 76) in which Ackner LJ (as he then was) said:

> "The essential function of an arbitrator … is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.
>
> …the adequacy of the turning area was not at the conclusion of the evidence - even though it was a possible issue at the commencement of the arbitration - any longer a live issue. The arbitrators clearly thought otherwise. They should have so informed the parties.…"

(b) *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, 15, in which Bingham J (as he then was) said:

> "If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties have never had the chance to deal with. Nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance."

30. Having set out those dicta Gloster J continued at [22]:

> "These principles apply to unargued points of law or construction as they do to unargued questions of fact. In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties "a fair opportunity to address its arguments on all of the essential building blocks in the

> tribunal's conclusion" (*ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 72)."

31. I respectfully agree with this analysis. There is nothing in the nature of a point of construction which requires it in all cases to be treated as falling into an entirely different category from any other basis on which a party loses a case before a tribunal, so as to exempt the tribunal from the overriding duty of fairness imposed by s. 33.

32. However where a point of construction is squarely in play and addressed by both parties, the tribunal is not obliged to put to the parties all aspects of the analysis in support of its conclusion in order to fulfil the s. 33 duty of fairness. As is well known, construction is an iterative process involving consideration of the particular wording in question, the other provisions of the contract taken as a whole, and the commercial consequences which follow from the rival constructions. The relevant provisions may be lengthy and admit of many nuances in the analytical argument. If provisions are relevant, and have been adverted to and addressed in argument, it is not necessarily unfair for the tribunal to use them to support its reasoning, even where the other party has not done so in the same way as the tribunal. It is always important to keep in mind the distinction between a lack of opportunity to deal with a case and a failure to recognise or take such opportunity. It is commonplace in judicial decisions on points of construction that a judge may fashion his or her reasoning and analysis from the material upon which argument has been addressed without it necessarily being in terms which reflect those fully expressed by the winning party. There is not perceived to be, and is not, anything which is unfair in taking such a course. It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated. To use the language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1 at [72], a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case. That applies to points of construction as much as to other points in dispute.

33. In this case my conclusion is that there has been no serious unfairness to the Claimants in the course adopted by the majority of the Tribunal, and it cannot be said that the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. It is not in dispute that the contractual interpretation favoured by the Tribunal was ventilated in argument: indeed it was the construction which the Government had put forward and was the subject matter of extensive argument. All the essential building blocks of the Tribunal's reasoning were in play:

    (a) The references by the Tribunal to the concepts of "actual outcome" and "net effect" were not, on a fair reading of the Award, references to the commercial consequences of the Claimants' construction, but to the "fundamental difficulty" in adopting that interpretation because it was incompatible with the other terms of the PSCs; what the Tribunal was doing was part of the iterative process of contractual interpretation which involved taking into account other provisions of the PSCs. That is a normal and legitimate process of construction which was part

and parcel of the architecture of the rival submissions and of which the experienced advocates on both sides must have been fully aware.

(b) The other terms of the PSC upon which the Tribunal relied were all in play on this issue and had been addressed in argument:

(i) Article 1.69 was referred to by both parties in relation to Issue 1, as is recorded in paragraphs 5.1(a), 5.3 and 5.6(e) of the Award. It was the subject of submissions by Mr Ganguli SC for the Government in support of his argument about the construction of "Development Costs". The Claimants submit that the Government did not specifically argue that Profit Petroleum could not be used to recover Development Costs exceeding the CRL because it was profit, but that is not sufficient to give rise to a serious irregularity. What must be "in play" is not the specific analysis adopted by the Tribunal, but the building blocks of that analysis, i.e., here, the definition of Profit Petroleum in Article 1.69. Plainly both parties had the opportunity to address the Tribunal on what effect, if any, Article 1.69 should have on the meaning of "Development Costs".

(ii) Article 13.1 was obviously central to the issue of construction in Issue 1, and was recorded by the Tribunal as being relied upon in both sides' submissions on the issue. Again the Claimants had a fair opportunity to address the effect of Article 13.1 on the rival constructions on this issue.

(iii) As to Article 7.3(a), Mr Flynn took me to a number of references to this Article (in particular at paragraphs 3.3, 5.6 and 10.6) in sections of the Government's Defence of 31 January 2012 which were concerned with the overall scheme of the PSCs. Those sections are entitled "PSCs are subservient to the Constitutional mandate", "Salient Features and Workings of the Tapti PSC" and "Salient Features and Workings of the Panna-Mukta PSC". It was also referred to in a section of the Defence headed "Accounting of Development Cost in excess of CRL", in which it was pleaded that expenditure incurred above the cap would be borne by the Claimants by virtue of Article 7.3(a). Mr Milligan objected that Article 7.3(a) had not been referred to as relevant to Issue 1 and that in the context of long and multi-faceted arbitral proceedings it would be difficult for the Claimants to have in mind every reference to a particular provision of the PSCs that had been made, however minor and in whatever context. However Article 7.3(a) had been relied upon as part of the essential contractual scheme of the PSCs as a whole, not merely en passant in relation to a discrete and isolated issue. According to paragraph 24.3(a) of the Award, Article 7.3 was referred to as the "backbone of the contract" in submissions on 20 November 2014. It is important to keep in mind that although the Tribunal separated the issues into 69 numbered issues, the parties did not address their submissions on this basis. Issue 1 was not isolated as an issue on which the parties made specific discrete submissions in a way which would have entitled them to assume that no other aspects of the parties' submissions might have a bearing on it. Each side must necessarily have been required to be alert to the consequences of arguments addressed in one context applying in another, and the intellectual ability to do so was not beyond the means of the Claimants'

experienced legal team. Article 7.3(a) can therefore properly be described as in play.

(iv) Article 34.5 was referred to by the Government in relation to this issue and was plainly "in play" before the Tribunal.

34. In reality the essence of the Claimants' complaint is directed towards the manner in which the Tribunal analysed and deployed the various provisions which were in play. That goes to the question of whether the Tribunal reached an erroneous conclusion, but there is no section 69 challenge on Issue 1, and the correctness or otherwise of the conclusion is irrelevant to the question of whether there has been a serious irregularity under section 68, which is concerned with process.

35. I therefore conclude that there has not been a serious irregularity under s. 68(2)(a), nor a failure to conduct the proceedings in accordance with the UNCITRAL Rules so as to engage s. 68(2)(c). In those circumstances it is not necessary for me to consider whether the alleged irregularity has caused or will cause substantial injustice to the Claimants.

Challenge 2: Notional Income Tax rate

36. Another component of the Investment Multiple formula is "notional income tax", which is to be determined in accordance with paragraph 7 of Appendix D which provides:

> "In determining the amount of notional income tax to be deducted in the applicable cash flows specified in paragraph 2 of this Appendix, a notional income tax liability in respect of the Contract Area shall be determined for each Company, as if the conduct of Petroleum Operations by the Company in the Contract Area constituted the sole business of the Company and as if the provisions of the Income Tax Act, 1961, with respect to the computation of income tax at a fifty percent (50%) rate applicable to Petroleum Operations on the basis of the income and deductions provided for in Article 15 of this Contract were accordingly applicable separately to the Contract Area, disregarding any income, allowances, deductions, losses or set-off of losses from any other Contract Area or business of the Company."

37. The dispute before the Tribunal as to what this meant was as follows. The Claimants submitted that the notional income tax rate had been fixed at 50% for the purposes of the formula. The Government submitted that the income tax rate in the formula should be determined using the actual income tax rates applicable to each of the Claimants at any given time; what was "notional" were the other aspects which the definition required to be assumed, not the rate of tax; and that the 50% figure was only included for illustration, being the rate of tax actually payable by both Claimants at the time when the PSCs were concluded.

38. The Tribunal accepted the Government's argument and held that the applicable rate was that actually paid by the Claimants from time to time. Its reasoning is contained in the following paragraphs:

> "9.6. In the Tribunal's view, when calculating the Investment Multiple, the income tax rates actually applicable to the Companies are to be applied. It has been the Claimants' submissions – albeit in the context of determining the scope of

Development Costs to be used when calculating the IM – that "[t]*he purpose of the* [Investment Multiple] *is to increase the Government's share of Profit Petroleum as the Contractor's profitability increases (i.e. as the returns on investment from the Fields grow beyond the costs required to develop them)"* and that "[i]*n simple terms, the more profitable the production becomes, the greater the Government's share of the profits"*. The Respondent has also submitted that the IM is a post-tax profitability rate similar to the post-tax Rate of Return which is used to evaluate the actual profitability of one project on a standalone basis. The Tribunal in light of the aforesaid submissions from Parties accepts therefore that the purpose of the Investment Multiple is to reflect the profitability of each of the PSCs. It follows, in the Tribunal's view, that the Investment Multiple must necessarily reflect how profitable each of the PSCs is in actual terms. Otherwise, the IM would not be able to serve as an indicator of each of the PSCs' profitability and the IM could not fulfil its "*purpose* [namely] *to increase the Government's share of Profit Petroleum as the Contractor's profitability increases"*. It necessarily follows that in the event *"the Contractor's profitability increases"* because of an actual income tax rate which is lower than 50%, this must result in an *"increase* [of] *the Government's share of Profit Petroleum"*.

9.7. As regards the reference to *"50%"* in paragraph 7 of Appendix D, the Tribunal considers that the wording of paragraph 7 of Appendix is not clear. Paragraph 7 of Appendix D provides as follows:

> *"In determining the amount of notional income tax to be deducted in the applicable cash flows specified in paragraph 2 of this Appendix,* ***a notional income tax liability in respect of the Contract Area*** *shall be determined for each Company, as if the conduct of Petroleum Operations by the Company in the Contract Area constituted the sole business of the Company and* ***as if the provisions of the Income Tax Act, 1961, with respect to the computation of income tax at a fifty percent (50%) rate applicable to Petroleum Operations*** *on the basis of the income and deductions provided for in Article 15 of this Contract were accordingly applicable separately to the Contract Area, disregarding any income, allowances, deductions, losses or set-off losses from any other Contract Area or business of the Company"* (emphases added by the Claimants in their December 2012 Submissions).

In the Tribunal's view, the above provision does not refer to a notional income tax rate of 50% as contended for by the Claimants. This provision only refers to a *"notional income tax* ***liability****"* (emphases added by the Tribunal). Whether this however also reflects an agreement between the parties to the PSCs on a notional income tax rate is open and as a matter of construction, needs to be determined.

9.8 The Tribunal is of the view that, as a matter of construction and as the provisions of the PSCs provide no further clarity or guidance as to whether the parties to the PSCs agreed a notional income tax rate of *"50%"*, it is appropriate to consider the pre-contractual negotiations and documents exchanged between the Parties prior to their entering into the PSCs. In this regard, the Tribunal notes it is now agreed that the income tax rate actually applicable at the time the PSCs had been entered into, was 50%. This appears to suggest that the reference to *"50%"* in paragraph 7 of Appendix D was a reference to the income tax rate actually applicable and was not meant to notionally fix the rate. If the Parties had intended to agree on such a notionally fixed rate, there would have been some documents on the record showing the Parties actually negotiated a notionally fixed rate. However, there is none and the Claimants have not referred the Tribunal to any documents which support their assertion that the

> Parties negotiated and agreed a notionally fixed rate. In fact, the Claimants in their *"Final Fiscal Proposal: Tapti"* stated clearly that:
>
> > (l) In the event the income tax rate reduces below 50%, then the lower rate shall be applicable.
>
> There is nothing on the record showing that the Claimants, after they had made the above Final Fiscal Proposal in respect of Tapti, amended the basis of the above offer by instead proposing a notionally fixed rate of 50%. In these circumstances and absent any evidence to the contrary, the Tribunal accepts the Respondent's submission that the Claimants did offer in their Final Fiscal Proposal that *"in the event the income tax rate reduces below 50%, then the lower rate shall be applicable"*, an offer which the Respondent accepted.
>
> 9.9. Against this background, the Tribunal is satisfied that the reference in paragraph 7 of Appendix D is merely an illustration of the actually applicable income tax rate which, at the time the PSCs had been entered into, was 50%.
>
> […]"
>
> (Emphasis and use of italics for quotations in original; citations omitted)

39. The Claimants' complaint is that the Tribunal reached this decision by considering pre-contractual negotiations between the parties – namely the Claimants' Final Fiscal Proposal – despite the fact that, so they submit, the Tribunal had earlier in its CRL Award "determined that it was not permissible to have recourse to pre-contractual negotiations as an aid to construction of the PSCs". The submission is founded on paragraphs 3.7 and 3.8 of the CRL Award, in which the Tribunal stated:

> "3.7 The Respondent in its submission that the CRL requires the completion by the Claimants of all the works set out in Appendix G of the PSC relied to a large extent in support of this submission on the pre-contractual correspondence and documentation.
>
> 3.8. Although the pre-contractual correspondence and documentation provides part of the factual background to the conclusion of the PSC, the Tribunal cannot accept the Respondent's submission that it is permissible to construe the PSC by reference to the earlier correspondence and documentation. The PSC is the agreement between the parties and its true construction must be found within the four corners of the document. That is the case in both Indian and English law, and, the case is a fortiori where, as in the PSC, there is in Article 34 an Entire Agreement provision. Article 34.1 provides:
>
> > *"This Contract supersedes and replaces any previous agreement or understanding between the Parties, whether oral or written, on the subject matter hereof, prior to the Effective Date of this Contract."*"
>
> (Italics in original)

40. Accordingly relief is sought under ss. 67 or 68 of the 1996 Act, on the basis that the Tribunal did not have substantive jurisdiction to take into account the Final Fiscal Proposal, or that by admitting and relying on it, the Tribunal committed a serious irregularity in exceeding its powers, failing to comply with its duty of fairness and impartiality or failing to comply with the procedure agreed by the parties.

41. Section 67 provides that a party may seek an order varying or setting aside an award or part of it or a declaration that it is of no effect where the tribunal has no "substantive jurisdiction". Section 82(1) provides that the phrase "substantive jurisdiction" refers to "the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly". The matters specified in section 30(1)(a) to (c) are "(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement". It was common ground that the grounds for a challenge under s. 67 are comprehensively circumscribed by the list of matters referred to in s. 30.

42. Mr Milligan submitted that the Tribunal found at paragraph 9.8 that the wording of paragraph 7 of Appendix D was unclear; therefore the Tribunal considered the pre-contractual negotiations and documents for the purpose of construing paragraph 7; the CRL Award had determined that it was not possible to construe the PSCs by reference to the pre-contractual negotiations and documents; that finding finally disposed of the dispute between the parties in relation to that issue; therefore the admissibility of pre-contractual negotiations and documents was no longer an issue that was the subject of an outstanding dispute or submission to arbitration within the meaning of s. 30(1)(c) of the 1996 Act, and so the Tribunal was *functus officio* to that extent. Mr Milligan submitted that this falls within the scope of s. 30(1)(c) because the position is no different from that where there is an agreement between the parties to withdraw a dispute from the reference, or to withdraw an admission of a credit such that it could no longer be taken into account, as in *Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Point* [2004] EWHC 1354 (Comm). The Claimants referred, too, to my judgment in *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm); [2016] 1 All ER (Comm) 517, where I said at [23] that absent a challenge to or appeal from an arbitral award, the award creates an issue estoppel between the parties precluding either party challenging it before the tribunal or as a ground of challenge to a subsequent decision of the tribunal, and at [26] that one of the consequences of an award being binding was that:

> "…subject to limited exceptions, the tribunal no longer has power to review or reconsider the subject matter of the award. There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end, and, with it, his powers and duties in the reference: he is then said to be functus officio…".

43. In the alternative the Claimants say that the Tribunal committed a serious irregularity on the following grounds:

(a) it exceeded its powers under s. 68(2)(b), for the same reasons as relied on for the lack of substantive jurisdiction challenge: in light of the CRL Award the Tribunal no longer had a power to rely on pre-contractual negotiations;

(b) alternatively, even if the Tribunal's recourse to pre-contractual negotiations did not constitute an excess of powers, the Tribunal should at the very least have warned the Claimants that it proposed to depart from the terms of paragraph 3.8 of the CRL Award, particularly given that the Claimants' case in this context was founded squarely on paragraph 3.8. Its failure to give the Claimants such a

warning is said to be an irregularity under s. 68(2)(a) or (c) on the basis that it deprived the Claimants of a reasonable and/or a full opportunity to present their case.

44. In relation to the section 67 challenge the Government argued as follows. The challenge does not concern one of the matters listed in s. 30(1)(a) to (c) of the 1996 Act. The Tribunal was not *functus officio* in relation to the use of pre-contractual negotiations as an aid to interpretation of the issue under consideration: in the CRL Award it had only decided the particular point of construction there addressed, and the permitted use of pre-contractual negotiations for that purpose alone, as distinct from any general issue of procedure and/or law about pre-contractual negotiations/ documentation for other purposes. Alternatively, there was a distinction recognised in paragraph 3.8 of the CRL Award between having regard to pre-contractual material as part of the "factual background" i.e. what is commonly referred to as factual matrix (which would be permissible), and as evidence concerning parties' negotiations and declarations of subjective intent (which would not be permissible as a matter of English and Indian law although could be admitted by the Tribunal in its wide arbitral discretion). The CRL Award recognised that factual matrix evidence would be admissible and the Claimants' Final Fiscal Proposal came within that categorisation for the purposes of the notional tax issue. Alternatively, even if it did not and the Tribunal had misapplied that distinction, the error would not give rise to a legitimate challenge under s. 67 (or s. 68): at most it would be an error of (Indian) law.

45. As to section 68(2)(b), the Government made the following submissions, some of which necessarily overlap with those relating to substantive jurisdiction:

(a) S. 68(2)(b) is only engaged when the tribunal has purported to exercise a power that it did not have, rather than making an error of law, arriving at the wrong conclusion as a matter of fact, or erroneously exercising a power which it did have: *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43 per Lord Steyn at [24], [25], [31] and [32]. In *B v A* [2010] EWHC 1626, Tomlinson J confirmed at [26] that s. 68(2)(b) is likewise not engaged by an alleged misapplication of foreign law. In order to decide whether s. 68(2)(b) is engaged, it is necessary to focus intensely on the particular power which is involved: *Lesotho* per Lord Steyn (with whom Lords Hoffmann, Scott and Rodger agreed) at [21] and [32]. The Tribunal plainly had the power to determine the notional tax issue and, for that purpose, to determine whether particular pieces of evidence were admissible. In particular:

(i) Article 25(6) of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".

(ii) Section 34(1) of the 1996 Act provides that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter".

(b) Paragraph 3.8 of the CRL did not purport to and did not curtail that power in relation to the notional tax issue.

(c) Alternatively paragraph 3.8 of the CRL Award left the Tribunal with the power to admit factual matrix evidence.

(d) The Claimants can at most contend that the Tribunal made an error of law or exercised erroneously a power that it did have in deciding whether certain pre-contractual material was admissible; as such there can be no challenge under s. 68(2)(b).

46. As to s. 68(2)(a) and (c), the Government submits that the Claimants were not deprived of the opportunity to present their case properly and there can be no question of a failure by the Tribunal to comply with its general duty under s. 33.

Analysis

47. The starting point is that subject to the effect, if any, of the CRL Award, the Tribunal has the power to admit and rely on pre-contractual negotiations in construing the PSCs, whether they form factual matrix evidence which would be admissible under English or Indian law, or evidence of subjective intentions which would not. The admission and use of such material is a matter entirely within the discretion of the Tribunal under Article 25(6) of the UNCITRAL Rules and s. 34 of the 1996 Act. That much was accepted by Mr Milligan.

48. The CRL Award could only deprive the Tribunal of that power and discretion in the context of the determination of the notional tax issue if it decided that such evidence was not admissible *for that purpose*. In my judgment it does not do so, and does not purport to do so. That issue was not before the Tribunal for determination as part of the CRL Award. Paragraph 3.8 of the CRL Award was only concerned with the material which the Tribunal decided it could take into account for the purposes of the particular construction point it was considering, namely how Article 13 was to be construed. It is not to be read as if it decided that for all subsequent questions of construction of the PSCs in dispute in the arbitral proceedings of whatever nature, no use could be made of pre-contractual negotiations and documentation. As Mr Milligan himself put it during argument "it is directed to the argument they are addressing at that stage". No issue estoppel arises in relation to any broader point about the admissibility of pre-contractual negotiations and documents. It follows that the Tribunal retained its substantive jurisdiction and power to have regard to pre-contractual negotiations and documents when addressing the notional tax issue should it so wish, and therefore had jurisdiction to decide as it did.

49. Nor was there any serious irregularity in the Tribunal's failure to warn the Claimants that it was going to take into account pre-contractual negotiations and documents in this context. The Claimants were aware that the Government had made submissions concerning pre-contractual documents on this issue and were relying in this context on the Final Fiscal Proposal (e.g. in submissions on 1 September 2012 and 7 October 2013, the latter being after the CRL Award). The Claimants specifically argued that they were inadmissible in paragraph 83 of their submissions of 7 November 2013 and on several occasions drew attention to paragraph 3.8 of the CRL Award, arguing at the November 2014 hearing that it precluded reliance by the Government on pre-contractual documents in the context of the notional tax issue. They also argued in oral submissions at the November 2013 hearing that reliance on the Final Fiscal Proposal on this issue was precluded by the entire agreement clause, Article 34.1.

They had also addressed the merits of the Government's reliance on the document in the alternative, in their 7 December 2012 submissions, and again briefly orally at the November 2014 hearing. In summary, the Claimants not only had the opportunity to address the point, but recognised the opportunity and took it.

50. The question of substantial injustice does not arise given that I have found that there was no serious irregularity. However I would in any event have found that the Claimants had failed to establish any substantial injustice. The second to seventh sentences of paragraph 9.6, which are not challenged, show that irrespective of the Final Fiscal Proposal, the Tribunal would have reached the conclusion it did for the reasons there set out: i.e. that the purpose of the Investment Multiple is to reflect the profitability of each of the PSCs; and that it followed, in the Tribunal's view, that the Investment Multiple must necessarily reflect how profitable each of the PSCs is in *actual* terms. Taken together with the unchallenged findings that the tax rate was in fact 50% at the time and that the wording of paragraph 7 does not resolve the question on its own, it follows that if the Tribunal had ignored the Final Fiscal Proposal, all its articulated reasoning would have led it to the same conclusion.

Challenge 3: Estoppel

51. In the CRL Award the Tribunal found that as a matter of construction the sole criterion in determining whether Development Costs fall within the scope of the CRL (meaning that their recovery by the Contractor is limited by the CRL cap) is whether the costs are incurred in respect of works which are necessary to enable production at a stipulated rate, viz. 4.2 million cubic meters of gas per day from Tapti and 38,300 barrels of oil per day from Panna Mukta. Any costs incurred to enable production in excess of those rates would therefore fall outside the scope of the CRL and would be recoverable in full. In so finding the Tribunal rejected the Government's contention that, as a matter of construction, the criterion for deciding whether Development Costs fall within the scope of the CRL is whether they are incurred in respect of items of work which were referred to in Appendix G of the PSCs.

52. The Government contended at the November 2014 hearing that the Claimants should be estopped from relying on the interpretation found by the Tribunal. This question had been left over for future consideration in the CRL Award and was addressed and determined in the Award. The Government's case was that throughout the implementation of the PSCs the parties shared a common understanding that the question whether particular Development Costs fall within the scope of the CRL depends not on whether those costs are incurred in respect of works necessary to enable production at the stipulated rates, but on whether they are incurred in respect of works listed in either Appendix G or the IPOD. The Tribunal held that the estoppel was made out (Mr Leaver dissenting). Having determined that the issue was governed by English law - London being the seat of the arbitration - the Tribunal articulated the three necessary ingredients as being (1) a common understanding between the parties, which (2) was relied upon by the Government, and in relation to which (3) it would be inequitable were the Claimants now to contend for some other meaning. It concluded that each was satisfied.

53. The Claimants seek permission to appeal against that finding under section 69 of the 1996 Act. Knowles J ordered that the permission application be heard at the same time as the other challenges, with the substantive application to follow if permission

were granted. The proposed appeal is said to raise three questions of law: (1) whether the Tribunal identified the wrong test as to common understanding; (2) whether the Tribunal failed to identify the right facts to be taken into account to determine whether or not there had been reliance; and (3) whether the Tribunal failed to identify the right facts to be taken into account to determine whether or not there had been inequity. The Claimants say that the Tribunal's findings in respect of these questions are obviously wrong, and that the other requirements of s. 69 for granting leave are satisfied.

54. In the alternative, the Claimants submit that the Tribunal's conclusions on estoppel are, in the words of their solicitor Ms Ahuja, "fundamentally unfair", and they seek to have the relevant parts of the Award set aside or declared to be ineffective or remitted to the Tribunal on the grounds of serious irregularity causing substantial injustice under s. 68 of the 1996 Act.

Legal principles

55. Section 69 requires that the Claimants must establish (1) a question of law; (2) on which the arbitrators were obviously wrong (it not being suggested in this case that there is any question of general public importance); (3) which the tribunal was asked to determine; (4) determination of which will substantially affect the rights of the parties; and (5) which it is just and proper for the Court to determine despite the agreement of the parties to have it determined by their chosen arbitral tribunal.

56. The restriction of appeals to errors of law must be rigorously applied in order to give effect to the principles of party autonomy and minimum court intervention enshrined in sections 1(b) and (c) of the 1996 Act: see *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 per Steyn LJ at p. 228. The arbitrators' findings of fact cannot be appealed, however wrong they may appear to the court to be. The arbitral tribunal is master of all issues of fact; by choosing arbitration the parties have bound themselves to honour the arbitrators' award on the facts. It is not generally permissible to argue that there has been an error of law because there was insufficient evidence to support the tribunal's findings of fact: *Athens Cape Naviera SA v Deutsche Dampfschiffartsgesellschaft Hansa AG (The Barenbels)* [1985] 1 Lloyd's Rep 528 per Robert Goff LJ at p. 532; *Universal Petroleum Co Ltd v Handels-Und Transport GmbH* [1987] 1 Lloyd's Rep 517 per Kerr LJ at p. 523. The court will be astute to discern and discourage attempts to appeal what are in reality findings of fact by seeking to dress them up as questions of law. Moreover, where a tribunal has not expressly stated the legal principles in terms which are obviously erroneous, it will be difficult for a would-be appellant to identify an error of law. If the arbitrators have stated the correct legal principle, the court will start from the assumption that that is the principle which has been applied. If the law is not stated, or not fully stated, the court will nevertheless start from the assumption that the law has been correctly understood and applied; tribunals are not to be treated as in error if they do not spell out the law, and to require them to do so would be contrary to the desideratum of speedy finality which underpins the Act. It is occasionally possible to infer an error of law which is not explicit on the face of the award, but only where a correct application of the law to the facts found would *inevitably* lead to one answer, whereas the arbitrator has arrived at another: see *Finelvet AG v Vinava Shipping Co Ltd ("The Chrysalis")* [1983] 1 WLR 1469 at p. 1475, per Mustill J and *Fulton Shipping Inc of*

Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U.) of Spain [2014] 2 Lloyd's Rep 230 at [74] (upheld at UKSC 43 [2017] 1 WLR 2581).

57. Similar rigour must be applied to the criterion that the tribunal was "obviously wrong". An arguable error will not be enough; the error must be clear and transparent: see per Arden LJ in *HMV UK v Propinvest Friar* [2011] EWCA Civ 1708 at [5]. The tribunal's reasoning must reveal a "major intellectual aberration": *HMV UK* at [8], approving the expression used by Akenhead J to capture the obviousness requirement in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 Lloyd's Rep 608 at [31].

The alleged errors of law

58. The Tribunal set out the three requirements which it said were necessary to make out the estoppel at paragraph 24.19 of the Award (and referentially paragraph 31.11), namely: (1) "a common understanding between the Parties of the meaning of the CRL"; (2) "which common understanding [the Government] relied on" and (3) that "it would be inequitable were the Claimants to now contend for some other meaning." The Tribunal found that each requirement was satisfied.

59. The Claimants say that the Tribunal committed three obvious errors of law:

(a) It identified the wrong test as to common understanding, in particular failing to identify and apply a requirement that the understanding must have been communicated by the Government to the Claimants in accordance with the principles stated in *The August Leonhardt* [1985] 2 Lloyd's Rep 28 and *The Vistafjord* [1988] 2 Lloyd's Rep 343: it is not enough that each of the two parties acts on an assumption not communicated to the other; there must be some words or conduct crossing the line between them which communicates the sharing of the assumption.

(b) It failed to identify the right facts to be taken into account to determine whether or not there had been reliance.

(c) It failed to identify the right facts to be taken into account to determine whether or not there had been inequity.

Communication

60. This is not a legitimate criticism of the formulation of the principles by the Tribunal, nor of their application. It is clear that when the Tribunal talked of a common understanding it meant a shared understanding in the sense of one communicated between the parties. There was no need to spell out communication as a separate ingredient because what the Government relied upon to establish the shared understanding was to a significant extent what had occurred at Management Committee meetings which had been attended by representatives of all parties. In the immediately preceding paragraphs of the Award the Tribunal had recited the Government's submissions which were couched in terms of communication, referring to what was "represented" in "the Claimants' own proposals" and to the Claimants having "understood and led [the Government] to agree and rely upon the same understanding". The Tribunal's formulation of the relevant ingredients of the

estoppel was identical to that which the Claimants had themselves articulated at paragraph 2.41 of their submissions of 30 January 2015. It was implicit in both that the expression "common understanding" meant a shared communicated understanding, an element which had been spelled out elsewhere in submissions and not been in issue as a matter of law.

61. Mr Milligan submitted that the overarching question for the Court was as follows: "on the findings of fact in the award, can we show that the Tribunal's conclusion on estoppel was obviously wrong as a matter of English law?"; in other words, he submitted that this was one of the rare cases in which the facts found were simply inconsistent with an estoppel being made out if the law had been correctly understood and applied. The central plank of this submission was that the Tribunal had concluded that discussions at the Management Committee and Operational Board meetings did not show a consistent mutual or shared understanding when it said at paragraph 24.20(b) that "the documentary evidence set out above does not appear to show a consistent basis on which the [Operating Board] and/or [Management Committee] stated the CRL was to apply or not." This is, however, to misread the Award. It is tolerably clear that what the Tribunal was saying was that the alleged understanding was not apparent from *the minutes* of the meetings; that was the "documentary evidence" being referred to. The Tribunal then went on to rely on the oral evidence about what happened at the meetings which it had heard from Mr Shaw, stating at paragraph 24.20(c):

> "…however, the Claimants' witness Mr Nigel Shaw, who had not filed any witness statement and had not given evidence prior to the release of the CRL Award, confirmed, in particular in cross-examination at the November 2014 Hearing, that there was in fact a consistent common understanding regarding the basis on which the parties to the Tapti PSC decided to which Development Costs the CRL applies, namely that the CRL applies to Development Costs incurred on works listed in either the IPOD or Appendix G."

62. The Tribunal set out in some detail the evidence from Mr Shaw which bore out that conclusion, with extensive quotation from the transcript. In other words, it held that the understanding had been established as the shared basis on which the discussion at the meetings had taken place, notwithstanding that that was not clear from the minutes, by reason of the admissions to that effect by Mr Shaw in his oral evidence. That evidence was accepted by the Tribunal and is sufficient to support the finding of a common understanding in the sense of one shared by communication between the parties. It is entirely consistent with the finding at paragraph 24.20(b) which does not contain a finding that the documentary evidence positively proves the absence of a shared understanding, but rather a finding that that evidence is inconclusive.

63. In short the Tribunal's finding and conclusion at paragraph 24.20 of the Award that the parties when carrying out the Tapti PSC "did so on the basis that the CRL cap…would apply to Development Costs incurred in respect of works either listed in Appendix G or listed in the IPOD" is consistent with the Tribunal having identified and applied the correct legal principle. There is no arguable error of law in this respect, let alone an obvious one.

64. The same applies in respect of Panna Mukta. At paragraph 31.12 the Tribunal relied on (1) the evidence given during cross-examination by another of the Claimants' witnesses, Mr Kulkarni, in respect of Panna Mukta, as supporting the finding that there was a consistent common understanding that the CRL applied to works listed in either Appendix G or the IPOD, and (2) Mr Shaw's evidence that that was the approach repeatedly endorsed and applied by the (all-party) Management Committee, which again is consistent with the Tribunal having identified and applied the correct legal principle. Again, there is no arguable error of law in this respect, let alone an obvious one.

Reliance

65. There can be no doubt that the Tribunal identified reliance as a necessary ingredient (at paragraphs 24.19 and 31.11), considered the rival submissions of the parties on the issue (at paragraphs 24.3(a), 24.11(l), 24.13, and 24.22) and made a clear and unequivocal finding that the Government had relied upon the common understanding in the "execution" (i.e. implementation) of the PSCs by reason of its representative on the Management Committee approving the implementation of the project on that basis (at paragraphs 24.20, 24.22 and 31.13). That reveals no error of law and involves findings of fact which are not open to challenge under s. 69 of the Act.

66. The Claimants sought to define the error of law as "a failure to identify the right facts to be taken into account in order to determine whether or not there had been reliance", in two material respects. The first was that the conclusion that there had been reliance was based on the documentary evidence, whereas this had been held to be inconsistent and inconclusive as to any shared understanding; accordingly once the Tribunal found the inconsistency in the documentary evidence as to common understanding, it inevitably followed that no reliance on some common understanding could be shown by reference to that same documentary evidence. This argument is misplaced because, as I have already observed, it is based on a misreading of the Award. The finding of a common understanding was based on all the evidence, oral and documentary, and is not invalidated by the indication that what appeared from the documentary record alone was not conclusive in itself.

67. The second aspect which is said to show "a failure to identify the right facts" is an alleged failure to identify when the estoppel came into existence. Mr Milligan argued that the Tribunal cannot have applied the correct test of reliance because it made no finding as to when the reliance occurred; that the Tribunal's findings meant that the earliest occasion on which a common understanding could have been relied upon was 27 January 2004 for Tapti and 7 April 2003 for Panna Mukta, which were the dates of the earliest Management Committee or Operating Committee resolutions which were identified in the Award as those potentially evidencing a common understanding; and that there could not have been any reliance and therefore estoppel before those dates.

68. This gave rise to a question of what was meant by the Tribunal's conclusion at paragraph 24.20 for Tapti, adopted also for Panna Mukta at paragraph 31.13, that it was clear "on the evidence" that the parties, "when executing the Tapti PSC", did so on the basis of the common understanding contended for by the Government. It was common ground that "executing" meant implementing or performing the PSC. Mr Milligan submitted that because of the evidence identified in the Award as supporting

the estoppel, this must be read to mean that the estoppel arose only from 2003/2004, and that this was the effect of the Award. I cannot accept this submission. The conclusion is expressed without any limitation as to the period of its application. Moreover, the formal parts of the Award at paragraphs 74.18 and 74.21 express the estoppel as applicable generally, without any qualification or limitation as to time or otherwise. In any event, had I taken a different view, it would not have assisted the Claimants' s. 69 challenge: if the effect of the Award had been as Mr Milligan submitted it would not support any argument that there was an error of law in applying the requirement of reliance; and if there were any ambiguity, the Claimants could (and should) have sought clarification under s. 57 of the 1996 Act.

69. As it is, there remains Mr Milligan's alternative submission that there must have been an error of law in applying the requirement of reliance because of the date range of the evidence identified, and a failure to make express findings of when the reliance occurred. In my judgment this too is unsound. Although in setting out its findings the Tribunal only adverted specifically to minutes from Management Committee meetings from 2003/04, Mr Shaw was in attendance at the Management Committee meetings from February 2002 and there was evidence in play that went back further than that, including Management Committee resolutions going back to 1999 (referred to as relied upon by the Government at paragraph 24.6(a) of the Award). The Government's case was that the common understanding formed the basis of the parties' dealings from the outset, and the Tribunal's findings accepted that case. The Government had submitted that the parties shared a common understanding of the PSCs "at all times", on the basis of which they had performed the PSCs "since the date of execution" (as recorded in the Award at paragraphs 24.1(a), 24.1(d) and 24.3(a)). In the cross-examination of Mr Shaw on 5 November 2014, recorded at paragraph 24.20(c) of the Award, Mr Flynn asked whether the common understanding alleged by the Government was the approach "before your time" as well as "during your time" to which Mr Shaw assented by nodding in response. The Tribunal referred at paragraph 24.21 to what it considered to be the improbability of the Claimants investing large sums of money "over approximately two decades" (i.e. since the date when the PSCs were entered into) without doing so on the basis of the common understanding. This reinforces the interpretation of paragraphs 24.20, 74.18 and 74.21 as findings by which the Tribunal accepted the Government's case that the common understanding formed the basis of the parties' dealings from the outset.

70. The fact that the evidence identified in the Award did not relate to the whole period is irrelevant on a s. 69 challenge. Even had it been the case that there was no evidence to support such a finding, that cannot amount to an error of law or form the basis of a challenge under s. 69. This challenge is, in substance, an impermissible attempt to challenge the Tribunal's findings of fact that there was reliance on a common understanding throughout the period of the "execution" of the PSCs.

71. The same is true of Mr Milligan's submission that the Government had not provided any evidence of its reliance or change of position and that the Government's representative on the Management Committee had not given any evidence to the effect that in approving an Operating Committee proposal he was relying on the common understanding rather than, for example, the intrinsic merits of the proposal, or his own understanding of the CRL. Mr Milligan invoked the Leaver Dissent at paragraphs 104, 106 and 110, where Mr Leaver made these points and argued that the

majority had not engaged with the obvious issues arising therein. The short answer is that these are all questions of the sufficiency of the evidence to support the Tribunal's findings of fact, which are outside the scope of a permissible s. 69 challenge.

Inequity

72. The Tribunal correctly identified the inequity ingredient of estoppel (at paragraphs 24.19 and 31.11). It recorded the Claimants' submissions on the issue (at paragraph 24.14). It found that it would be inequitable for the Claimants to be allowed to go back on the common understanding because the Government through its representative on the Management Committee had approved the proposals for the implementation of the PSCs on the basis of the shared understanding (at paragraph 24.23 and 31.13). The Claimants' complaint is that the Tribunal failed to identify the relevant facts which would need to be taken into account in making a finding on inequity and that there was no evidence to justify such a finding. For similar reasons as apply to the arguments on reliance, this does not support a challenge based on an error of law: the findings are clearly capable in law of fulfilling the requirement of inequity. This again is an impermissible attempt to overturn the Tribunal's findings of fact.

Just and proper to determine the question

73. I heard a number of arguments as to whether it would be just and proper for the Court to determine the questions raised by the Claimants' s. 69 appeal. In the light of my earlier conclusions, it is not necessary to address them.

Conclusion on section 69 challenge

74. The application for permission to appeal will be dismissed.

Section 68 challenge

75. The Claimants' alternative challenge pursuant to s. 68 was presented very briefly. It alleged a "complete failure of the Government to articulate its case on estoppel intelligibly at any stage" and "the Tribunal's failure to grapple with the want of any case on reliance or inequity". I have dealt with the Tribunal's findings on reliance and inequity, which were coherently addressed and expressed in the Award. As to the articulation of the Government's estoppel case, the Claimants had no difficulty in identifying estoppel by convention as at least one of the legal bases for the estoppel: they addressed it at some length both as a matter of fact and law in their submissions. There was no procedural irregularity, let alone a serious one giving rise to substantial injustice.

Challenge 4: the Agreements Case

76. The Claimants contended that some particular categories of Development Costs fell outside the scope of the CRL on the basis that the Government had specifically agreed that they should do so and that the costs should be recoverable in any event. This was referred to as the "Agreements Case". It was advanced on the basis that agreement

had been reached between the parties at the Management Committee meetings that the Development Costs of four[1] particular work programmes in Tapti and six particular work programmes in Panna Mukta would be recoverable regardless of whether they were incurred in respect of works referred to in Appendix G or the IPOD.

77. The Tribunal concluded at paragraphs 28.5 (as to Tapti) and 33.12 (as to Panna Mukta) that:

> "In light of the Tribunal's decision in respect of [the Estoppel Case], the Tribunal considers that this issue no longer falls for determination".

78. The Claimants contend that having lost the estoppel argument, their Agreements Case necessarily fell for determination, and accordingly the failure by the Tribunal to address and determine it constitutes a serious irregularity. The foundation for this submission is sound: it does not follow from the fact that the parties had a common understanding as to the meaning of the CRL as to the recoverability of Development Costs (as the Tribunal found on the estoppel issue) that they could not have agreed *ad hoc* that the cost of some specific categories of development works should nevertheless be recoverable in full. The Government accepts that as a matter of logic, a determination of the estoppel case in its favour was not necessarily dispositive of the Agreements Case and that the latter had to be decided by the Tribunal. Its short answer to the challenge is that on the facts, the Claimants' Agreements Case relied on their interpretation of particular documentation which was inconsistent with findings that the Tribunal had already made on that documentation in relation to the estoppel case. In other words, in coming to its general conclusion on estoppel the Tribunal had considered and determined the specific questions which then arose in relation to the Agreements Case. In expressing its conclusion that the Agreements Case issue "no longer falls for determination" in the light of its conclusions on the estoppel case, the Tribunal was concluding that on the facts its findings on the estoppel case were dispositive of the Agreements Case, not that the Agreements Case did not need to be addressed. This is what the Tribunal meant by "no longer falls for determination".

79. The issue therefore resolves itself into one of interpretation of that expression. What did the tribunal mean by "no longer falls for determination"?

80. I keep in mind that the principles governing the approach to the reading of awards are those summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyd's Rep 183 at [16], including the oft-cited dictum of Bingham J as he then was in *Zermalt Holdings* that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". As I observed in *Bulk Ship Union SA v Clipper Bulk Shipping Limited* [2012] 2 Lloyd's Reports 533 at [23], where the tribunal has correctly identified the issues which fall to be decided, the usual inference will be that those issues have been decided.

81. Mr Flynn's main arguments in support of the Government's interpretation were as follows:

[1] The headings to Issue 24 and paragraph 28.1 of the Award refer to eight categories of works in Tapti. There were only four. The mistake was corrected in paragraph 5.1 of the corrective award dated 28 December 2016.

(a) The Tribunal set out the rival arguments at some length in these sections of the Award, including the specific factual basis for the Claimants' Agreements case. This would have been unnecessary had it intended to hold that the issues did not need to be considered. The recitation of each party's case by the Tribunal strongly suggests that it had considered each party's submissions on the issue on their merits and on the facts.

(b) Further support for the Government's construction was to be derived from other sections of the Award where the Tribunal had also disposed of issues by using the wording: "In light of the Tribunal's decision in respect of Issue [x] above, the Tribunal considers that this issue no longer falls for determination". That formulation was also used for Issue 21 (paragraph 25.11); Issue 22 (paragraph 26.3); Issue 23 (paragraph 27.8); and Issue 28 (paragraph 32.7).

(c) In relation to at least some aspects of the Agreements Case it can be seen from the detail of what the Tribunal said, when dealing with the estoppel case, that its findings do necessarily preclude there having been any agreement of the nature contended for by the Claimants in their Agreements Case. That is so, for example, in relation to the "NRPOD" work programme, which formed the largest constituent part of the Agreements Case claim in respect of Tapti (US$670.85m out of a total expenditure of US$698.10m). The interpretation of the words "no longer falls for determination" contended for by the Government is therefore justified by at least some of the detailed findings of fact set out in the Award. Whilst this exercise cannot be performed for every element of the Agreements Case, all the reasons on the face of the Award are consistent with the Tribunal determining that its factual conclusions on the estoppel case, based as they were on what happened at the Management Committee meetings, meant that the Claimants' Agreements Case, similarly so based, could not as a matter of fact be made out.

82. In response, Mr Gearing QC submitted that the similar wording used in the conclusions on Issues 21, 22, 23 and 28 supports the Claimants' construction. Each of those Issues concerned the Claimants' "Upside Case". That was relevant only if the Tribunal agreed with the Claimants that the criterion for applying the CRL was that relating to the production rate, in which case issues arose as to how that criterion was to be applied. As a result of the estoppel case, those Issues simply no longer arose. Therefore the words "no longer falls for determination", as it appeared in the conclusion on those Issues, simply meant "no longer needs to be determined".

83. In my judgment the Claimants' submissions are to be preferred on this issue of the interpretation of the Award. The natural meaning of the words is that the issue was not being addressed and decided, rather than that it was being decided by reference to other findings of fact. The issue did fall for determination, and to say that it did not is an unlikely form of words to use if what the Tribunal intended to convey was that the issue was being addressed and determined.

84. Mr Gearing is correct that the same expression when adopted by the Tribunal in relation to Issues 21, 22, 23 and 28 was used to mean that the issue did not require a decision:

(a) Issue 21 asked whether the Tapti PSC provided for a 15-year plateau period, being a period during which gas production would be at the plateau level of 4.2 mmcmd, after which, the Claimants contended, all Development Costs incurred would be fully cost recoverable (see paragraphs 25.1 and 25.2 of the Award). This debate was premised on the relevance of the production rate criterion in respect of the recoverability of Development Costs. It follows that a finding for the Government on the estoppel issue simply prevented Issue 21 from arising: if the Claimants were estopped from relying on the stipulated production rate in determining the application of the CRL, it would be pointless to ask whether there was a period in respect of which gas production at that level would last.

(b) Issues 22 and 23 both related to eight specific categories of works in respect of which the Claimants said that the Development Costs incurred were fully recoverable because the work had been done to enable gas production above the 4.2 mmcmd production rate, and therefore fell outside the scope of the CRL on the basis of the production rate criterion. That was the Claimants' "Upside Case". Again, that Upside Case would simply not arise should the estoppel issue be decided in the Government's favour, because the production rate criterion would no longer be the one being applied in determining the recoverability of Development Costs. Further, Issue 22 asked whether that claim was time-barred. When the Tribunal determined that this issue "no longer [fell] for determination" in light of the estoppel issue determination, it was plainly not finding that anything in its findings of fact on the estoppel issue also disposed of a limitation point relating to a separate issue: rather the position was that Issue 22 simply did not arise because of the conclusion on estoppel.

(c) Issue 28, which related to Panna Mukta, also concerned the Claimants' Upside Case: it concerned Development Costs said to have been incurred in achieving a production rate above the specified 38,300 barrels of oil per day (by reference to an apparent distinction between works done to achieve a "peak" production rate, and all works done thereafter). Again, that case would not arise if the Government succeeded in its Estoppel Case such that the production rate criterion did not apply.

85. When dealing with those issues (with the exception of Issue 22, concerning limitation), the Tribunal recited at some length the rival submissions, notwithstanding that it concluded, correctly, that those arguments did not need to be addressed. The recitation of the rival arguments in those sections of the Award means that the Government's interpretation gains no support from a similar recitation of the Agreements Case arguments in the section of the award under consideration.

86. I note that although it was accepted by the Government before me that the Agreements Case fell for decision in circumstances where the Government succeeded on its estoppel argument, the Award suggests that that was not apparently the stance taken, or consistently taken, before the Tribunal. Notwithstanding that in their evidence and argument before me the Claimants averred that the Government had never suggested that the estoppel case would be dispositive of the Agreements Case, the terms of paragraphs 25.7 and 25.8 of the Award suggest that the Government argued before the Tribunal that the estoppel case meant that the Claimants' "new primary case" could not be raised, where the "new primary case" included the Agreements Case as well as the Claimants' 15-year plateau case that was addressed as

Issue 21 in that section of the Award. It is therefore possible that if the interpretation of "no longer falls for determination" is that for which the Claimants contend, it was a conclusion which the Tribunal understood was being contended for by the Government.

87. Accordingly I conclude that the Agreements Case fell for determination and the Tribunal failed to address it. That is a serious irregularity. It gives rise to a substantial injustice. Despite the force of Mr Flynn's submissions in relation to some of the particular elements of the Agreements Case, including in particular the NRPOD work programme, it is clear from the nature of the submissions recited in the Award that the Claimants meet the threshold of establishing that the Tribunal might have reached a decision in their favour, at least in respect of some items worth a substantial amount, had it addressed the Agreements Case. It cannot be said from the face of the Award that the Tribunal would have considered its findings in relation to the estoppel issue dispositive as a matter of fact of all the issues arising in respect of the Agreements Case.

Challenge 5: The Panna Mukta Appendix G Case

88. The Claimants had a further alternative case relating to the CRL issues which was that certain costs which they had incurred in relation to Panna Mukta were recoverable even if they lost in relation to the estoppel and Agreements case, because they had been incurred in respect of works that are not listed in Appendix G. Issue 31 was expressed as follows:

> "If [the Claimants are not precluded from advancing their alternative claim for Development Costs in respect of Panna Mukta on the basis of Appendix G[2]], are the Claimants entitled to Development Costs in respect of Panna Mukta on the basis of Appendix G?"

89. The Claimants say that the dispute between the parties under Issue 31 related specifically to narrow issues regarding (1) whether certain works did or did not fall within Appendix G and (2) whether the (recoverable) cost of works falling outside Appendix G should be that stated in the Contractor's audited financial statements or in a document produced for the arbitration which had been derived from the Contractor's books and reconciled with the financial statements. There are two aspects to the challenge:

(a) The first complaint is that the Tribunal "went off on a frolic of its own", determining that Development Costs which fell within *the IPOD* as well as Appendix G fell within the scope of the CRL even though the Government had not made that submission in relation to Issue 31. Applying this criterion led to the conclusion that the Panna Mukta Development Costs falling within the scope of the CRL amounted to US$1,195,035,528 (later corrected to US$1,206,409,130), which far exceeded the Panna Mukta CRL of US$577.5 million and therefore led to a very substantial sum being irrecoverable. The Claimants say at paragraph 157 of their skeleton argument that the Tribunal took this course "notwithstanding that the Government had not relied on the IPOD in this context and that the material on

[2] This was Issue 30, which was decided in the Claimants' favour.

which the Tribunal purported to rely (primarily Management Committee minutes) had not been canvassed by either party in this context". The legal consequence, the Claimants submit, is that the Tribunal lacked substantive jurisdiction (under s. 67 of the 1996 Act) to determine that the CRL applied to works falling outside Appendix G but within the IPOD, because no such dispute had ever been submitted to the Tribunal. Alternatively the Tribunal committed a serious irregularity under s. 68 giving rise to substantial injustice by exceeding their powers and/or by acting unfairly in determining a question which it did not give the parties any opportunity to address.

(b) The second complaint is that the Tribunal made certain material mistakes in calculating the figures which it concluded represented the Development Costs incurred in respect of works falling within Appendix G and/or the IPOD and which were therefore subject to the CRL. The Claimants' complaint is again as to the approach adopted by the Tribunal; the argument is that it was unfair not to warn the Claimants of the approach that would be taken or to allow the Claimants an opportunity to address the Tribunal accordingly. This is again said to be a serious irregularity causing the Claimants substantial injustice.

The inclusion of the IPOD in the criterion applied

90. The Government's estoppel case was that the parties had proceeded on a common understanding that the recoverability of Development Costs would depend on whether the costs had been incurred in respect of works that were not listed in Appendix G *or the IPOD*. On the estoppel issue the Government had expanded its case to embrace the IPOD in its written closing submissions produced after the November 2014 hearing. The inevitable and necessary corollary was that if the estoppel case succeeded the determination of what costs were caught by the CRL cap would be determined by reference to whether they fell within Appendix G or the IPOD, not just whether they fell within Appendix G. Mr Gearing submitted that it was "completely unrealistic" to suggest that the Claimants should have "anticipated a cross-fertilisation of points from the estoppel case". I disagree. It should have been obvious that this was the consequence of the expansion of the estoppel case. The Claimants' Appendix G case was advanced in the alternative specifically to cater for the situation in which the Government succeeded in its estoppel case. Not only was this obvious, but it was expressly put forward by the Government in the context of the Appendix G case, albeit briefly: in the same closing submissions as those in which it introduced its expanded estoppel case, the Government stated as follows at paragraph 3.42, directly under the heading "Claimants' alternative case on Appendix G": "[t]he Claimants are estopped from submitting that the Development Costs related to works that are inside Appendix G / *the IPOD* are outside of the CRL" (emphasis added). Plainly, that was a submission that (1) the effect of the Government's estoppel case was that the Claimants could not argue that works listed *either* in Appendix G *or* the IPOD fell outside the CRL and (2) this was the relevant criterion for the Claimants' attempts to recover costs in their Appendix G case.

91. Mr Gearing submitted that the estoppel case was only expanded at the last minute, after the evidence had closed. But the course of the reference involved further submissions and a further hearing after the expansion following the November 2014 hearing. It has not been said by the Claimants that they had insufficient opportunity to address the expanded estoppel case, which is not surprising in light of the fact that

they served a lengthy "Response to the Government's Closing Following the November 2014 Hearing" in which they engaged with it. Just as there was a sufficient opportunity for the estoppel case in its expanded form to be addressed, so too there was an adequate opportunity to address its necessary and expressed impact on the Appendix G case. The Claimants were plainly in a position to make their own decision about whether and how to recast their Appendix G case, and to address, if they so chose, whether costs which fell outside Appendix G fell within the IPOD. The Appendix G case involved a money claim by the Claimants to establish a right to recover certain costs; it was for the Claimants to make the running by establishing which costs fell outside the CRL so as to entitle them to recovery. If they failed to address which costs fell outside the IPOD, they failed to address a critical ingredient of that claim. The Claimants were not deprived of a sufficient opportunity, whether characterised as reasonable or full, to address the question of whether the IPOD was relevant to the Appendix G case, or to address which costs they wished to say fell outside both; they simply failed to recognise and/or take the opportunity which existed to address those questions. As I observed in *Terna Bahrain* at [84(5)], failing to take an opportunity does not give rise to a serious irregularity. In those circumstances there was neither unfairness under s. 68(2)(a) of the 1996 Act nor a failure to comply with the agreed procedure under s. 68(2)(c). Equally s.67 affords no grounds for relief because the issue was in dispute before the Tribunal which had substantive jurisdiction to deal with it; for similar reasons it cannot be said that the Tribunal lacked the power under s. 68(2)(b) to proceed as it did. This aspect of the challenge must fail.

Errors in the figures

92. The Claimants submit that the Tribunal made a series of material mistakes in calculating the figures which represented Development Costs which were subject to the CRL applying the Appendix G and/or IPOD criterion. It is not necessary to set them out, or recite the rival arguments on them, because they all represent findings of fact which cannot be the subject matter of an appeal. Indeed there is no s. 69 application in respect of them. Mr Gearing sought to bring the challenge within s. 68 by arguing that the alleged errors arose as a result of the Tribunal failing to warn the Claimants of the approach it intended to adopt in determining which costs fell within the CRL, which deprived the Claimants of a reasonable or full opportunity to address the Tribunal on the figures that it was considering. The errors were said to be "the product of the Tribunal's unheralded approach"; they were "among the consequences of the principal error in terms of the departure from the case before it".

93. This way of putting the challenge is doomed in the light of my conclusions on the inclusion of the IPOD in the criterion. The Tribunal did not go off on a frolic of its own: the basis on which the CRL would be applied in the eventuality of the Government's estoppel case succeeding was or ought to have been obvious to the Claimants. The Claimants had a full opportunity to address its consequences for the Appendix G case but simply failed to recognise or take that opportunity. This is in substance an impermissible attempt to dress up an appeal on issues of fact as a serious irregularity challenge.

94. Challenge 5 therefore fails.

Challenge 6: The Withholdings Claim

The issue

95. The oil and gas produced pursuant to the PSCs was mostly sold to Government nominees, GAIL and IOC. On two occasions, GAIL and IOC withheld part of the price due to the Claimants in respect of gas and oil supplied to them. The Claimants argued before the Tribunal that they were entitled to payment by the Government of the amounts withheld by GAIL and IOC on the grounds that the Government was a principal debtor for the sales price for oil and gas supplied to GAIL and IOC. The Government submitted that GAIL and IOC were entitled to withhold the amounts in question because they had been directed by the Government to do so by notices issued pursuant to an Office Memorandum of 2 May 2003 issued by the Ministry of Petroleum and Natural Gas ("the OM"). The OM stated as follows at paragraph 4:

> "Keeping in view the public interest and to protect the interests of the Government, it has been decided by the Government that in case statutory or contractual amounts due to the Government as calculated by contractors in terms of provisions of respective PSCs or relevant laws are not deposited in a timely manner as specified in the respective PSCs or agreed between the parties, the Government of India or its nominee shall withhold payments until such time as the default is remedied by contractors."

96. There were two withholdings, in each case by both GAIL and IOC. The first was pursuant to a notice dated 6 August 2008 directing amounts to be withheld on the grounds of the Claimants' non-payment of interest. The second was pursuant to a notice dated 24 December 2010 directing amounts to be withheld on the grounds that there were sums allegedly due from the Claimants to the Government pursuant to an audit report for Panna Mukta for 2005/2006.

97. In broad terms (I examine the arguments in more detail below), the Government submitted that the OM was an executive order passed by the Government as a legislative act, and the sovereign powers of the Government were not curtailed by the PSCs; accordingly the withholding was pursuant to, and required by, the law applicable in the territory. The Claimants submitted that the OM could not deprive them of their substantive right to payment and did not provide the Government with the power to direct GAIL and IOC to make the withholdings. The Tribunal concluded that the Government was the principal debtor under the PSCs and was prima facie liable to pay the sales price notwithstanding that GAIL and IOC were its nominees and the Claimants had separate agreements with GAIL and IOC. However the Tribunal concluded, Mr Leaver dissenting, that it did not have jurisdiction to determine the question of whether the Government was entitled to withhold any part of that sales price. It did so on the grounds that the legal basis of the withholdings was the OM and the Tribunal's jurisdiction extended only to determining the rights and obligations of the parties under the PSCs, not to the question raised by the Claimants that the OM cannot permit the Government to expropriate substantive rights under the PSC (Award paras 57.11, 57.12).

98. The Government contends that the Tribunal was right to hold that it did not have jurisdiction: the question it had to answer was not arbitrable by reason of the foreign act of state doctrine, as recently considered and articulated by the Supreme Court in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964. The Claimants submit that the Government's defence on this issue should have been decided by the Tribunal, which

had jurisdiction, because: (1) the foreign act of state principles of non-justiciability do not apply to arbitration; (2) to the extent that the Government might have had an act of state objection, it had waived any such objection by submitting to the arbitration and in any event by failing to object timeously; and (3) on any basis the issue before the Tribunal was arbitrable (and would have been justiciable before a court) because at issue was the construction and/or applicability of the OM, rather than its validity.

99. The Claimants make their challenge under s. 67 because, as was common ground, the concept of "substantive jurisdiction" includes the question of whether the subject matter of a dispute is arbitrable. The Claimants also allege serious irregularity (causing substantial injustice) under s. 68; it is common ground that if the Tribunal did have jurisdiction to deal with the question whether the Government's defence is well-founded, then it has failed to deal with an issue under s. 68(2)(d). Although the Claimants also sought relief under s. 68(2)(a) and (c), in a speaking note handed up in Court on day three of the hearing they accepted that these bases did not add anything.

100. The logical order in which to address the parties' submissions is as follows:

(a) Do the issues engage the foreign act of state doctrine such that they would be non-justiciable in court?

(b) If so, are they non-arbitrable in arbitration?

(c) If so, has the Government lost the right so to contend as a result of waiver or submission to the jurisdiction of the Tribunal?

The procedural history

101. Before addressing these three questions it is convenient to set out the chronological development of the arguments advanced before the Tribunal, whose nature and timing are critical to the answers. The following are the key aspects:

(a) The Government responded to the Claimants' withholding claim in its Statement of Defence of 31 January 2012. It asserted that the withheld sums were not due to the Claimants. Paragraph 19.2.2 referred to the OM but the pleading does not make clear what, if any, significance it was said to have as a legal basis for resisting the withholding claim.

(b) The Arbitrability Award was made on 12 September 2012, dealing specifically with the Government's contentions that the Claimants' claims relating to royalties, cess, service tax and audit were not arbitrable. Although the Tribunal recorded the existence of a dispute about the withholdings, it did not address the question of whether the withholdings dispute was arbitrable, and the OM and notices were not mentioned.

(c) In their "Submissions of 20 December 2013", the Claimants noted at paragraph 4.12 that the Government's contention was that the OM entitled it to withhold the payments, and made two points in response. First, they argued that the OM was "not applicable to" the particular withholdings in question, because the document stated that its purpose was to ensure timely payment by contractors to the Government of sums due "as calculated by contractors", whereas in the present

case the Government had unilaterally asserted that the sums were due, which the Contractor disputed, rather than being sums calculated as due by the Contractor. This has been termed the applicability argument, and was reiterated, with some development/variation, throughout the subsequent submissions. Secondly, the Claimants "denied that [a Ministry] inter-office memorandum could unilaterally amend the terms of the PSCs" and hence that this particular OM could have that effect. This was said to be because Article 34.2 of the PSCs provides that the agreements are not to be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all parties.

(d) The Government responded on 5 May 2014 in its "Pleadings and Reply to the Claimants' Submissions dated 20 December 2013". It asserted at paragraph 7.9 that the OM entitled it to withhold the relevant sums, and briefly addressed the two arguments advanced by the Claimants. As to the applicability argument, the Government submitted that it could not be the Claimants' case that they "would either not pay such amounts or make deliberate wrongful calculations". As to the Article 34.2 argument, it denied that the OM operated by amending the PSCs.

(e) The Claimants did not address the OM in their "Reply Submissions of 1 August 2014", and the document was not mentioned further until 17 October 2014 when the parties exchanged written opening submissions ahead of the November 2014 hearing. The Claimants submitted at paragraphs 5.24 to 5.26 that even if the Government had a "constitutional obligation" to collect debts due to it, it did not follow that it was entitled to collect them "other than in a manner permitted by law", and that it would require an arbitral award in its favour to allow it to garnish the debts due from GAIL and IOC. The OM "did not give the Government the power under Indian law" to do that because there was "no statutory power or term of the PSCs to that effect". The OM as an "executive order" was contrasted to a "statutory power". The Claimants also made the applicability argument.

(f) The Government (without knowledge of what the Claimants had said because these submissions were exchanged) submitted at paragraph 6.5 of its written opening submissions that "[t]he Claimants did not challenge the Memorandum. In fact, there is no challenge to the Memorandum even in this arbitration. In any event, even if such a challenge were made, the Tribunal would obviously have no jurisdiction".

(g) Various submissions were made orally and in writing in the course of the November 2014 hearing:

(i) On 14 November Mr Ganguli SC for the Government submitted that the OM was issued by the Government in its sovereign capacity; it was an executive order which had the force of law pursuant to Article 162 of the Constitution; and in the event of conflict with a contract, the OM would prevail: Transcript Day 2, pp. 80-88.

(ii) In their written closing dated 18 November 2014 the Claimants argued at paragraphs 5.24-5.29 that the OM did not have the force of law; Article 162 of the Constitution did not relate to the executive power of the Central Government, but rather to the scope of the executive power of the States within the Union of India. The applicability argument was repeated.

(iii) In oral closing for the Claimants on 19 November 2014 (Transcript Day 13, pages 161-164) Mr Milligan suggested that Mr Ganguli had intended to refer to Article 73, which is the provision relevant to central government, Article 162 being the equivalent provision relevant to the State governments (which Mr Ganguli accepted in his submissions the following day). Mr Milligan submitted that those Articles were concerned only with defining the scope of the areas which could be dealt with by the executive of the Union of India on one hand and the executive of the States on the other. Article 73 did not confer power on the executive to make law, which is conferred on the Parliament of the Union or the legislature of the States.

(iv) In his oral closing submissions on 20 November 2014 on behalf of the Government, Mr Ganguli submitted that the Claimants' primary submission on the power of the executive to make law was misconceived as a matter of Indian law. In the absence of a legislative measure the executive had co-extensive powers to make law under "[A]rticle 309". He cited case law in support of the submission. (Transcript Day 14, pages 171-176).

(h) The parties exchanged further closing submissions on 22 December 2014. Before repeating the applicability argument the Claimants submitted as follows:

> "5.27 The Office Memorandum could not have deprived the Contractor of its substantive right to payment nor did it purport to do so; it is irrelevant in the present circumstances.
>
> 5.28 Although gaps in the law could be filled by an Office Memorandum issued pursuant to article 73, on no view could substantive rights be expropriated by an Office Memorandum. If the Office Memorandum on which the Government relies had purported to deprive the Contractor of its substantive right to payment of the price for the gas or oil (as the case may be), it would not have been effective."

(i) In its written closing submissions of 22 December 2014 the Government reiterated at paragraphs 7.6-7.9 that the OM has the force of law and said that because it had not been challenged in the Indian courts, it bound both the Government and the Claimants. The Government also addressed the applicability argument, submitting at paragraph 7.11(c) that even if the basis for the withholdings was not made out because they related to amounts inconsistent with 'amounts calculated by the Contractor', that point was irrelevant because *the notices* had not been challenged; and even if they had been, the Tribunal could not quash them. Therefore the Tribunal had "no option but to apply the notices, which, being issued in accordance with extant law – the Memorandum cannot be ignored".

(j) In the Claimants' "Response to the Government's Closing" served on 30 January 2015, they submitted as follows at paragraph 5:

(i) They did not dispute that the OM was a valid legislative act (paragraph 5.4).

(ii) The OM gave rise to two questions: (1) "Did it purport to deprive the Claimants of their contractual right to payment of the price from whomever it was due, whether from the Government, GAIL or IOC?" (i.e.

the applicability argument), and (2) "If it did, would it have been effective to do so?" (paragraph 5.5).

(iii) In relation to (2), they submitted that although it was common ground that the Government had power to fill gaps in regulation under Article 73 of the Constitution, the Government "does not have power under Article 73 to expropriate substantive rights nor has any authority been cited by the Government to the effect that it does" (paragraph 5.7).

(iv) As to the applicability argument, they submitted that "[t]he Contractor has never calculated the sums which the Government claimed were due to the Government. Consequently the directions [i.e. the notices] given to GAIL and IOC were not permitted by the Office Memorandum" (paragraph 5.8). They further submitted that "the Government says that, even if the Office Memorandum does only apply to amounts as calculated by the Contractor (as the Claimants say), the two withholding notices cannot be quashed by the Tribunal and, because they were issued in accordance with the Office Memorandum, they cannot be ignored. That contention, however, is untenable for the simple reason that, on that hypothesis the withholding notices were not issued in accordance with the Office Memorandum, because they did not reflect amounts due to the Government as calculated by the Contractor" (paragraph 5.9(3)).

102. By the close of submissions there were therefore two extant bases on which the Claimants challenged the Government's ability to rely upon the OM and the notices. The first basis was the applicability argument: the OM was not applicable to the particular withholdings in question, because the document stated that its purpose was to ensure timely payment by contractors to the Government of sums due "as calculated by contractors", but in the present case the Government had unilaterally asserted that the sums were due, those sums had not been calculated by the Contractor and the Contractor disputed that they were due. This issue included an issue not just about the applicability of *the OM* but also a challenge to the applicability of *the notices* as executive acts: the Government was arguing that the notices could not be quashed by the Tribunal, without which they had to be given effect to; the Claimants were arguing that the notices themselves could not properly be characterised as having been made pursuant to the OM because of their scope, for the same reasons as founded the main applicability argument.

103. The second extant basis on which the Claimants were challenging the Government's ability to rely on the OM and the notices was that they could not validly or effectively deprive the Claimants of what would otherwise be their rights under the PSCs. The Article 34.2 basis initially put forward for this conclusion was not developed, although not formally abandoned. Instead the later focus was on Article 73. Notwithstanding the apparent concession in paragraph 5.4 of the final submission that the OM was a valid legislative act, the concession is qualified by the submission in paragraph 5.7 that Article 73 did not confer power to expropriate substantive rights. This did not address the Government's submission that the legislative power derived from Article 309. Nevertheless it squarely raised an issue as to whether there was constitutional power to make an order which had the effect contended for by the

Government, that is to say affecting the rights of the parties under the PSC. I shall call this the validity argument.

Non-justiciability in court

104. It is not necessary for the purposes of this case to trace the history of the Anglo-American jurisprudence establishing the doctrine of foreign act of state, as Rix LJ did in *Yukos Capital v OJSC Rosneft Oil Co* [2014] QB 458; nor to explore the differences of opinion on its application at the margins, as an expanded constitution of the Supreme Court did in *Belhaj v Straw*. In this case I am concerned with legislative or executive acts in relation to expropriation of property within the jurisdiction of the foreign state in question, India. In that context the English court will recognise, and will not question, the validity or effect of the foreign state's legislative acts: see the first rule articulated by Lord Neuberger in *Belhaj v Straw* at [121], [125], [135], with whose judgment Baroness Hale, Lord Clarke and Lord Wilson all expressly agreed; per Lord Mance at [11(iii)(a)] and [38]; and per Lord Sumption at [228]-[233].

105. I also consider that I am bound to hold that the doctrine includes the principle that the English court will not question the effect of the foreign state's *executive acts* in relation to property situate within its territory, and will not adjudicate upon whether such acts are lawful. That was Lord Neuberger's second rule articulated at [122] and considered at [136]-[143]. Although Lord Neuberger preferred to leave open the question whether such a rule existed, he recognised the pragmatic attraction of such a rule (at [142]) and that it had significant judicial support in relation to property, including the decision of the Court of Appeal in *Princess Paley Olga's case* [1929] 1 KB 718. Lord Mance's judgment addresses the principle and its judicial support at [11(iii)(b)] and [38] and assumes without deciding that the principle exists and applies to property cases. Lord Sumption's analysis treats the principle as established, being an aspect of what he labels "municipal act of state": see [228]-[230]. I am bound, as was the Tribunal, by the Court of Appeal decision in *Princess Paley Olga's case*, which, as the majority in *Belhaj* recognise, decided as part of the ratio that the second rule existed in property cases. I therefore treat it as established for the purposes of deciding this application.

106. The validity argument falls fairly and squarely within the doctrine as expressed in Lord Neuberger's first rule and would be non-justiciable as a foreign act of state. Notwithstanding the qualified concession by the Claimants in their final submission, the argument challenges the constitutional power to make an order having the effect which the Government claims for the OM, whether under Article 73 or otherwise. In that respect it is a head on challenge to the validity of a sovereign legislative act of a foreign state in relation to property within its own territory.

107. The position in relation to the applicability argument is less clear-cut. The (alternative) argument is not that the OM could not lawfully have had the effect contended for, but rather that it did not in fact purport to have that effect. So far as the OM is concerned, that is an argument as to its construction and applicability. Such issues are justiciable if they arise under foreign laws just as if they arise under English law: the court must determine the proper ambit of the foreign legislative or executive act to determine whether or how it applies to the factual circumstances which form the subject matter of the dispute. Mr Milligan cited support for this uncontroversial proposition from *Yukos Capital v OJSC Rosneft Oil Co* [2014] QB

458, in which the Court of Appeal, referring to the case of *Kirkpatrick (WS) & Co Inc v Environmental Tectonics Corpn International* (1990) 493 US 400, said at [110]:

> "What the Kirkpatrick case is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted…"

108. However the applicability argument in this case is not confined to the construction or effect of the OM itself; the Government also argued that the notices are executive acts which have not been quashed and therefore must be treated as valid and effective. The Claimants' response is not that there is room for argument as to whether the notices apply as a matter of their construction: they were clear in their terms that the direction by the Government was to withhold these specific payments. The Claimants' challenge to their effectiveness is on the grounds that they cannot have been issued pursuant to the OM because of the applicability argument on the scope of the OM. However that challenge to the validity and effect of the notices is itself a challenge to the validity and effect of the executive acts of the Government in relation to property within its own territory. One of the notices says in terms that it is issued pursuant to the OM and the nature of the other implicitly compels that conclusion. The Claimants' case cannot therefore be resolved in their favour, even on the applicability argument, without determining in their favour a challenge to the lawfulness of the notices as executive acts affecting the Claimants' property on the grounds that if the OM is a valid legislative act, it nevertheless did not empower the notices as executive acts because of the scope of the OM. As such, the challenge comes within the doctrine of foreign act of state articulated as Lord Neuberger's second rule at [122].

109. Accordingly the withholding claim could only be resolved in the Claimants' favour by resolving issues which would not be justiciable in an English court under the foreign act of state doctrine.

Arbitrability

110. Mr Milligan submitted that even if non-justiciable in an English court, the withholding claim is arbitrable; the basis for the doctrine of foreign act of state, to the extent that it applies, is that one sovereign state should not sit in judgment on the acts of another; unlike a court, an arbitral tribunal is not an organ of a sovereign state; therefore its determination of the validity of the conduct of a sovereign party would not entail one sovereign calling into question the conduct of another; because the rationale for the foreign act of state doctrine does not apply to arbitration, what would in court be a non-justiciable issue can nevertheless be adjudicated upon by arbitrators.

111. I am unable to accept this submission. Mr Milligan relied upon the judgment of Rix LJ in *Yukos Capital v OJSC Rosneft Oil Co* [2014] QB 458 at [41] where in the course of setting out the history of the act of state doctrine, he cited three US Supreme Court authorities from between 1897 and 1918 which, it was said, gave "new

impetus" to the doctrine; and *Liberian Eastern Timber Corporation v Government of the Republic of Liberia* 650 F. Supp. 73 (SDNY 1986), p.77 footnote 11. However the juridical basis for the doctrine, in its many different guises, is controversial, and the authorities on both sides of the Atlantic do not speak with one voice. The scope of the various aspects of the doctrine and their juridical basis were comprehensively considered by the Supreme Court in *Belhaj v Straw*, and it is to that decision that I must turn for guidance. Only Lord Sumption (with whom Lord Hughes agreed) treated comity as an underlying rationale for all aspects of the doctrine, by virtue of the English courts being an organ of the United Kingdom: [225]. The other judgments suggest that whilst some aspects of the foreign act of state doctrine have as their basis the exercise of "judicial self-restraint", those are not the aspects of the doctrine which are relevant to the current issue. Here I am concerned with the principle that the validity and effectiveness of legislative and executive acts of a sovereign state in relation to property within its jurisdiction is not justiciable. The majority of the judgments in *Belhaj v Straw* suggest that that is a hard-edged principle of English private international law, and that its rationale derives from the very concept of sovereignty which recognises the power and right of a state to determine the property rights of those whose property is situate within its territory. The point was made clearly by Lord Neuberger at [150] to [151]:

> "150. Having discussed the four possible rules which may be said to fall under the umbrella of the Doctrine, it is appropriate briefly to identify the characterisation of the various rules. I agree with Lord Mance that the first rule is a general principle of private international law. The rule was characterised by Upjohn J in In *re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323, 344-345 as:
>
> > "the elementary proposition that it is part of the law of England, and of most nations, that in general every civilized state must be recognized as having power to legislate in respect of movables situate within that state and in respect of contracts governed by the law of that state, and that such legislation must be recognized by other states as valid and effectual to alter title to such movables."
>
> To the extent that it exists, the second rule also seems to me to be a general principle, and, at least to some extent, it may be close to being a general principle of private international law.
>
> 151. The third rule is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving…It is purely based on common law and therefore has no international law basis….."

112. Lord Mance also treated the first rule as being a principle of general private international law (at [11(iii)(a)] and [35]), although he considered that the second rule, relating to executive acts, might either be characterised in the same way or as a principle of judicial self-restraint: [38].

113. That being so, there is no good reason why the principle should be any less applicable in arbitration than in litigation before an English court. It does not depend upon the tribunal itself being an organ of a sovereign state or exercising sovereign functions: it depends upon a general principle of English private international law which recognises the sovereignty of nations within recognised spheres, a principle to which

arbitration tribunals, no less than courts, are required to give effect when applying English private international law principles.

114. Mr Milligan relied upon the judgment of Beatson J (as he then was) in *The Republic of Serbia v ImageSat International NV* [2009] EWHC 2853 (Comm), in which he was considering a challenge under s. 67 of the 1996 Act to an award in arbitration proceedings between the Republic of Serbia and ImageSat which arose from a contract between ImageSat and the State Union of Serbia and Montenegro. The award dealt with a preliminary issue as to the proper parties to the arbitration. The issue before Beatson J was whether the arbitrator had jurisdiction to find, as he did, that Serbia was the continuation or "continuator" of the State Union and was a proper party. Serbia argued that that question was non-justiciable as an act of state. Beatson J held that Serbia had conferred jurisdiction on the arbitrator by the Terms of Reference ("Issue 3"), so that the non-justiciability issue ("Issue 4") did not fall for decision and could be addressed briefly (see [112] and [121]). Mr Milligan relied in particular on the following passages in the judgment dealing with Issue 4:

> "111. Serbia's position is that the "continuator"/"successor" issue is non-justiciable because (a) it trespasses on the ambit of the Crown's prerogative in matters of foreign affairs, and the recognition of a foreign state; (b) there is no settled principle of customary international law which is part of English law on the point, so that it involves making a decision solely by reference to public international law, and (c) there are no judicial or manageable standards by which a court or arbitrator can reach a decision.
>
> 115. In *Ecuador v Occidental* [*Ecuador v Occidental Exploration & Production Co* [2005] EWCA Civ 1116; [2006] QB 432] the Court of Appeal (Lord Phillips of Worth Matravers MR, Clarke and Mance LJJ) considered jurisdictional issues that arose under an agreement to arbitrate under UNCITRAL Rules that both parties agreed was validly made by them. Provision for the arbitration had been made in a bilateral investment treaty between Ecuador and the United States. The treaty provided that nationals and entities of one state would have direct dispute resolution rights against the other state in respect of investment disputes, by *inter alia* UNCITRAL arbitration.
>
> 116. The arbitrators considered and rejected an objection by Ecuador that the dispute fell outside the categories of claim specified in the treaty. Ecuador then applied to the Court under section 67 to set aside the Award. The issue was whether the Court had jurisdiction to determine this application. It was argued on behalf of Occidental that the Court did not have jurisdiction because determining the section 67 application would involve interpreting the provisions of the investment treaty which were…non-justiciable in an English court. Before dealing with the decision of the Court of Appeal on that point, I observe that there is no suggestion in the judgment that the arbitrators could not deal with Ecuador's objection or should not have dealt with it because the interpretation of the treaty was non-justiciable or non-arbitrable. Indeed the approach of the Court of Appeal is inconsistent with such a suggestion.
>
> 117. I turn to the decision of the Court of Appeal. The Court stated that determining the application would involve interpreting the provisions of the investment treaty and, in other contexts, this would be non-justiciable and impermissible. However, it also stated (at [31]) that the context is always important in deciding whether a principle of non-justiciability applies. It held that the court has jurisdiction to determine an

application which involves interpreting the provisions of an international treaty where this is necessary to determine a person's rights and duties under domestic law.

118. In the *Ecuador* case, this was so because the investment treaty provided for arbitration and was intended to facilitate the parties' agreement to arbitrate: see *[2006] QB 432* at [32], [37], [41] and [46]. …

119. The Court in the *Ecuador* case rejected the argument that a matter that was justiciable in an arbitration should be treated as non-justiciable by the Court when it arises in the context of a section 67 application. It stated (at [41]):

> "If issues regarding jurisdiction are justiciable before the arbitrators, we do not find it easy to see why they should be regarded as non-justiciable before the English court."

120. In doing so the Court of Appeal appears to have accepted that "justiciability" in a Court differs from "justiciability" or "arbitrability" before an arbitral tribunal. Given the importance of arbitral tribunals as dispute resolution mechanisms in relation to the commercial transactions of sovereign states, and the unavailability of sovereign immunity or act of state defences to a state which has agreed to submit a dispute to arbitration, this is not surprising.

[…]

124. If, after the arbitrator has dealt with the matter, the court cannot exercise its powers under section 67 because to do so involves a question which in other contexts would be non-justiciable, there would be a significant gap in the court's supervisory powers. The non-justiciability of the issue would mean the court would not be in a position either to uphold the challenge and set aside the Award or to conclude that the challenge is not well founded. The arbitrator's provisional determination would thus be deprived of substance and rendered illusory. But under the 1996 Act the Court is given the power to decide whether the Award, as a provisional determination pursuant to section 30, should stand.

[...]

126. Serbia's position on non-justiciability also involves both the arbitrator and the court having to accept its assertion that it was not a party to the underlying contract and the arbitration agreement. There is also force in the response…that it would be wrong to "allow a State to escape liability under a commercial contract merely by pronouncing that it was not an original party to the contract, and then sheltering behind a cloak of non-justiciability in order to prevent an arbitration or adjudication based on the true legal position". The approach taken by the Court of Appeal in *Ecuador v Occidental* suggests that ImageSat's submissions are to be preferred.

[…]

135….The key is whether there are clear standards of international law from which a domestic court can conclude that there is a principle of customary international law on the matter. The material before me…however, suggests that there are not. Despite the factual indications in this case that Serbia is the continuator of the State Union, had the context in this case not been an arbitration concerning a commercial contract, I do not consider the material before me enables me to conclude that the question would have been justiciable."

115. Beatson J's view that justiciability in court differs from arbitrability before a tribunal must be read in the context of the issues in that case. Not only was what he said obiter, but it was also directed to whether the arbitrator had jurisdiction to determine the issue of who was party to the contract in question and there were policy objections to the tribunal not having such jurisdiction so as to leave the state in question to determine the issue by its own say so. The argument arose in the context of the ability of the arbitrator and the court to determine the tribunal's jurisdiction, and the *Ecuador* case was treated as authority for the proposition that the tribunal had jurisdiction to determine its own jurisdiction even where that might involve a non-justiciable issue. The case, and these passages, were not concerned with whether a foreign act of state could be adjudicated upon in the course of a reference to which it was accepted that the state was a party notwithstanding that well established rules of private international law which the tribunal is required to apply preclude its determination.

Waiver/ submission to arbitration

116. I understood the Claimants to be advancing three separate and alternative grounds for the argument that the issue had been submitted to the arbitrators or that the Government was precluded from contending to the contrary:

(a) By agreeing to arbitration in a commercial contract, the Government waived any objection that it might otherwise have had as a sovereign state; it thereby voluntarily submitted to the determination by an arbitral tribunal of any dispute which falls within terms of the arbitration agreement, including any dispute which entails the determination of the validity of an act of state.

(b) The Government had lost the right to object to the Tribunal having jurisdiction by failing to state its objection timeously.

(c) The Tribunal had already determined that it had jurisdiction by its conclusions in the Arbitrability Award.

Submission by the arbitration clause

117. I am unable to accept the proposition that if a state agrees to have contractual disputes determined by an arbitration tribunal it thereby waives any right to object to the tribunal determining any and all act of state issues which might be raised in the course of any dispute under the contract. The jurisdiction being conferred on the tribunal is to decide disputes in accordance with the relevant principles of law which are applicable, and if the relevant applicable principles of private international law make some issues non-justiciable, they form just as much a part of the body of legal rules which the state is asking the tribunal to apply to its future disputes as any other aspect of the applicable substantive or procedural law. If I am correct in my conclusion above that act of state issues are not to be questioned in arbitration as a result of hard-edged principles of English private international law, at least in some of the relevant aspects of the act of state doctrine, it would be perverse to conclude that merely by agreeing to arbitration in general, a state should have agreed that those principles of private international law should be dispensed with rather than applied. It would be the very opposite of giving effect to the parties' bargain.

118. An analogy can here be drawn with an exclusive jurisdiction clause. Where a state agrees to a clause by which any dispute will be determined by a particular court in a particular jurisdiction, such agreement would not carry with it an agreement that the court in the chosen jurisdiction could adjudicate on any matter including the validity of an act of state, simply by the fact of agreed submission of disputes to that court. Mr Milligan accepted that this was so. In the same way an arbitration clause is directed to the forum in which disputes are to be resolved. The language which identifies what disputes fall within the arbitration clause is what determines the scope of what it has been agreed that the tribunal should decide, just as does the language defining the scope of disputes which fall within a court jurisdiction clause; but the mere fact of agreement to an arbitration tribunal on the one hand, or a particular court on the other, tells one nothing about the scope of what it is that the chosen adjudicatory body should have the ability to determine. An agreement to submit all disputes to arbitration no more closes off an ability to treat an act of state issue as non-justiciable than does an agreement to submit all disputes to the jurisdiction of a particular court. Mr Milligan submitted that exclusive jurisdiction clauses are different from arbitration clauses because they are concerned with the submission of disputes to a body which is an organ of the state. However that provides no relevant point of distinction on this issue. Each involves a choice of forum for resolution of future disputes, which may be widely or narrowly defined in the clause. It is the definition of disputes which determines the substantive scope of the issues which it is intended to confer power on the court/tribunal to decide, not the mere fact of a choice of the particular adjudicatory body. The court's position as an organ of the state is irrelevant to the particular issues of act of state which are engaged in this case, for the reasons I have endeavoured to explain.

119. This conclusion also draws some support from the decision in *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The "Playa Larga")* [1983] 2 Lloyd's Rep 171, in which the Court of Appeal upheld the decision of Mustill J that the plea of act of state was capable of waiver, and had been waived on the facts of that case, by a failure to raise it in the course of an arbitration: see pp. 193-4. Had the mere fact of agreement to arbitration itself involved waiver, the issue would surely have been addressed and disposed of on that basis.

120. Mr Milligan's reliance on what Beatson J said in the *Republic of Serbia* case at [120] takes the matter no further. The reference to "the unavailability of sovereign immunity or act of state defences to a state which has agreed to submit a dispute to arbitration" begs the question of whether there has in fact been a submission to arbitration of the act of state issue. The very fact that Beatson J felt it necessary to determine Issue 3 and find that there was in that case an *ad hoc* submission to jurisdiction because of the particular language of the Terms of Reference, which formed the ratio of his decision, suggests that the mere existence of the arbitration clause was not regarded as sufficient.

Failure to object

121. Mr Milligan argues that the Government lost the right to object to the Tribunal dealing with the issue by failing timeously to object, and indeed that in continuing with the arbitration on the withholding issue following the Claimants' December 2013 Submissions, or at least during and following the November 2014 hearing, the

Government made a specific *ad hoc* agreement to submit to arbitration the issues concerning the validity of the OM and the notices.

122. Section 31(2) of the 1996 Act requires that "[a]ny objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised". Section 73(1) provides:

> "(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—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> […]
>
> 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."

123. The question which arises is when the Government knew or could reasonably have known that there was an issue in relation to the OM, or the notices, which arguably gave rise to the act of state doctrine and entitled it to object to the Tribunal assuming jurisdiction over the issue. In my view that had not occurred prior to 17 October 2014 when the parties exchanged written opening submissions ahead of the November 2014 hearing, at which stage the Government expressed its jurisdictional objection at paragraph 6.5 that "[t]he Claimants did not challenge the Memorandum. In fact, there is no challenge to the Memorandum even in this arbitration. In any event, even if such a challenge were made, the Tribunal would obviously have no jurisdiction". The jurisdictional objection was never withdrawn thereafter. The statement that before then the Claimants had not challenged the OM was an accurate statement that its existence and validity had not been put in issue at that stage. Before then the Claimants' submissions in relation to the OM had only identified the applicability argument as applied to the OM itself, and reliance on Article 32.4, neither of which engaged the act of state doctrine or gave rise to a right to object to the jurisdiction of the Tribunal. It was only in the Claimant's subsequent submissions that it was apparent that the defence to the withholding claims involved challenges to the validity of the OM and the notices in a way which might be met with an objection of non-justiciability.

124. Mr Milligan also relied on Articles 21(3) and 30 of the UNCITRAL Rules which provide:

> "21(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim."
>
> "30 A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

125. These do not assist the Claimants' argument. Article 21(3) is obviously only concerned with a "plea" that the tribunal does not have jurisdiction which is or could

reasonably be known to the Respondent at the time of service of its statement of defence. To construe it otherwise would be to make it an instrument of injustice. Article 30 is inapplicable on the facts for the reasons I have explained.

126. The Government has not therefore lost its right to object to the Tribunal dealing with the present issue, and has not made an *ad hoc* submission to arbitration through its failure to make such an objection earlier than it did in fact do so.

The Arbitrability Award

127. I have little hesitation in rejecting the submission that the Arbitrability Award was dispositive of the question. The Arbitrability Award was rendered on 12 September 2012, long before the issue as to the arbitrability of the Claimants' challenges to the validity of the OM and notices arose. The Tribunal in that award only dealt with the Government's contentions that the Claimants' claims relating to royalties, cess, service tax and audit were not arbitrable. Although the Tribunal recorded the existence of a dispute about the withholdings, the OM and notices were not mentioned in the Arbitrability Award. The Tribunal expressly recorded at paragraph 5.18 that its decision was "limited to a decision on the arbitrability, as a matter of English law, of the four arbitrability issues". Thus the Tribunal plainly did not consider itself to be deciding the arbitrability of any and every issue which might arise in the future; its decision on arbitrability was limited to the four issues set out above, which did not include the withholdings claim. The Tribunal's statement at paragraph 5.15 on which the Claimants relied, that "[a]s a matter of English law any dispute can be decided by arbitration" was a general comment (which is not necessarily correct) but it did not form part of its decision as paragraph 5.18 and other paragraphs on the scope of the Award made clear. The comment certainly cannot prevent the Government from raising an objection to the arbitrability of a challenge to the validity of the OM and notices made more than two years later, when that point had not been in issue in the proceedings at the time of the Arbitrability Award and was not under consideration in that Award.

The Government's alternative submission

128. The Government also argued that foreign act of state was not capable of waiver or an *ad hoc* submission to jurisdiction. Given my conclusions above, this point does not fall for determination. I will state my views on it briefly.

129. Mr Wolfson QC relied upon the decision of Henderson J (as he then was) in *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah and others* [2016] EWHC 1465 (Ch); [2016] WTLR 1763 at [87]-[90]. At [87] the judge said:

> "whereas sovereign immunity is capable of being waived, the principle of act of state or non-justiciability is not. If the court lacks jurisdiction to determine an issue, such jurisdiction cannot be conferred upon it by the parties, and the court is in principle obliged to investigate the question itself even if the parties do not wish to do so, or even if it would otherwise be an abuse of process for a party to ask the court to do so."

130. Whether this be so in court proceedings (on which I express no view), I do not consider there to be any such bar in arbitration. The parties are free to submit

whatever issues they wish to adjudication by an arbitration tribunal, which derives its jurisdiction from the agreement between the parties. Prima facie the tribunal has jurisdiction to decide anything which the parties have asked it to decide (subject to supra-national considerations as to whether a state can do so inconsistently with its treaty obligations, such as those governing the EU: see *Achmea BV* (2018) CJEU Case C-284/16). If private parties to an arbitration were expressly to ask a tribunal to determine the validity of a foreign state's legislative act, there could be no objection to its doing so. That applies equally where the foreign state is one of the parties which has submitted that issue to the determination of the arbitral tribunal. The tribunal's decision, normally private and confidential, would of course have no wider significance than that it would be binding on the parties to the arbitration. I am inclined to think that this would be so for act of state in any of its forms, including cases in which it raises inter-state issues on the international plane in which, as Lord Wilberforce put it in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, a municipal court would be left without any judicial or manageable standards by which to judge the issue; but at all events it is true of acts of state falling within Lord Neuberger's first two rules. So too where the parties submit to arbitration a dispute which potentially raises an act of state point, a party who fails to rely upon it in the arbitration may be taken thereby to have waived his right to do so.

131. This is so as a matter of principle, being the consequence of the consensual nature of arbitration. It is also supported by authority. That is the effect of the Court of Appeal decision in *The Playa Larga*, upholding the first instance decision of Mustill J that the plea of act of state had been waived by a failure to raise it in the course of the arbitration. So too in *The Republic of Serbia* case, Beatson J held that the issue of whether the Republic of Serbia was the successor or "continuator" of the State Union of Serbia and Montenegro, was one which the arbitrator had jurisdiction to decide because Serbia conferred jurisdiction by the Terms of Reference, irrespective of his consideration of whether it would have been non-justiciable or non-arbitrable on grounds of foreign act of state: see Issue 3 and [122], [140].

Conclusion

132. Accordingly the decision of the Tribunal that it lacked jurisdiction was correct and there are no valid grounds of challenge under s. 67 or s. 68 of the 1996 Act.

Challenge 7: GAIL Withholding Counterclaim

133. The "GAIL Withholding Counterclaim" was not a counterclaim for a sum of money, but rather a claim by the Government that the Claimants had failed to prepare and maintain accounts in accordance with certain provisions of the PSCs in respect of certain revenue items. The potential significance was that the way in which revenue was accounted for in a particular year could affect the calculation of the Investment Multiple and therefore the relative entitlements to shares in Profit Petroleum.

134. GAIL had withheld 10% of the amounts invoiced by the Contractor between 5 February 1998 and 31 March 2005 following a dispute between the Contractor and ONGC relating to the payment of gas transportation costs. The amounts which the Contractor recognised as revenue in its accounts were the amounts which it actually received from GAIL – i.e. only 90% of the invoiced amounts. The dispute was settled in financial year 2005/06 on terms that GAIL would pay the full amount which had

been withheld, with the payment being made subsequently in financial year 2008/2009. Having received the payment, the Contractor recognised the additional 10% as revenue in its accounts for that year. The Government sought adjustment of the Contractor's accounts in three financial years: 2002/03, 2003/04 and 2004/05, arguing that the full invoiced amount should have been recognised as accrued sales revenue, rather than the 90% actually paid. The Claimants' position was that their receipt based accounting treatment was correct. The Tribunal addressed this as Issue 59.

135. The Tribunal found (by a majority) in the Government's favour, holding that the Claimants should have accounted for the full value of the invoices as accrued revenue. The Claimants accept that they cannot challenge that determination of principle, but they challenge the conclusion which the Tribunal reached on the quantum of the adjustment required in respect of the last of the years in question, 2004/05. The Tribunal concluded that the revenue was required to be adjusted to US$166,356,624. The error, say the Claimants, is that the Tribunal included in this figure two amounts withheld by GAIL, one of US$15,086,684 and the other of US$15,003,115, in circumstances where only the former was the subject of the 10% withholding.

136. The latter sum was the subject of what had been a different dispute between the parties, known as the Price Ratchet Dispute, which arose in relation to both Tapti and Panna Mukta. The Contractor purported to exercise a contractual right under Article 21.5.13(d) of the PSCs to raise the price at which it sold gas to GAIL. Accordingly in the period from June 2004 to 1 April 2005 in relation to Tapti, and from 6 February 2005 to 31 March 2005 in relation to Panna Mukta, the Contractor issued invoices to GAIL at the higher price. GAIL refused to pay the higher price and paid only at the lower price. The amount which the Contractor recognised as revenue in its accounts for financial year 2004/05 was based on the lower price. In relation to Panna Mukta, the total difference between the higher price and the lower price was US$15,003,115. After the Contractor had commenced separate arbitrations in respect of Tapti and Panna Mukta, the dispute was settled in June 2012. In relation to Panna Mukta, GAIL agreed to pay just over one third of the total difference of US$15,003,115. This additional revenue was received in financial year 2012/13 and recognised by the Contractor in its accounts for that year. The Tribunal had to consider the Price Ratchet Dispute in a different context under Issues 4 and 63, in which the question was whether the higher or lower amount should be used for the purpose of calculating notional income tax, the Claimants in that context arguing for the higher invoiced amount.

137. The Government accepts that the US$15,003,115 sum related to the Price Ratchet Dispute, but says that once the Tribunal had determined the point of principle in relation to the 10% withholding under Issue 59, the principle applied equally to the Price Ratchet Dispute amount and it was correct for that to be reflected in the adjustment to be made.

138. The Claimants' challenge is made on the grounds that the Tribunal ignored their argument that if a finding was to be made in the Government's favour on Issue 59, the adjustment to be made for the year 2004/05 should have been US$15,086,684. The Claimants say this constitutes a serious irregularity under s. 68(2)(d) giving rise to substantial injustice. Although s. 68(2)(a) was also relied on, it added little and the

focus of the argument was under s. 68(2)(d), namely that the Tribunal had overlooked the quantum argument in relation to the US$15,003,115.

139. The short answer to this challenge is that there is no reason to think that the Tribunal failed to take account of the Claimants' quantum argument merely because it found against them when determining quantum. In paragraph 48 of their Statement of Claim the Claimants had treated the Price Ratchet Dispute as within the category of accounting adjustments which were affected by the accounting treatment dispute, as had the Government in its Statement of Defence. The Claimants' quantum argument was specifically recorded by the Tribunal in paragraph 63.9 of the Award as follows (with footnotes omitted):

> "In the event the Respondent succeeds in respect of the GAIL Withholding Counterclaim, then the Petroleum produced and saved would need to be increased by the sum of…USD 15,086,684 for Financial Year 2004/05. The figure referred to by the Respondent [of US$30,089,799] is incorrect: only the sum of USD 15,086,684 is attributable to this issue with the remaining sum of USD 15,003,115 being attributable to the Price Ratchet Dispute…"

140. In those circumstances a fair reading of the Award is not that the Tribunal had overlooked the argument or failed to deal with it, but rather that it simply rejected it. Whether the majority was correct to reach that conclusion, on the grounds advanced before me or on any other grounds, cannot be the subject matter of a challenge under s. 68. It was plainly a tenable conclusion, to put it at its lowest. Indeed there seemed to me considerable force in Mr Wolfson's submissions that the issue of principle addressed under Issue 59 was determinative of the quantum point in the Government's favour because it applied equally to the sum which was the subject matter of the Price Ratchet Dispute. But however that may be, the question on the current challenge under s. 68 is not whether the Tribunal could validly have rejected the point, but whether they did in fact reject it. The Court will not lightly assume that a tribunal has overlooked an argument which arose on the pleadings and which it expressly recorded, merely because it did not spell out its reasons, at least not where there are tenable grounds on which it could reach its conclusion and no complicated process of reasoning is called for. There is no warrant for doing so in this case.

141. There is no question of any inconsistency in the Award between this approach and the way in which the Price Ratchet Dispute was addressed for the purposes of the calculation of notional income tax under Issues 4 and 63, which were not concerned with the amounts so far as they related to (a) Profit Petroleum or (b) Panna Mukta. Mr Gearing submitted that the language of the Award in the section addressing Issue 59 was only consistent with the Tribunal considering the 10% withholding claim, and was inconsistent with it giving any consideration to the effect of the Price Ratchet Dispute on the accounting dispute. There is no doubt that a number of the passages to which he drew attention strongly suggest that the Tribunal was focussed on the 10% withholding claim. It does not follow, however, that having addressed the point of principle in the context of that withholding claim, the Tribunal did not *consider* the Claimant's submission that only part of the disputed quantum was referable to that claim. If the issue of principle which it had determined meant that it could logically reject the quantum submission, a proposition which arose on the pleadings and is at the lowest tenable, there is no warrant for inferring that it overlooked the argument, especially since the argument was expressly set out in the Award at paragraph 63.9.

142. Accordingly this challenge fails. I should record that even if I had reached the conclusion that there was a serious irregularity, I was unpersuaded that it would give rise to substantial injustice. The Claimants' argument was that the accounting treatment would potentially affect the calculation of the relevant shares of Profit Petroleum in the year in question, but there was no attempt before me to show that it would in fact do so on the figures in question. The highest it was put was that "just a one dollar difference can tip the Investment Multiple over the next threshold in Article 14.2", and that "it may well" do so; but unless the actual amount in question would have done so, on which I had no evidence or argument, there would be no detriment to the Claimants at all. I simply had no evidence on which I could conclude that it might make any difference to the monetary position of the parties.

Challenge 8: Marketing Margin Counterclaim

143. The Marketing Margin Counterclaim was a claim by the Government in respect of a failure by the Claimants to account for a "marketing margin" which the Claimants had charged to third party customers, it being common ground that that had occurred in financial years 2005/06 and 2006/07. The Tribunal (Mr Leaver dissenting) found in the Government's favour and held that the Claimants should recompute the Profit Petroleum by including the margin in the sales revenue; the Tribunal also directed the Claimants to produce records showing whether they had charged margin in the years in which they had sold petroleum to third party customers, not limited to 2005/06 and 2006/07.

144. The Claimants accept that they cannot challenge the conclusion that they must account for marketing margin received. The narrow challenge is to the direction that they produce documents showing whether they had charged marketing margin in years other than 2005/06 and 2006/07. The Claimants say that the Government knew that marketing margin had been received in 2007/08 (and no further year) but that, despite purporting to reserve its rights in respect of marketing margin charged in years other than 2005/06 and 2006/07, the Government never advanced a counterclaim for marketing margin in respect of 2007/08. In those circumstances the Tribunal's direction is said by the Claimants to constitute a failure by the Tribunal to comply with its duty to act fairly and impartially under s. 33(1) and s. 68(2)(a) of the 1996 Act or to conduct the proceedings in accordance with the procedure agreed by the parties, under s. 68(2)(c) of the 1996 Act.

145. This is a challenge to a direction to produce documents. The Claimants have in fact produced records which show that they charged marketing margin in 2007/08 and the Government has confirmed that it is content with that disclosure and will not pursue a pecuniary claim in respect of any year other than 2007/08. It might therefore be thought that this is an arid dispute. I suspect, however, that the real objective of the challenge is not so much an objection to producing documents, but an attempt to shut out the Government from any pecuniary claim in respect of marketing margin for 2007/08. The Claimants' argument was as follows:

(a) The Government knew that marketing margin had been received in 2007/08 but not in any years subsequent to that, because: (i) the Government had received regular monthly copies of the Contractor's invoices to third party customers which showed marketing margin being charged; (ii) the Government had been informed by the Contractor in the Profit Petroleum Statements for the year 2007/08 dated 26

June 2008 that the Contractor had not given credit for marketing margin received in that year; and (iii) Mr Kulkarni's witness evidence made the position clear.

(b) The Tribunal's Procedural Order dated 13 January 2014 required that the entire Marketing Margin Counterclaim should be determined at the November 2014 hearing. The Government never asked the Tribunal to modify its order in that respect.

(c) The Government did not advance a counterclaim for marketing margin charged by the Contractor in 2007/08. It stated in its Statement of Defence in January 2012 that it was reviewing the practice of the Claimants for years subsequent to 2006/07. Subsequently the Government sought to reserve its rights in respect of marketing margin charged in those years. It did ask for the production of records in May 2014 but did not pursue any proper application to that effect, and did not make such an application at the November 2014 hearing. Nor did it challenge the evidence given by Mr Kulkarni at paragraph 113 of his seventh witness statement dated 1 August 2014 to the effect that the Government already had the relevant documents about the marketing margin. Indeed far from making any claim or other application relating to years other than 2005/06 and 2006/07, the Government in its written closing for the November 2014 hearing stated under the heading "Marketing Margin Counterclaim" that "[t]he period in question is 2005/07". Subsequently the Claimants stated at paragraph 6.24 of their January 2015 Response that the parties "agree that the Marketing Margin Counterclaim relates to Financial Years 2005/06 and 2006/07 only"; the Government did not comment on this in its January 2015 Response.

146. This challenge is misconceived because it is, and can only be, a challenge to an order for disclosure of documents. This is immediately apparent from the parts of the Award which the Claimants seek to vary. The Claimants seek to impugn paragraph 65.13 of the Award, which states in relevant part as follows (with those parts challenged by the Claimants being struck through):

> "Consequently, the Tribunal finds that the Respondent is entitled to an order *"direct*[ing] *the Claimants to* […] *recompute the Profit Petroleum by accounting all the components of sales"* ~~and to produce records showing whether the Claimants have charged marketing margin in those years it had sold Petroleum to third party customers. In this regard, the Tribunal is not persuaded by the Claimants' submission that the parties are agreed the Marketing Margin Counterclaim only concerns Financial Years 2005/06 and 2006/07 as it is unclear on the evidence that marketing margin was only charged in respect of Financial Years 2005/06 and 2006/07~~."

147. The consequence of the first sentence being unchallenged in the respect identified is that the Claimants accept that they must recompute Profit Petroleum by accounting all the components of sales, which must include marketing margin for 2007/08 if charged. That is also the logical consequence of the lack of any challenge to paragraph 74.51 in which the Tribunal:

> "**Directs**:
>
> (a) in respect of the Marketing Margin Counterclaim, the Claimants to recompute the Profit Petroleum by accounting for all the components of

> sales including the marketing margin with consequential adjustments to the Parties' corresponding share of Profit Petroleum to follow."

148. It is obvious that, contrary to the Claimants' submissions at one stage, the unchallenged parts of the Award apply to 2007/08 as well as to 2005/06 and 2006//07. Accordingly the direction to produce documents cannot be a serious irregularity, nor cause any substantial injustice. It is a procedural safeguard to allow verification of what the Claimants are bound to do by the unchallenged parts of the Award, and has in any event been complied with. That is sufficient to dispose of the challenge.

149. Moreover there is in any event no substance to the complaint that the Tribunal committed a serious irregularity by allowing the Government to preserve a pecuniary claim for 2007/08. In May, October and November 2014 the Government had reserved its rights in respect of financial years other than 2005/06 and 2006/07, and had sought an order for production of documents for other years. It had reserved its right to pursue a pecuniary claim for 2007/08, as it was entitled to do. It did not at any stage abandon any such claim. Although in its written closings it stated that "[t]he period in question is 2005/07", this related only to the pecuniary claims which the Government had said that it felt able to quantify in various of its submissions, rather than the matters in respect of which it had reserved its position. It was a matter for the Tribunal to decide, in the exercise of its discretion, whether the Government should be permitted to pursue a pecuniary claim for 2007/08 and to allow it do so was not unfair to the Claimants.

150. Finally, the Procedural Order of January 2014 provides no bar to the Tribunal's decision. The Claimants are wrong to characterise the Procedural Order as requiring the Marketing Margin Counterclaim to be determined in its entirety by the Tribunal in or before the Award. The Order includes a table of "Issues to be heard" which include both liability and quantum in relation to the Marketing Margin Counterclaim. The Chairman of the Tribunal also stated at paragraph 2 of his covering letter of 13 January 2014 that "the issue of quantum in respect of the Respondent's counterclaim will be heard in November 2014". Those matters of liability and quantum on the Marketing Margin Counterclaim were indeed heard. If one aspect required further documentation to be produced before quantum was established, it was in accordance with the procedure envisaged by the Procedural Order that the Tribunal could order disclosure of the necessary documentation in order for it to be quantified subsequently. Even were this not the case, the Tribunal is the master of its own procedure and it would be within the Tribunal's proper exercise of its discretion to depart from the Procedural Order if it thought that it would be fair to do so.

Challenge 9: Tapti Production Loss Counterclaim

151. The Government counterclaimed damages in respect of production losses allegedly suffered as a result of breaches of the Tapti PSC. In relation to South Tapti, the Tribunal felt unable to reach a conclusion, which it reserved for future determination. The Claimants argue that it was a serious irregularity to reserve the issue and not to resolve it in the Claimants' favour.

152. It is important to focus on the nature and scope of what the Tribunal reserved for future decision. The Tribunal concluded that only complaint being advanced by the Government in the Tapti Production Loss Counterclaim which merited consideration

was of a failure to construct additional wellhead platforms or drill more wells, and that in respect of Mid Tapti the claim must fail because further development would not have been economically viable.

153. So far as South Tapti was concerned, at paragraph 73.9 of the Award the Tribunal set out evidence that in January and February 2009 the Claimants refused to drill two particular infill wells in South Tapti ("the Two Infill Wells") unless the CRL was increased. The Tribunal saw "no basis to assume that the drilling of [the Two Infill Wells] would have been uneconomical" (paragraph 73.15). Its conclusion was expressed in paragraph 73.16 as follows:

> ".. the Tribunal is, however, unable to come to a conclusion at this juncture on the merits of the Respondent's Tapti Production Loss Counterclaim so far as South Tapti is concerned. That is because such determination turns on whether the Claimants were justified in insisting on there being an agreement on an increase in the CRL as a pre-condition for drilling the two infill wells in South Tapti. The Tribunal will determine whether the Claimants were so justified, in the context of any application the Claimants may make for an increase in the CRL. In the event no such application is made, the Tribunal will determine whether the Claimants were so justified on the basis of the submissions filed and the evidence to date. Accordingly, the Tribunal reserves for further consideration its decision in respect of this aspect of the Respondent's Tapti Production Loss Counterclaim."

154. The Tribunal's formal findings were:

> "74.61 **Reserves** for determination whether the Claimants were justified in insisting on there being an agreement on an increase in the CRL as a pre-condition for drilling the two infill wells in South Tapti either in the context of any application the Claimants may make for an increase in the CRL or in the event no such application is made, on the basis of the submissions filed and the evidence adduced to date.
>
> …..
>
> 74.63 **Dismisses** all other claims and counterclaims"

155. The reference in paragraph 73.16 to "any application the Claimants may make for an increase in the CRL" was to an application under Article 13.1.5 of the PSCs which enabled the Claimants to seek a determination from the Tribunal that the CRL should be increased in the absence of agreement by the Management Committee. Such an application had been foreshadowed as a possibility, depending on the outcome of the issues determined in the Award. The Procedural Order of 13 January 2014 had already provided that the Claimants' CRL increase application would be made, if they chose to make one, after the issues for the November 2014 hearing had been determined. Accordingly it made good sense for the Tribunal to defer the question whether the Claimants were justified in demanding such an increase in relation to the Two Infill Wells to await such application, and to be considered at the same time if made.

156. In its evidence on the s. 68 application, the Government had suggested that the Tribunal's reservation left open all aspects of the Production Loss Counterclaim in relation to South Tapti, not merely that related to the Two Infill Wells. Mr Wolfson clarified during his oral submissions that the Government accepted that its Production Loss Counterclaim, so far as it remained, would be limited to a claim relating to a

delay in the Two Infill Wells being drilled (a "delay" because it is common ground that the wells were in fact eventually drilled). He confirmed that this meant that the Government accepted that when the question came to be determined, the Production Loss Counterclaim would be limited to loss said to be caused by the delay in drilling the Two Infill Wells. As a result, one aspect of the Claimants' complaint of unfairness, namely that it gave the Government an opportunity to widen and recast its case in the way suggested by its evidence, fell away.

157. Against this background, Mr Milligan's main complaints, as I understood them, were the following:

(a) The Tribunal failed to follow its Procedural Order which required it to decide all issues in relation to the Production Loss Counterclaim at the November 2014 hearing.

(b) The Tribunal, in determining that the Claimants would be liable on the counterclaim subject only to the question whether the insistence on a CRL increase was justified, failed to deal with other issues which it should have dealt with first and which would have doomed the counterclaim to failure. They were that there had not been a failure to drill the Two Infill Wells, but merely a delay in doing so; and that the Government had never sought to articulate or quantify its losses said to arise out of such delay, nor to address the causation questions inherent in establishing any such loss.

158. I cannot accept that there was any serious irregularity in these respects. The Tribunal had a general power to make an award which was not determinative of every issue before it pursuant to section 47(2) of the 1996 Act and Article 32(1) of the UNCITRAL Rules. The Tribunal's power to reserve the question of liability in relation to the drilling of the Two Infill Wells was not modified by the Procedural Order. That Order did not require a final determination at the November 2014 hearing, and even if it had done, it was not set in stone. Indeed one would expect the Tribunal, if it considered that it needed to be addressed on a particular point in order to fairly determine an issue that it was considering, to set out appropriate directions for that to happen. When a tribunal exercises its power under s .47 of 1996 Act to reserve an issue for future determination, it cannot be said to have failed to "deal with" that issue: see *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 578 (Comm) at [19] and *Russell on Arbitration* (24th edn., 2015) at paragraph 8-110. The course taken by the Tribunal on this issue involved no unfairness.

159. I agree that the Tribunal has not addressed whether the Government has made out any loss as a result of breach, if breach were established. But it is inherent in the issue which has been reserved that that question has also been reserved and will fall to be addressed if and when the Tribunal concludes that there was a breach in relation to the Two Infill Wells giving rise to liability. Issues of causation and loss remain to be addressed if they arise.

160. There is no reason to suppose that the Tribunal made any error about the wells having been drilled. The language of the Award is consistent with the common ground between the parties that what was in issue was a delay in drilling. The Tribunal was addressing the refusal to proceed with them at a particular point of time when the

justification being advanced was a refusal to increase the CRL. The Tribunal's reservation of the issue of liability was couched in terms of whether the insistence on an increase in the CRL was justified. If there were an argument that there could be no liability for delayed drilling, but only for non-drilling, the merits of which I find difficult to comprehend, the Tribunal must be taken to have rejected it. That does not preclude, of course, any argument that the delay was not causative of loss, which is within the scope of the matters reserved for future determination.

161. Accordingly Challenge 9 fails.

CONCLUSION

162. Challenges 1 to 3 and 5 to 9 fail. Challenge 4 succeeds. I shall hear the parties on the form of relief.