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THE ANNULMENT OF THE NEGATIVE JURISDICTIONAL RULING IN *GPF V. POLAND*. DID THE ENGLISH JUDGE GO TOO FAR?

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HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, QUEEN'S BENCH DIVISION, COMMERCIAL COURT, judgment of 2 March 2018, - *GPF GP S.à.r.l.* v. *The Republic of Poland*, Mr Justice Bryan. Neutral Citation Number: [2018] EWHC 409 (Comm) (*)

Jurisdiction of arbitral tribunals under BITs - Treaty interpretation - Creeping expropriation - Violation of FET as a measure "similar to expropriation" - Scope of set aside proceedings - Gateway issues.

Art. 67 of the English Arbitration Act provides English Judges with a full power of rehearing in the case where a party brings set aside proceedings before them. This means that English Judges are entitled to reopen all factual and legal issues presented before the arbitral tribunal. This power also applies to negative jurisdictional rulings.

An arbitration clause contained in a BIT and referring to "measures that lead to consequences similar to expropriation" may be interpreted as referring also to FET claims.

Creeping expropriation is composed of a series of acts the effect of which is tantamount to expropriation. In the cases where the final of these acts could, alone, be considered as expropriatory, this circumstance does not affect the classification of the entire sequence of acts as a creeping expropriation.

A. Introduction

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

2. It is well established (*omissis*) that where the arbitration agreement is seated in London it is subject to the 1996 Act, and gives either party the right to challenge an award of the arbitral tribunal as to its substantive jurisdiction under section 67 of the 1996 Act (*omissis*).

3. (*omissis*)

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

(*) Vedi il commento che segue di Giovanni Zarra.

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

5. The Tribunal found (at paragraph 187) of its Award that the Tribunal had jurisdiction to rule upon one aspect of Griffin's claim in the arbitration, namely whether a judgment of the Warsaw Court of Appeal of 19 December 2014, as confirmed by the Polish Supreme Court on 2 June 2016, constituted an "expropriation, nationalization or any other similar measures affecting investments" in violation of the BIT, but that it lacked jurisdiction to rule on any other measures allegedly in violation of the BIT.

6. On this section 67 application, Griffin submits that the Tribunal had jurisdiction in respect of all the claims it advances in the arbitration, and the Court should so find. (*omissis*)

7. (*omissis*). Suffice it to say at this point that I am satisfied that it is well established that the hearing is in the nature of a rehearing, and to the extent that Griffin advances any particular arguments not argued before the Tribunal, or adduces any new evidence, I am satisfied that Griffin may do so (*omissis*)

8. (*omissis*)

9. (*omissis*) as is common ground, it is for me to interpret the arbitration agreement in the BIT in accordance with international law, and the principles of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") which codifies customary international law - see *Occidental Exploration v The Republic of Equador,* supra, at [33]-[34].

B. The provisions of the BIT

10. The BIT was signed in French, Dutch and Polish with each text being authentic. I set out below what were previously agreed translations from the French text into English. Whilst it had previously appeared that no issues arose between the parties as to appropriate translations (whether from the French or Polish) into English, and the words used in such English translations, it became apparent shortly before the hearing that that was no longer so. (*omissis*)

11-14. (*omissis*)

C. Griffin's Factual Case

15. (*omissis*)

16. (*omissis*)

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

18. 29 Listopada was the holder of perpetual usufructuary rights for a term of 99 years over a Property comprising two plots of land and a former military residential building located at 29 Listopada Street (the "Property"), in the centre of Warsaw, pursuant to a Perpetual Usufruct Agreement that had been entered into on

6 February 2001 (the "PUA") and which 29 Listopada took over on 13 September 2004. Perpetual usufructuary rights are rights in rem and a form of quasi-ownership as a matter of Polish law. As described below, Griffin subsequently acquired those ownership rights through its subsidiary.

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

20. (*omissis*).

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

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

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

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

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

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

25. Despite the Warsaw Monuments Conservator's April 2007 Recommendation and the National Centre opinion, on 5 January 2009 and then again on 2 March 2009, the same Monument Conservator reversed her prior position and issued two decisions refusing to agree a new WZ decision on the purported basis that the development was unacceptable from a conservation point of view (the "2009 Monuments Conservator's Decision"). (*omissis*)

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

27. In the meantime, Parkview Terrace carried out demolition works which it alleges it was entitled to do pursuant to the 2005 Building Permit. (*omissis*)

28. On 10 November 2010, the Warsaw Monument Conservator issued a decision ordering the halting of the demolition work and initiated proceedings

which Griffin says was aimed at entering the former military barracks on the register of historical monuments. (*omissis*). Griffin says that all subsequent efforts by Parkview Terrace to put forward modified development proposals for WZ decisions were rejected, with the Warsaw Monuments Conservator issuing further negative recommendations.

29. On 20 December 2011, the City of Warsaw requested the termination of the PUA, and it formally filed an action for termination with the Warsaw Regional Court on 22 March 2012. (*omissis*).

30. (*omissis*).

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

32. (*omissis*). On 2 June 2016, the Supreme Court dismissed any further challenge. (*omissis*)

33. Griffin also alleges that the City of Warsaw (whose actions, Griffin says, are to be attributed to Poland) in acting in the manner in which it did, had a hidden agenda, which was to transfer the Property to a State-owned museum (*omissis*).

34-35. (*omissis*).

D. Griffin's claims in the arbitration

36. Griffin advances two separate claims in the arbitration:

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

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

D1. Claim for Violation of the FET Standard

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

38-39. (*omissis*)

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

41. (*omissis*)

D2. Claim for expropriation in violation of Article 4.1

42. In the Arbitration, Griffin makes a claim for indirect expropriation, in the form of creeping expropriation, on the Respondent's part, in violation of Article 4.1, which claim, it submits, is closely related to its FET claim as identified above. The

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

43. (*omissis*)

44-45. (*omissis*)

E. The interpretation of arbitration agreements within Treaties

46. It is not in dispute between the parties that an arbitration agreement in a bilateral, or multilateral, investment treaty, although a separate agreement, is governed by international law. (*omissis*)

47. (*omissis*).

G1. Article 31 of the Vienna Convention

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

49. This rule of interpretation is textual. (*omissis*)

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

> "(*omissis*).
> 16 It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method). (*omissis*)
> 17 The search for a common intention is likely to be both elusive and unnecessary. (*omissis*)
> 18-19 (*omissis*)

51-52. (*omissis*)

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

53. The good faith interpretation principle as set out Article 31(1) of the Vienna Convention brings within it the principle of effective interpretation. Under this principle, provisions of treaties are to be interpreted so as render them effective rather than ineffective and therefore meaningless, but without going beyond what the text of the treaty justifies. (*omissis*)

54. The principle has been recognised by many investment arbitral tribunals. (*omissis*)

55. (*omissis*).

G3. Object and Purpose

56. It will be recalled that Article 31 provides that a treaty should be interpreted in accordance with the ordinary meaning of its terms and in the light of its "*object and purpose*". (*omissis*)

57. In the present BIT there is no particular wording in the preamble that reinforces the purpose of the treaty as including the protection of investors, although this is an inherent feature of the provision for arbitration. (*omissis*)

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

59. (*omissis*)

G.4 Article 32

60. (*omissis*)

61. It is important to note that the supplementary means of interpretation in Article 32 is applicable **only** to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Thus if the meaning resulting from the application of Article 31 is clear (i.e. where there is no ambiguity etc, such as where there are two equally possible meanings) the supplementary means of interpretation in Article 32 **cannot** be used to change or contradict the meaning resulting from the application of Article 31 (*omissis*).

62. As will become apparent, the Tribunal and the Respondent each place reliance on the negotiating history as a supplementary means of interpretation under Article 32. (*omissis*).

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

63. (*omissis*)

64. There is consistent authority to the effect that a section 67 application is a re-hearing (*omissis*).

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

"26 An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court,

on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. *Azov Shipping Co. v Baltic Shipping Co.* [1999] 1 Lloyd's Rep 68. The English and French legal positions thus coincide: see the *Pyramids* case (*omissis*). ... 96 The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. (*omissis*) the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. (*omissis*). ... 160 (*omissis*). The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself."

66-67. (*omissis*)

68. The Respondent submits, however, that, *"The Claimant having already lost its case on jurisdiction before the Tribunal is effectively now having a second bite at the same cherry. In these circumstances there are no grounds for a 'complete rehearing' as the Claimant has suggested is required."* (*omissis*).

69. The Respondent submits that not only is a complete rehearing unjustified where a party fails to raise issues in the arbitration, it must be taken to have waived or lost rights to do so, (*omissis*)

70. I am satisfied that on the current state of the authorities (*omissis*) a hearing under section 67 is a re-hearing (*omissis*). In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. (*omissis*).

71. However, the fact that a section 67 application is a re-hearing does not mean that the court cannot control the evidence adduced on a section 67 application - it clearly can

(*omissis*).

72. (*omissis*)

G. The Award and The Tribunal's exclusion of Griffin's FET Claim and aspects of Griffin's indirect expropriation claim G.1 Griffin's FET Claim

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

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

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

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

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

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

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

76. (*omissis*)

G.2 Griffin's Creeping Expropriation claim

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

78. In this regard the Tribunal held:

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

that this decision terminated the Usufruct and deprived the underlying mortgage of any value (Award para 92).

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

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

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

79. (*omissis*)

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

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

80. As has already been noted, the BIT was signed in French, Dutch and Polish with each text being authentic (*omissis*)

81. The Respondent point out that the three arbitrators were French speakers, had the French text before them, and would have been aware of the finer nuances of the French text. That is correct, but equally the Tribunal used the agreed translation in the Award (*omissis*).

82. (*omissis*)

83. However even more recently the Respondent also sought to go back on the agreed translation from the French (*omissis*).

84. Griffin objects strongly to these late attempts to renege on an agreed translation (*omissis*).

85. I should indicate that where an English court is asked to interpret a text in another language there should either be an agreed translation as there was in this case until very recently or, in the event of any disagreement, expert evidence should be adduced in good time before any hearing. It is neither acceptable, nor satisfactory for a translation to be agreed and then an attempt made at the last minute to go back on that agreement based on submission only, and without applying for

permission to adduce expert evidence which can be tested, if necessary, in cross-examination. No such application was made in this case, and it is likely that any such application would have been refused given its timing, the likely prejudice to Griffin, and the impact upon the hearing (not least that arbitration applications are to be progressed with expedition).

G2. The proper interpretation of Article 9.1(b)

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

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

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

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

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

89. There are many cases in international law in which similar phrases are used and which have been recognised as covering indirect as well as direct expropriation. (*omissis*)

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

91. (*omissis*).

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

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

94. It is important to have careful regard to each of the words used (the Tribunal did not endeavour to do so). On the ordinary meaning of these words, they

are not, and cannot be, part of a continuing list of examples for a number of reasons. First, whereas what had gone before, being introduced by the word "*notably*" are factual examples, what follows is not a factual example, but a new legal definition, and what follows is not a further example on a homogenous list. (*omissis*)

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

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

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

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

99. Such an interpretation is also consistent with the principle of effet utile — it gives meaning and effect to all the words used, and gives the second clause its own meaning and effect contrary the interpretation of the Tribunal and the Respondent. In this regard the Respondent's stance before the Tribunal was that the second clause was a "*tautology*" because it, *"does not bear any additional meaning above and beyond what was originally agreed upon in the Polish version of the Treaty"*, a stance which is simply untenable given the difference in words used in the second clause. (*omissis*). As already identified, the language of the first clause covers all forms of expropriation including creeping expropriation, and the second clause is framed in broader terms, being concerned with measures other than expropriation that lead to/cause consequences similar to expropriation, without them being in of themselves expropriatory.

100. A further aspect of the difficulty with the interpretation of the Respondent and the Tribunal is that it would give rise to a mis-match between Article 4.1 (the provision dealing with the substantive protection against expropriation), and Article 9.1(b). There is no equivalent to the second clause of Article 9.1(b) in Article 4.1, only the first clause which would mean that the wording of the second clause was redundant. There is no such mis-match if the second clause extends to FET claims where the state measure has an effect similar to expropriation, as it is covering a different type of claim. If this were not the case, it would make no sense for there to be a provision conferring jurisdiction (the second clause), where there was no substantive right being protected. This is a further indication that the second clause is not concerned with expropriation itself.

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

102. (*omissis*). I consider that the ordinary meaning of the words of the Treaty are clear.

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

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

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

106. (*omissis*). I do not consider that the negotiations assist.

107. What is clear is that a time came when Poland proposed that Belgium submit a revised wording for consideration, and that Belgium did so indicating that the version that they proposed was "*the best version that they can accept*" (9 March 1989 internal fax from the Polish Embassy in Brussels to the Polish Ministry of Foreign Affairs). It was this formulation that was agreed, that extended the types of disputes covered from those under the first clause, to those under the second clause (which was not contained in the original Polish version of the Treaty). It is not possible to deduce any "*goal*" of a common intention to limit arbitral jurisdiction to only expropriation claims, or as to the precise nature of any compromise. All that can be said is that the final wording added in what I have referred to as the second

clause, and that was the "*best version that [Belgium could] accept*". Certainly, there is nothing to support a conclusion that the new wording was to be treated as no different to the Polish original version or that (as the Tribunal concluded), Belgium proposed the wording to "*preserve a narrow scope of the dispute resolution clause*" (Award paragraph 88). The language may well have been a compromise though no conclusion can be drawn as to the nature of the compromise. (*omissis*)

108. I accordingly find that Griffin's FET claim falls within the scope of Article 9.1(b) (*omissis*).

G3. Griffin's Indirect (Creeping) Expropriation Claim

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

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

111. (*omissis*)

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

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

113. It is possible to have an indirect expropriation before a direct expropriation as a matter of logic because it involves something different. It involves a substantial interference, but not a taking of title - see the reasoning in the ICSID case of *Teinver S.A. v The Argentine Republic*, 21 July 2017 (*omissis*) at paragraphs 948 and 949:

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

...

However, it is still necessary for the individual measures to culminate in a taking or deprivation of property rights. The Tribunal has found that the takeover of the day-to-day management of the Airlines was an indirect expropriation; it was a substantial and permanent deprivation of property rights. This event was expropriatory on its own even without reference to earlier impugned events. (*omissis*). In order to conclude that a creeping expropriation took place, the Tribunal must conclude that the earlier impugned events formed part of a chain of events that led to the eventual substantial and permanent deprivation of property rights."

114. Secondly, it is possible to have a creeping expropriation plus an indirect expropriation before a direct expropriation, and the final act in that expropriation can be in and of itself an indirect expropriation, as is also illustrated by the reasoning in the *Teinver case* ((*omissis*)see paragraph 950 of the Award).

115. Thirdly, it is possible to have a creeping expropriation where the act at the end of the chain is a specific act of direct expropriation. This is illustrated by the case of *Crystallex International Corporation v Venezuela* (*omissis*).

116-117. (*omissis*)

118. The case illustrates that there can be creeping expropriation, and a finding of creeping expropriation, by reference to a progression of events culminating in an event that is arguably a direct expropriation in its own right, that final event not rendering irrelevant prior events, or preventing the overall course of events being a creeping expropriation, and allowing a finding of creeping expropriation without a tribunal having to form a view on whether the final event was itself a direct expropriation. This approach is directly contrary to the Respondent's submission (*omissis*). I reject the Respondent's submission. It is perfectly possible to have a creeping expropriation where the act at the end of the chain is (or is argued to be) a specific act of direct expropriation.

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

120. (*omissis*)

121. (*omissis*). This approach, which I consider to the right approach as reflected in the authorities, ensures that all potentially relevant facts are capable of being relied upon, and considered by a tribunal, which may be of particular importance in the context of a claim based on creeping expropriation as the individual acts in isolation may not have been be obviously wrongful (*omissis*) and there may be issues as to how the final act is to be characterised (which will ultimately be for the merits stage - *omissis*).

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

so far as to say that there may not be a creeping expropriation in such circumstances.

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

124. Where the Tribunal went wrong in particular, and where the Respondent falls into error in its submissions, is in inverting what is said by Michael Reisman, as if what was being said was "*if there is an act of expropriation at the end there cannot be a creeping expropriation*". That does not reflect international law and is simply inconsistent with cases such as *Siemens v Argentina, Crystallex* and *Teinver.* (*omissis*). In the present case the Tribunal perpetuated a viewpoint, expressed by the tribunal chaired by Prof. Gabrielle Kaufmann-Kohler in *Burlington Resources v Republic of Ecuador,* ICSID Case No. ARB/08/05, Decision on Liability 14 December 2012, that "*creeping expropriation only exists when "none" of the challenged measures separately constitutes expropriation*" (para 538). That does not reflect international law.

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

126. I would add that I consider that it will be generally inappropriate (save possibly in a very clear case) at an initial hearing in relation to jurisdiction for a tribunal to make any definitive findings as to whether particular acts amount to indirect expropriation (including creeping expropriation) or expropriation generally, or make any findings which would preclude consideration of all facts (including the Prior Measures) being explored at the merits stage in due course (*omissis*). Any other course is likely to result in injustice if it has the effect that a party cannot rely upon matters which form part of the overall picture, and may be part of the expropriatory conduct either in isolation, or in the aggregate.

127-130. (*omissis*)

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

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

132-135. (*omissis*)

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

137-141. (*omissis*)

142. (*omissis*). I am satisfied that Griffin has pleaded what it needs to plead to establish a prima facie case of creeping expropriation for jurisdictional purposes on a *pro tem* approach. Whether in fact there was a creeping expropriation, having regard to the aggregate effect of the prior measures relied upon, and in what respects, will be a matter for the Tribunal at the merits stage.

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

H. Conclusion

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

"(ii) The Tribunal has jurisdiction over:

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

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

(iii) (*omissis*)".

145. (*omissis*).

The annulment of the negative jurisdictional ruling in *GPF v. Poland*. Did the English Judge go too far?

1. The English decision annulling the *GPF v. Poland* Award on Jurisdiction. — 2. The canons of interpretation of the relevant provisions of the BIT (in brief). - (*follows*) (*a*) The sustainability of both the interpretations of the BIT provided by the Tribunal and the English Judge in relation to the creeping expropriation claim. - (*follows*) (*b*) The sustainability of both the interpretations of the BIT provided by the Tribunal and the English Judge in relation to the FET claim. — 3. Critical reflections on the broad judicial review adopted by the English Judge. — 4. Conclusions.

1. *The English decision annulling the* GPF v. Poland *Award on Jurisdiction.*

The English decision that is the subject of the present paper represents a rare example of national court decision annulling an arbitral award in which the tribunal has declined its jurisdiction on a certain dispute (or part of it) (1). This circumstance lets it deserve some thoughts (2), jointly with the fact that the decision proposes again the long-standing issue of the relationship between national courts and arbitral tribunals on all those questions which, firstly, entail an evaluation of the allocation of powers between them, and, secondly, require to make a balance between efficiency of the arbitral process and fairness in the resolution of a dispute (so-called "gateway problems") (3).

The Claimant ("GPF" or "Griffin") started proceedings against Poland in accordance with the 1987 Bilateral Investment Treaty (the "BIT") between Poland and the Belgium-Luxembourg Economic Union (in force since 2 August 1991). This treaty was drafted in three original languages (French, Dutch and Polish), but

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(1) Other examples are: Constitutional Court of Croatia, 27 October 2004, No. U-III-669/2003, available at *https://sljeme.usud.hr/usud/prakswen.nsf/5417ecd501f70787c1257de1004a8681/564242a214e51a80c1257e5f003e3e50/$FILE/U-III-669-2003.docx*; German Supreme Court (BGH), 6 June 2002, Case III ZB 44/01, in *Schieds VZ*, 2003, p. 39 ff. The issue is, indeed, rarely discussed in scholarship. See S. Kröll, *Recourse against Negative Decisions on Jurisdiction*, in *Arbitration International*, 2004, p. 55 ff.; L. G. S. Boo, *Ruling on Arbitral Jurisdiction - Is That an Award?*, in *Asian International Arbitration Journal*, 2007, p. 125 ff.; P. Fohlin, *A case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations Governed by the UNCITRAL Model Law*, in *Asian Dispute Resolution Journal*, 2008, p. 113 ff.; M. Dunmore, *What to Expect from the Review of Arbitral Awards by Courts at the Seat*, in *ASA Bulletin*, 2015, p. 293 ff.; A. Uzelac, *Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law*, in *International Arbitration Law Review*, 2005, p. 161; V. Ramayah, Chan Leng Sun, A. Vergis, *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings*, in *Acts of the Singapore Academy of Law Law Reform Committee* available at *https://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/2011-01%20-%20Judicial%20Review%20of%20Negative%20Jurisdictional%20Rulings.pdf*, 2011. For a first comment to the present decision see K. A. Loya, *In a first, English High Court sets aside Investment Treaty Award against Poland*, in *www.kluwerarbitrationblog.com*, 2018.

(2) The Decision is also noteworthy for its being one of the firsts annulling a treaty based arbitral award. See W. Ben Hamida, *Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Walde's Legacy*, in J. Werner, A. H. Ali, *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought*, London, 2009, p. 80 ff.

(3) G. A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, in *Yale Journal of International Law*, 2012, p. 1 ff.

the arbitral Tribunal and, later on, the Judge mainly based their decision on an English translation on which the parties originally agreed (4).

The dispute arose in relation to the Claimant's real estate business in the centre of Warsaw for the realization of apartments and related underground parking (5). The Claimant's decision to invest in the project (occurred in 2008) was based on the existence of a favourable opinion to the construction program by the Warsaw Monument Conservator and a further authorization by the Municipality of Warsaw, which had been already granted in 2007 (6). However, after the investment took place, in 2009 the Monument Conservator reversed its prior position and the Municipality denied the authorization. For this reason, the City of Warsaw requested (on 22 March 2012) the judicial termination of the agreement concerning the utilization of the land where the investment should have been located. This termination was obtained on 4 June 2013 through a decision of the Warsaw Regional Court that was later appealed by Griffin. However, on 19 December 2014, the appeal was dismissed. Finally, on 2 June 2016, the Supreme Court dismissed any further challenge.

In relation to the above factual scenario, GPF brought two claims before the arbitral Tribunal. The first was based on alleged violations of the FET provision of the BIT generated by the inconsistent behaviour of the Monument Conservator and the Municipality, while the second was a claim for indirect expropriation (in the form of creeping expropriation) generated by the Court of Appeal Decision of 19 December 2014 and the prior conduct of Poland, which allegedly *de facto* deprived the Claimant of its investment (7).

The dispute was brought before a very authoritative Tribunal, composed of Prof. Gabrielle Kaufmann-Kohler (Chair), David Williams QC, and Prof. Philippe Sands QC. The managing institution was the Stockholm Chamber of Commerce and the seat of arbitration was London (8). On 17 February 2017 the Tribunal issued a Partial Award on jurisdiction on the basis of article 9.1(b) of the BIT, which states that

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

The Tribunal, firstly, declined jurisdiction on the FET claim, considering that FET violations do not lead to consequences *similar to expropriation*, because they do not entail a deprivation of a right to property and only produce less intrusive effects (9). Secondly, with regard to the expropriation claim, the Tribunal only assumed jurisdiction on the evaluation of the expropriatory effects of the Court of

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(4) This translation was unsuccessfully contested by Poland in English proceedings (see paras. 80-85).

(5) Para. 17 ff. of the commented decision.

(6) Para. 24.

(7) Para. 42.

(8) Para. 1.

(9) See para. 74 of the Decision, expressly quoting para. 84 of the Award (which is unpublished).

Appeal Decision of December 2014. None of the administrative acts preceding this Decision are to be considered as falling within the Tribunal jurisdiction, because, in presence of an act that — alone — allegedly deprived the Claimant of its investment (i.e. the 2014 Court of Appeal Decision) and constituted an (indirect) expropriation, it is not possible to *also* talk about a creeping expropriation, which is characterised by a 'series of [previous] acts' to be looked at as an *ensemble*, rather than any individual act amounting to a measure that is expropriatory ([10]).

The Partial Award on Jurisdiction was challenged before English Courts on the basis of S. 67(1)(a) of the English Arbitration Act 1996, which entitles a party to apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction, and was finally annulled by Mr. Justice Bryan, who forced the Tribunal to assume jurisdiction on the FET claims and the acts preceding the Court of Appeal Decision ([11]).

Preliminarily, also applying the previous case law on similar matters ([12]), Mr. Justice Bryan clarified that proceedings before him involved a complete rehearing of the case previously brought before the arbitrators. As a consequence, he was free to decide whether jurisdiction existed "unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators" ([13]).

The Judge then moved to analyse the relevant provisions of the BIT, to be interpreted on the basis of Article 31 and followings of the 1969 Vienna Convention on the Law of Treaties (VCLT), which — as he admitted — reflect customary international law ([14]). The analysis was mainly focused on art. 9(1)(b) of the BIT, that Mr. Justice Bryan divided in two sub-clauses as follows ([15]):

> (1) "disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision" (the "first clause")
> (2) "[as well as] any other deprivation or restriction of property rights by state measures that [lead to] consequences similar to expropriation." (the "second clause").

Creeping expropriation claims were considered to be falling under the first clause that refers not only to expropriation and nationalization but also to "any other similar measures affecting investments" ([16]). In this regard, Mr. Justice Bryan clarified that the Tribunal erred in excluding the previous acts from its jurisdiction, because the circumstance that the last measure is expropriatory does not exclude that the entire sequence of acts is a creping expropriation. This opinion is allegedly confirmed by some previous arbitral Awards ([17]). Contrariwise, the Tribunal's

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([10]) See para. 78 of the Decision, expressly quoting para. 95 of the Award.
([11]) Para. 144.
([12]) The reference mainly applies to *Azov Shipping Co. v. Baltic Shipping Co.* [1999] 1 Lloyd's Rep 68; and *Dallah Real Estate v. Pakistan* [2010] UKSC 46, [2011] 1 AC 763.
([13]) Para. 70.
([14]) See para. 48 ff.
([15]) Para. 86.
([16]) Paras. 88-92.
([17]) *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007; *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras.

approach only finds confirmation in *Burlington*, another Award issued by a Tribunal chaired by Gabrielle Kaufmann-Kohler ([18]). The Judge finally added that the Tribunal's characterization of the disputed issues at the jurisdictional stage was improper, because Arbitrators did not dispose of a complete picture of the case ([19]).

Moving to the second clause, Mr. Justice Bryan observed that a careful examination of its wording let him think about something less intrusive than expropriation: indeed, the second clause refers to measures which can either bring a "deprivation" or a "restriction" of property, this last word allegedly encompassing also FET claims. With regard to the most critical part of the clause, i.e. the reference to measures which shall "lead to consequences similar to expropriation", the judge stated that, notwithstanding the ambiguous wording, the treaty clearly refers to "something distinct from expropriation", i.e. FET ([20]). Mr. Justice Bryan also found confirmation for his opinion in the principle of *effet utile*, which would point towards an interpretative solution giving different meanings to the first and the second clauses of art. 9(1)(b) ([21]). The Judge found the above interpretation of art. 9(1)(b) of the BIT (only based on art. 31 VCLT) completely reasonable and satisfactory and refused to apply art. 32 VCLT and to give weight to the drafting history of the Treaty ([22]).

As is easy to imagine, each of the issues raised in the decision would deserve an autonomous, in depth, analysis. This is, of course, not possible in the present paper, the final scope of which is to stimulate some reflections on the appropriate management of the relationship between courts and arbitral tribunals concerning the judicial review of arbitral awards, and on the current attitude of English judges towards arbitration. However, in order to develop such arguments — which will be the subject of the third section — we will have to briefly analyse how Mr. Justice Bryan arrived to its decision to annul the Award and demonstrate that the Tribunal's approach was fully sustainable and the Award did not deserve to be annulled (at least in a system of law which trusts the work of arbitrators); this will be the task carried out in the second section. The fourth section will be devoted to some brief conclusive remarks.

2. *The canons of interpretation of the relevant provisions of the BIT (in brief).*

There is no doubt that, in his decision, the English Judge duly took into account the relevant international law criteria of treaty interpretation, which, obviously, shall be applied also to bilateral investment treaties ([23]). In particular,

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666-667 and footnote 945; *Teinver S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, paras. 948-949.

([18]) Where at para. 538 is stated that "creeping expropriation only exists when 'none' of the challenged measures separately constitutes expropriation". See *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (mentioned at para. 124 of the English decision).

([19]) Paras. 126 and 143.

([20]) Para. 95.

([21]) Para. 99.

([22]) Para. 107, referring to para. 88 of the Award.

([23]) On the subject of BITs interpretation see T. Gazzini, *Interpretation of International Investment Treaties*, Oxford, 2016, *passim*; T. Weiler, *The Interpretation of International Investment Law*, The Hague, 2013, p. 34 ff.; C. Schreuer, *Diversity and Harmonization*

prior to analyse the BIT's provisions, the Judge observed that (*a*) art. 31 set forth the criteria of textual, contextual, and teleological interpretation (24), which shall be jointly taken into account (25); (*b*) the principle of *effet utile* imposes that "provisions of treaties are to be interpreted so as render them effective rather than ineffective and therefore meaningless, but without going beyond what the text of the treaty justifies" (26); and (*c*) art. 32 provides for the supplementary means of interpretation to be applied *only* to confirm the meaning resulting from the application of art. 31 or to determine the meaning *when* the interpretation according to article 31 leaves the meaning or leads to a result which is absurd or unreasonable.

With specific regard to the interpretation of the Belgium-Poland BIT it is to be noted that it has a very brief preamble, composed of only two sentences, putting forward the reasons why the Contracting Parties entered into the Treaty. Indeed, these two sentences say that the parties concluded the bilateral investment treaty

> "désireux de renforcer leur coopération économique en créant des conditions favorables à la réalisation d'investissements par les investisseurs de rune des Parties contractants sur le territoire de l'autre Partie contractante",

and

> "considérant l'influence bénéfique que pourra exercer un tel accord pour améliorer les contacts d'affaires el renforcer la confiance dans le domaine des investissements".

As to the treaty's object, scope, and context (which, it is worth remembering, shall be identified taking into account the preamble, annexes and other treaties between the parties), what we can certainly infer from the above sentences is that the drafters wanted, as is obvious, incentivize foreign investments though a reinforcement of the legal protection afforded to such investment in the territory of the other contracting party. This is, generally speaking, the goal of all treaties regulating foreign investment and, as is often recognized (27), this circumstance is not sufficient to allow interpretations excessively favouring investors and disregarding the treaty wording. Indeed, as recently recognized in *Beijing Urban Construction v. Yemen* (28), the more appropriate way of interpreting dispute resolution clauses contained in a BIT is the so-called "balanced approach": this means that the

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of Treaty Interpretation in Investment Arbitration, in M. Fitzmaurice, T. O. Elias, P. Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, The Hague, 2010, p. 129 ff.; M. L. Jaime, *Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreement*, in *Georgetown Journal of International Law*, 2014, p. 291 ff.

(24) Paras. 48-52.

(25) See O. Dörr, *Article 31*, in O. Dörr, K. Schmalenbach, *Vienna Convention on the Law of Treaties - A Commentary*, Heidelberg, 2012, p. 521 ff; Id., *Article 32*, p. 571 ff.; J.M. Sorel, V. Boré Eveno, *Article 31*, in O. Corten, P. Klein, *The Vienna Convention on the Law of Treaties*, Oxford, 2011, p. 804 ff.; Y. Le Bouthillier, *Article 32*, *ibid*., p. 841 ff.; M. Herdegen, *Interpretation in International Law*, in *Max Planck Encyclopedia of Public International Law* (online), 2013.

(26) Paras. 53-55.

(27) See the discussion reported in Gazzini, *supra* n. 23, p. 163 ff.

(28) ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, Para. 98. In the same sense see Schreuer, *supra* n. 23, p. 134.

BIT's object of favouring foreign investments cannot lead to a re-writing of a narrow dispute resolution clause ([29]). Indeed, as stated in *Renta 4*, to favour the protection of covered investments is not equivalent to a presumption that the investor is always right ([30]).

It would be therefore arbitrary to interpret the dispute resolution clause contained in this BIT overly extending the arbitral tribunal jurisdiction only on the basis of the goal of incentivizing foreign investment. Hence, as the arbitral Tribunal and Mr. Justice Bryan (correctly, in our opinion) did, the interpretation of art. 9(1)(b) of the BIT should be mainly driven by the treaty text. In addition to this — in the case where the treaty wording leads us to an obscure result (something on which the Tribunal and the Judge seem to have disagreed) — the interpretation shall be carried out on the basis of the supplementary means of interpretation set forth in art. 32 VCLT, i.e., mainly on the basis of the preparatory works.

In the following subparagraphs we will briefly retrace the possible interpretations of the two sub-clauses composing art. 9(1)(b) of the BIT and will demonstrate that — regardless of the personal opinion which one might have with regard to the interpretation of these clauses — both the Tribunal's and the Judge's approaches are perfectly sustainable according to international law. Therefore, as we will see in Section 3 below, Mr. Justice Bryan — in substituting his opinion to the one of the Tribunal — probably exceeded in applying his authority conferred by art. 67 of the English Arbitration Act.

(*follows*) *(a) The sustainability of both the interpretations of the BIT provided by the Tribunal and the English Judge in relation to the creeping expropriation claim*

The first point on which the English Judge annulled the *GPF* Partial Award on Jurisdiction is the Tribunal's choice to assume jurisdiction only on the Court of Appeal Decision of December 2014 while rejecting to hear all the previous acts as being part of the same chain leading to a creeping expropriation. In this regard, it is preliminarily necessary to briefly recall what is a creeping expropriation in contemporary international law. According to the United Nations Conference on Trade and Development (UNCTAD),

> "[c]reeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the

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([29]) *RosInvest Co UK Ltd. v. Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction, 5 October 2007, para. 83.

([30]) *Renta 4 SVSA et al v. the Russian Federation*, SCC Case No. V 024/2007, Award on Preliminary Objections, 20 March 2009, para. 57. Similarly see R. Dolzer, M. Stevens, *Bilateral Investment Treaties*, The Hague, 1994, pp. 17-18, saying that since the final goal of BITs is to protect foreign investments "it could be argued that any ambiguity should be interpreted in a way that would favor the rights granted to a foreign investor". However, this consideration may be "tempered by the fact that the general normative effect of bilateral investment treaties in the final analysis depends on the extent to which they are viewed as fair and balanced regimes for foreign investment outside the immediate context of the bilateral relationship".

investor or investment" (31).

We are therefore dealing with an expropriation which occurs gradually or in stages. This is a sub-category of the so-called indirect expropriation, i.e. a form of expropriation which "involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure" (32). What is still uncertain, with regard to creeping expropriations, is the possibility that they culminate in an act that — alone — might constitute an indirect expropriation. While, as it possible to infer from the *GPF* English Decision quoted above, some Awards (such as *Siemens*, *Crystallex* and possibly *Teinver*) recognized the possibility that a creeping expropriation takes place also in presence of a final act which may be in itself of expropriatory nature, others (such as *Burlington*) have excluded this possibility (33). This uncertainty is also reflected in scholarship, where — as also expressly recognized by Prof. Steven Ratner — there is still a lot of inconsistency among arbitral decisions on the core elements of indirect expropriations (34). Ironically, while Mr. Justice Bryan adhered to the former conception of creeping expropriation, the arbitral Tribunal chaired by Prof. Kaufmann-Kohler preferred the latter. In this regard, both of the adjudicators tried to use in support of their opinion an article by Michael Reisman and Robert Sloane (35), where it is expressly said that

> "if one or two events in that series [i.e. the expropriating chain] can readily be identified as those that destroyed the investment's value, then to speak of a creeping expropriation may be misleading" (36).

Moreover, the Authors state that

> "[b]ecause of their gradual and cumulative nature, creeping expropriations also render it problematic, perhaps even arbitrary, to identify a single interference (or failure to act where a duty requires it) as the 'moment of expropriation'".

It is self-evident that the above statements seem to assume that if there is a final act that in itself constitutes an expropriation we cannot speak of a creeping expropriation. However, they *do not expressly exclude* that the chain of acts constituting creeping expropriation may also involve acts which, taken alone, might be considered as a form of indirect expropriation. In Mr. Justice Bryan's words, Reisman and Sloane "do not go so far as to say that there may not be a creeping expropriation in such circumstances" (37).

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(31) UNCTAD, *Expropriation: A Sequel*, in *UNCTAD Series on Issues in International Investment Agreements II*, New York, 2012, p. 11.

(32) Ibid., p. 7.

(33) The *Burlington* decision has been also confirmed in the *Burlington v. Ecuador* Decision on Reconsideration of 7 February 2017, para. 174, where it is said that "while the Tribunal has dismissed the argument of a creeping expropriation, it did so because the physical takeover of the Blocks constituted an expropriation in and of itself".

(34) S. R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, in *American Journal of International Law*, 2008, pp. 478 and 480.

(35) M. Reisman, R. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, in *The British Yearbook of International Law*, 2004, p. 123.

(36) See also *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 200, Dissenting Opinion of Kenneth Heigh.

(37) Para. 122.

This brief study is not the place where to ascertain which one, among the above approaches, is the more correct. What is certain, however, is that probably none of them reflects the status of international law better than the other, considering that the authorities at our disposal are not univocal ([38]) and, in any case, there are few available awards dealing with this precise matter which can demonstrate that one of the two approaches has definitively prevailed.

Hence, in the present case, Mr. Justice Bryan simply substituted his personal view on the matter (perhaps in a hazardous way when saying, at para. 124, that such a view reflects international law) to the Tribunal's one. In doing so, the English Judge also arrived at saying that the Arbitrators erred in characterizing certain acts as expropriatory (or not) at the jurisdictional stage, considering that at this phase of the proceedings they did not have the overall picture of the dispute ([39]). The Judge expressly said that he "deprecate any over analysis of the elements of a claim by a [T]ribunal at the jurisdictional stage", because this "only increases costs and almost inevitably leads to a lengthy debate" ([40]).

In this regard, some observations are required. Mr. Justice Bryan's over-intrusive statements on the Tribunal's work seem to ignore, first of all, that any jurisdictional analysis requires a *prima facie* evaluation of the merits of the case and a preliminary characterization of the matters before the Tribunal. A recent example of this practice may be found in *Anglia Auto v. Czech Republic*, where the Tribunal had to ascertain whether — in presence of an arbitration clause which only referred to some kind of claims — certain actions by the Respondent could be involved in these categories: in order to do so, as in the present dispute, the Tribunal obviously had to preliminarily characterize the nature of the claim ([41]). In addition, it shall be recalled that, as recognized by certain very authoritative theorists of legal interpretation, the fact that a decision maker carries out a process of pre-understanding in relation to the dispute brought before him is functional to the same task of

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([38]) This is evidenced by the debate occurred in *Caratube Oil Company and Devincci Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, 27 September 2017, para. 964, where the Claimants submitted that in cases of creeping expropriation, arbitral tribunals may dispose of some discretion when determining the relevant moment of expropriation and the Tribunal, afterwards, did not deny this circumstance.

([39]) Para. 126.

([40]) Para. 143.

([41]) SCC Case No. V 2014/181, Award, 10 March 2017, paras. 189-190, where, after having said that "Article 8(1) of the BIT sets out the types of disputes that can be submitted to arbitration. These are "*[d]isputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former*". Thus, Article 8(1) expressly provides that only certain types of breaches can be submitted to arbitration: those concerning Article 2(3) (the effect of specific agreements entered into by investors); Article 4 (compensation for losses, in situations of armed conflict, national emergency or civil disturbances); Article 5 (expropriation); and Article 6 (repatriation of investment and returns)"

the Tribunal stated that it

> "finds, in light of the express language of, and comprehensive enumeration under, Article 8(1), that the standards of fair and equitable protection and full protection and security, which are contained in Article 2(2) of the BIT, are excluded from the scope of the Respondent's consent to arbitration and cannot, accordingly, provide a basis for a claim under the BIT".

For this reason, the Tribunal had to evaluate the nature of each claim brought before it.

deciding (42). Indeed, a Judge, prior to assume a certain decision, usually characterizes the issues before him and figures out the possible outcomes of the case on the basis of the prior process of characterization. In a case such as the present, the predetermination (at the jurisdictional stage) of the non-expropriatory nature of all the acts which preceded the Court of Appeal Decision of 2014 allowed to avoid addressing the nature of all these acts at the merits phase. Hence, by declining jurisdiction on those acts, the Tribunal likely acted in order to safeguard the efficiency of proceedings (i.e. in order to save time and costs), something which is considered to be a general duty of international arbitrators (43) and a fundamental canon of international adjudication (44).

(follows) (b) The sustainability of both the interpretations of the BIT provided by the Tribunal and the English Judge in relation to the FET claim.

The second point on which Mr. Justice Bryan annulled the *GPF* Partial Award on Jurisdiction is that the Tribunal allegedly failed to consider FET claims as included in the provision of art. 9(1)(b) of the BIT, which refers to "measures that lead to consequences similar to expropriation".

It is well-known that, together with the prohibition of unlawful expropriation, the obligation to grant fair and equitable treatment to foreign investors is one of the main (and most invoked) rules contained in international investment treaties. It is commonly accepted, in this regard, that the obligation to grant fair and equitable treatment — which according to a recent book on the subject is to be considered as a general principle of international law specific to the area of international investment law (45) — involves three main obligations on the part of the State, i.e. to respect the legitimate expectations of foreign investors, to respect the principle of due process of law (both from the perspective of the judiciary and from the one of the administration), and to respect the principle of proportionality and avoid discriminatory treatment (46). This approach to the content of the FET standard is shared also by Mr. Justice Bryan in his decision (47). It goes without saying that — generally speaking — violations of FET involve restrictions on the property rights

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(42) J. Esser, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, Napoli, 1972. pp. 41-42. See also D. Canale, *La precomprensione dell'interprete è arbitraria?*, in *Etica & Politica*, 2006, p. 5.

(43) Recognized also in the SCC Arbitration Rules (i.e. the arbitration rules applicable to the present case) at article 19(2), stating that "the Arbitral Tribunal shall conduct the arbitration in an impartial, *practical and expeditious manner*, giving each party an equal and reasonable opportunity to present its case"(emphasis added).

(44) F. M. Palombino, *Judicial Economy and Limitation of the Scope of the Decision in International Adjudication*, in *Leiden Journal of International Law*, 2010, p. 909 ff. This is confirmed by certain recent investment awards, including *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 220 ff.; *Eiser Infrastructure Limited y Energia Solar Luxembourg S.à.r.I. v. Reino de Espana*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 353-354; and *Ampal-American Israel Corp., EGI-FUN (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Head of Loss, 21 February 2017, para. 291.

(45) F. M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*, Heidelberg, 2018, p. 50 ff.

(46) Id., p. 57 ff.

(47) Para. 37 ff.

of foreign investors which, by definition, are less intrusive than expropriation (either direct or indirect). It is not by chance, indeed, that the two standards are usually dealt with separately in international investment treaties, in arbitral awards (both from the perspective of the ascertainment of liability and the calculation of damages) and in scholarship on international investment law (48).

It is therefore possible that — when referring to "measures that lead to consequences similar to expropriation" (or, in the French version, "toute autre privation ou restriction de droits réels par des mesures souveraines qui entraineraient des conséquences similaires à l'expropriation") — the drafting States intended to refer to measures which substantially constituted a deprivation of property. Being the focus of the provision on the effects of the measures, it is well possible to think that — referring to something that generates effects similar to an expropriation — the treaty concerns creeping expropriations and not violations of the fair and equitable treatment, which would have probably required a different wording in article 9(1)(b). The focus of the treaty text is, indeed, on the causal link between the measures and the consequences which shall be similar to expropriation and, most likely, FET violations do not involve such a causal link. Indeed, as K. Yannaca-Small correctly puts forward, "not all [S]tate measures interfering with property are expropriation" (49). As a consequence, it could be argued *a contrario* that if a treaty refers to effects which are similar to an expropriation, it requires something similar to a deprivation of property, while it excludes other interferences with investors' properties that may be considered as mere restrictions (e.g. FET violations).

We are not saying, here, that the just mentioned interpretation is the only possible one. We are simply affirming that the treaty wording is not at all clear as the English Judge wanted to show. It seems exaggerated, therefore, to say that in giving an interpretation such as the one proposed above the Tribunal "went wrong" (50). Nor the principle of *effet utile* (51) — invoked at para. 99 of the English Decision — is necessarily helpful in this kind of situation. This principle cannot lead to rewriting the treaty text. In this regard, while, on the one hand, it may seem strange that the both the first and the second paragraphs of art. 9(1)(b) refer to the same kind of measures (i.e. creeping expropriations), it is, on the other hand, a matter of fact that (as recognized at para. 53 of Mr. Justice Bryan's decision) the principle of *effet utile* can be applied "without going beyond what the text of the

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(48) Ratner, *supra* n. 34, p. 483, saying that "[a]n indirect expropriation is legally distinct from a violation of other norms protecting foreign investors from changes in domestic regulations. Thus, a governmental measure may be a violation of the norm of fair and equitable treatment without rising to an expropriation".

(49) K. Yannaca-Small, "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in *OECD Working Papers on International Investment 2004/4*, p. 4.

(50) Para. 101.

(51) This principle, as said above, is "a specific [interpretative] argument based on the presumption that a provision of a treaty shall not be interpreted in a way that makes other provisions superfluous or meaningless". See O.K. Fauchald, *The Legal Reasoning of ICSID Tribunals - an Empirical Analysis*, in *European Journal of International Law*, 2008, p. 317. See also J. L. da Cruz Vilaça, *Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Heidelberg, 2012, pp. 279-306.

treaty justifies" and — in this case — including FET violations in the scope of application of the treaty provision consists, perhaps, in stretching the treaty wording.

It seems, on the contrary, that the Tribunal's interpretation is fully justifiable in light of the treaty text. A confirmation to this opinion comes also from the *traveaux preparatoires*, to which Mr. Justice Bryan refused to give any weight. Indeed, as recognized at paras. 105-107 of the English Decision, it is clear that Poland wanted to restrict disputes to be brought before the arbitrators only to expropriation claims. Belgium, for its part, accepted the current wording as "the best [i.e. narrowest] version that [it] could accept". These observations reinforce the idea that this wording shall refer only to direct and indirect expropriation and not to FET claims. Indeed, as the same Mr. Justice Bryan recognizes,

> "there is nothing to support a conclusion that the new [i.e. the current] wording was to be treated as no different to the Polish original version or that (as the Tribunal concluded), Belgium proposed the wording to 'preserve a narrow scope of the dispute resolution clause (Award paragraph 88)".

With regard to the above, it should also be stressed that the Tribunal was composed of two French native speakers (i.e. Prof. Kaufmann-Kohler and Prof. Sands) who certainly could have gathered all the shades of the French original wording and of the text of the negotiations. Their interpretation of the treaty, therefore, should not have been disregarded so easily by the Court at the seat.

From all the above, one may again infer that the Judge has simply replaced the Arbitrators' interpretation of the BIT with his personal viewpoint on the same BIT, both of these interpretations being in principle plausible (notwithstanding the fact that, with regard to the FET claim, the present author feels closer to the interpretation of art. 9 given by the arbitral Tribunal).

3. *Critical reflections on the broad judicial review adopted by the English Judge.*

Having tried to show that the English Decision analysed in the present paper is based more on the Mr. Justice Bryan's personal convictions on the issues at stake than on an actual misapplication of international law by the arbitral Tribunal, we will now spend some words on the worthiness of such an approach, which, for its over-intrusive review of the arbitral award as well as for the circumstance that the Judge has imposed to the Tribunal to assume jurisdiction on certain claims, seems closer to an appeal (on the merits) than to a form of annulment for reasons of legitimacy of the arbitral decision.

There is no doubt that English authorities related to the scope of annulment proceedings are, in principle, almost unanimous in recognizing that the High Court has a full power of reconsidering the entire case before the arbitral tribunal. This attitude started, under the application of the 1996 English Arbitration Act, in *Azov Shipping Co v. Baltic Shipping Co* (52) where Rix Justice stated that where there is a substantial issue of fact as to whether a party had entered into an arbitration agreement, even if there had already been a full hearing before the arbitral tribunal, the domestic judge shall not be in a worse position than the arbitrator for the

(52) High Court, Decision, 11 May 1999, [1999] 1 Lloyd's Rep 68.

purpose of determining the challenge. This decision has been consistently applied at first instance and confirmed by the Supreme Court in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* (53). This approach, moreover, is apparently consistent with the position in various other countries (among which France, Switzerland, USA and Germany) (54). This attitude, however, usually applies to claims for lack of legitimacy of the award and is tempered by the assertion that arbitral awards are final and binding (55) and national courts shall not substitute their own view on the merits of the case to the one of the arbitrators, who are the only adjudicators empowered by the parties to decide their dispute (56). The decision by Mr. Justice Bryan seems, in this regard, as already shown, very far from this statement.

Having said the above, the practice to extensively review arbitral decisions in cases of challenges at the place of the seat requires three critical (and very important) observations.

Firstly, as was rightly observed by Gary Born, this practice risks undermining the trust of the operators in the pro-arbitration attitude of a certain system of law (57). Indeed, in Born's words, the fact that a Court so extensively reviews a jurisdictional decision of an arbitral award highlights

> "a possible divergence between the pro-arbitration and pro-enforcement attitude of English law and the reality of practice before the English courts, where very limited deference is afforded to foreign arbitral awards in the circumstance of challenge".

In this regard, what is even more surprising is that — notwithstanding London is still perceived as the most popular arbitration seat in the world (58) — it is

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(53) Supreme Court, Decision, 3 November 2010, [2010] UKSC 46, paras. 24-26 (Lord Mance) and 93-98 (Lord Collins). In support of the decision see G. Bermann, *The UK Supreme Court Speaks to International Arbitration: Learning from the* Dallah *Case*, in *The American Review of International Arbitration*, 2011, p. 1 ff.

(54) See Kroll, *supra* note 1, p. 58 ff.; P. Mayer, *The Second Look Doctrine: The European Perspective*, in *The American Review of International Arbitration*, 2010, p. 201 ff.

(55) See, e.g., LCIA Rules Art. 26(8), ICC Rules Art. 35(6). See also N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Sixth Edition, Oxford, 2015, p. 569.

(56) N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *supra* n. 55, p. 570, where it is said that

> "domestic laws on arbitration "are principally focused on ensuring that the arbitration has been conducted in accordance with basic rules of due process, respecting the parties' equal right to be heard before an independent and impartial arbitral tribunal within the boundaries of their arbitration agreement. Grounds of challenge are rarely concerned with a review of the merits of the tribunal's decision, thus distinguishing challenge from appeal".

See also W. L. Craig, *Uses and Abuses of Appeal from Awards*, in *Arbitration International*, 1988, p. 178 ff. In this direction see also High Court of Singapore, Decision, 30 September 2013, *BLB and another v. BLC and others*, [2013] SGHC 196, para. 2, stating that "the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases".

(57) G. Born, *Who is the Most Competent? Some Comments on the Allocation of Jurisdictional Competence Under the English Arbitration Act 1996*, in www.kluwerarbitrationblog.com, 2010.

(58) See P. Friedland, S. L. Brekoulakis (eds.), *Queen Mary University of London and White and Case, 2018 International Arbitration Survey: The Evolution of International Arbitration*, 2018, available at *http://www.arbitration.qmul.ac.uk/research/2018/*.

possible to find certain statements from authoritative English judges expressly putting into question the suitability of arbitration to allow a common law system to adequately develop the rule of law. For this reason, critics say, the importance of arbitration should be reduced ([59]). One may therefore infer that the pro-arbitration stance of English Courts is, today, not strong as it was some years ago. The *GPF* decision, for the reasons observed above, seems to find its place within this trend. On the other hand, however, it is worth noting that these are still isolated episodes of statements running again the development of arbitration, and that in the vast majority of cases English lawyers still tend to even increase the importance of London as the seat of important arbitration proceedings ([60]).

Secondly, it is worth highlighting that all the abovementioned decisions analyse the issue of the reviewability of arbitral rulings which *affirmed* the tribunals' jurisdiction, while in the present case the arbitrators *declined* jurisdiction on certain parts of the claim. This circumstance is not irrelevant for the assessment of the Decision, first and foremost because nothing precludes that — somehow stressing the principle of *kompetenz-kompetenz*, which entitles them to be the first judges of their own jurisdiction ([61]) — arbitrators find, again, that they are not

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([59]) See, significantly, J.L. Thomas of Cwmgiedd (Lord Chief Justice of England and Wales), *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration, The Bailii Lecture 2016*, available at *https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf*, p. 9 ff. where it is said that

> "[t]he effect of the diminishing number of appeals compounds the problem that arises from the diversion of more claims from the courts to arbitration. It reduces the potential for the courts to develop and explain the law. This consequence provides fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, "an ossuary". Here lies the irony. As I have explained reform was effected to promote the use of London as a centre for dispute resolution largely based on contracts based on the common law as developed in the Commercial Courts of London. However, the consequence has been the undermining of the means through which much of the common law's strength — its "excellence" was developed — a danger not merely to those engaged in dispute resolution in London, but more importantly to the development of the common law as the framework to underpin the international markets, trade and commerce".

Similarly see, from Australia, R. French, *Arbitration and Public Policy*, in *Asia Pacific Law Review*, 2016, p. 1 ff.;, T. F. Bathurst (Chief Justice of New South Wales), *The importance of developing convergent commercial law systems, procedurally and substantively*, 15th Conference of Chief Justices of Asia and the Pacific, available at *http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2013.10.28.pdf*, 2013, p. 11 ss. With regard to Italy, in favour of a wider diffusion of arbitration, see P. Perlingieri, *Sulle cause della scarsa diffusione dell'arbitrato in Italia*, in *Il giusto processo civile*, 2014, p. 657 ff.

([60]) The practice of issuing anti-suit injunctions aimed at protecting arbitration proceedings seated in England is significant in this regard. See G. Zarra, *Il ricorso alle anti-suit injunction per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'*international comity, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 561 ff.

([61]) In this regard, it should be noted that according to the principle of *kompetenz-kompetenz*, "the arbitral tribunal has jurisdiction to address a claim which undermines the premise of its own authority; or, in other words, it provides arbitrators with the power to begin with the question". See S. L. Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative*, in *Austrian Arbitration Review*, 2009, p. 238. This does not mean that the Tribunal is *the only* to be able to judge its jurisdiction, considering that

entitled to hear the claims at issue. This would obviously be an unusual scenario (possibly leading to another annulment at the courts of the seat, considering that arbitrators are in principle bound by the decisions taken at the seat) but, in the present author's opinion, it is absolutely improper to impose to an arbitral tribunal to assume jurisdiction on a claim on which arbitrators think that they do not have jurisdiction (62). This is, indeed, paradoxical and completely frustrates the essence of the principle of *kompetenz-kompetenz*, which is the cornerstone of jurisdiction in international arbitration (63). In this regard, it is important to highlight, again, that this last consideration is strongly intertwined to the circumstance that a negative award on jurisdiction has been issued. Indeed — at least from the present author's perspective — while when a court decides that an arbitration panel has no jurisdiction it simply deprives arbitrators of the power to decide (regardless of the fact that the Court's decision is or is not correct), in the case where the court forces arbitrators to rule on a case on which they declined jurisdiction, this generates the bizarre scenario in which an arbitration goes on disregarding the fact that the Tribunal already found that the pillar on which arbitration rests (i.e. the parties' consent on arbitrators' jurisdiction) does not exist.

Moreover, the possibility that courts review negative awards on jurisdiction is subject to debate in scholarship, even if this problem only rarely occurred in practice (64). The issue was mainly discussed during the drafting process of the first UNCITRAL Model Law on International Commercial Arbitration (in 1985), where the view that negative awards on jurisdiction are final and binding, i.e. not subject

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courts usually are entitled to re-examine the issue if the jurisdiction of the tribunal is challenged before them. Moreover, according to the negative version of *kompetenz-kompetenz*, endorsed by French scholarship, the tribunal is not only the first authority to be able to review its competence, but also the only one until an award is issued. Court will therefore refrain to analyse the issue of arbitral jurisdiction until arbitrators had the opportunity to do so. See A. Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, in *Pepperdine Law Review*, 2014, p. 17 ff.

(62) Similarly, see Report of UNCITRAL 18th Session (Vienna, June 1985, A/40/17), para. 163, stating that

> "[i]t was recognised that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings".

(63) See P. Landolt, *The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*, in *Journal of International Arbitration*, 2013, pp. 525-526, recognizing that kompetenz-kompetenz is a "self-generating principle" applicable to all arbitration proceedings, which preserves the "salutary, pro-arbitration effects independently of state will to interfere in arbitration". Its goal is to protect arbitration, at least to a certain extent, from undue interference from national courts. Similarly, see T. E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, in *Penn State Law Review*, 2009, p. 1352, who strongly criticized the English approach described in this paper, saying that "the judiciary acted as a barrier to arbitration's full development and acceptance as an adjudicatory mechanism". In general terms see O. Susler, *The English Approach to Compétence-Compétence*, in *Pepperdine Dispute Resolution Law Journal*, 2013, p. 427 ff.

(64) See the cases mentioned at footnote 1 above. In this regard, it should be noted that scholars mainly debated the issue whether negative decisions on jurisdiction can be considered as awards, considering that — if they are not considered as awards (at least from the substantive point of view) — they could not be subject to a challenge. In favour of the negative answer, see Boo, *supra* note 1, p. 141; for the positive (the correctness of which seems confirmed by the case law) see Kroll, *supra* note 1, p. 71; Fohlin, *supra* note 1, p. 113 ff.

to review at the courts of the seat, finally prevailed. Art. 16(3) of the 2010 Model Law, indeed, still states that "[i]f the tribunal rules as a preliminary question that *it has* jurisdiction, any party may request the court to decide the matter". This wording is commonly interpreted as excluding that review of negative awards on jurisdiction is permitted under the Model Law (65). The reason for this approach mainly stays in the circumstance that — should an arbitral tribunal be forced to assume jurisdiction on a case — this could be a strong reason for denying enforcement of the award for lack of jurisdiction (66) pursuant to art. V(1)(a) of the 1958 New York Convention (67). For all the above reasons it seems that, even if under the applicable law a court has the power to review a negative award on jurisdiction, it should refrain from making use of such a power, considering that this would, in general, strongly undermine the reliability of arbitration (by creating uncertainty on the finality of arbitral rulings on jurisdiction) and, in particular, would generate (in the eyes of the parties) a prejudice to the credibility and the authority of the Tribunal in charge of resolving the relevant dispute. In the words of Michael Dunmore,

> "a limited measure of substantive judicial review arguably serves to safeguard the integrity of the arbitral process by permitting annulment of truly perverse decisions and by providing arbitrators with an enhanced incentive to do their job properly" (68).

Such a deferential approach is even more necessary in the context of investment arbitration, where generally speaking arbitrators are usually very experienced people in the specialized field of international investment law, while — at least in the majority of cases — national judges are not particularly familiar with this area of public international law. This approach has been endorsed in a recent Decision of the Swiss Tribunal Federal, where it has been said that:

> "D'autre part, comme la définition de l'investissement au sens de l'art. 1 (1) du TBI a été le fait de trois arbitres dont l'expérience en la matière et la renommée internationale sont reconnues par les deux parties, *le Tribunal fédéral, bien qu'il jouisse à cet égard d'une pleine cognition, ne s'écartera pas sans nécessité de l'opinion unanime émise par des spécialistes de la question au sujet de la notion juridique indéterminée de l'investissement*" (emphasis added) (69).

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(65) See Fohlin, *supra* note 1, p. 113; Boo, *supra* note 1, p. 130-131. The situation is opposite in Switzerland, where art. 190 of the Private International Law Act expressly recognizes the possibility of court review of negative awards on jurisdiction.

(66) Boo, *supra* note 1, p. 130.

(67) Such a rule sets forth that:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

(68) Dunmore, *supra* note 1, pp. 304-305.

(69) Swiss Federal Tribunal, Decision, 20 September 2016, 4A_616/2015, para. 3.4.1. A similar approach has also been recently endorsed by US Courts (and related scholarship). See C. De Stefano, *Deferential review of international investment awards by US Courts*, in

The third critical point concerning the practice of reviewing negative awards on jurisdiction concerns efficiency of arbitral proceedings and the necessity to preserve the finality of awards. In this regard, set aside applications have been ironically nicknamed "the Trojan horses" of international arbitration, because if domestic courts open the gates for their uncontrolled entrance, "they end up conducting an impermissible review on the merits of the award and endanger the efficiency of arbitration" (70). Thus, the issue of the relationship between private commercial arbitration and national courts concerning the scope of annulment proceedings flows in the perennial need for a balance between fairness and finality (in other words, between legitimacy and efficiency) of arbitral awards (71): it is up to domestic judges to adequately measure out their intervention in arbitral proceedings (and on arbitral awards) in order to ensure, on the one hand, that arbitral awards are the result of a fair set of proceedings but, on the other hand, that once the parties have chosen to refer their dispute to arbitration, the tribunal will usually be the only and final judge of merits of the case. In the words of the Singapore Court of Appeal,

> "parties to an arbitration do not have the right to a correct decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived following a fair process" (72).

The finest balance between those opposing needs seems therefore to require that arbitral awards are subject to review only to a limited extent, i.e. they shall be annulled only in cases of lack of legitimacy affecting the regularity of proceedings (e.g. violations of the principle of due process) but not in cases of mere errors of law or — even worse — when the judge simply disagrees with the arbitrators' view (as it happened in the *GPF* English Decision). Hence, also for its unbalanced approach

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this *Rivista*, 2017, p. 1059 ff., who — at pp. 1074 and 1075 — after having analysed the deferential approach adopted by the US District Court for the District of Columbia in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Civil Action No. 16-0661 (RC), Memorandum Opinion, 25 March 2017 (D.D.C. 2017), states that

> "[i]n the dialectics between international arbitral tribunals and national courts, the deferential approach in the review of awards appears to be consonant to the demand for stability and finality in international investment arbitration, be it administered under the aegis of ICSID or under different arbitration rules. This approach may prove to be effective with a view to limit the downsides of non-ICSID investment arbitration, including the possible interference of domestic legal systems in the enforcement stage within the mechanisms of resolution of international economic disputes".

In general terms, on this matter see also L.G. Radicati di Brozolo, *I rimedi contro le interferenze statali con l'arbitrato internazionale*,in *Riv. arb.*, 2015, p. 1.

(70) J. O. Jensen, *Setting Awide Arbitral Awards in Model Law Jurisdictions: the Singapore Approach from a German Perspective*, in *European International Arbitration Review*, 2015, p. 56.

(71) See Bermann, *supra* note 3, p. 1 ff.; also W. M. Reisman, H. Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, in *The American Review of International Arbitration*, 2010, p. 6.

(72) Decision, 31 March 2015, *AKN and another v. ALC and others and other appeals*, [2015] SGCA 18, para. 32.

to the relationship between fairness of proceedings and finality of arbitral awards, the *GPF* Decision is not to be welcomed ([73]).

4. *Conclusions*.

This comment analysed the English Decision in *GPF v. Poland*, which annulled a Partial Award on Jurisdiction in which, on the basis of the ambiguous provision of art. 9(1)(b) of the BIT between Belgium and Poland, the Arbitral Tribunal refused to assume jurisdiction on part of the claims brought by GPF. The English Judge, therefore, imposed to the arbitral Tribunal to assume jurisdiction on such claims. This is one of the first decisions annulling a negative jurisdictional ruling, as well as one of the rare cases in which a national court set aside a treaty based arbitral award.

After having reviewed the grounds on which Mr. Justice Bryan decided to annul the Award, and having demonstrated that the Arbitrators' approach was fully justified as a matter of international law, this paper has strongly criticized the over-intrusive approach of the Judge, which seems to have interpreted a claim for setting aside an arbitral award — that should involve only a limited review of the legitimacy of the award — as a real form of appeal in which the court of the seat is entitled to substitute its view on the merits to the one of the arbitrators. Such an approach is not to be welcomed for several reasons. First of all, by frustrating the principle of *kompetenz-kompetenz* (which is the cornerstone of arbitral jurisdiction), it undermines the credibility of international arbitration as a reliable system of dispute resolution. Secondly, by forcing arbitrators to hear a case which they believed as falling outside the scope of their jurisdiction, the Judge has increased the probabilities that the enforcement of the award will be refused (or at least opposed) pursuant to art. V(1)(a) of the New York Convention. Finally, the English Decision does not apply a balanced approach to the relationship between fairness of arbitral proceedings and finality of awards (and efficiency of proceedings), considering that it opens the door to challenges which finally fall into the merits of the arbitrators' decision without a proper reason for doing so.

Giovanni Zarra

([73]) Over-intrusive attitudes of national courts, moreover, risk to undermine the credibility of a country as a pro-arbitration seat. See S. Sattar, *National Courts and International Arbitration: A Double-edged Sword?*, in *Journal of International Arbitration*, 2010, p. 51 ff.; H. Abedian, *Judicial Review of Arbitral Awards in International Arbitration*, in *Journal of International Arbitration*, 2011, p. 553 ff.