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Case No: FL-2016-000002

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

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

Date: 29/03/2017

Before:

MR JUSTICE BLAIR

- -

Between:

The Law Debenture Trust Corporation P.L.C	**Claimant**
- and -	
Ukraine, represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine	**Defendant**

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- -

Mark Howard QC and Oliver Jones (instructed by **Norton Rose Fulbright LLP**) for the **Claimant**
Bankim Thanki QC, Malcolm Shaw QC and Simon Atrill (instructed by **Quinn Emanuel Urquhart & Sullivan, LLP**) for the **Defendant**

Hearing dates: 17-19 January 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr Justice Blair:

Introduction

The parties and the proceedings

1. This is an application by the claimant for summary judgment in respect of non-payment of Notes in the form of debt instruments that are commonly called Eurobonds. Summary judgment is the procedure by which the court may decide a claim without a trial, where the claimant can show that the defendant has no real prospect of successfully defending the claim.

2. The claimant (the "Trustee") is The Law Debenture Trust Corporation plc. It is a company incorporated under the laws of England. It is trustee under a Trust Deed which was (or was purportedly) entered into with the defendant on 24 December 2013. It is a professional provider of such services, and as explained below, it brings these proceedings on the direction of the Russian Ministry of Finance. The Russian Federation ("Russia") is the sole holder of these Notes.

3. The defendant ("Ukraine") is the State of Ukraine. It is the issuer of the Notes. It is represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine (the Cabinet of Ministers of Ukraine is referred to in the evidence and in this judgment as the "CMU").

4. Ukraine's case is that Russia applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by President Viktor Yanukovych from signing an Association Agreement with the European Union, which was to have been signed at the Vilnius Summit on 28 November 2013, and to accept Russian financial support instead. The Notes were to be the first tranche of that support. Ukraine's case, opposed by the Trustee, is that the borrowing resulted from that pressure, and that for this and other reasons, its non-payment of the Notes is justified, and that in any event summary judgment is not appropriate.

5. Evidence has been filed in the form of witness statements by:

   i) Julian Robert Mason-Jebb, Director of The Law Debenture Trust Corporation plc;

   ii) Galina Danylivna Pakhachuk, Head of the Debt Policy Department of the Ministry of Finance of Ukraine;

   iii) Olena Mykolaiivna Zubchenko, Partner in the Finance and Banking Law Department of the Ukraine law firm Lavrynovych & Partners (which advised the Ministry of Finance of Ukraine);

   iv) Oleksandr Oleksandrovych Danyliuk, the Minister of Finance of Ukraine;

   v) Volodymyr Andriiovych Pasichnyk, Head of the Division for Budget and Tax Policy, the CMU Secretariat;

   vi) Alexander Joseph Gerbi, Partner in Quinn Emanuel Urquhart & Sullivan UK LLP, acting for Ukraine in these proceedings

6. In addition, Ukraine filed Expert Reports on Ukrainian law by Professor William E. Butler, the John Edward Fowler Distinguished Professor of Law, Dickinson School of Law, Pennsylvania State University.

7. In addition to the evidence, each party filed written submissions and a chronology.

8. As regards the facts:

   i) Some of the facts, for example as to the documentation relating to the transaction in issue, are not in dispute.

   ii) Other facts, for example those maintained by Ukraine in its defence, are or may be in dispute.

   iii) Disputed issues of fact are not normally capable of determination on a summary judgment application such as is before the court.

   iv) With some exceptions, the Trustee accepts that the court will proceed on the basis of Ukraine's factual case, whilst stating, "This is not to say, however, that the Trustee does not have very serious concerns about the plausibility or veracity of many of the matters advanced by Ukraine".

The factual framework

9. The full facts are set out elsewhere in this judgment. The following is the factual framework relating to the issuance of the Notes.

10. On 17 December 2013, President Putin of Russia and President Yanukovych announced Russia's intention to subscribe for up to US$15 billion of Ukrainian sovereign debt before the end of 2014. This included an initial tranche of US$3 billion in the form of Eurobonds having a maturity of two years and a fixed interest rate of five per cent per annum. These are the Notes which are the subject of these proceedings. There was also to be a substantial reduction in the price of gas to be supplied by Russia to Ukraine.

11. On 18 December 2013, there was a meeting of the CMU which adopted or purportedly adopted Decree No.904 concerning the borrowing of the US$3 billion. The facts concerning this meeting form an important part of Ukraine's capacity defence (see below).

12. On 24 December 2013, a Trust Deed was (or was purportedly) entered into between Ukraine and the Trustee as part of a transaction by which Ukraine issued US$3 billion notes (the "Notes") due on 20 December 2015 carrying interest at 5% payable bi-annually.

13. According to the evidence, such instruments governed by English law are often constituted by a trust deed. The issuer appoints a trustee to represent the interests of the holders, for the time being, of the instruments, with the practical consequence that litigation generally has to be brought via the trustee. In fact, the claimant in these proceedings is the Trustee, not the Noteholders.

14. The Notes were constituted by the Trust Deed, which is governed by English law, the English courts having exclusive jurisdiction. By the terms of the Trust Deed, Ukraine waived sovereign immunity. Jurisdiction is not at issue in this case.

15. It is not in dispute that instruments of this kind are tradable instruments, though Russia acquired the entire issuance, and Ukraine's case is that Russia had no intention of transferring the Notes.

16. On 20 December 2013:

    i) Ukraine's Minister of Finance signed a Subscription Agreement with VTB Capital plc, part of the Russian investment banking group, as Sole Lead Manager for the issuance of the Notes.

    ii) The Prospectus for the issuance of the Notes was published by Ukraine. The Prospectus states that it was approved by the Central Bank of Ireland. It was required so that the Notes could be listed on the Irish Stock Exchange.

    iii) Both parties have referred to and relied on the Prospectus. It includes a section on "Risk Factors Relating to Ukraine", including a reference to the possibility of "punitive measures" by Russia should Ukraine sign in the future the Association Agreement with the EU.

17. The transaction came into effect on 24 December 2013. On that day:

    i) Ukraine's Minister of Finance signed the Trust Deed and other documentation relating to the Notes issue.

    ii) This documentation included an Agency Agreement between Ukraine, the Trustee and Citibank, N.A., London Branch ("Citibank") and others, pursuant to which Citibank would act as Principal Paying Agent and Registrar in respect of the Notes (the "Agency Agreement").

    iii) The Notes were issued. The Russian Ministry of Finance was the sole subscriber—in other words, Russia bought and paid for all the Notes. None of the Notes have since been transferred by Russia, which remains the only noteholder.

    iv) The subscription money for the Notes was paid by Russia, and Ukraine received payment in the amount of US$3 billion into the foreign currency accounts of the Treasury.

    v) The Notes were listed on the Irish Stock Exchange.

18. There are full explanations of the structure of the transaction in the evidence of Mr Mason-Jebb for the Trustee, and in Ukraine's evidence, particularly that of Ms Zubchenko. In summary, the issuer of the Notes was Ukraine, the trustee was The Law Debenture Trust Corporation plc, the Paying Agent was Citibank, and the Notes were acquired by Russia on issuance.

19. Ukraine's case is that the CMU's decision on 21 November 2013 to suspend preparation for Ukraine's signing of the EU Association Agreement resulted in mass

protests in the Ukrainian capital, Kyiv. Following President Yanukovych's decision not to sign at the Vilnius Summit on 28 November 2013, these protests grew significantly in size. President Yanukovych is reported to have fled Kyiv on 21 February 2014.

20. Shortly afterwards, Russia invaded Crimea. In addition to the invasion, Ukraine's case is that Russia has also fuelled and supported separatist elements in, interfered militarily in and succeeded in destabilising and causing huge destruction across eastern Ukraine.

21. During this period, Ukraine made payments under the Notes. Three bi-annual interest payments under the Notes totalling US$233,333,350 were paid by Ukraine during 2014 and 2015.

22. The Trustee relies on these payments in support of its case on ratification/ affirmation. Ukraine disputes this case on various grounds, including continuing and increasing duress.

23. On 18 December 2015, that is, shortly before the Notes on their face were due, the CMU approved a moratorium proposed by the Ukrainian Government to suspend payments of the Notes. This was pursuant to a Moratorium Law adopted by the Verkhovna Rada (the Ukrainian Parliament) which became effective on 31 May 2015.

24. The Notes were not repaid on 21 December 2015 which was the due date (20 December 2015 being a Sunday). No payment has been made since then. On 21 December 2015, the Notes were delisted by the Irish Stock Exchange.

25. By clause 8 of the Trust Deed, the holders of at least one-quarter in principal amount of the Notes then outstanding can direct the Trustee to take enforcement proceedings. On 16 February 2016 the Russian Ministry of Finance gave the Trustee such a direction.

26. These proceedings were brought by the Trustee on 17 February 2016. The Trustee claims US$3,075,000,000 being principal together with interest for the preceding six month period due on 20 December 2015. The Trustee further claims continuing interest.

27. On 12 April 2016, the Verkhovna Rada voted to extend the moratorium on the Notes indefinitely. Finance Minister Danyliuk explains in his evidence that this was "… in order to preserve Ukraine's rights."

28. On 27 May 2016, Ukraine filed its defence stating that the claim forms part of a broader strategy of unlawful and illegitimate economic, political and military aggression by Russia against Ukraine and its people aimed at frustrating the will of the Ukrainian people to participate in the process of European integration.

29. By application of 28 July 2016, the Trustee applied for summary judgment against Ukraine pursuant to CPR rule 24.2 on the basis that Ukraine does not have any real prospect of successfully defending the claim, and there is no other compelling reason why this case should be disposed of at a trial. (There is also an application to strike

out the defence pursuant to CPR rule 3.4, but this adds nothing to the summary judgment application.)

30. The Trustee's summary judgment application is the application before the court for decision.

The main issues

31. Ukraine resists the application on the basis that it has a real prospect of successfully defending the claim. The detail of each of its defences is set out later in this judgment. Ukraine submits that each of them not only provides a defence, but is unsuitable for summary judgment.

32. The defences fall under four main headings:

(1) Ukraine lacked the relevant capacity to issue the Notes, the issue of which breached the limits in the Budget Law: further, before approving the borrowing, and in breach of a mandatory requirement, the CMU was not provided with an obligatory opinion regarding the borrowing, and was not aware of terms that were unusual and oppressive to Ukraine in their combined effect.

(2) The contractual arrangements were procured by duress, and Ukraine's purported consent to them was vitiated by unlawful and illegitimate threats and pressure exerted by Russia in order to coerce the country's then administration into withdrawing from signing the Association Agreement with the European Union, which was all but agreed by then.

(3) There were implied terms of the Trust Deed which included terms that Russia would not deliberately interfere with or hinder Ukraine's ability to repay, or demand repayment if it is in breach of its obligations towards Ukraine under public international law.

(4) If contrary to the above Ukraine owes a valid contractual obligation which it has breached, it is entitled to decline to make payments to Russia under the Notes as a "countermeasure" under public international law.

33. Irrespective of its prospects of success, Ukraine submits that there are compelling reasons to proceed to trial because the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost. Ukraine submits that these matters should be the subject of a trial, and that the summary judgment process is not something to which Russia should be entitled to benefit given its egregious conduct.

34. The details of the Trustee's responses are set out later in this judgment. It submits that the court does not need to get into any controversial issues of fact raised by Ukraine to resolve the present application which can be determined on questions of law and on the basis of uncontroversial or assumed facts. In brief, it submits that:

(1) As a state, Ukraine has unlimited capacity to contract, and properly characterised under English law, the issues relied on by Ukraine are matters of authority, not capacity. Further, Ukraine has ratified the agreements.

(2) Ukraine's case concerns matters that cannot be relied on in the context of the English law of duress, and if the court is required to determine them it will be required to denounce the conduct of a foreign state as unlawful on the plane of international law, something that is beyond its competence and non-justiciable. Further, Ukraine has affirmed the agreements.

(3) It is not arguable that terms such as those contended for by Ukraine would be implied into tradable instruments such as the Notes, constituted by a Trust Deed entered into with the Trustee as counterparty, to which Russia is not a party.

(4) The English court does not have competence to adjudicate on the asserted countermeasures. The agreements constitute a simple, English law-governed, debt agreement and should be treated as such.

35. The Trustee further submits that there are no other compelling reasons for the case to go to trial. It submits that Ukraine's defence is an attempt to shoehorn into an ordinary debt claim wide-ranging and contentious issues of international law that do not fall within the purview of the English courts, and have nothing to do with the Trustee. The court is being invited to determine factual and legal matters that do not fall within its competence. This issue has to be determined now.

The Trust Deed and the Agency Agreement

36. The Trust Deed sets out the terms and conditions upon which the US$3 billion 5% Notes issued by Ukraine are constituted.

37. The Trust Deed provides so far as relevant that:

i) Clause 1.1: "Original Notes" is defined as "the notes in registered form comprising US$3,000,000,000 5.00 per cent. Notes due 20 December 2015 of the Issuer hereby constituted…".

ii) Clause 2.1: The aggregate principal amount of the Original Notes is limited to US$3,000,000,000.

iii) Clause 2.2: Ukraine covenants with the Trustee that it will, in accordance with the Trust Deed, on the due day for the final maturity of the Original Notes, or on such earlier date as the same may become immediately due and payable in accordance with Condition 8 (Events of Default) of the Conditions[1], pay or procure to be paid unconditionally to or to the order of the Trustee an amount of principal equal to the principal amount of the Original Notes, together with interest on the outstanding principal amount pursuant to the Conditions. Pursuant to Condition 8(a), an Event of Default shall occur where Ukraine fails to pay any amount of principal or interest in respect of the Notes and the default continues for a period of 10 days.

iv) Clause 2.2.2: In any case where payment of all or part of the principal amount due on any day is not made, interest shall continue to accrue on such principal amount at the rate specified in the Conditions (or, if higher, the rate of interest on judgment debts for the time being provided by English law).

[1] Set out at Schedule 2 of the Trust Deed.

v) Clause 3.6: In certain circumstances, including a failure to pay principal in respect of any Note at maturity, a Noteholder may require Ukraine to issue the Noteholder with Definitive Original Notes in place of the relevant Original Global Note.

vi) Clause 5: Ukraine covenants with the Trustee that it will comply with and perform and observe all the provisions of the Trust Deed which are expressed to be binding on it, and that the Conditions shall be binding on Ukraine and the Noteholders. The Trustee shall hold the benefits of this covenant upon trust for itself and the Noteholders according to its and their respective interests.

vii) Clause 7.1: The Trustee may at any time, at its discretion and without notice, take such proceedings and/or other actions as it may think fit against or in relation to Ukraine to enforce its obligations under this Trust Deed.

viii) Clause 8: The Trustee is bound to take the proceedings mentioned in Clause 7.1 where it is requested to do so in writing by the holders of at least one-quarter in principal amount of the Notes then outstanding and if indemnified to its satisfaction. Only the Trustee may enforce the provisions of the Trust Deed. No Noteholder is entitled to proceed directly against Ukraine to enforce performance of any of the provisions of the Trust Deed unless the Trustee having become bound to take proceedings fails to so within a reasonable period and such failure is continuing.

ix) Clause 14.5: Ukraine is liable to pay or discharge all Liabilities of the Trustee in relation to the exercise of its powers under the Trust Deed, including but not limited to legal expenses.

x) Clause 25.1: The Trust Deed is governed by English law.

xi) Clause 25.2: For the exclusive benefit of the Trustee and each of the Noteholders (and subject to the Trustee's right to elect arbitration), Ukraine irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the Trust Deed and the Notes and that accordingly any suit, action or proceedings arising out of or in connection with any of the above may be brought in such courts.

xii) Clause 25.9: Ukraine appoints its Ambassador in London to receive service of process in any proceedings in England based on the Trust Deed or the Notes.

38. Pursuant to Clause 13(e) of the Trust Deed, Ukraine covenants that it shall at all times maintain Paying and Transfer Agents and a Registrar in accordance with the Conditions.

39. The Agency Agreement of 24 December 2013 between Ukraine, the Trustee and Citibank as the Principal Paying Agent provides, so far as relevant, that:

i) Clause 2.6: Upon the Notes becoming due and payable, the Trustee may, by notice in writing to Ukraine, require Ukraine to pay all subsequent payments in

respect of the Notes to or to the order of the Trustee and not to the Principal Paying Agent.

ii) Clause 4.1: In order to provide for payment of principal and interest in respect of the Notes as the same becomes due and payable, Ukraine shall pay to the Principal Paying Agent on the Issuer Payment Date an amount equal to the amount of principal and/or interest falling due in respect of such Notes on the due date.

40. The Notes are constituted by the Trust Deed and subject to the Conditions. Pursuant to the Conditions, Noteholders shall be entitled to the benefit of, be bound by, and are deemed to have notice of, all the provisions of the Trust Deed and the Agency Agreement.

41. The Conditions further provide, so far as relevant, that:

i) Condition 3(c): All payments in respect of any Note shall be made in full on the due date in respect thereof and Ukraine undertakes not to claim or exercise any right of set-off in respect of such payments.

ii) Condition 5(a): Ukraine will redeem the principal amount of the Notes on 20 December 2015.

iii) Condition 6(a): Payments of principal and interest in respect of the Notes will be made in U.S. dollars.

Summary judgment

42. CPR rule 24 sets out the procedure by which the court may decide a claim or a particular issue without a trial. As indicated above, the Trustee asserts that the claims are appropriate for summary judgment, and Ukraine asserts that the claims are not appropriate for summary judgment.

43. So far as the law is concerned, the applicable test on an application for summary judgment is well-established (*Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 (Comm) at [38]), and is not in dispute. The claimants must show that the defendants have "no real prospect of successfully defending the claim or issue [on which summary judgment is sought]": CPR, rule 24.2(a)(ii). To succeed, a respondent to such an application has to have a case which is better than merely arguable: see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [3]-[8].

44. In determining whether the defence has a real prospect of success, the criterion is not one of probability, but "absence of reality" (*Three Rivers DC v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [158]). While the court may resolve points of law or construction, it is inappropriate to do so where a question of law "calls for detailed argument and mature consideration" (*Home & Overseas Insurance Co. Ltd v Mentor Insurance Co. (UK) Ltd* [1990] 1 WLR 153 at 159G-H). Ukraine submits that summary judgment is inappropriate in an area where the law is developing as it is in the present circumstances (*I-Way Ltd v Word Online Telecom Ltd* [2002] EWCA Civ 413 at [11]-[12]).

The parties' cases in summary

45. Each party summarises its case in its skeleton argument as follows.

The Trustee's case

46. The Trustee submits that in no other context, other than for the purposes of seeking to engineer a triable issue in these proceedings, has Ukraine or any Ukrainian official taken the position that the agreements were not properly issued and duly authorised or that they were somehow voidable or unenforceable. To the contrary, its most senior government representatives and officials have repeatedly represented the opposite.

47. Ukraine continues (even now) to treat the Notes as valid, outstanding debt obligations and has done so at all times since the Notes were issued in December 2013, in, for example:

    i) its representations to the International Monetary Fund ("IMF") in September 2016;

    ii) laws adopted by Ukraine's own Parliament in April 2016;

    iii) Ukraine's formal announcements and disclosures to the markets on other debt issuances between February 2014 and February 2016; and

    iv) public statements from Ukraine's Ministry of Finance that the Notes were properly issued and comprise valid obligations, responding to a September 2014 criminal investigation by Ukraine's State Security Service relating to the very issues raised in these proceedings.

48. Ukraine's position outside these proceedings accords with the factual and legal reality that this is a simple English law debt obligation, owed not to Russia but to the Trustee. Ukraine chose the form of the Notes, and issued them pursuant to a Prospectus approved by the Central Bank of Ireland, allowing the Notes to be listed on the Irish Stock Exchange (where Russia could have sold them to anyone). Ukraine used the same procedures as it used to issue the 31 other Eurobonds for which Trustee has acted as trustee over a period of 13 years.

49. The matters of which Ukraine complains do not form part of English law or part of the agreements, and cannot be adjudicated upon by the English courts. In waiving its immunity and submitting to the jurisdiction of the English courts, Ukraine has agreed that it will be treated as any other private party to a debt obligation with the Trustee like that contained in the agreements, governed by English law, would be treated. In particular, alleged "political aggression" or breaches of international law, which have no bearing or connection to the Trustee, or to any subsequent holder of the Notes, have no part to play either in considering the circumstances in which the agreements came into being, or their proper interpretation, or whether they should be enforced. The difficulties that an English court would face if it entered into factual or legal investigations of this nature, or entertained Ukraine's request to imply the asserted terms, are manifest. Such complaints should be ventilated via the dispute resolution mechanisms available on the international plane.

Ukraine's case

50. Ukraine submits that, as the Trustee acknowledges, this claim is brought by it acting at the direction, on behalf and for the sole benefit of Russia. Russia has been keen to publicise "its" claim against Ukraine as widely as possible. Despite the Trustee's attempts to present the claim as a conventional commercial debt claim, arising from a conventional commercial contractual structure, it is nothing of the sort.

51. The claim arises from, and is part of, a broader strategy of unlawful and illegitimate economic, political and military aggression by Russia against Ukraine which has had, and continues to have, devastating consequences for the country, its people and economy. In 2013, and as part of that strategy, the aim of which was to force Ukraine to abandon its planned integration with the European Union, Russia applied massive, unlawful and/or illegitimate military, economic and political pressure to Ukraine in order to coerce the then administration led by Viktor Yanukovych into withdrawing from signing an Association Agreement with the EU, which was all but agreed. The effect of that action was to cause Ukraine's access to the capital markets to become closed, leaving it with no choice but to obtain financial support from Russia on unique and onerous terms.

52. The Trust Deed and Agency Agreement pursuant to which the Eurobonds were issued, were the fruit of that illegitimate pressure. Although structured as a bond issue, the true nature and commercial substance of the arrangement (reflecting the factual context and purpose) is that of a bilateral loan from Russia to Ukraine, negotiated directly between the two sovereign states, which avoided the cumbersome and lengthy approval process that would have been required of a formal bilateral loan and enabled the transaction to be implemented within the very short timeframe available. The terms are neither conventional nor commercial, but are unusual, extraordinary and oppressive to Ukraine. They were imposed on Ukraine by Russia and the arrangements for their implementation were rushed through in what Professor Butler refers to as "flagrant" breaches of fundamental requirements of Ukrainian law, and in circumstances constituting duress under English law.

53. As Ukraine's Minister of Finance, Oleksandr Danyliuk, explains in his evidence:

> "Ukraine has in its Defence in these proceedings explained the overwhelming pressure that was brought to bear upon it by the Russian Federation in the second half of 2013 in order to coerce the then-president of Ukraine, Viktor Yanukovych, not to sign the EU Association Agreement at the Vilnius Summit on 28 November 2013.
>
> Those illegitimate acts included extraordinary economic sanctions that resulted in severe financial losses to Ukrainian businesses and its people… However, they also included grave and severe threats that if Ukraine signed the EU Association Agreement, Russia could no longer guarantee Ukraine's status as a State and that Russia could support a partitioning of Ukraine… This constituted a direct threat to the political independence and territorial integrity of Ukraine and was seen as such. As someone who was part of the State advisory and

> supporting agencies at that crucial time, I can confirm that it was widely understood amongst members of the Ukrainian government that these threats were real and that Russia would not hesitate to intervene in Ukraine by different means including with armed force if it felt it expedient to do so in its own interests. It was well known that threats of the use of force followed by actual use of force had been used by Russia before with regard to other former Soviet bloc nations. There was a pattern. This was understood. Accordingly, these threats were taken extremely seriously by government officials.
>
> …those grave threats from the Russian Federation, coupled with its other actions, achieved their intended objective: President Yanukovych refused to sign the EU Association Agreement, with long-lasting and hugely significant consequences for Ukraine. That Russia was serious in the threats it made, and that Ukraine was right to take those threats seriously, is borne out by the events that followed the fall of the Yanukovych administration and his fleeing to Russia: in particular Russia's unlawful invasion and occupation of Crimea, and its military interference and campaign in Ukraine's eastern provinces…"

54. When Mr. Yanukovych was removed from power following popular protests sparked by his administration's decision not to proceed with the EU Association Agreement, Russia responded with a massive campaign of unlawful aggression. That has included the illegal invasion, occupation and purported annexation of Crimea, sovereign Ukrainian territory, and interference and unlawful use of force in eastern Ukraine. These Russian actions have killed thousands of Ukrainian citizens, injured tens of thousands, displaced millions, inflicted severe damage to Ukraine's economy and infrastructure, and resulted in Russian seizure of Ukrainian state assets, which damage is measured in many billions of dollars. The effect on Ukraine of this continuing conduct is the equivalent of a depression.

55. In these proceedings, Russia seeks to hide behind the Trustee in asserting that (a) in the midst of this military aggression, Ukraine waived its defences to the present claim without knowing that they existed and (b) despite the infliction of economic devastation and doing its utmost to prevent Ukraine from being able to repay, Russia is entitled to demand repayment as if this were a standard Eurobond issuance in the capital markets. This is not merely a matter of moral outrage, but based on a flawed factual and legal analysis.

Issue (1): CAPACITY

Introduction

56. Ukraine's case under this heading raises the question of capacity. It submits that the Eurobond transaction is void because as a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into it. The question, it submits, is (contrary to the Trustee's case) correctly characterised as one of capacity and not

authority. As a consequence, issues of usual or ostensible authority do not arise, and since the transaction was void *ab initio*, there is no possibility of ratification.

57. The parties' respective cases are in summary as follows.

The Trustee's case on capacity

58. The Trustee submits that Ukraine does not plead any English conflict of law principle that requires application of Ukrainian law to determine Ukraine's capacity to enter into the agreements, or otherwise explain the relevance of Ukrainian law to an English law governed agreement.

59. The Trustee submits that a sovereign state's internal law is irrelevant to whether or not that state has capacity to enter into a particular transaction. A state is not created by its own internal law, and there is no reason in logic or principle for a state's internal law to be applied when determining its capacity.

60. The matters of Ukrainian law relied on by Ukraine are matters of authority and not capacity (as those terms are understood by English private international law).

61. In support, the trustee submits that the question of which law applies to determine the capacity of a foreign state is to be resolved by common law rules. The appropriate law is that which recognises the entity's legal existence, for it is this law that determines the scope of its powers.

62. English common law recognises the legal personality of foreign states recognised as such by the Crown, without the need for statutory intervention. An unrecognised state, by contrast, does not have legal personality as a matter of English law.

63. A foreign state is, therefore, afforded legal personality and existence, for the purposes of English law, by English law, on recognition. Such a state is to be treated, as a result, as having all the capacities of a natural person in English law. A natural person in English law, of age and of sound mind, has unlimited capacity to contract (*Chitty on Contracts* (32nd ed., 2015) ¶9-001).

64. This position is consistent with the powers of a state in international law. There is no rule of international law limiting a state's powers to enter into financial transactions governed by English law or by reference to its own internal law.

65. As a matter of international law, a state's municipal law is not a restriction on its powers, but simply evidence of what it does: see the Permanent Court of International Justice in the *Certain German Interests in Polish Upper Silesia* cases, PCIJ, Series A, No.7, p. 19: "'From the standpoint of International Law ... municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures...".

66. A choice of law rule that would require reference to Ukrainian law when examining the capacity of the Ukrainian state would also be inappropriate because the court would have to determine that an act of Ukraine was unlawful by reference to its own law, and would also have to determine that Ukrainian legislation (Decree No. 904)

was invalid by reference to higher legal norms in Ukraine. The court has no jurisdiction to do this (*Buck v Attorney General* [1965] Ch 745 at 770).

67. If the internal law of a foreign state was the relevant law when determining that state's capacity to contract, the English courts would necessarily be required to determine the compliance of foreign states with their own internal law, which question is non-justiciable.

68. There is no analogy to be drawn between a foreign corporation and a foreign state for these purposes.

69. Even if Ukrainian law is relevant in assessing Ukraine's power to contract, the matters of Ukrainian law relied on by Ukraine are not, properly characterised under English private international law, restrictions on its capacity.

70. Ukraine does not contend that it has no power to enter into finance agreements of the type of these agreements. It could have entered into them had it followed its internal procedures correctly. The argument, rather, is that its constitutive organs did not exercise that power correctly.

71. As to the Minister of Finance's authority to enter into the agreements, questions of actual authority are governed by Ukrainian law, but questions of usual or ostensible authority are governed by English law, as the putative proper law of the agreements.

72. It is obvious that the Ukrainian Minister of Finance had either usual or ostensible authority to enter into the agreements:

(1) Any reasonable person would expect that the Minister of Finance, by reason of his appointment, would have authority to enter into the agreements, such that he had usual authority to do so:

a) It is normal to expect that the Minister of Finance will have authority to act on behalf of a Ministry of Finance at least in respect of financial transactions.

b) Ukraine's evidence assimilates the Ministry of Finance with the Ukrainian State as regards Eurobond, and other loan, transactions confirming that a reasonable person would normally expect the Minister of Finance to have such authority, and this was how the Trustee understood and approached the transaction.

c) The Minister of Finance has been the signatory for all 31 issuances by Ukraine in which the Trustee has acted. Each of the previous Trust Deeds since 2006 contained representations that the bonds were duly authorised and complied with Ukrainian law, and similar representations were made about the Notes in the Trust Deed. Ukraine has not put forward any example of a financing transaction that was not executed by the Minister of Finance on Ukraine's behalf. As a result, the Trustee was entitled to expect that the Minister of Finance was authorised to act on behalf of the Ukrainian State. This prior practice

establishes the Minister of Finance as being cloaked with usual authority to sign Eurobond documentation on behalf of Ukraine.

(2) Ukraine represented in the Prospectus provided to the Trustee prior to the issuance of the Bonds that they were "issued by Ukraine, represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine". The Prospectus also stated that (1) the issue of the Notes was authorised by the Cabinet of Ministers and (2) that it had been approved by the Central Bank of Ireland as complying with Directive 2003/71/EC, as amended (the "Prospectus Directive). The Prospectus Directive requires that it contain all information relevant to a potential investor, including any risk factors. There was no indication in the Prospectus that there was an issue in relation to authority. Indeed, it was a requirement of the ISE listing rules that the securities be validly authorised and freely transferrable. Ukraine has not sought to suggest that the representations in the Prospectus were not made or that they were in some way unauthorised, and itself contends that the Trustee should have read and relied on the Prospectus when entering into the transaction. It would be inconsistent to contend now that the representations contained in the Prospectus were not made on Ukraine's behalf or that Ukraine did not intend the Trustee to rely on them. The Minister therefore had ostensible authority to enter into the Agreements as a result of these representations.

(3) The President of Ukraine represented that the Minister of Finance had authority to enter into the transaction by the announcement of the intention of Russia to subscribe for up to US$15 billion of Ukrainian sovereign debt, of which the Notes were to be the first tranche. Ukraine's decision to borrow from the Russian Federation was "public knowledge", and any reasonable person would interpret the announcements as meaning that the Minister of Finance had authority to enter into the Agreements, when they were presented to the Trustee. Again, the Minister of Finance had ostensible authority as a result of these representations.

(4) The Minister of Finance represented that he was acting on behalf of Ukraine by executing the Trust Deed. A reasonable person would expect that the Minister of Finance would have authority to make representations as to whether the Notes had been issued in accordance with the requirements of Ukraine's internal law. The Minister of Finance therefore had ostensible authority to enter into the Agreements for this reason as well.

73. It is not open to Ukraine to contend that the Trustee should have known about the issues of Ukrainian law that it now advances as part of its capacity defence. It is impossible to see how the Trustee should have known about issues that it has taken Ukraine itself over two years to discover, and which are inconsistent with its publicly stated position subsequent to the issuance of the Notes. The Trustee's actual lack of knowledge of these issues is confirmed in its evidence.

74. Professor Butler states that no Ukrainian official would have power under Ukrainian law to authorise any person to exceed the limits of their authority, such that no ostensible authority could arise. However, questions of usual or ostensible authority are governed by English law. Ukraine does not assert that any of the representations on which the Trustee relies were not made on Ukraine's behalf (e.g. the issuance of the Prospectus) or that the President or Minister of Finance was not validly appointed.

75. Alternatively, even if Ukraine would have a real prospect of defeating the Trustee's arguments on usual or ostensible authority, Ukraine ratified the agreements. This question is also governed by English law as the putative proper law of the contract.

Ukraine's case on capacity

76. Ukraine's case is that it is a state constituted and inherently limited by the parameters defined by its Constitution and applicable laws. It is not a state of infinite capacity.

77. Its capacity defence has two main strands based on the evidence of Professor Butler which is not challenged.

(5) ***Breach of Budget Law limit*** Ukraine was unable to borrow more from external sources (such as Russia) than the limits that were specified in its then-current Budget Law. Under Ukraine's Constitution, only the Verkhovna Rada has constitutional power and authority over the budgetary process in the form of the adoption of the budget law for a particular year. The Budget Code establishes a framework of laws including the Constitution that define this process. The annual Budget Law includes a fixed limit on the level of external borrowings that Ukraine may make that year, and only the Verkhovna Rada can amend such limit, and Ukraine has no power to borrow beyond it. Its CMU accordingly could not authorise any borrowing beyond the limit, nor could it issue debt beyond the limits. The Eurobonds exceeded the limit in the 2013 Budget Law. The Verkhovna Rada sought to increase it, but the approval was insufficient, and came only after the purported approval of the proposed borrowing by the CMU and the purported entry into of the relevant contractual documents, and was not of retrospective effect. As a result Ukraine had no capacity to enter into the Eurobonds.

(6) ***Breach of Constitutional principles in passing the Decree*** Ukraine's Constitution imposes further, separate restrictions on the means by which Ukraine may agree to assume such obligations. Approval is a matter for the CMU which is restricted not only by the Budget Law limits: it only has power to approve such borrowings in accordance with certain constitutional and administrative law principles and rules of conduct, including its own Procedural Rules. It must act rationally (or "sensibly" as it is put in the Ukrainian rules) and after taking into account relevant matters (there is a rough parallel with English administrative law principles rendering decisions ultra vires and void). In the present case, Professor Butler says there was a "flagrant" breach of those requirements in at least two respects:

(a) Before approving the proposed borrowing, in breach of a mandatory requirement, the Ministers of the CMU attending the critical meeting on 18 December 2013 were not provided with an obligatory "Expert Opinion" regarding the draft Decree No.904. The Expert Opinion when prepared identified the very breach of the 2013 Budget Law limits referred to above, but the CMU never came to know of the fundamental legal defect affecting the borrowing they had purported to approve.

(b) Additionally, the CMU was not aware of and did not consider all of the material terms of the proposed borrowing, as came to be reflected in the

> contractual documents for the Eurobonds. The Eurobonds documents included provisions, never identified for the CMU, imposed by Russia, that were unusual and extraordinarily oppressive to Ukraine in their combined effect. Under Ukrainian law, the CMU was not permitted to delegate its power to the Minister for him to exercise in this way; it was the CMU's responsibility in law, and it abdicated its responsibility.

78. These are questions of capacity not authority and, applying Ukrainian law, Ukraine lacked capacity to enter into the relevant contractual documents and to issue the Eurobonds. The effect of such a lack of capacity is determined by English law, as the *lex contractus*, and the contract is void.

79. There are two questions to consider, in determining whether Ukraine's case is properly arguable:

(1) Is the capacity of states such as Ukraine unlimited by some English procedural rule, or is the capacity of states to be determined by reference to some other choice of law rule, such as *Dicey's* Rule 175?

(2) If Ukraine does not have infinite capacity by reason of some English procedural rule, is the substantive issue raised by Ukraine's Defence one of capacity or authority? See *Haugesund Kommune v Depfa ACS Bank* [2012] Q.B. 549.

80. Ukraine's case is that the issue is to be characterised as one of capacity. If it is right, it submits that the question is to be determined by Ukrainian law, as the law of the place where Ukraine is self-evidently constituted.

81. In support, Ukraine submits that in essence, the Trustee invites the court to determine summarily that Ukraine (and indeed, all states) has unlimited capacity for all purposes and to do so without paying any regard to the positive, substantive limitations on its power as expressly set out in its own constitution and laws.

82. The Trustee has elided erroneously two distinct concepts of (a) the existence or recognition of a state and (b) whether an existing, recognised state has the capacity to enter into a certain transaction. The former concerns the legal personality of a particular entity and therefore its standing to sue or be sued in the English courts or to claim other benefits such as state immunity, questions of the English court's control of its own procedures, and hence a question for the *lex fori*.

83. That is separate from the question of whether that entity has capacity to contract. The English court recognises that a foreign corporation has standing to sue or be sued in England by application of its (English) procedural rules, but its capacity is a matter for the law of the place of its incorporation.

84. There is no reason why a state, constituted by its constitution and applicable laws, should be equated with a natural person rather than a corporation for the purposes of its capacity to contract, and this does not follow from recognition. It is obvious that a state is not a natural person and that its closest analogue is a public authority or a corporation. No natural person has his/her powers defined by a constitution.

85. Even if English law did view a state as a "natural person", this would not necessarily mean that Ukrainian law is irrelevant or that it has unlimited capacity. There would still be a conflicts of law issue to resolve as to which law is to be applied to determine Ukraine's capacity, i.e. whether it is the law which governs the contract or the law of the place of Ukraine's domicile. As a matter of logic and principle, questions concerning a state's capacity are much more closely connected with its own constitution and municipal laws which expressly set out the scope and limits on that capacity than with the private law of a foreign country which on the Trustee's case would apparently view the state as an ordinary man on the street.

86. Whether a state can rely on restrictions in its municipal law with respect to alleged breaches of its international obligations is irrelevant to (a) whether a state has capacity to enter into a private law contract and (b) the content of the English conflicts of law rules.

87. The Trustee's submissions as to non-justiciability are wrong. There are numerous examples where issues of the interpretation of foreign legislation and whether foreign entities act beyond their powers are considered and decided, inevitably involving some consideration of the extent of their powers as contained in that foreign law. This is a matter of evidence, and part of the normal course of making findings of fact as to the content of a foreign law. "Higher norms" of foreign law are routinely considered as part of arguments as to the extent of a foreign entity's capacity: e.g. *Haugesund*, ibid.

88. No authority has considered which choice of law rule applies in relation to arguments as to the capacity of a foreign state to enter into a contract: the point is an important, but novel one. The closest analogue is the characterisation of issues that have arisen as to defences regarding the lack of power to enter into certain kinds of contracts that commonly arises in respect of foreign local government agencies. Questions of their capacity are determined in accordance with the principles summarised in *Dicey* at Rule 175 dealing with the capacity of a corporation.

89. Whether a foreign state can "exist" or be "recognised" in England independently of the municipal law of that foreign State is, at most, relevant only to whether that foreign state has legal personality and can sue and be sued in England. This says nothing about the extent of its substantive powers or the private international law rules concerning that state's capacity to enter into a contract.

90. Rule 175 is a flexible, pragmatic one that has been applied by analogy to various foreign governmental entities. It or a materially similar rule should apply to the capacity of a state, which like foreign governmental entities, does not have unlimited capacity:

    (1) The justification for looking to the constitutional documents of a corporation is that "the corporation exists as such only by virtue of its constitution" and it is those documents which set the scope and limits of its powers. The same is true of Ukraine, as Professor Butler explains.

    (2) An assumption that Ukraine has unlimited capacity would mean that Ukraine is taken to have powers that it does not have, a matter described by Professor Butler as anathema to Ukrainian public law given Ukraine's particular legal heritage. It

would place Ukraine in a worse position than a Ukrainian municipality or housing association.

(3) This approach also accords with the parties' expectations. The parties must have been taken to have understood that an issue of capacity under Ukrainian law might arise under English conflicts of law rules. That is the only explanation for Ukraine as Issuer being required to provide a legal opinion under Ukrainian law specifically addressing the question of capacity, in the context of contractual documentation that provides for exclusive jurisdiction of the English Courts and English law as the law of the contract.

91. Applying *Haugesund*, there was the absence of a "legal ability" or a "lack of substantive power" on Ukraine's part to enter into the Trust Deed and Agency Agreement and, consequently, to issue the Eurobonds. Ukraine had no such power to enter into a loan however structured which exceeded specified limits in its Budget Law. Compliance by the CMU with an "internal procedure" could not have changed the amount of the loan to bring it within the hard limit. Likewise, the other elements of Ukraine's defence regarding the CMU's powers are questions of capacity, and not "mere" procedural defects, but "substantive" ones.

92. The consequence of this failure is that the CMU did not make a valid decision. Having failed to do so, Ukraine had no power to enter into the contractual documents and to issue these Eurobonds. The relevant question is as to the "legal ability" of the relevant body to act, as defined in its "constitution" given a broad "internationalist" interpretation, Questions of the legal ability of a body to do something, for whatever reason, are issues of capacity (see *Haugesund*).

93. There is obvious sense in applying Ukrainian law to the question of Ukraine's powers to enter into the Trust Deed and Agency Agreement and to issue the Eurobonds; it would be absurd to treat this as a question relating only to the Minister's authority. The rules relied on are not matters relating to the competency of a Minister, but the competency of Ukraine.

94. No legal basis is given for the suggestion that it would be commercially inconvenient for these matters to be characterised as questions of capacity because the matters pleaded could not be known to the Trustee. On this basis, there would be no room for any issue to be one of capacity governed by Ukrainian law; all issues would be questions of authority, which could be overridden by ostensible authority.

95. Nor does it reflect the parties' own behaviour. The Trustee received two legal opinions as to Ukraine's capacity which were heavily qualified and, in any event, according to Professor Butler, wrong. The fact that the parties instructed lawyers to consider this point highlights their understanding that it was for the parties to investigate these matters.

96. It is wrong to suggest that the information that gives rise to the capacity defence was unknowable:

(1) The annual Budget Law was public. Quarterly borrowing data was published by the State Treasury Service of Ukraine on its website, and more detailed data was also available.

(2) Decree No. 904 was published, and the breach of the non-delegation principle was therefore a matter that lawyers would have been able to identify.

(3) Although the information available to the CMU would not have been public, if the relevant lawyers chose not to investigate the underlying position including a carve-out in their opinion making an assumption regarding the compliance with the applicable procedures, a party relying on that assumption must do so at their own risk.

97. The true position on the evidence is that these issues were not considered and the preparation of the documentation was unusually hurried. That may also reflect the more limited aims of such generic and standardised opinions.

98. Even if Ukraine's defences are properly characterised as matters of authority rather than capacity, the Minister signing the contractual documents did not have authority, actual, ostensible or otherwise, to do so.

99. It is common ground that questions of an agent's actual authority are determined by the law of the place of incorporation (i.e. Ukraine). The Trustee has not suggested that the Minister had actual authority to issue the Eurobonds.

100. Whether the Minister had ostensible authority is determined by the putative applicable law of the contract (i.e. English law). Applying English law, the question of ostensible authority is not a matter that can be determined summarily or at all in favour of the Trustee because:

(1) The question of what (if any) representations were made, and understood, and relied upon are factual issues that require to be determined at a trial, after disclosure, witness evidence and cross-examination. It is wrong to assert that Ukraine does not dispute any of the representations on which the Trustee relies: the true scope of the alleged representations and how they were understood are disputed. The resolution of those matters will require the individuals representing the Trustee to give disclosure and be cross-examined as to their understanding at the time.

(2) As a matter of English law, no agent of a legal entity has authority to act outside the capacity of the entity. In order to confer ostensible authority on the Minister, it would be necessary to identify a representation by someone other than the Minister acting on behalf of Ukraine to the effect that the Minister had relevant authority, and for this representation to have been made by someone with authority to represent that the Minister would have authority to make a contract that was outside of Ukraine's capacity. There is no such person, and the Trustee has not attempted to identify one, or how that person might have authority to make such a representation.

(3) On the present facts there is a real prospect of successfully arguing that there was no representation as to the Minister's authority by anyone other than the Minister himself, or which could be traced back to a person with actual authority to make such a representation (see *Bowstead & Reynolds on Agency* at § 8-041, *Donegal International Ltd v Zambia* [2007] 1 Lloyd's Rep 397 at [450]-[451]).

(4) The Trustee's case as to matters constituting a representation of the Minister's ostensible authority is unsustainable.

a) The assertion that "any reasonable person would expect that the Minister of Finance, by reason of his appointment, would have authority to enter into the agreements, such that he had usual authority to do so" is made without evidence and is a matter to be tested at trial. Insofar as the Minister of Finance carries usual authority by virtue of his appointment to act on behalf of the Ministry of Finance, this is subject to Ukraine's (and the Ministry of Finance's) limitations set out in the Constitution and applicable Ukrainian law. As in *Donegal*, the Trustee should be taken to have been aware of those limitations. An organ of the Ukrainian State is not bestowed with ostensible authority to act on behalf of the State for all purposes: it can only act within the scope of its capacity as set out in the Constitution and Ukrainian laws. Although the Trustee refers to previous Eurobond issuances in which it has performed the role of trustee, it has not provided the court with the full circumstances in which each of these issuances was made, nor would it be practicable or appropriate to do so on a summary judgment application. The Trustee does not evidence a relevant representation that might be spelled out of these earlier issuances that the Minister had some wider authority than that set out in the Instruction. If the Minister complied with those requirements in the other cases, that would not be evidence of a representation that the Minister had some wider authority, in particular to issue the Eurobonds in circumstances contrary to the Constitution and applicable Ukrainian law. Alternatively, even if Ukraine had previously issued Eurobonds beyond the Minister's authority, it would be necessary to establish that this in itself was evidence of something other than a mistake by Ukraine, and that it indicated that Ukraine was representing, by a consistent pattern of knowing previous behaviour, that the Minister had authority in any event. There is no evidence to support such a finding. To the contrary, the severe consequences that may befall Ukrainian public servants found to have acted incorrectly in the performance of their duties militates strongly against any suggestion that such prior instances (if any) would have been other than a mistake.

b) As with the Trust Deed, Agency Agreement and Subscription Agreement in relation to which the Minister was the sole signatory, for the purposes of issuing the Prospectus, the Prospectus stated that Ukraine was represented by the Minister of Finance, and therefore it is clear that any representations were made by the Minister as to his own authority.

c) Whilst the Presidents of Ukraine and Russia had publically announced a package of economic support for Ukraine, this did not cloak the Minister of Finance with ostensible authority to enter into the agreements in contravention of the constitution. Even if such a representation was made, the President of Ukraine did not have (nor is there any other person who could have had) actual or ostensible

authority to make any representation that the Minister had authority to act outside of Ukraine's capacity.

(5) There is no evidence of reliance. The Trustee's evidence is careful not to say that the Trustee understood any such representations to have been made. Mr Mason-Jebb does not say in terms that he himself read the Trust Deed and suggests that the Trustee would not review the Prospectus in any detail. Nor does he say that he relied upon the alleged representations, or the legal opinions. He does not identify the "colleagues involved in the issuance process" with whom he has "consulted" in order to give evidence as to the Trustee's alleged reliance. He merely says that "[h]ad the Trustee noticed" anything that suggested Ukraine did not have capacity or authority, it would not have proceeded. However, ostensible authority requires positive reliance on the relevant representation.

(6) Nor does he comment on the impact of the carve-outs from the legal opinions. Although those opinions stated that Ukraine had capacity, and that the Minister had authority, they were based on various assumptions that, in practice, denuded the opinions of any real substance. Mr Mason-Jebb does not state whether anyone at the Trustee read them, or understood them to be unqualified representations as to Ukraine's capacity and authority. If the Trustee wishes to advance a position that it did rely on the alleged representations, Ukraine is entitled to have that case pleaded, the persons alleged to have relied on the representations identified, to see appropriate disclosure as to the alleged reliance and cross-examine the relevant person(s) responsible for taking the decision to enter into the contractual documentation to test whether they did, in fact, rely upon any such alleged representations.

101. As regards the alleged ratification, the Trustee cannot establish the necessary requirements under English law.

The court's discussion of the capacity issue

(i) <u>The scope of the permissible factual inquiry</u>

102. At the beginning of this judgment, the limited scope of the permissible factual inquiry on a summary judgment application is explained. The court therefore approaches the issue on the basis that the opinion of Professor Butler as set out in the evidence and summarised above is correct—namely that as a matter of Ukrainian law, Ukraine had no capacity to enter into the Eurobonds, and the Minister of Finance had no actual authority to sign the various agreements and issue the Eurobonds, for the reasons Professor Butler gives.

(ii) <u>The transaction at issue</u>

103. As explained above, the transaction was the issuance of notes in the form of Eurobonds. The transaction was structured in the same way as previous issuances by Ukraine, the Notes being constituted by a Trust Deed between the Trustee and the Issuer (Ukraine), and the documentation including an Agency Agreement between Ukraine, the Trustee and Citibank, N.A., London Branch, pursuant to which Citibank is Principal Paying Agent and Registrar in respect of the Notes.

104. The Notes were listed on the Irish Stock Exchange, and were tradable instruments. The ISE Main Securities Market Listing Rules and Admission to Trading Rules stipulate that, "To be listed, securities must be freely transferable". In fact, there has only been a single Noteholder, namely Russia, none of the Notes having been transferred.

105. It is not in dispute that the subscription money for the Notes was paid by Russia, and that Ukraine received payment in the amount of US$3 billion into the foreign currency accounts of the Treasury on the date the transaction came into effect, that is, 24 December 2013.

106. Although Ukraine submits that the transaction was in substance a bilateral loan between Russia and Ukraine, it does not contend that the transaction should be recharacterised legally as a bilateral loan.

107. Nor does it contend that the moratorium on payment enacted under Ukrainian law (see above) is a defence to a loan transaction governed by English law (see the well-established line of authority, e.g. *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509).

(iii) A State's capacity to borrow

108. Ukraine's defence raises squarely the question of its capacity to borrow. The term "capacity" comes with a particular English law consequence attached. Capacity is different from authority, as both parties assert—if an act is unauthorised, a number of legal doctrines come into play to mitigate the rigour of the outcome, such as usual or ostensible authority, and subsequent ratification. These doctrines are not available in the case of lack of capacity, which in principle invalidates a contract regardless of the knowledge or lack of it of the counterparty.

109. The ability to borrow to fund its requirements is a feature of the modern state, and national and international markets have developed commensurately to meet these requirements. Ukraine's submission (among others) is that external borrowing above the limits in its Budget Law has the legal consequence that it lacked capacity to enter into the Eurobond transaction, which consequently is void and unenforceable against it. If this submission is upheld, the Trustee argues, a counterparty which does not (and perhaps cannot) know that a breach of internal law has occurred, may find that the borrowing is unenforceable: representations as to capacity, as Ukraine itself asserts, cannot remedy a lack of capacity. Hence, the point is of potential significance for the markets.

110. Neither party was able to point to any case law in which the question of the capacity of a state to borrow, or indeed to enter into other forms of contract, has been raised before. The Trustee says that this is because a state has, by definition, capacity to borrow. Limits or requirements which are imposed by its laws or constitution on entering into such contracts go to the authority of individual actors to bind the state but do not go to the state's capacity. Once an entity is recognised as a state, the Trustee submits, as a matter of English law and international law its capacity to borrow necessarily follows.

111. Ukraine says that a state is constituted and inherently limited by the parameters of its constitution and applicable laws. It is not to be equated with a natural person and its closest analogue is a public authority or a corporation. The court should apply the same characterisation as has been applied to the power of foreign local government agencies to enter into certain kinds of contracts (*Haugesund Kommune v Depfa ACS Bank* [2012] Q.B. 549). The question of Ukraine's capacity is necessarily more closely connected with its constitution and municipal laws which set out the scope and limits on that capacity than with English law as the private law of a foreign country. Professor Butler's analysis shows that Ukraine had no substantive power or legal ability to enter the arrangements. It would be absurd to treat the issue as relating only to the Minister of Finance's authority.

112. The court's view on these issues is as follows.

113. As Ukraine says, there is a distinction between the recognition of a state for the purposes of suing and being sued[2] in the English courts, and the capacity of a state to enter into contracts. But the connection in this context arises because legal personality as a matter of English law flows from such recognition, and capacity flows from legal personality.

114. Recognition is not an issue in this case—Ukraine is a sovereign state. The issue is as to the nature of its legal personality—is it analogous to that of a natural person, as the Trustee submits, or to that of a corporation, as Ukraine submits?

115. Ukraine submits that the English law rule which deals with the capacity of a corporation is flexible and pragmatic. The rule is authoritatively stated in Dicey, Morris & Collins, *The Conflict of Laws*, (15th ed., 2016), p. 1538, Rule 175:

> "(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.
>
> (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

116. Ukraine further relies on the *Haugesund* case in which a majority of the Court of Appeal held that the terms "capacity" and "company's constitution" in this rule are to be given a broad, internationalist meaning, and must not be confined to the narrow definition accorded by English domestic law. A lack of substantive power to enter into a contract of a particular type was regarded as a lack of capacity despite the fact that the lack of the relevant power was imposed by national legislation rather than the internal instruments of the company (see *Integral Petroleum SA v SCU-Finanz AG* [2015] Bus. L.R. 640 at [28]). The consequence in the *Haugesund* case was that swaps contracts entered into by local authorities were void.

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[2] As regards its immunity from the jurisdiction of the UK courts in respect of contracts, s. 3 of the State Immunity Act 1978 provides so far as relevant that a State "is not immune as respects proceedings relating to … a commercial transaction entered into by the State", which includes "… any loan or other transaction for the provision of finance …".

117. Ukraine submits that the same applies in this case. It emphasises that the matters identified by Professor Butler are fundamental obstacles to the CMU, or anybody else representing Ukraine, being able to approve or enter into the Eurobonds. The matters give rise to a substantive lack of power, not a mere procedural defect.

118. The first difficulty with this submission is that the *Haugesund* case was concerned with the capacity of Norwegian local authorities—it was not concerned with the capacity of the state itself, and so is not directly applicable. The reasoning that the lack of legal ability of a body to do something amounts to lack of capacity also has to be seen in that light.

119. Further, whilst Rule 175 is apt to apply to local authorities as well as to companies, it is not in terms apt to apply to a state. Thus Ukraine as a state cannot be said to have a "place of incorporation", nor (as was argued) can reference be made to the law of the "place of Ukraine's domicile", since it has no domicile.

120. This is not a linguistic objection. As *Dicey* says in the commentary to the rule at §13-021, a corporation's "… capacity may be limited by its constitution. A corporation, for example, which by its constitution (as interpreted by the law of its place of incorporation) cannot enter into a transaction for the acquisition of land, has no power to effect a purchase of land in any country; *for the corporation exists by virtue of its constitution* …" (italics added).

121. Of course, a corporation owes its existence to the law under which it is incorporated. Unlike a state, a corporation is not a sovereign body. Unlike a corporation, a state is not created by its internal law—it exists independently of that law. A state does not "exist by virtue of its constitution". There is little equivalence in terms of legal status between the constitution of a corporation, and the constitution of a state, not least because a state may change its constitution unilaterally.

122. The Trustee's analogy with a natural person is (for obvious reasons) also inexact. Further, as Ukraine points out, the question as to what law determines a natural person's capacity to contract is debatable, and not covered by authority (*Dicey* at § 32-170).

123. In fact, neither analogy seems to provide a determinative answer. In different contexts, the courts have treated the personality of a sovereign state as in a distinct category: "…English courts can only identify and allow actions by individuals, sovereign states and corporate bodies" (*Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 at 165).

124. But, as Ukraine says, this leaves open the question of which law determines the state's capacity. The Trustee submits that there is no English conflict of law rule that requires the application of internal Ukrainian law to determine the capacity of the Ukrainian state to contract. Ukraine responds that the Trustee has not explained why English law would apply instead of Ukrainian law.

125. In this regard, the Trustee relies on a fundamental reading of international law, citing "the *Lotus* principle" derived from the much-discussed dictum in *The Case of the S.S. "Lotus" (France v Turkey)*, PCIJ, Series A, No. 10 (at pp. 18-19) to the effect that a state may do that which is not specifically prohibited in international law.

126. In *R v Gul (Mohammed)* [2014] AC 1260 at [57], the Supreme Court endorsed this principle, referring to the Permanent Court of International Justice's statement at p 4:

> "… that "[restrictions] on the independence of states cannot … be presumed" given that the "rules of law binding upon states … emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between [states] or with a view to the achievement of common aims." Whilst various assumptions on which that decision was based have been modified or superseded by subsequent developments in international law, "the *Lotus* principle [is] that states have the right to do whatever is not prohibited by international law", as is stated in the *Max Planck Encyclopaedia of Public International Law*, in its discussion of the case."

127. The Trustee argues that there is no rule of international law limiting a state's powers to enter into financial transactions governed by English law. Ukraine responds that the *Lotus* principle is confined to relationships between states at the international level, and is irrelevant to whether a state has capacity to enter into a private law contract and the content of the applicable English conflicts of law rules.

128. The court has to choose between these very different approaches. It accepts that there is some force in Ukraine's response, because the question as to the circumstances in which a state loan contract may be invalidated by alleged lack of capacity on the part of the state is far removed from the *R v Gul (Mohammed)* case (which concerned the definition of terrorism) or the *Lotus* case itself.

129. However, as a matter of principle, the court considers that the Trustee's submissions are correct. Whether considering the nature of a state on the international plane, or the nature of a state for the purposes of entering into a loan contract governed by English law, the position is the same. Once a state is recognised as such, as a matter of international law it has unlimited capacity to borrow, and such capacity is recognised under English law. A state's capacity to borrow "rests in its sovereignty" (to use the phrase in the *Lotus* at p. 19). The state's internal laws as to borrowing, dispositive though they may be in other contexts, cannot operate by way of a limit on the state's capacity, so as to enable the state, as is contended for in the present case, to treat the obligation to repay as void by reason of breach of such laws.

130. The reason for the absence of case law to this effect may simply be that the principle has never been questioned.

> "Even though the Lotus principle, which entails the presumption of freedom of action of sovereign States, has been opposed in some doctrinal quarters it proved to function adequately as a paradigm in international law for the interaction between legal regulation and the sovereign freedom of action. In effect, the Lotus principle means that when with the help of all the sources of international law (treaties, custom, and general principles of law) no clear rule imposing a limitation of

> a sovereign State's freedom of action can be found, no such limitation may be presumed. This applies, of course, to financial operations of States. As a matter of fact, except in the context of the European monetary integration, no one ever questioned, in any serious manner, the competence of States to engage in financial operations, whether as debtors, as creditors, or as providers of fiduciary services."

See Rustel Silvestre K. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), p. 203

131. It is said this puts Ukraine in a worse position than a Ukrainian municipality, but the position is different, rather than worse or better. Doubt is not cast on the analysis by the fact that Ukraine as Issuer was required to provide a legal opinion under Ukrainian law specifically addressing the question of capacity.

132. It is important to emphasise that this result does not imply that a failure to follow domestic rules as to borrowing by a state such as those identified in the case of Ukraine is legally irrelevant as a matter of English law. Such failure may of course be relevant. The question is whether such failure should be characterised as going to capacity or authority.

133. Applying the reasoning in *Haugesund* at [47], it is not contended by Ukraine that it had no power to enter into a Eurobond transaction, having entered into a number of such transactions in the past. Its case is that it had no power to enter into this Eurobond transaction because it was outside the "hard limits" set out in the Budget Law. The law could have been amended by Parliament, but not retrospectively.

134. However, the court accepts the Trustee's submission that this is not a case of lack of power, but of the power not being exercised as the law required. This is properly characterised as going to a lack of authority on the part of the actors concerned, and in particular the Minister of Finance, which is a different inquiry, with potentially different consequences (c.f. *Central Tenders Board v White* [2015] UKPC 39 at [19], and as to characterisation generally, *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 WLR 387).

(iv) Ostensible or usual authority: the parties' cases on the facts

135. Ukraine submits that if its defences are properly characterised as matters of authority (rather than capacity), the Minister of Finance signing the contractual documents did not have authority, actual, ostensible, usual or otherwise, to do so. It also contends that this issue is not suitable for summary determination.

136. It is common ground that questions of actual authority are governed by Ukrainian law, and Professor Butler's evidence that the Minister of Finance lacked actual authority is unchallenged.

137. The factual basis for his opinion is set out above and relates to breach of the Budget Law limit and breach of constitutional principles in passing Decree No 904 including the mandatory requirement as to the provision of an "Expert Opinion" regarding the

draft decree to the Ministers of the CMU attending the meeting on 18 December 2013.

138. The Trustee's case is that the Ukrainian Minister of Finance had either usual or ostensible authority to enter into the agreements.

139. The Trustee relies on the terms of Decree 904 of the CMU which is entitled "On Carrying out External State Borrowings in 2013" and which records or purports to record a resolution by the CMU to enter into the borrowings and for the Ministry of Finance to carry out the issue of the Notes.

140. As described above, the Prospectus for the issuance of the Notes was published by Ukraine on 20 December 2013. A number of statements in the Prospectus are relied on by the Trustee.

i) On the cover page beneath Ukraine's coat of arms is stated:

> "The U.S $3,000,000,000 5.00 per cent. Notes due 2015 ("the **Notes**") to be issued by Ukraine, represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine (the "**Issuer**" or "**Ukraine**"), will mature on 20 December 2015 and will be redeemed at par at that date."

ii) At page 201 it is stated under "Authorisation":

> "The issue of the Notes is duly authorised by the Instruction of the Cabinet of Ministers of Ukraine "On Mandating the Execution of External State Borrowings in 2013" dated 16 January 2013, No. 21-p and the Resolution of the Cabinet of Ministers of Ukraine "On Carrying out External State Borrowings in 2013" dated 18 December 2013, No. 904."

141. The Trustee also relies on the fact that by December 2013 it had acted for Ukraine in 31 previous issuances by Ukraine of Eurobonds, and these were all signed by the Minister of Finance.

142. In this regard, the Trustee's policy is to keep all documents for 12 years after redemption, but in practice some documents are kept for longer. Its evidence is that the previous trust deeds show that:

i) 21 trust deeds for the period 4 March 2004 – 17 April 2013 are signed by the Minister of Finance.

ii) Of the 10 trust deeds dating from 2000 to 2003, there are a mixture of documents:

a) Six were executed by the Minister of Finance (or acting Minister of Finance) although in one instance there is a conformed copy;

b) Three contain a signature block that refers to the "Ministry of Finance", and it appears that they were executed by the Minister of Finance.

c) For one issuance, the signature page has not been located, but the Euro Paying Agency Agreement for the issuance is signed by the Minister of Finance, and it is likely that the trust deed itself was executed by the Minister of Finance.

143. A further relevant factual consideration is as to whether the Trustee could have known of the matters that gave rise to the lack of capacity/authority. This is in dispute between the parties.

144. The Trustee's case is that it had no knowledge of these matters, and it is impossible to see how it should have known about them. Further, Ukraine's position is inconsistent with its payment of interest under the Notes, and its publicly stated reference to the Notes as outstanding debt obligations of Ukraine, including in a letter of intent addressed to the IMF on 1 September 2016. The Trustee produced an Annex with details (which it also relies on in support of its case as to ratification).

145. Ukraine relies on a number of matters to refute the Trustee's contentions:

i) The annual Budget Law was public. Quarterly borrowing data was published by the State Treasury Service of Ukraine on its website, and more detailed data was also available. In his evidence, Mr Pasichnyk (Head of the Division for Budget and Tax Policy in the CMU Secretariat) describes the exercise he carried out by which he became aware that the sum of borrowings foreseen by Decree 904 would exceed the limit on external borrowings set out in Annex No 2 of the 2013 Budget Law. He raised this in the Expert Opinion dated 19 December 2013 (that is, the day after the meeting of the CMU on 18 December 2013, which is one of the failures of process upon which Ukraine relies).

ii) There are references to external borrowing and to the Budget Law in the Prospectus.

iii) As regards the breach of constitutional principles in passing the Decree, Ukraine accepts that the information available to the CMU would not have been public, but says that if the relevant lawyers chose not to investigate the underlying position, and included a carve-out in their opinion by making an assumption regarding the compliance with the applicable procedures, a party relying on that assumption did so at its own risk.

146. The Trustee responds that if there were concerns about the budget limits, these should have been escalated beyond officials like Mr Pasichnyk. The figures in the Prospectus for 2013 are as at 30 September 2013 because it was published before the end of the calendar year, and there is no suggestion that the US$3 billion would breach the borrowing limits. The legal opinions are irrelevant to the question of authority and the Trustee does not rely on them.

(v) Ostensible or usual authority: the court's conclusions

147. Ukraine submits that the question of ostensible or usual authority is not a matter that can be determined summarily in favour of the Trustee for four reasons.

148. First, the question of what (if any) representations were made, and understood, and relied upon are themselves factual issues that require to be determined at a trial, after disclosure, witness evidence and cross-examination.

149. In this regard, the court considers that the following points do not raise conflicts of fact which require to be resolved by the trial process:

i) There is no issue as to the factual position as to signatures set out above. The Minister of Finance was the signatory in respect of all 31 Eurobond issues on which the Trustee acted over some thirteen years.

ii) No example has been put forward of a financing transaction that was not executed by the Minister of Finance on Ukraine's behalf.

iii) The Prospectus published by Ukraine states that Ukraine was "represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine".

iv) Given the exercise that Mr Pasichnyk of the CMU Secretariat carried out by which he became aware that the borrowings would exceed the budget limit, the suggestion that the Trustee could have known of the breach is very weak. Such knowledge could not have come from the Prospectus, which only gave the figures up to the end of September 2013.

v) It is not contended that the Trustee could have known of the breaches of constitutional principles in passing Decree 904, and it obviously could not.

vi) The Opinion Letter of Ukrainian law counsel to the Issuer dated 24 December 2013 is stated to be given without independent investigation or verification, and on the basis of assumptions and qualifications. However, the Trustee does not rely on the opinion expressed as to the Issuer's legal capacity and authority, and it is irrelevant on the authority issue.

vii) Whether or not it amounts to ratification in law (as the Trustee alleges), it is not in dispute that Ukraine did make continuing interest payments after 2013. Mr Danyliuk's evidence is that "Ukraine's appreciation of its true legal position has been a gradually evolving process". Lack of capacity/authority was not raised until these proceedings in 2016.

150. Second, as a matter of English law, Ukraine says that no agent of a legal entity has authority to act outside the capacity of the entity. This may be correct, but the court has not accepted Ukraine's case as to lack of capacity.

151. Ukraine's third and fourth reasons are primarily points of law, and can be taken together.

152. Ukraine submits that there is a real prospect of successfully arguing that:

i) There was no representation as to the Minister's authority by anyone other than the Minister himself, or which could be traced back to a person with actual authority to make such a representation. It is extremely difficult to

establish ostensible or usual authority in relation to a public servant, even a Minister of Finance (*Bowstead & Reynolds on Agency* at § 8-041).

a) As to the 31 previous issuances:

i) The Trustee has elected not to provide the court with the full circumstances in which each of those issuances was made and it would not be appropriate to do so in a summary judgment application. It would be wrong to assume that a representation as to authority can be spelled out of previous conduct. Everything will depend on the facts and context of each issue, for example, whether it complied with applicable budget limits.

ii) The Trustee does not evidence a relevant representation that might be spelled out of the earlier issuances that the Minister of Finance had some wider authority as regards external state borrowings. If the Minister complied with the budget requirements in the other 31 issuances, that would not be evidence of a representation that he had some wider authority. If Ukraine previously issued Eurobonds beyond the Minister's authority it would be necessary to establish that this was evidence of something other than a mistake.

ii) There is no evidence of reliance on a representation.

153. The court's conclusions in this regard are as follows.

154. It is common ground that questions of ostensible authority or usual authority are determined by the putative applicable law of the contract, i.e. English law: Dicey Rule 244, § 33R-432.

155. The test in English law is set out in *Bowstead & Reynolds on Agency* (20th ed.), Art 72, § 8-010 as follows:

> "Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

156. There is a distinction between usual and ostensible authority. The term "usual authority" is associated with the authority usually held by a person in the position of the person acting, whereas ostensible authority arises where there has been some more direct representation as to the authority of the person acting.

157. The two types of case are explained as follows in *Bowstead & Reynolds on Agency* at § 8-015:

> "If the doctrine is based on the idea of representation, it may be suggested that the cases can be divided into two types. First, … cases where there is something that can be said to be something like a genuine representation (orally, in writing, by course of dealing or by allowing the agent to act in certain ways, e.g. entrusting him with the conduct of particular negotiations or allowing him to run a business that appears to be the principal's business) by the principal of the agent's authority, on which the third party relies: such cases could be called cases of "genuine apparent authority" and more easily (but not always perfectly) based on estoppel. Secondly, cases where the representation is only of a very general nature, and arises only from the principal's putting the agent in a specific position carrying with it a usual authority, e.g. making him a partner or appointing him managing director, or using the services of a professional agent, viz. someone whose occupation normally gives him a usual authority to do things of a certain type, e.g. a solicitor."

158. The starting point in the present case is that the transaction documents record that Ukraine was represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine, and that the issue of the Notes was duly authorised by the Resolution of the Cabinet of Ministers of Ukraine "On Carrying out External State Borrowings in 2013" dated 18 December 2013, No. 904.

159. Professor Butler has explained why in his opinion there was no actual authority under Ukrainian law in this regard (see above) and that is conclusive of the question on the present application. The question is as to usual or ostensible authority, which is a matter of English law.

160. Beginning with the Trustee's case as to usual authority, the court does not agree with the Trustee so far as it contends that a Finance Minister always has usual authority as regards state borrowing by reason of his or her office. This depends on the role of the Finance minister in the particular state and the particular borrowing.

161. However, there is, in the court's view, a clear answer so far as this borrowing by Ukraine was concerned. The Minister of Finance plainly had usual authority to enter into the transaction on behalf of Ukraine. The fact that the Minister of Finance was the signatory of all 31 debt issuances by Ukraine in which the Trustee had acted between 2000 and 2013 establishes such authority beyond doubt. As regards the Trustee, the Minister of Finance of Ukraine was a person whose position gave him usual authority to sign such issuances within the case law (*Bowstead & Reynolds on Agency* at §8-015).

162. The same principle was applied in *Marubeni Hong Kong and South China Ltd v Mongolia* [2002] 2 All ER (Comm) 873 in which it was held at [46] that there was a "good arguable case" that the Government of Mongolia, by putting the Minister of Finance in his position, had afforded him usual authority to bind the state to a guarantee. (The finding of a "good arguable case" was all that was required at the jurisdiction stage. At trial, it was held that there was actual authority: [2004] 2 Lloyd's Rep 198.)

163. Contrary to Ukraine's submission, the circumstances are sufficiently established by such prior practice. There is no justification for investigating at trial the position as regards compliance with the then applicable budget law, or whether the CMU procedures were properly complied with, in respect of the earlier issuances.

164. This is not a case in which the Trustee was on notice of the lack of authority (c.f *Donegal International Ltd v Zambia* [2007] 1 Lloyd's Rep 397 at [451]). As already indicated, the suggestion that the Trustee could have known of the breach of the Budget Law is very weak, and it is not contended that the Trustee could have known of the breaches of constitutional principles in passing Decree 904. The Trustee's evidence that it would not have entered into the transaction had it known of the breaches identified by Professor Butler, and that it relied on the statements as to authority in the contractual documentation, are in the court's view inferences which should properly be drawn as a matter of commercial sense.

165. Turning to ostensible authority, the particular matters relied on by the Trustee are the statement in the Prospectus that Ukraine was "represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine", and Resolution No 904 of the CMU dated 18 December 2013 which records or purports to record a resolution by the CMU to enter into the borrowings and for the Ministry of Finance to carry out the issue of the Notes.

166. Ukraine's contention (based on the evidence of Professor Butler) is that these are ineffective as representations because no person in Ukraine had authority to authorise the Minister of Finance to do something beyond his actual authority, so that any representations were made by the Minister on his own authority which is not enough.

167. The Trustee's response is persuasive in this regard. Although, as Ukraine says, for the reasons given by Professor Butler, the Cabinet of Ministers of Ukraine had no actual authority to hold out the Minister of Finance as Ukraine's representative in the transaction, it did have usual authority to do so as the state's cabinet. The same approach was taken as regards the Minister of Justice of Mongolia in the *Marubeni* case: see [2004] 2 Lloyd's Rep 198 at [125] – [126]).

168. The Trustee gives sufficient evidence of reliance to the effect that it would not have proceeded with the transaction had it known of the lack of authority. This is a case in which detriment can be inferred from the established facts (*Kelly v Fraser* [2013] 1 AC 450 at [18]).

169. If necessary, therefore, the Trustee's case of ostensible authority is also upheld, though the finding as to usual authority is sufficient.

(vi) Ratification

170. The Trustee's alternative case is that Ukraine ratified the agreements. This question is also governed by English law as the putative proper law of the contract. The Trustee relies primarily on the making of interest payments, the terms of the Moratorium Law, and references to the Notes in official, public documents as outstanding debt obligations of Ukraine.

171. Ukraine does not dispute as a matter of fact the matters relied on by the Trustee. However, it contends that as a result of Russian aggression in Crimea and eastern Ukraine, Ukrainian officials were not able to give free or adequate consideration to the Eurobonds. Further, from 17 December 2015 onwards, Ukraine had already reserved all its rights. For these and other reasons, Ukraine contends that the legal requirements are not met and that the Trustee cannot establish ratification under English law. It further submits that this issue is unsuitable for summary determination

172. The court agrees with this submission. In order to assess the Trustee's case it would be necessary to conduct a "mini-trial" examining the various acts and statements relied upon by the Trustee. That would be a major exercise and is neither permissible nor possible on a summary judgment application.

173. Further, Ukraine's case is that it was unable freely to consider the legal position as regards the bonds because of the military steps being taken by Russia in Crimea and eastern Ukraine. There can be no question of dealing with ratification on a summary basis against that background. If the Trustee is not able to rule out lack of authority as a matter of law, it cannot rely on ratification at this stage in the proceedings.

(vii) Conclusion

174. The court's conclusion is that:

i) As a matter of English law which governs in this respect, the Minister of Finance of Ukraine had usual authority to enter into the Eurobond transaction, and Ukraine's case to the contrary has no real prospect of success. The Trustee is accordingly entitled to summary judgment on this issue.

ii) The Trustee's further case based on ratification is unsuitable for determination summarily.

Issue (2): DURESS

(1) Introduction

175. The validity of an agreement, including whether it is voidable for duress, is determined according to the putative proper law of the contract (see Art. 10 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)). In the present case, that is English law.

176. Ukraine submits that wrongful and illegitimate acts by Russia constitute duress under English law, and that the Trust Deed, the Agency Agreement and the issue of the Eurobonds on 24 December 2013 were voidable as a result, and were avoided by the act of the Cabinet of Ministers of Ukraine (CMU) approving a moratorium suspending payments of the Notes on 18 December 2015.

177. There is no dispute as to the English law as to duress: "In outline, a party may be able to avoid a contract for duress where he or she entered it because of a wrongful or illegitimate threat or other form of pressure by the other party, normally because the threat or pressure left him or her with no practical alternative" (*Chitty on Contracts* (32nd ed., 2015), § 8-001):

> "A contract which has been entered as the result of duress may be avoided by the party who was threatened. It has long been recognised that a threat to the victim's person may amount to duress; it is now established that the same is true of wrongful threats to his property, including threats to seize his goods, and of wrongful or illegitimate threats to his economic interests, at least where the victim has no practical alternative but to submit. In each case, the wrongful or illegitimate threat must have had some causal effect on his decision to enter the contract, but the causal requirements may differ between the various kinds of duress" (at § 8-003).

178. Ukraine relied on *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm) for a recent statement of the proposition that pressure may amount to duress even if no illegality is involved. This responded to the Trustee's submission that the English court cannot pronounce on the effect of treaties which are not incorporated into English law.

179. It was held in *Progress Bulk Carriers* at [30] that the exertion of pressure by "lawful means" does not prevent the operation of the doctrine of economic duress. The critical enquiry is not whether conduct is lawful but whether it is morally or socially unacceptable, although the court should not "set its sights too high", and it might be a relatively rare care in which "lawful act duress" can be established, particularly in a commercial context (see also *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714).

180. No authority was cited in which the doctrine of duress had been invoked by a state as regards a contract entered into by the state, but neither was it suggested that the principles applicable to non-states do not apply.

(2) Ukraine's duress defence in summary

181. Ukraine's case on duress pleaded in its defence comprises two elements: (1) its right to avoid the Eurobond transaction entered into on 24 December 2013, and (2) its response to the Trustee's case that Ukraine subsequently affirmed the transaction. In outline:

(1) Ukraine relies on illegitimate pressure applied by Russia during 2013 leading up to the entry into of the Eurobonds on 24 December 2013. Ukraine's dependency on Russia, its vulnerability to Russian threats and some of the pressure applied by Russia are recorded in the Prospectus itself. Minister Danyliuk explains that these threats to Ukraine were taken extremely seriously in light of (amongst other matters) Russia's previous use of force against former Soviet bloc nations. As events transpired, Ukraine was clearly right to do so. By December 2013, the threats and pressure had inflicted billions of dollars of damage, Ukraine had effectively lost access to capital markets, and it had no real choice but to abandon the EU Association Agreement and accept a deal on Russia's terms. Russia had achieved its objective. The Presidents of each country agreed a package of economic measures, which included borrowing from Russia in a total amount of US$15 billion, the first tranche of which was subsequently (purportedly) effected

through the Eurobonds. This pressure amounted to duress, and the Eurobonds and related contractual documentation are voidable as a result.

(2) The Trustee's case on affirmation is that when after February 2014 Russia's threats turned into unlawful invasion, occupation and purported annexation, Ukraine nevertheless affirmed the contract and waived its rights to assert a defence of duress. Ukraine denies this: Russia's military aggression meant Ukraine remained subject to duress and could not affirm the contract. In addition, it lacked the requisite knowledge of its legal rights.

182. It is wrong for the Trustee to assert that the case on duress has "nothing to do with the alleged conduct of the Russian Federation in relation to Crimea or Eastern Ukraine". (1) This conduct is central to Ukraine's case that it was subject to ongoing duress such that it could not ratify or affirm the purported contract. (2) The court is entitled to take into account in assessing the credibility of the threats in 2013 that Ukraine was right to be intimidated by Russian threats which were borne out within months.

183. In relation to each period, as a matter of the English law of duress this pressure was "illegitimate", the phrase used in the cases to delineate the somewhat uncertain boundary between acts that are permissible forms of pressure and those that are not (see the *Progress Bulk Carriers* case, *supra*. The fact that an act is lawful does not mean it cannot constitute duress, and whether it does is factually sensitive. Ukraine also alleges that the forms of pressure applied are unlawful, being in contravention of various treaties and customary international law, but its case is based on English law and illegality under international law is not the only way in which it frames it. The Trustee submits that no case has recognised the ability of a party to an English law contract to invoke breaches of international law in order to found a duress claim, but there is equally no authority establishing that it cannot be done. It is a novel point arising in unusual circumstances which cannot be dismissed summarily.

184. Although the claim is brought by the Trustee, duress is a defence either because the Trustee is acting at the direction, on behalf and for the sole benefit of, Russia, and so cannot be in a better position than Russia, or else because the Trustee was on notice of Russia's actions not least because various elements of the pressure were noted in the Prospectus, and were widely reported in the media.

185. For the purposes of this application, the Trustee does not dispute the facts relied on by Ukraine. Nor does it dispute that the pressure caused it to enter into the contractual documentation and issue the Eurobonds, or that the Trustee had notice of the duress applied. The only points relied on by the Trustee for present purposes are that Ukraine's defence is not justiciable, and that Ukraine has affirmed the Eurobonds.

(3) The Trustee's response to the duress defence in summary

186. Ukraine's case is that duress is said to constitute, primarily, threats to breach various trade treaties to which Ukraine and Russia are parties. Ukraine also contends that certain statements were reportedly made by an adviser to the President of Russia on the Eurasian Customs Union constituted threats to breach customary international law, in particular the prohibition on the use of force contained in Art. 2(4) of the United Nations Charter.

187. These complaints have nothing to do with the Trustee, and they concern matters that cannot be relied on in the context of the English law of duress. These international law obligations do not form part of English law, and if the court is required to determine them it will be required to denounce the conduct of a foreign State as unlawful on the plane of international law, something that is beyond its competence, or, as it is put in the authorities, something that is non-justiciable by the English court.

188. No case has recognised the ability of a party to an English law contract to invoke alleged breaches of international law in order to found a duress claim, especially international law norms of the nature relied on by Ukraine in respect of the period prior to the signing of the agreements.

189. Ukraine's arguments that the agreements were procured by duress have nothing to do with the alleged conduct of the Russia in relation to Crimea or Eastern Ukraine, and whether that conduct can be said to comply with international law or not. That alleged conduct is said to have occurred after the agreements were entered into.

190. In the alternative, even assuming there had been actionable duress, Ukraine has affirmed the agreements.

(4) Ukraine's pleaded duress defence in respect of avoidance of the Eurobond transaction

191. The factual aspects of Ukraine's pleaded defence as to duress in respect of avoidance of the Eurobond transaction and in response to the Trustee's case on affirmation are both set out in full in the Annex and are summarised here.

192. As regards the first aspect of its case on duress, Ukraine pleads in the defence (and supports in its evidence) the following.

193. Ukraine's policy since soon after independence from the USSR in December 1991 has been to draw closer to and ultimately seek membership of the European Union.

194. In response, Russia sought to deter Ukraine from European integration and to encourage it instead to join the Eurasian Customs Union.

195. Notwithstanding Russian threats, negotiations between Ukraine and the EU continued and significant progress was made towards the conclusion of an Association Agreement.

196. At the Sixteenth EU-Ukraine Summit on 25 February 2013, the President of Ukraine, the President of the European Council, and the President of the European Commission, reaffirmed their commitment to concluding the Association Agreement, with a view to doing so at the Vilnius Summit scheduled for 28 November 2013.

197. The poor state of Ukraine's public finances at this time left it particularly vulnerable to Russian economic pressure. During 2012 and 2013, Ukraine was reliant on external borrowing in order to fund its public finances.

198. Among the factors that determined Ukraine's ability to borrow funds on the capital markets on viable terms was the state of its relationship with Russia which accounted for approximately a quarter of Ukraine's export market, and the perception that

Ukraine was preparing to enter into an Association Agreement with the EU during the course of 2013.

199. In June 2013, the Ukrainian Parliament published the text of the draft Association Agreement on its website.

200. Following publication, Russia took a number of steps to threaten and put pressure on Ukraine with the aim of preventing it from entering into the Association Agreement including the imposition of unlawful trade restrictive measures on Ukraine, and the making of threats to impose further trade restrictive measures, as well as threats regarding the security of Ukraine's status as a sovereign state, including its territorial integrity:

i) In July 2013, Russia imposed a ban on the import of confectionery products of a Ukrainian manufacturer (associated with the current President of Ukraine) that had annual exports to Russia in 2012 worth around £350 million.

ii) During July 2013, the Russia added about 40 Ukrainian companies to a list of "high-risk" producers which had the effect of blocking their exports to Russia, and this was extended to all Ukrainian producers in August.

iii) Although the *de facto* trade ban was lifted, Russia continued to apply "additional control procedures" to Ukrainian exports to Russia, severely inhibiting their passage.

iv) In August 2013, Mr Sergei Glazyev, an Adviser to the Russian President with responsibilities for the development of Eurasian integration, stated that the trade ban could be imposed on Ukraine on a permanent basis in the event that Ukraine entered into the Association Agreement with the EU.

v) In October 2013, the Lithuanian Foreign Minister indicated that Russia had threatened to suspend the gas supply to Ukraine should it proceed to sign the Association Agreement.

vi) In November 2013, Russia introduced new customs procedures causing line-ups of trucks exporting goods from Ukraine at the border.

vii) President Yanukovych told his Lithuanian counterpart that President Putin had threatened to procure Russian banks to bankrupt factories in eastern Ukraine if Ukraine signed the Association Agreement.

201. Each of these actions was illegitimate and/or unlawful in that they were spurious and not applied for bona fide reasons and/or applied for an ulterior purpose, with the intention of applying pressure to Ukraine:

i) Each of the trade restrictive measures was imposed in the few months before the Vilnius Summit;

ii) On 17 December 2013, when the parties announced that Ukraine would be borrowing funds from Russia, Russia agreed to terminate a number of these trade restrictive measures.

iii) The measures were breaches of:

a) Articles I:1, III:4, VIII:3, X:3(a), XI:1, XIII:1 and/or XXIII of the General Agreement on Tariffs and Trade 1994;

b) Articles 2, 5, 7 and/or 8 of the Agreement on the Application of Sanitary and Phytosanitary Measures;

c) The 2011 Free Trade Agreement between Member States of the Commonwealth of the Independent States;

d) The 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and Russia;

e) The Budapest Memorandum on Security Assurances 1994.

202. Representatives of Russia made threats of further action in the event that Ukraine entered into the Association Agreement:

i) In August 2013, Mr Glazyev stated: "We are preparing to toughen customs administration in case Ukraine takes this suicidal step and signs the association agreement with the EU".

ii) Mr Glazyev said that Russia could annul the CIS Free Trade Area Agreement and cancel joint projects in a number of industries if Ukraine signed.

iii) President Putin suggested that if Ukraine concluded the Association Agreement "the member states of the [Eurasian] Customs Union will have to consider protective measures [against imports from Ukraine]."

iv) Deputy Prime Minister Rogozin announced the possibility that Russia would cease to co-operate with Ukraine in the production of transport aircraft.

v) In September 2013, Russian Prime Minister Dmitry Medvedev warned that Ukraine would be barred from entry into the Eurasian Customs Union if it entered into the Association Agreement.

vi) President Putin warned Ukraine that Russia would retaliate with protectionist measures if Ukraine entered into the Association Agreement.

vii) Speaking in Yalta, Crimea, Mr Glazyev:

a) Threatened that the tariffs and trade checks that Russia would impose if Ukraine entered into the Association Agreement could cost Ukraine billions of dollars and result in a default in its obligations to creditors.

b) Asserted that signing the Association Agreement would violate the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and Russia. He threatened that if Ukraine signed, Russia could no longer guarantee Ukraine's status as a state and could possibly intervene if pro-Russian regions of the country appealed directly to Moscow.

viii) Mr Glazyev threatened that Russia would support a partitioning of Ukraine if it signed the Association Agreement. He stated that Ukraine's Russian-speaking minority might break up the country in protest at such a decision, and stated wrongly that Russia would be legally entitled to support them.

ix) In November 2013, Mr Glazyev stated that if Ukraine signed the Association Agreement, that would be a breach of the 1997 Agreement between Ukraine and Russia, and that "we will have to start over [discussion of] all matters from the very beginning, including the issues of borders [between Ukraine and Russia]".

203. Each of these actions was illegitimate and/or unlawful in that:

i) Russia's public statements in offering to support the partitioning of Ukraine were:

a) A threat of the use of force, directly or indirectly, contrary to customary international law which rule has the status of *jus cogens* and/or Art. 2(4) of the UN Charter.

b) A breach of Russia's duty under customary international law to refrain from intervention in the internal affairs of a sovereign state, namely Ukraine, which duty has the status of *jus cogens*.

ii) Russia's public statements in threatening further trade restrictive measures were each threats of action that, if taken, would have been illegitimate and/or unlawful, and in breach of:

a) Articles I:1, III:4, X:3(a), XI:1, XIII:1 and/or XXIII of the General Agreement on Tariffs and Trade 1994;

b) The 2011 Free Trade Agreement between Member States of the Commonwealth of the Independent States;

c) The 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and Russia;

d) The Budapest Memorandum on Security Assurances 1994.

204. These actions had a significant impact on Ukraine's economy:

i) During 2013, Ukrainian exports to Russia were around 15% lower than during 2012 and in sectors specifically affected by Russian trade restrictive measures, exports fell by around a third.

ii) Overall trade between Ukraine and Russia during 2013 reduced by around 15% as against 2012.

205. These matters significantly and adversely affected Ukraine's ability to access international capital markets in the period from summer 2013 onwards:

i) Credit Default Swap bid prices for Ukrainian debt increased substantially throughout the period from June 2013 to October 2013;

ii) Ukrainian sovereign bond yields also increased substantially throughout this period;

iii) By around September 2013, Ukraine was unable to access international capital markets on terms that were economically viable.

206. By autumn 2013, Ukraine:

i) Had the credit rating on its existing Eurobonds downgraded by the major credit rating agencies;

ii) Had borrowed several billion US dollars on domestic markets through short-term domestic government bonds, and was unable to raise any significant further funds from domestic borrowing.

iii) Was due to repay sums totalling around US$1.6 billion to the IMF by the end of November 2013;

iv) In December 2013, would have to repay or roll over at an increased interest rate of 9.5% US$750 million in borrowings from Russian state-owned banks.

207. It was clear that if it signed the Association Agreement, Ukraine would face a grave threat to its national security and territorial integrity and that its economy would be intentionally and severely (if not irreparably) damaged by Russian action. That was clear from the actions taken, and threats made, by Russia, and in light of the seriously deteriorating ability of Ukraine to borrow the funds that it required from the international capital markets that was itself in substantial part a result of those actions and threats. If Ukraine signed the Association Agreement, the likely consequences of Russian actions were such that Ukraine would be unable to meet its future debt repayment obligations, unable to refinance them on economically viable terms, and/or unable to borrow any further funds sufficient to offset the consequences of the Russian actions and threatened actions.

208. As a consequence, during meetings in October 2013 and November 2013 between President Putin and President Yanukovych, Russia and Ukraine agreed that:

i) Ukraine would not sign the Association Agreement;

ii) Russia would take steps to remove the restrictions on trade with Ukraine that it had imposed during 2013;

iii) Russia would lend Ukraine up to US$15 billion;

iv) The Russian gas company, Gazprom, would sell Ukraine's national gas company, Naftogaz, natural gas at a discounted rate.

209. Ukraine had no practical choice but to accept these terms, and only did so as a result of the duress applied to it by the Russian Federation.

210. Pursuant to the agreement, on 21 November 2013 the CMU passed Order No. 905-p suspending the process of preparation to enter into the Association Agreement, and the Ukrainian Parliament rejected some of the legislation designed to meet the remaining EU preconditions.

211. On 28 November 2013, the Vilnius Summit took place and the Association Agreement was not signed there as had been envisaged.

212. As a result, the international capital markets became effectively closed to Ukraine. Its sovereign bond yields increased throughout November 2013 and reached 14% during the first two weeks of December 2013.

213. On 12 December 2013, the Ukrainian Minister of Finance and the Head of the External Borrowing Department[3] visited Moscow to negotiate the final terms of the borrowing with the Russian Minister of Finance and other Russian officials.

214. The parties reached an arrangement under which:

i) As a first tranche, Ukraine would borrow around US$3 billion from Russia. Initially, the Ukrainian delegates sought financing in the sum of around US$1.6 billion, as this was, and was understood to be, the maximum sum that Ukraine was permitted to borrow by the 2013 Budget Law in force at that time. However, at the insistence of Russia, this amount was increased to US$3 billion.

ii) The borrowing would take place through the issuing of Eurobonds. A bilateral direct loan agreement between Ukraine and Russia would take much longer to implement, whereas the documents in respect of an issue of Eurobonds had been substantially prepared for a capital markets offering and could be adapted.

iii) It would be a precondition of any lending that around US$1.6 billion out of the US$3 billion would be used to enable Naftogaz to make payment to Gazprom in respect of alleged debts for gas supplies to Ukraine. Likewise, if Russia was to lend further funds—up to US$15 billion—then US$5 billion of that total lending would be used to enable Naftogaz to make payment to Gazprom.

iv) The remainder of the terms would be the subject of further negotiation.

215. The Offering Circular identified "Risk Factors" including references to Ukraine's economy depending heavily on its trade flows with Russia, to relations being strained due to disagreements over prices for gas, to issues relating to the Russia-Ukraine maritime border and the temporary stationing of the Russian Black Sea Fleet in Ukraine, to a Russian ban on imports of meat and milk products, and to anti-dumping investigations conducted by Russian authorities.

216. The Prospectus stated that:

> "Recently, pressure was placed on Russia-Ukraine bilateral relations arising out of the prospect of Ukraine signing the

[3] Ms Galina Pakhachuk, who has made a Witness Statement in these proceedings.

> Association Agreement with the EU, including the threat of restrictive trade measures by Russia. For the nine months ended 30 September 2013, exports of Ukrainian goods to Russia decreased by 13.4 per cent. as compared to the corresponding period in 2012. As at the date of this Prospectus, discussions are ongoing between Russia and Ukraine in relation to restoring industrial cooperation and trade and economic relations between the two countries, following the decision of Ukraine to defer the signing of the Association Agreement with the EU. The work on the preparation of a "road map" for continuing negotiations between Ukraine and the EU remains in progress. If for any reason the announced economic and financial support is not forthcoming from Russia and Ukraine in the future signs the Association Agreement with the EU, this could impact trade and other aspects of Ukraine's bilateral relations with Russia and could lead to the imposition of trade and other punitive measures by Russia. These factors, in turn, could have a material adverse effect on the Ukrainian economy."

217. On 17 December 2013, President Putin and President Yanukovych announced:

i) The intention of Russia to subscribe for up to US$15 billion of Ukrainian sovereign debt before the end of 2014, including an initial tranche of US$3 billion, which would be in the form of Eurobonds and other instruments having a maturity of two years and a fixed interest rate of five per cent per annum; and

ii) A substantial reduction in the price of gas to be supplied by Gazprom to Naftogaz compared to the then-prevailing prices.

218. On 18 December 2013, the CMU adopted Decree No. 904 that resolved to confirm the Terms and Conditions of the issuance of the Notes, and attached an outline of terms of the Notes, which however did not include reference to:

i) any covenant entitling Russia to call an Event of Default and to procure the Trustee to demand early repayment of the principal and interest outstanding under the Notes in circumstances of the:

a) violation of a requirement that the total of Ukrainian State debt and State guaranteed debt must not exceed an amount equal to 60 per cent of the annual nominal gross domestic product of Ukraine ("the GDP Ratio Clause");

b) default by Ukraine in repayment of any Relevant Indebtedness exceeding US$25 million. Since Relevant Indebtedness was in due course defined as including any indebtedness to any noteholder, and Russia was entitled to sell the Notes to any third person without notice to Ukraine, in practice this required Ukraine not to default on any indebtedness exceeding US$25 million to any person ("the Cross-Default Clause");

ii) the Clause prohibiting Ukraine from claiming or exercising any right of set off in respect of the payment obligations under the Notes ("the No Set Off Clause").

219. These conditions were onerous and unusual in Eurobonds generally and/or in Eurobonds being purchased by a sovereign wealth fund and/or being issued by a sovereign state.

220. Thereafter, Ukraine purported to enter into the Trust Deed and Agency Agreement both dated 24 December 2013.

221. In the light of the wrongful and illegitimate Russian acts and threats at the time of entering into the Trust Deed and Agency Agreement and issuing the Eurobonds:

i) Through unjustified trade restrictive measures and threats against Ukraine's territorial integrity, Russia placed considerable political, economic and financial pressure on Ukraine from July 2013 onwards, thereby demonstrating its will and ability to harm the Ukrainian economy if Ukraine did not suspend signature of the EU Association Agreement and accept Russian financial support instead;

ii) Ukraine had urgent need of substantial further sums to meet its budgetary obligations, including salaries to state employees and social payments, including pensions, to its citizens;

iii) Ukraine effectively had no access to the international capital markets;

iv) Ukraine had no effective ability to raise funds from the EU or the IMF or any other supranational institution;

v) Ukraine was not able to raise sufficient funds in the domestic market to meet its needs;

vi) In those circumstances, Ukraine had no realistic choice other than to borrow from Russia through the Eurobond structure, and to accept the onerous and unfavourable terms including the GDP Ratio Clause and the Cross-Default Clause and insisted on by Russia. Ukraine sought to resist the imposition of those terms by Russia, but attempts were rejected out of hand.

222. The wrongful and illegitimate acts and threats of Russia constitute duress, and Ukraine entered into the Trust Deed and Agency Agreement and issued the Eurobonds as a result of the duress.

223. The transaction was voidable as a result, and has been avoided by the CMU moratorium of 18 December 2015, alternatively is avoided by the pleaded defence, so that the Trustee is unable to enforce its purported rights under the Trust Deed on the instructions of and for the sole benefit of Russia in circumstances where Russia applied duress to Ukraine and would not itself be permitted to enforce any purported obligation of Ukraine, or would not itself be able to enforce any such obligation if it were owed by Ukraine directly to the Russia where

i) The wrongful and illegitimate acts and threats of Russia were public knowledge and/or reflected in the Prospectus and/or matters of which the Trustee was either aware or had constructive notice.

(5) Ukraine's pleaded defence in respect of continuing duress: Russian interference in Crimea and eastern Ukraine

224. This is set out in full in the Annex, and referred to further above and below. It concerns in particular the occupation and purported annexure by Russia of Crimea, and Russia's military interference in eastern Ukraine, with serious consequences for Ukraine:

i) This is central to Ukraine's case that it was subject to ongoing duress such that it could not ratify or affirm the purported contract. As explained elsewhere, the court accepts Ukraine's submission that ratification and affirmation are not suitable for summary judgment.

ii) Ukraine further submits that the court is entitled to take these acts on the part of Russia into account in assessing the credibility of the threats in 2013.

(6) Avoidance of the transaction on grounds of duress: the parties' legal arguments

(1) The Trustee's legal arguments

225. If Ukraine's contention that alleged threats made by Russia were "illegitimate and/or unlawful" as contrary to international law pursuant to trade treaties is to be determined by the court, the court would have to interpret the treaties, determine whether the alleged conduct of the Russian authorities occurred, determine whether that conduct could be said to constitute a "threat", and then determine whether such a threat was of conduct that was unlawful pursuant to the treaties.

226. The court could not decide Ukraine's contention that Russia's trade restrictions were "spurious" or for an "ulterior purpose" without determining if the basis for imposing the trade restrictions was legitimate and consistent with the treaty obligations as between Russia and Ukraine, or otherwise condemning Russia's trade restrictions on the international plane.

227. The courts will be very reluctant to entertain a claim that a state has acted in an unlawful or illegitimate way on the international plane (*Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 at 931, *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 at [66]). This applies with particular force when considering not merely questions about the legality of the conduct of a state actor under a domestic system of law, but whether a foreign state is in breach of its obligations to another state in international law, especially treaties.

228. An unincorporated treaty can neither create nor destroy rights under domestic law. Obligations existing pursuant to international treaties do not form part of English law. They are legally irrelevant to an English law claim.

229. Complex multilateral instruments such as the General Agreement on Tariffs and Trade 1994 (GATT) contain dispute resolution mechanisms of their own and which

provide that the remedy for a violation by a state is to apply compensatory trade measures.

230. The allegations made by Ukraine relate to trade disputes with Russia. Such disputes, no matter how bitter, cannot be considered by the English courts, and cannot give rise to a duress claim in English law. To do so would be to permit unincorporated international law to destroy domestic law rights such as those held by the Trustee.

231. This court cannot draw a line between political influence imposed by one state on another, whether in relation to "trade restrictive measures" or anything else, that can be regarded as "legitimate", and that which cannot. That is for the systems set up as between states to mediate their disputes with one another.

232. It has been held that the existence of a clearly established breach of international law can give rise to an exception to the non-justiciability doctrine, but the cases concern conduct that has been uniformly condemned by the international community, including the UN Security Council, and acknowledged by both parties to the proceedings so as not to be in dispute at all (see *Oppenheimer v Cattermole* [1976] AC 249, *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883). There is no parallel between these cases and the present case.

233. The threatened breaches of the prohibition on the use of force in Art. 2(4) of the UN Charter and the prohibition on interference in the internal affairs of other states are said to derive from statements made by Mr Glazyev. If the English court is to determine these issues, it would have to assess what he said, whether that can be attributed to Russia, whether the statements could be said to constitute "threats", whether those "threats" were to commit conduct unlawful as a matter of customary international law or as a breach of the UN charter, and whether those "threats" induced Ukraine to issue the Notes.

234. These are matters that the English courts have never considered themselves competent to determine.

235. Norms of international law (*jus cogens*) are not relevant as a matter of principle to questions of the English law of duress. International law prohibitions on the use of force and the interference in the internal affairs of other states do not form part of domestic law.

Ukraine's legal arguments

236. At least some aspects of Ukraine's case do not engage the principle of non-justiciability. The portion that *prima facie* may do so does not offend such principle based on the true scope of Ukraine's pleaded case. As a matter of English law, it is neither necessary nor sufficient for an act to be unlawful in order to constitute duress. Ukraine's pleaded case is focused on the *illegitimacy* of the actions relied on. That case includes reference to, but does not depend on, breaches of international law.

237. Nevertheless, Ukraine does suggest that the court should determine that Russia's actions were unlawful: international law provides a yardstick against which the court can consider whether the pressure applied was illegitimate.

238. Insofar as the court is required to rule on matters of international law, there is no breach of the principle of non-justiciability. There is no general principle that the fact that the court is considering an issue between states, or matters that might involve criticism of states, or concern an unincorporated treaty, is a reason not to determine any issue. In light of later case law, the court should be careful about reliance on generalised remarks in older cases.

239. It is not inherently impossible for the court to apply or interpret international law. The aspect of non-justiciability on which the Trustee relies is that some (not all) of the breaches of international law relied on by Ukraine are contained in unincorporated treaties.

240. This issue is not relied on in response to Ukraine's case in relation to the threat and use of force. In that regard, (1) Ukraine's case arises from customary international law as well as treaty law and (2) these are breaches of clearly established principles of international law (see the *Kuwait Airways* case).

241. Economic pressure applied to Ukraine is not severable from the threats and use of force. Non-justiciability does not preclude Ukraine's case because (1) insofar as it relies on treaties, it is necessary to consider those to determine the scope of English law rights, and (2) the actions of Russia engage customary international law principles, in particular the prohibition on intervention in the internal affairs of other States, and the prohibition on the threat or use of force (*Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, ICJ Rep, p. 14).

242. The principle of deference has no application where the English court is required to determine the contents of international law as part of a determination of English law rights, here whether an English law contract is voidable (*Shergill v Khaira* [2015] AC 359 at [43]).

243. Ukraine is not seeking a ruling on international law in the abstract, nor to rely on a right created by the treaties, or to take enforcement action based upon them. Ukraine's "rights" (to avoid the contract for duress) arise under English domestic law, which is a clear "foothold" in domestic law to which international law is relevant in establishing that Russia's actions were illegitimate under English domestic law.

244. Alternatively, Ukraine's pleaded reliance on the threats of the use of force, and the subsequent use of force by Russia in Crimea and eastern Ukraine, falls within an exception to the doctrine. It would be absurd for *threats* of the use of unlawful force to be treated differently from the use of force itself.

245. Non-justiciability may be dis-applied on grounds of public policy where there is a violation of peremptory public international law, permitting no derogation (i.e. *jus cogens*). This was applied in *Belhaj* to the case of unlawful rendition. Here as in *Kuwait Airways* the relevant rule of international law is the prohibition on the threat or use of force: see Art. 2(4) of the UN Charter which prohibits the threat and use of force. Threats of the unlawful use of force by Russia against Ukraine during 2013 are just as clearly proscribed as the unlawful use of force subsequently.

246. The applicable standards of international law are clear. The application of the English law of duress to the present context is novel, but that cannot be a good reason to

decline to determine the issues, and there is no other tribunal in which the allegations as to the validity of the Eurobonds contracts would otherwise be determined.

247. The "investigation" will not require much by way of controversial examination. The legal standard is not in doubt. It is hard to imagine that the facts themselves are controversial. The UK (and others, including the EU) has made its position clear that Russia's use of force is unlawful. This has already received explicit recognition in English law, the EU having adopted a sanctions regime based on that premise, which is mostly directly applicable in the UK.

248. The English Court is entitled and obliged to apply the English law of duress, and is not precluded from doing so by any principle of non-justiciability.

(7) The court's discussion and conclusions

(1) Introduction

249. Ukraine's factual case as to duress is set out at length in the evidence. Russia's case is not set out.

250. The issue cannot be approached however simply on the basis that on a summary judgment application, issues of fact are generally assumed in favour of the respondent.

251. This is because Ukraine cites ample material supporting its factual case that Russia exerted strong pressure on Ukraine with a view to preventing it entering into an Association Agreement with the European Union: e.g., a European Parliament resolution of 12 September 2013 deploring Russian pressure on Ukraine in the run-up to the Vilnius Summit, as well as contemporary press commentary.

252. In one respect, there was a dispute on the evidence. Mr Mason-Jebb sought to challenge Ukraine's case that the transaction contained terms that were onerous and unusual, specifically, the GDP Ratio Clause and the Cross-Default Clause, and the two-year term of the bonds (a waiver in respect of Soviet debt was not in the event included in what became the No Set Off Clause):

i) However, there is an issue to be tried in this respect which cannot be resolved on a summary judgment application. The court proceeds on the basis that the terms of the Eurobond were onerous and for Ukraine unusual.

ii) It should be added that it is not in dispute that the 5% interest rate under the Notes was favourable compared to other rates relevant to Ukraine's debt at the time.

253. Again, there is ample material supporting Ukraine's factual case as to duress arising *after* the transaction was concluded. The following was cited at the hearing:

i) The recitals to Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine state that:

> "On 6 March 2014, the Heads of State or Government of the Union's Member States strongly condemned the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation and called on the Russian Federation to immediately withdraw its armed forces to the areas of their permanent stationing, in accordance with the relevant agreements. …"

ii) On 27 March 2014, the General Assembly of the United Nations adopted a resolution on the Territorial Integrity of Ukraine. It recalled the obligations of all states under Art. 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, and affirmed its commitment to Ukraine's sovereignty, political independence, unity and territorial integrity within its internationally recognized borders, underscoring the invalidity of the 16 March 2014 referendum held in Crimea.

iii) The court was told that only the exercise of the veto by Russia prevented the UN Security Council from adopting a resolution declaring Russia's actions unlawful, a resolution for which all the other members of the UNSC voted in favour (apart from China, which abstained).

iv) As regards the position of the British Government, the Foreign Secretary stated "one year on" on 22 March 2015 that:

> "The illegal annexation of Crimea by Russia one year ago was a blatant breach of international law. It showed total disregard for Ukraine's right to sovereignty and territorial integrity, and I condemn it in the strongest terms.
>
> It is completely unacceptable for Russia to use force to change borders. We do not recognise last year's sham referendum which President Putin has admitted was planned to provide a fig leaf for his land grab. This behaviour threatens international security, and has grave implications for the legal order that protects the integrity and sovereignty of all states.
>
> Our message to Russia is consistent and clear: the annexation of Crimea was illegal and illegitimate in March 2014, and remains illegal and illegitimate in March 2015. Russia must return Crimea to Ukraine."

(2) Affirmation

254. It is convenient to consider affirmation first. The Trustee's case is that the conduct of Ukraine subsequent to its entry into the transaction (including representations to the IMF in September 2016) would be interpreted by a reasonable observer as confirming its view that it was bound by the transaction, and would therefore as a matter of English law constitute affirmation of the transaction such that it cannot now purport to rescind it on grounds of duress.

255. Ukraine's case is that it had no knowledge of its English law right to rescind on grounds of duress until March 2016. It says that following the transaction, Russia intensified the pressure. It says that there was no unequivocal manifestation of affirmation by Ukraine, and that from December 2015 Ukraine had expressly reserved its rights.

256. In the court's view, the position is the same as that as regards ratification—see above. In agreement with Ukraine, affirmation is unsuitable for summary determination. In order to assess the Trustee's case it would be necessary to conduct a "mini-trial" examining the various acts and statements relied upon by the Trustee, and Ukraine's reservations. That would be a major exercise and is neither permissible nor possible on a summary judgment application.

257. Further, Ukraine's case concerns military steps taken by Russia in Crimea and eastern Ukraine. There can be no question of dealing with affirmation on a summary basis against that background. If the Trustee is not able to rule out non-justiciability as a matter of law, it cannot rely on affirmation at this stage in the proceedings.

(3) Whether the duress issue is suitable for summary determination

258. Affirmation aside, the Trustee's sole response to the duress defence is that it is non-justiciable in the English court. The most recent authority on this issue is the decision of the Supreme Court in *Belhaj and others v Straw and others* [2017] UKSC 3. Judgments were handed down in that case on the first morning of the hearing, and parties have been able to take full account of it in their contentions.

259. Ukraine contends that the non-justiciability doctrine has no application in this case. To the extent that it does apply, Ukraine contends that the court is bound to stay the proceedings against it. In any case, it submits that the issue is unsuitable for summary determination.

260. As to summary determination, Ukraine submits that:

i) The working out of the application of the *Belhaj* principles is best done in the context of an established factual basis. Lord Sumption at [267] refers to the court examining the evidence, and the need to establish a factual foundation for the application of the doctrine.

ii) A case requiring the consideration of numerous authorities that is highly likely to be the subject of an appeal by either party potentially to the Supreme Court is manifestly inappropriate for attenuated consideration.

iii) It is hard to see what argument might be advanced by the Trustee to dispute that the relevant actions were not flagrant breaches of international law.

261. The Trustee's response is that summary determination is appropriate because it is clear that the matters raised by Ukraine in its duress defence are non-justiciable, and cannot afford a defence. Further, it submits that the authorities treat justiciability as a threshold matter, and not a matter to await determination at trial.

262. As further explained below, the court does not agree with the Trustee that the justiciability issue is a clear one, regarding it on the contrary as an issue of difficulty.

263. However, the need for a factual foundation for a decision, which *Belhaj* makes clear is a prerequisite, can be satisfied. The factual foundation can be ascertained by following the well-established approach to factual issues on a summary judgment application. In the present case, this will involve proceeding largely on the basis of Ukraine's factual case, since Russia itself has not filed evidence.

264. Further, as the Trustee has submitted, the case law appears to show the justiciability issue being considered prior to a trial, in effect as a threshold issue. On practical grounds, a trial of the issues raised by Ukraine would require extensive preparation, much of it unnecessary if the defence is clearly non-justiciable in the first place.

265. Of course, the issue must be considered consonant with the rules as to summary judgment. The Trustee is only entitled to summary judgment on the issue if it can show that Ukraine has no real prospect of successfully defending the claim on the ground of duress. But if the Trustee can establish non-justiciability as a matter of law on a sufficient factual foundation, complexity or the fact that the case law is evolving should not stand in the way of a decision at the summary judgment stage.

(4) Terminology

266. There is a preliminary question of terminology. In *Belhaj* at [91], Lord Mance indicated that the term "judicial abstention" is preferable to non-justiciability. The term used by Lord Sumption to describe the relevant principle is "international law act of state" [234]. The doctrine is described in the judgment of Lord Neuberger (with whom three other justices agreed thereby constituting the majority judgment) at [117] as "foreign act of state".

267. In a related case decided at the same time, Lord Sumption said that:

> "Non-justiciability is a treacherous word, partly because of its lack of definition, and partly because it is commonly used as a portmanteau term encompassing a number of different legal principles with different incidents. Strictly speaking, as this court observed in *Shergill v Khaira* [2015] AC 359 at para 41, it should be reserved for cases where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter." (*Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1 at [79]).

268. The Trustee's case is, or is broadly, that the duress defence is inherently unsuitable for judicial determination by reason of its subject matter. The court will therefore generally follow the parties in referring to the relevant principle as one of non-justiciability.

(5) Overview

269. If the Trustee is correct, the court must abstain from deciding the duress defence. For these purposes, it important to see how the defence is formulated in Ukraine's defence. This is set out in detail above.

270. The relevant period is up to 24 December 2013 when the Eurobond transaction was entered into, because to make good its claim to avoid the relevant agreements, Ukraine has to show that duress operated to vitiate the transaction at that date. As to the English law of duress on which Ukraine relies, see above.

271. In its approach to the issues, the Trustee has sought to emphasise the standard structure of the transaction as an issuance of Eurobonds, and the fact that it (and not Russia) brings the claim as trustee in accordance with the contractual terms. So, it says, Ukraine's defence is an attempt to bring into an ordinary debt claim wide-ranging and contentious issues of international law that have nothing to do with the Trustee. It also emphasises the fact that Ukraine received in full the funds subscribed for the Notes by Russia.

272. It is not disputed that the structure of the transaction is in standard form. However, the background is extraordinary, and in the court's view, it is not credible to describe this as an "ordinary debt claim". That is not to say that lending by one state to another does not come sometimes (or even usually) with strings attached. But as it is put in Ukraine's evidence, Russia's policy can be seen as keeping it on a "tight leash", and that assertion is sufficient on a summary judgment application.

273. Although the transaction involved in substance one sovereign state lending money to another, it was subject to English domestic law, with the consequence that domestic law defences are available in respect of a claim for repayment. In principle, if a defence of duress is otherwise available to Ukraine, it is not ruled out by the fact that one state is lending to another, or the fact that Ukraine has in fact received the money. As to the latter, issues may arise as to restitution, as arise in analogous cases where money has been paid under void contracts, but these have not been raised by the parties at this stage, and can be left on one side.

274. There is also strength in Ukraine's submission that since the Trustee brings the claim at the direction of, and for the benefit of, Russia as Noteholder, a defence of duress, if otherwise available, should not in principle be precluded by the interposition of the Trustee in the transactional structure, but the court need not decide that point.

(6) <u>The applicable legal rules</u>

275. The case law is gathered together in the Supreme Court's decision in *Belhaj and others v Straw and others* [2017] UKSC 3, which provides authoritative and recent guidance. There is a considerable measure of agreement between the parties as to the interpretation of the judgments, but there are differences also.

276. The Supreme Court identified three types of foreign act of state, of which the first two, which concern property within a state's jurisdiction, are not relevant in the present case.

277. The parties agree that it is the third type, which is not limited territorially, that is relevant in this case.

278. As Lord Mance puts it, "Whether an issue is non-justiciable falls to be considered on a case-by-case basis. Considerations both of separation of powers and of the sovereign nature of foreign state or inter-state activities may lead to a conclusion that an issue is non-justiciable in a domestic court …". He added that, "… in deciding whether an issue is non-justiciable, English law will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised…" ([11(iv)(c)]).

279. At [123], Lord Neuberger defines the third type in these terms:

> "The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "[o]bvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory" - per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. Nissan was a case concerned with Crown act of state, which is, of course, a different doctrine … but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels (see *Shergill v Khaira* [2015] AC 359, paras 40 and 42)."

280. Lord Neuberger says at [151] that:

> "The third rule is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving …. It is purely based on common law, and therefore has no international law basis, although … its application (unsurprisingly) can be heavily influenced by international law."

281. At [234], Lord Sumption describes the principle as being:

> "… that the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states: … This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law,

> and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country. In all of the cases cited, the claimant relied on a recognised private law cause of action, and pleaded facts which disclosed a justiciable claim of right. But the private law cause of action failed because, once the cause of action was seen to depend on the dealings between sovereign states, the court declined to treat it as being governed by private law at all. … If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general, as was pointed out by Lord Wilberforce in *Buttes Gas* (p 931D-E). Once the acts alleged are such as to bring the issues into the "area of international dispute" the act of state doctrine is engaged."

282. These passages show that there is no single criterion for non-justiciability, which falls to be considered on a case-by-case basis, where the issue concerns dealings between sovereign states. See to similar effect, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at [85].

283. Its case, as summarised by Ukraine in oral argument, is that there is a strongly arguable basis for contending that Russian pressure was improper (within the meaning of the English law of duress) because it was designed to coerce the foreign and economic policy of a sovereign state. The question for the court is whether that case falls under the act of state doctrine as above described.

(7) Trade restrictive measures

284. It is convenient to take first Ukraine's case as to trade restrictive measures, whilst noting its contention that economic pressure is not severable from the threats and use of force.

285. Its case concerns trade restrictive measures imposed by Russia during 2013 and the threat of more such measures applied to prevent Ukraine signing the Association Agreement with the EU. The measures are said to have been illegitimate and/or unlawful, and in breach of specified Articles of the GATT (General Agreement on Tariffs and Trade), specified Articles of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Free Trade Agreement between Member States of the CIS, the Friendship Agreement between Ukraine and Russia, and the Budapest Memorandum on Security Assurances. Details of these treaties/agreements are not given.

286. What would determination of this case require? The Trustee says, correctly in the court's view, that it would require the court to interpret the treaties/agreements, determine whether the impugned conduct occurred, determine if constituted a threat, and whether the threat was of conduct that was in breach of the treaties/agreements.

287. Further, to decide whether the trade restrictions were spurious or *bona fide* or were for an ulterior purpose as pleaded would require a determination as to motive in the sense of whether Russia's basis for imposing the trade restrictions was legitimate and consistent with its treaty obligations.

288. Because of the scope of the inquiry, there are obvious practical difficulties in the way of this in terms of the preparation and conduct of a trial.

289. However, the fundamental objection as a matter of law, the Trustee contends, is the reluctance of the courts to entertain a claim that a state has acted in an unlawful or illegitimate way on the international plane (*Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888).

290. Ukraine submits that the principle of deference has no application where the English court is required to determine the contents of international law as part of a determination of English law rights (sometimes referred to as a "domestic foothold")—here whether an English law contract is voidable (*Shergill* (*supra*) at [43]).

291. The Trustee responds that in order to have a "domestic foothold", it has to be shown that the conduct on which the party wishes to rely is conduct that the English court could condemn by some standard of English law.

292. This is illustrated by *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), where an application for a declaration that the UK Government was in breach of its international obligations in relation to the conduct of the State of Israel in Gaza was refused on the grounds of non-justiciability. The court said at [41] that for the English courts "… to decide whether Israel is in breach of its international obligations and, if so, the extent and nature of the breach or breaches, is beyond their competence …".

293. Ukraine submits that even if the court is not competent to determine whether or not the actions of Russia were unlawful under international law, Ukraine can rely on such actions as being illegitimate and therefore as constituting duress under English law—the critical enquiry, it says, is not whether conduct is lawful but whether it is morally or socially unacceptable (*Progress Bulk Carriers*, supra, at [30]).

294. However, the court accepts the Trustee's answer in this respect: *Progress Bulk Carriers* was a dispute between commercial parties. As a matter of state to state relations on the international plane, the only standard by which the legitimacy of conduct can be assessed is international law itself. Reference to the "illegitimacy" of conduct cannot provide a basis for justiciability if otherwise lacking.

295. The court's conclusions are as follows:

i) Ukraine has made out a strong case that economic pressure applied by Russia by way of trade measures during 2013 along with threats led to its Government's decision not to sign the EU Association Agreement at the Vilnius Summit on 28 November 2013, and to accept Russian economic support instead. This included the Eurobond transaction in respect of which Russia provided US$3 billion in what was intended as the first instalment of US$15 billion, and the supply of gas at advantageous prices. This provides sufficient factual foundation for a decision by the court as to justiciability on the summary judgment application (see *Belhaj* at [267]).

ii) Ukraine has also made out a strong case that it is necessary to see this as more than simply economic. Drawing closer to the EU was a fundamental national policy objective since the break-up of the USSR in December 1991. Both the nature of the pressure and its effects were, therefore, of profound consequence to the state.

iii) The question whether this pressure can amount to duress in English law is one which has to be decided by an application of legal principle. Ukraine's case is that the issue is justiciable because it has to be decided as part of a determination of its English law rights, that is, whether the English law contracts to which it is party are voidable (*Shergill v Khaira* [2015] AC 359 at [43]).

iv) The starting point must be the fundamental principle as set out in *Belhaj* at [43(ii)] and [221], referring with approval to *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at p.499F-G: it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law".

v) Assessing the trade restrictive measures relied on would inevitably involve adjudication by the court upon transactions entered into between states on the plane of international law. Effectively, that is what Ukraine seeks to establish as its duress defence. The defence falls therefore within the fundamental prohibition.

vi) Further, assessment of the measures would require interpretation of the treaties/agreements identified by Ukraine. These are not incorporated into English law. In *Belhaj* at [123], it was said "… that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts".

vii) Further, Ukraine invokes these treaties/agreements to avoid its obligations under the Eurobond transaction. Its case as to its non-liability "…stems from an unincorporated treaty [*in this case treaties/agreements*] which, without legislation, can neither create nor destroy rights under domestic law" (*Rayner* (*supra*) at p. 512). However, Ukraine relies on such unincorporated treaties/agreements to destroy the domestic law rights held by the Trustee under the Eurobond transaction, which appears to be impermissible.

viii) Assessing the *bona fides* of the trade restrictions would entail inquiries into motive. There are statements in the case law that the court is precluded from "adjudication on the validity, legality, lawfulness, acceptability or motives of state actors" (*Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 at [66]), though Ukraine suggests that this is "loose language".

ix) Further, it seems at least doubtful that there are "judicial or manageable standards" by which to assess the legitimacy of such economic pressure applied by one state to another (*Belhaj* at [90]).

x) The Trustee's contention that at least in part Ukraine has redress at the international level because the General Agreement on Tariffs and Trade 1994 (GATT) has its own dispute resolution mechanisms, carries less weight.

xi) Overall however, applying the case law, the court's conclusion is that Ukraine's case is non-justiciable in this respect under the foreign act of state doctrine. It raises matters which the court will "abstain or refrain from adjudicating upon" (see *Belhaj* at [11(iii)(c)] and [151], and *Buttes Gas* at p 934). Ukraine's case to the contrary has no real prospect of success.

xii) For reasons set out below, Ukraine's case as to threats of the use of force made during 2013 does not change this analysis.

(8) Threats of the use of force

296. Alternatively, if its case as to economic pressure is non-justiciable, Ukraine submits that the threats of the use of force fall within the public policy exception to the act of state doctrine. This again is an issue which is comprehensively reviewed by the Supreme Court in the *Belhaj* case.

297. The pleaded threats are those made by Mr Sergei Glazyev, an adviser to the Russian President, in the course of mid to late 2013: see above.

298. Ukraine argues that there is no reason to treat the threats of force in 2013 differently from the actual use of force in 2014. It submits that these threats were clearly contrary to customary international law which rule has the status of *jus cogens* and/or Art. 2(4) of the UN Charter. The court should accept this as established (as in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883), and regard the breach by Russia as requiring no detailed investigation of the facts.

299. Although its case is that the economic pressure applied during 2013 is not severable from threats of force, Ukraine submits that if necessary a "blue pencil" can be put through its allegations of breach of trade treaties/agreements, leaving the threats of the use of force as a discrete ground of duress. The same considerations apply as apply to its case on the public policy exception.

300. It is common ground that in deciding the question the court must apply the principles as set out in *Belhaj*. In that case it was unanimously held that claims alleging complicity by UK officials in the alleged rendition, unlawful detention and torture of the claimants committed by various other states in various overseas jurisdictions were

not barred under the doctrine of foreign act of state, that is, the third of the three rules or principles analysed by the Court (see above).

301. The reasoning by which this result was reached differed slightly. Lord Sumption gave the third type of foreign act of state (in his terminology international law act of state) a wider scope than Lord Mance, but qualified it by an English law public policy exception drawing *inter alia* on the international law concept of *jus cogens* ([34]). Lord Mance saw the question as being whether the principle of non-justiciability applied at all, rather than whether any exception to it exists ([89]). Lord Neuberger agreed with Lord Sumption as to the public policy exception ([172]).

302. It was argued by Ukraine that the reasoning of Lord Sumption supports its case, in that threats of the use of force such as it relies on are contrary to *jus cogens*, and should equally fall within the public policy exception.

303. It cites Art. 2(4) of the UN Charter, which provides that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

304. However, as the Trustee says, Lord Sumption did not equate *jus cogens* for these purposes with the public policy exception. This is explained at [106] by Lord Mance who says that:

> "Lord Sumption takes a more general view of the third type of foreign act of state … But … he argues in favour of the recognition in English domestic law of a public policy qualification. He finds it helpful in this connection to consider the scope of certain international law rules with jus cogens force, though he does not suggest that domestic public policy in all cases necessarily reflects or corresponds with international law rules having *jus cogens* force …. On this basis, he concludes that, so far as the allegations made in these proceedings amount to allegations of complicity in torture or of arbitrary detention without any legal ground or recourse to the courts, including enforced disappearance and rendition, a domestic court should not abstain from adjudicating upon them. Not every unlawful detention would, in his view, fall into this category, and nor would the allegations made of other cruel, inhuman or degrading treatment, but the position on the facts is not at this stage clear to the point where any of the allegations made should be struck out …."

305. Lord Mance explains at [107(iii)] that the prohibition on the use of armed force and on aggression are core examples of *jus cogens* yet are also treated as giving rise to core examples of issues upon which domestic courts should refrain from adjudicating:

> "If violation of a *jus cogens* were a primary test of whether a domestic court could adjudicate upon an issue which was

> otherwise non-justiciable and upon which it would otherwise have to abstain from adjudicating, central areas of abstention identified by Lord Sumption would become potentially amenable to adjudication. The prohibition on the use of armed force and on aggression are core examples of *jus cogens*. Yet these are, rightly as would be my present view, treated by Lord Sumption himself as giving rise to core examples of issues upon which domestic courts should refrain from adjudicating …"

306. In his own judgment, Lord Sumption makes clear that "… recognition of the influence of international law does not mean that every rule of international law must be adopted as a principle of English public policy, even if it is acknowledged as a peremptory norm (*jus cogens*) at an international level" ([257]).

307. Whether viewed as a discrete ground of duress, therefore, or viewed as subject to a public policy exception as in the majority reasoning in *Belhaj*, the question is essentially the same. Is Ukraine's case as to the threats of force made against it during 2013 justiciable?

308. The court's conclusions are as follows:

i) The Trustee tended to diminish the significance of these threats in oral argument. However, as Ukraine rightly says, the threat of the use of force in 2013 has to be seen against the actual use of force in 2014. Further, it says that the lack of evidence of direct government to government threats has to be seen against the fact that senior members of the Ukrainian government fled to Russia in 2014. The court sees no reason not to accept these points.

ii) In English law, violence to a person, or threats of such violence, have long been recognised as a paradigm form of duress, entitling the victim to avoid a contract entered into as a result (*Chitty on Contracts* (32nd ed., 2015) §8-010). If the same approach is applied to Ukraine's defence, its case is plainly a strong one, particularly on a summary judgment application.

iii) The Trustee's answer is that the law requires the court to treat such threats and violence as non-judiciable because they took place as between states. However, there is no exact parallel to this case in the case law, and in any event the principle of justiciability has to be considered on a case-by-case basis (*Belhaj* [11(iv)(c)]).

iv) The first question is whether there is sufficient factual foundation for a decision as to justiciability on the summary judgment application (see *Belhaj* at [267]). There is such a foundation because Ukraine's case as to the threats made is credible, and has not been answered. The issue therefore for the court is whether on these facts the Trustee's contention is correct.

v) In that regard, Ukraine contends that the same considerations apply to the threat as to the use of force, arguing that while a state is to be afforded respect for sovereign acts within its own territory, there is no such justification for insulating extra-territorial acts from judicial scrutiny. The use of force by

Russia in Crimea and eastern Ukraine is clearly extra-territorial, and it would be absurd, it submits, for threats of the use of unlawful force to be treated differently from the subsequent fulfilment of those threats.

vi) It relies on *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 where the court refused to recognise an Iraqi law confiscating the Kuwait Airways fleet which was in Iraq. Problems of justiciability could be overcome by pointing to the "clarity, indisputability and seriousness" of the violations of the United Nations Charter and Security Council Resolutions (*Belhaj* at ([80]), the violations being in any event admitted.

vii) Nevertheless, the *Kuwait Airways* case is treated as exceptional (*Belhaj* at [157], [253] and [256]), and there are differences which may be significant. In the present case, the violations are disputed, and it is of some weight that there is no UN Security Council Resolution, albeit it was the exercise of the veto by Russia that prevented the adoption of a resolution declaring Russia's actions unlawful, the other members of the UNSC voting in favour apart from China, which abstained (UN News Centre Report, 15 March 2014).

viii) Though not an exact parallel either, in *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 the court treated as non-justiciable a challenge to the legality of US drone strikes in Pakistan.

ix) Of that case it was said in *Belhaj* that the issues were non-justiciable because their resolution "would depend on determining whether there was an armed conflict in Pakistan and/or Afghanistan, whether any such conflict was international or non-international in nature and what rights of action or self-defence existed. … Some matters are … better addressed at the international legal level, rather than in domestic courts. In civil as well as common law, it appears unsurprising under present conditions that domestic courts should treat acts of government consisting of an act of war or of alleged self-defence at the international level as non-justiciable and should abstain from adjudicating upon them" (at [95], [130], and [223]-[224]). This clearly has resonance where the issue is as to threats of the use of force by Russia in Ukraine.

x) There are other statements in the judgments as to non-justiciability in the case of aggression and armed conflict which are equally clear:

a) The prohibition on the use of armed force and on aggression are described as "central areas of abstention" and "giving rise to core examples of issues upon which domestic courts should refrain from adjudicating" (*Belhaj* at [107(iii)], Lord Mance).

b) The "… courts of this country will not interpret or question dealings between sovereign states; "[o]bvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory" - … *Nissan v Attorney General* [1970] AC 179, 237" (*Belhaj* at [123], Lord Neuberger).

c) "If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court

to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general…" (*Belhaj* at [234], Lord Sumption).

d) The paradigm cases of sovereign acts are "acts of force in international space or on the territory of another state". Obvious examples are "making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory". Subject to the important public policy exception, "…it is not open to an English court to apply the ordinary law of tort, whether English or foreign, to acts of this kind committed by foreign sovereign states" (*Belhaj* at [237], Lord Sumption).

xi) Similarly, in *R v Jones (Margaret)* [2007] 1 AC 136 in the context of the construction of a domestic statute (the Criminal Law Act 1967), it was held that the international law crime of aggression (i.e. the unlawful use of force) does not form part of English law (Lord Bingham at [30] and Lord Hoffmann at [67]).

xii) Applying these statements of principle to the present case, it seems an inevitable conclusion that the threats of the use of force by Russia in 2013, which are relied upon by Ukraine as vitiating the Eurobond transaction it entered into on 24 December 2013, fall within the foreign act of state doctrine. They concern threats, and ultimately aggression by a state and armed conflict between states. On the authorities, these acts are non-justiciable, and fall outside the public policy exception. They cannot give rise to a defence of duress in English law. Ukraine's case to the contrary has no real prospect of success.

xiii) So far as it is relevant, there is at least an element of redress in this case to be had at the international level: on 17 January 2017, Ukraine instituted proceedings against Russia in the International Court of Justice, seeking provisional measures. The subject matter of the proceedings relates to Russian action in Crimea and eastern Ukraine. This tends to support the above.

(9) Stay

309. In the event that the court is of the view that it is non-justiciable, Ukraine submits that it would be wrong to proceed as if the duress defence does not exist. If the court is prevented from determining the pleaded dispute, it must avoid determining a different, hypothetical dispute in which only the points relied on by one party and not the other are in play. The only appropriate course, it submits, is to stay the claim.

310. That approach, Ukraine submits, is supported by *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)* [1982] AC 888. It was said in that case that it would be unjust to allow a slander action to proceed where the defence of justification was held to be non-justiciable ([1982] A.C. 888 at 938F). Reliance is also placed on *Shergill* (*supra* at [43]) citing *Hamilton v Al Fayed* [2001] 1 A.C. 395 (which was also a defamation claim), and *Victoria Aircraft Leasing Limited v United States* [2004] VSC 341 and

[2005] VSCA 76; (2005) 12 VR 340 cited by *Dicey* at [5-052], fn 209). It was submitted that the stay should be permanent.

311. It should be noted that at this stage, the court is considering a very specific point in relation to a stay, namely whether it is in effect inherent in the non-justiciability decision. Ukraine's argument in this respect gains force from the fact that the case on which it is based, the *Buttes Gas* case, is the leading modern authority on act of state in English law.

312. In agreement with the Trustee, however, the court considers that there is a material difference between the *Buttes Gas* case, and the present case. There, the defence of justification was essentially the reverse side of the claimant's defamation case—if the one could not proceed, neither could the other. By bringing the proceedings, the claimant necessarily raised the issue of justification, whereas the Trustee's claim to enforce the Notes does not raise the issue of duress. If Ukraine is correct that its duress defence is arguably justiciable it is entitled to defend the claim, but if it is not arguably justiciable, then (subject to the other defences raised) the Trustee is entitled to enforce the Notes, and enforceability cannot be precluded by a permanent stay as Ukraine seeks.

313. A point was raised as to the possible breach of Article 6(1) of the ECHR, but this does not arise in the light of the Supreme Court's decision in *Belhaj* at [281]-[284].

Issue (3): IMPLIED TERMS

The implied terms pleaded by Ukraine

314. The implied terms pleaded by Ukraine fall into two categories (taking the headings from the skeleton argument), that relating to frustration of purpose and obstructing performance (paragraph 85), and that relating to public international law (paragraph 93). They are:

> **Implied term not to (1) deprive Ukraine of the economic benefit of the Russian loan and/or (2) demand repayment if (a) repayment would be impossible or impracticable for Ukraine and/or (b) Russia had deliberately interfered with or hindered Ukraine's ability to repay**
>
> 85. Alternatively to the foregoing, if the Trust Deed and Agency Agreement are binding and enforceable as against Ukraine, and in light of the matters pleaded at paragraphs 41 and 42 above, it was an implied term of the Trust Deed, necessary to give effect to the obvious shared intention of the parties (including the Russian Federation as Noteholder) and/or business efficacy that Ukraine would be excused performance of its obligations (including obligations to make any repayment under the Eurobonds) and/or the Russian Federation would not insist on repayment, or procure the Trustee to insist on such repayment if:

> 85.1. Either the Trustee or the Russian Federation (as Noteholder) deliberately and/or unlawfully deprived Ukraine of the economic benefit of the loan received by Ukraine through the issue of the Eurobonds and/or frustrated the economic purpose of the loan;
>
> 85.2. Either the Trustee or the Russian Federation (as Noteholder) deliberately and/or unlawfully acted in such a way as to make it impossible or impracticable for Ukraine to comply with its obligations under the Trust Deed (including the Conditions), or deliberately and/or unlawfully and/or unreasonably interfered with or took steps to prevent, hinder or delay its ability to do so.
>
> **Implied term not to (1) enforce the Russian loan and/or (2) demand repayment if the Russian Federation is in breach of its obligations towards Ukraine under public international law**
>
> 93. In the further alternative, and in light of the matters at paragraphs 41 and 42 above, if the Trust Deed and Agency Agreement are binding and enforceable as against Ukraine, it was an implied term of the Trust Deed, necessary to give effect to the obvious shared intention of the parties (including the Russian Federation as Noteholder) and/or business efficacy that Ukraine would be excused performance of its obligations (including obligations to make any repayment under the Eurobonds) and/or the Russian Federation would not insist on repayment, or procure the Trustee to insist on such repayment if:
>
> 93.1. The Russian Federation was in breach of its obligations towards Ukraine under public international law not to use force against Ukraine and/or not to intervene internally in the affairs of Ukraine; and/or
>
> 93.2. The Russian Federation was in breach of its obligations towards Ukraine as pleaded at paragraph 93.1 above, and this had been a significant cause of loss to Ukraine and/or had deprived Ukraine of the economic benefit of the loan represented by the Eurobonds.

Ukraine's case

315. In 2013 Ukraine required funds urgently in order to fund expenditures, its financial position/access to the capital markets having been critically degraded by illegitimate Russian actions. It was always intended that Russia would be the sole subscriber: the timescale of the arrangement was extremely and unusually short. The contractual terms were negotiated directly between representatives of Russia and Ukraine, and effectively imposed by Russia. The bilateral arrangement finally "agreed" was bespoke and unique, and the terms imposed were extraordinary.

316. The commercial substance of the arrangement is that of a bilateral loan by Russia. The Eurobond structure was used out of expediency, allowing the parties to evade the approval process that would have been required of a formal bilateral loan under respective internal laws.

317. Although the Trustee, at Russia's direction, relies on the formalities of the Eurobond structure, Russia has sought to present the loan as a bilateral loan, e.g. to the IMF which has accepted Russia's representations that its claim is an "official" claim, i.e. a claim by a sovereign state.

318. The extent to which these arrangements are to be equated/compared with bilateral arrangements is central to the issue of implication. The factual context is relevant to the implication of terms and this is a reason to decline to grant summary judgment at this stage. It renders inapt the authorities cited by the Trustee concerning the approach to tradable instruments.

319. The interposition of the Trustee makes no difference: Russia expressly agreed to be bound by the terms of the Eurobonds. The trustee in Eurobonds transactions is only the holder of a fiduciary power, the "real value" being in the bonds themselves and the anticipated stream of payments to be made by the issuer to each investor.

320. The Trustee was not involved in negotiations. The parties must have intended that the true commercial counterparty (Russia) would not prevent or hinder Ukraine from making repayment. If Russia is not treated as a party, in order to give effect to this basic assumption, it must be implied that Russia could not instruct, and/or the Trustee would not act on any instruction, to enforce the payment obligation in circumstances where repayment had been prevented or hindered by Russia.

321. The principle is in Lewison, *The Interpretation of Contracts* (6th ed 2015) at para 6.14: "In general, a term is necessarily implied in a contract that neither party will prevent the other from performing it." The justification is that both parties to a contract are taken to have agreed that they wish the contract to be performed and that neither will actively prevent performance.

322. In the context of a bond issue the application of such a term cannot be confined to the actions of the "synthetic" trustee. It must extend to the actions of the Bondholder to whom the underlying debt obligation is due.

323. There is an overlap between the implied requirements of acting in good faith (*Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB)), and the obligation not to prevent performance.

324. The implication of such terms is orthodox, and is limited to Russia (in summary) not *deliberately* or *unlawfully* preventing or hindering Ukraine from performing its obligations: defence para 85.

325. The existence of a payment obligation in a loan contract is not an answer to the prevention or hindrance of that obligation as the focus of implied terms. It is necessary and/or obvious for the contract to work as intended that a party is not prevented or hindered from performing.

326. The fact that the Notes are marketable and could be transferred to a third party does not alter this analysis:

i) The Notes have not been transferred, and the parties never intended it: the Prospectus makes clear that the finance was part of a wider package of support. Russia would not want to give up the Notes, which were designed with the intention of gaining leverage over Ukraine, and the mechanism of pressure they provide. There is no realistic prospect of a transfer: Russia has asserted an official claim in respect of them to the IMF, is funding, directing and publicising its direction of this litigation, and is seeking to use it as a means of applying further pressure to Ukraine.

ii) The question of how the implied term operates in the event of a transfer is a question of construction – it is not a reason to doubt that the term should be implied:

a) If the Notes were transferred to an "innocent" third party, that third party would not be able to enforce the Notes because performance had already been prevented or obstructed by Russia as the transferors.

b) If the Notes had been held by a mixture of "guilty" and "innocent" Bondholders, it would probably be inappropriate to deny the innocent Bondholders a claim in circumstances where they bore no responsibility for the prevention of performance. The Trustee could act on the instructions of the innocent Bondholders and for their benefit, but not the "guilty" Bondholders.

iii) It will be unusual for a private counterparty to a loan to be in a position to prevent a state from performing its obligation to repay, and the conduct required will necessarily be of the magnitude of the use of military force or economic warfare at the state to state level. It is hard to envisage a situation where action by a private market participant would be restricted. The idea that the implied terms would render the Notes "unworkable and untradable" is not supported by evidence.

327. There is no undue interference with the commercial freedom of any party present or future. It was not envisaged that, having entered into arrangements which were required to ameliorate the damage done by earlier Russian action, Russia might wish to take action that would harm Ukraine, still less to materially affect its ability to repay, or render it impossible.

328. The suggestion that the implied terms are "hopelessly vague and uncertain" is contrary to authority, given that such terms are commonly implied.

329. Russia has no legitimate interest in deliberately or unlawfully inflicting harm on Ukraine at least on the scale that would be required to materially affect its ability to repay. If the objection to the suggested implied term is that it is too wide, too difficult to adjudicate, or non-justiciable, the minimum content the court should accept is that which prohibits deliberate prevention or material hindering of performance, or still more narrowly prevention or material hindering of performance arising from breaches of clearly established principles of international law.

330. The court should place limited weight on the self-serving evidence of the Trustee that it would not have agreed to any such terms.

331. The effect of the breach of such an implied term can be to suspend the enforceability of the obligation or to replace the maturity date with an obligation to pay within a reasonable time (*Multiplex v Honeywell* [2007] Bus LR Digest D 109 at [47]-[48]). Russia could not enforce its claim while it is occupying and interfering militarily in parts of Ukraine. However, in this case the acts inflict irreversible losses, which is different from cases where the counterparty can perform when the act of prevention ceases. Accordingly, the effect of such a breach would be to dismiss the claim.

332. Paragraph 93 of the defence pleads a similar implied term:

    i) Paragraph 93.2 is a narrower form regarding prevention or hindrance of performance limited to prevention or hindrance of performance that arises from conduct that amounts to a justiciable breach of public international law.

    ii) Paragraph 93.1 is in wider form, and does not depend on performance having been prevented or hindered—it arises from breach of public international law, irrespective of its consequence on the ability to repay.

333. Each of these terms is narrower than the formulations at paragraph 85 of the defence in that they are limited to prohibiting specific justiciable breaches of public international law. It is state actors in respect of whom these implied terms could have an impact.

334. The basis for implication of these terms is that:

    i) There is a close relationship between them and the other implied terms. The implication can be justified on the same basis (*Stirling v Maitland* (1864) 5 B&S 841, 852). In the present case, the "existing state of circumstances" might be the absence of armed conflict, or the absence of a violation of Ukraine's territorial integrity. Alternatively, that Ukraine was comprised of each of the regions that it comprised in 2013, and that Russia was not in control of and collecting revenue from those areas.

    ii) There is a close relationship between the pleaded terms and the developing law in respect of the implication of an obligation to act in good faith (see *Yam Seng*, ibid, at [138]. In the context of Eurobonds, the *"standards of commercial dealing"* referred to would include matters that would impact on states, including breaches of public international law.

The Trustee's case

335. Ukraine's case on the implied terms is an attempt to require the English court to venture into areas that it is not competent to tread, and to litigate matters of international law as between Ukraine and Russia which have nothing to do with the simple repayment obligations owed by Ukraine to the Trustee.

336. The financing provided by Russia to Ukraine took the form of tradable Eurobonds, a form proposed by Ukraine and deliberately chosen by the parties.

337. There is no allegation that the agreements were a "sham". The Trustee is the true counterparty, and the covenant to make payment is a covenant entered into with the Trustee (see *Concord Trust v The Law Debenture Trust Corpn plc* [2005] 1 WLR 1591 at [4]).

338. Ukraine contends that the agreements contain various "unusual" terms, or were negotiated in a "non-standard" way. Even if this is correct which is not accepted by the Trustee it would make no difference. The agreements fall to be interpreted, and terms implied into them (or not), according to ordinary principles.

339. The notes were transferrable pursuant to the agreements and their transferability has been acknowledged by Ukraine on numerous occasions. For example:

    i) In September 2014 the Ukrainian Ministry of Finance stated that the Notes "traded publicly", and were "available to any investor".

    ii) Ukraine's Minister of Finance stated in August 2015 that the Notes were a "tradable obligation" such that no one could tell who the holder would be on any particular day in the future.

340. The asserted implied terms are obviously inappropriate because (1) they are unnecessary, the agreements working perfectly well without them. To the contrary, the implied terms would render the Notes unworkable and untradeable and would therefore conflict with their express terms. (2) The terms are not capable of clear expression but are vague and uncertain. (3) The implied terms are not so obvious as to go without saying. It is absurd to suggest that had the parties been asked about these terms at the time of the agreements they would have agreed to them. (4) Ukraine has framed its implied terms as setting up pre-conditions to the engagement of the payment obligation which would have the deliberate effect of circumventing the No Set-Off Clause. (5) The suggested term introduces concepts of unlawfulness under public international law into the agreements. The suggested terms would be insufficiently precise to incorporate international law even had they been express stated, and the suggestion that such concepts might be incorporated by implication is hopeless.

Implied terms: the legal test

341. There is no dispute between the parties as to the general rules as to implication of terms into a contract. The Supreme Court recently considered the principles in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742.

342. Broadly, the Court endorsed the distillation of the essence of the principles in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [1977] UKPC 13, 26, where it was said by Lord Simon that:

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is

> effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

343. At [21], Lord Neuberger added the six comments. First, it had been:

> "…rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

The court's discussion and conclusions

344. As can be seen, the implied terms that Ukraine pleads in its defence are of some complexity. Its submission is that the minimum content the court should accept is that which prohibits Russia from deliberately preventing or materially hindering performance, or prohibits Russia from preventing or materially hindering performance arising from breaches of clearly established principles of international law. Performance means Ukraine meeting its obligations under the Notes.

345. Ukraine's case is that these terms are to be implied into the Trust Deed and the Agency Agreement, and that the holders and any transferees of the Notes would be bound by them.

346. Ukraine says that in economic substance the transaction involved a two-year loan of US$3 billion by Russia. Seen in these bilateral terms, it submits that though the transaction took the form of a bond issue, the implication of what it submits are standard terms that a party will not prevent performance cannot be confined to the actions of the Trustee. It must extend to the actions of the bondholders as the "commercial counterparty" to whom the debt obligation is due.

347. The basic point which Ukraine makes is correct. Among the authorities cited, in *Crastvell Trading Ltd v Bozel SA* [2010] EWHC 0166 (Comm) at [30], it was stated in the context of the repayment of a loan that, "I readily accept that the court would imply a term to the effect that the claimants would not take steps to prevent the performance of the defendants' repayment obligations, namely their obligation to repay when those sums came due."

348. However, that case concerned a bilateral loan. In the court's view, only limited conclusions can be drawn from the economic substance of the present transaction. In legal terms it consists of an issuance by Ukraine of transferrable notes, listed on the Irish Stock Exchange, with a structure including a Trustee and a Paying Agent. As explained above, it was one of 31 such issuances since 2000. The fact that this structure rather than a loan was used for convenience to get the transaction done in a short time is of little relevance.

349. Russia is not a party to either the Trust Deed under which the Trustee acts in these proceedings to enforce the Notes, or the Agency Agreement, these being the agreements into which it is argued that terms should be implied. Russia is the holder of transferable Notes issued by Ukraine. Rightly, Ukraine does not suggest that the transaction should be legally re-characterised as a loan. The implication of terms has to be consonant with the nature of the transaction when it was entered into.

350. Ukraine has a number of responses to this point. First, it says, and the court accepts on the present evidence, that the expectation as at 24 December 2013 was that Russia would retain the Notes. But this does not alter the fact that these were tradable instruments which could have been transferred. The implication of terms happens at the time of contracting, and the implied terms that Ukraine contends for must be apt to bind not only Russia as Noteholder, but subsequent transferees as well. The suggested distinction between "guilty" and "innocent" noteholders cannot meet this objection. It is difficult to avoid the conclusion that the implied terms contended for contradict the transferable nature of the Notes.

351. Second, Ukraine submits that the Trustee plays a merely "synthetic" role in the transaction, and for that reason the implication of terms should focus on the position of the Noteholders. It relies on the analysis in Thomas and Hudson, *The Law of Trusts* (2nd edition), where the authors question whether the trustee in Eurobonds transactions is anything more than the holder of a fiduciary power. The "real value in the bond transaction is constituted by the bonds themselves and the anticipated stream of payments to be made by the issuer to each investor" (§52.16).

352. At §52.17, the authors explain:

> "It is this thinking which reduces the role of the trustee to that of a financial agent charged with the duty of supervising the issuer. The presence of the trustee is not essential to the enforcement of the obligation incumbent on the issuer to make payment when due under the bond transaction. The interpolation of the trustee is an artificial device. The trustee exists not to take title in any property which is held for the benefit of the investor, nor to effect investment of that property in the usual way. Rather, the trustee is a fiduciary responsible for the proper performance of the bond transaction."

353. It is not necessary for the court to express an opinion on this, because even if this view of the trustee's role is correct (compare *Elektrim S.A. v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178 at [153], to the effect that the main function of the trustee of a bond issue is "administrative and ministerial") it does not convey any lack of regard for the contractual structure. The authors go on to say that, "The more significant role of the eurobond trustee is in relation to the exclusive powers conferred on the eurobond trustee to the exclusion of the investors". Their analysis does not support a contention that the Noteholders should effectively be treated as a party to the Trust Deed in determining the implication of contractual terms.Further, recent authority has emphasised the importance of the express wording of the contracts in the case of tradable financial instruments: see *In re Sigma Finance Corp* [2010] BCC 40 at [36]-[37], *Hayfin v Windermere* [2016] EWHC 782 (Ch) at [40].

354. In *BNY Mellon Corporate Trustee Services Limited v LBG Capital* [2016] UKSC 29, the Supreme Court considered "enhanced capital" loan notes constituted by a trust deed. Lord Neuberger said at [30] that in a general sense the weight to be given to what was said in other documents is highly fact-dependent. But he added:

> "However when construing a contract or Trust Deed which governs the terms upon which a negotiable instrument is held, as in the present case, very considerable circumspection is appropriate before the contents of such other documents are taken into account."

Similar reasoning applies to the implication of terms into such a transaction.

355. The question whether or not the transferable Notes in this case would be considered in law as negotiable instruments (in the sense that a transferee for value in good faith may acquire a better title than the transferor) does not arise for decision since the Notes have not been transferred, but the principle is the same. The reason that the room for the implication of terms is limited in the case of such financial instruments is that transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts. Otherwise, the scope of transferability would be severely limited, and the market thereby compromised.

356. The court's conclusion is as follows:

i) Ukraine correctly draws attention to the general principle that a term may be readily implied into a contract that a party will not seek to prevent performance.

ii) Further, it can powerfully contend that military action by Russia in Crimea and eastern Ukraine has the economic effect of severely impeding the state's ability to meet its obligations under the Notes (it specifies the adverse effects on tax revenues).

iii) Further, it is not in dispute that the Trustee acts on Russia's directions in this matter, and that Russia will be the beneficiary of repayment under the Notes so long as it retains them.

iv) However, it is at this point that the legal nature of the transaction becomes decisive. For the reasons just given, the general principle that a term is necessarily implied in a contract that neither party will prevent the other party from performing it is inapt where the subject matter of the contract is transferable financial instruments such as the Notes because transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts.

v) The fact that Russia may have intended to retain the Notes does not impinge on their transferability. The fact that Russia has not transferred the Notes is not legally relevant, because the question of the implication of terms has to be decided at the time of contracting, and not *ex post* (see the *Marks and Spencer* case at [21], *supra*).

vi) The ambit of an implied term of this kind has to be defined by reference to the contract, and cannot be used to expand it: see *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]:

> "… any implied term of co-operation or prevention from performance can only be given shape in the light of the express terms which set out the obligations of the parties …. A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself."

vii) In any case, on established principles as to implication, the proposed terms which Ukraine seeks to imply into the Trust Deed even in their minimal form would render the Notes unworkable and untradable, and would thereby contradict their express terms. The Notes, in form and substance transferable, would effectively cease to be transferable.

viii) The proposed terms are unnecessary to give business efficacy to the contract, which is effective without such terms, and are not capable of clear expression, and as pleaded (and even in the minimal form proposed in written submissions) are uncertain.

ix) Additional to the above, the proposed terms relating to breaches of principles of international law are too uncertain to be incorporated by implication, and raise matters which for reasons set out above are non-justiciable.

x) The legal test for the implication of terms is accordingly not satisfied, and references to the duty of good faith and/or the duty of cooperation do not alter that conclusion.

xi) The court accepts the Trustee's submissions in these respects, and Ukraine's case to the contrary has no real prospect of success.

Issue 4: COUNTERMEASURES

Ukraine's case

357. Countermeasures are unlawful actions taken by one state against another in response to that other state having committed an internationally wrongful act in order to induce that other state to comply with its international obligations.

358. A summary is in Article 49 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts:

> Object and limits of countermeasures
>
> 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
>
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
>
> 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

359. The underlying principles behind countermeasures are, Ukraine submits, familiar to the English Court. The requirement of "clean hands" in equity, or of excusing contractual breaches that arise from a counterparty's breaches, or set-off, bear similarities with the countermeasures defence.

360. Ukraine relies on the following elements of the defence of countermeasures:

i) *Russia has committed an internationally wrongful act.* The use of force is plainly such an act. Ukraine's case is that it is justiciable.

ii) *The non-payment of the Eurobonds is action "directed against a State".* Russia is the sole Bondholder, the Trustee is acting at the direction, on behalf and for the sole benefit of Russia, and any payment would be to Russia.

iii) *The non-payment of the Eurobonds is the non-performance of an international obligation of Ukraine.* Russia has sought to characterise the obligation as being a duty owed to it, the IMF has recognised that position as the economic reality, the money would be paid to Russia and the Eurobond structure can be analysed in this way given that Russia has direct rights of enforcement in certain circumstances. It would also be a prima facie breach of the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and Russia.

iv) *The non-payment of the Eurobonds is to induce Russia to cease its internationally wrongful act.* This litigation is part of a wider strategy by Russia to pressure Ukraine, which includes the unlawful occupation of Crimea, the military interference in the east and other measures; the corollary is that if there is any obligation to pay, the non-payment is directed towards responding to that pressure and the massive damage inflicted by Russia on Ukraine by its actions.

v) *The non-payment of the Eurobonds is proportionate*. Ukraine's non-performance of the alleged obligation to repay US$3 billion in response to Russia's acts cannot be disproportionate.

The court's discussion and conclusions

361. This aspect of the case was not developed at any length in oral submissions. In its written submissions, Ukraine "recognises that the application of this defence in a contractual context is novel; but that novelty is merely a reflection of the fact that the present situation – of a sovereign State (by proxy) suing another in the High Court – is itself novel".

362. Ukraine's contention in summary is that countermeasures is a well understood principle of public international law, and that if it is otherwise obliged to make payment under the bonds, it is entitled, on the facts of this case, not to meet that obligation. Non-payment is a proportionate countermeasure, given the severity of the effect of Russian interference on its territorial integrity and economy. It submits that the novelty of the point is a reason for not granting summary judgment, rather than the other way round.

363. In fact, as the Trustee submits, the point has arisen in the courts before, though in a different context. The question whether the English court is competent to rule on the question of countermeasures in public international law was considered in *Westland Helicopters Ltd. v Arab Organisation for Industrialisation* [1995] 2 WLR 126. It was said at p. 311 that these were not matters that the court could or should consider.

364. As Ukraine says, this finding was obiter. However, this court considers that it is correct in law and should be followed.

365. In substance, the case on countermeasures is the same as the case on duress, but placed in the context of non-payment. The defence must fail for the same reasons as set out in relation to Issue 2. As the Trustee says, where the underlying acts concerned are non-justiciable, as has been held, they cannot result in legal consequences through this route. Ukraine's case to the contrary on this issue has no real prospect of success.

Other compelling reasons for a trial

366. See below.

Summary of conclusions

367. This is a summary of the judgment. The full reasoning is set out above, and this summary does not detract from its terms.

368. The Trustee has sought to emphasise the standard structure of the transaction as an issuance of Eurobonds, and the fact that it (and not Russia) brings the claim as trustee. It describes Ukraine's defence as an attempt to bring into an ordinary debt claim issues of international law that have nothing to do with the Trustee. It emphasises that Ukraine received in full the funds subscribed for the Notes by Russia.

369. The court's view on that is as follows. It is correct that Ukraine received the funds, and it is not disputed that the structure of the transaction is in standard form. However, the background is extraordinary, it is not credible to describe this as an "ordinary debt claim".

370. As to the background, there is much material before the court substantiating Ukraine's case as to Russian pressure and ultimately military action. It is right to say that Russia's answer is not before the court, though to a considerable extent this is its own choice.

371. The decision for the court on this application depends on whether in these circumstances the Trustee can nevertheless show that, as a matter of law, Ukraine has no real prospect of successfully defending the claim or issue on which summary judgment is sought, and that there are no other compelling reasons for a trial.

372. Ukraine has four main defences, and each of them raises legal questions of considerable difficulty. So that those who read the judgment have the opportunity to understand fully the nature of Ukraine's case, and how it relates to the issues for decision, the factual part of the Defence is annexed to the judgment.

373. In the deeply troubling circumstances shown in that Defence and in the evidence that has been submitted by Ukraine in support, the court must resolve the legal issues before it by application of the relevant law. Its conclusions in summary are as follows.

(1) Capacity

(1) Ukraine submits that the Eurobond transaction is void because, as a matter of Ukrainian law, Ukraine had no capacity to enter into it. Its expert evidence that the Note issuance was in breach of Ukraine's Budget Law limit, and that there

were constitutional breaches in passing the relevant Decree, is not challenged on this application.

(2) Ukraine is, of course, a sovereign state. On this point, the court's conclusion is that, whether considering the nature of a state on the international plane, or the nature of a state for the purposes of entering into a loan contract governed by English law, the position is the same. Once a state is recognised as such, as a matter of international law it has unlimited capacity to borrow, and such capacity is recognised under English law (*The Case of the S.S. "Lotus" (France v Turkey)*, PCIJ, Series A, No. 10 (at pp. 18-19)).

(3) The court accepts the Trustee's submission that this is not a case of lack of power, and therefore capacity, but of the power not being exercised as the law required (*Haugesund Kommune v Depfa ACS Bank* [2012] Q.B. 549). This is properly characterised as going to a lack of authority on the part of the actors concerned. It is common ground that whereas questions of actual authority are governed by Ukrainian law, questions of ostensible or usual authority are determined by English law as the putative applicable law of the contract.

(4) In the court's view, it is clear that the Minister of Finance had usual authority to enter into the transaction on behalf of Ukraine. The fact that the Minister of Finance was the signatory of all 31 debt issuances by Ukraine in which the Trustee had acted between 2000 and 2013 establishes such authority beyond doubt. As regards the Trustee, the Minister of Finance was a person whose position gave him usual authority to sign such issuances (*Bowstead & Reynolds on Agency* (20th ed.), Art 72, §8-015). The Trustee is entitled to summary judgment on this issue.

(5) The Trustee's alternative case is that Ukraine subsequently ratified the relevant agreements. Ukraine's case is that it was unable freely to consider the legal position as regards the bonds because of the military steps being taken by Russia in Crimea and eastern Ukraine. The court agrees with Ukraine that the question of ratification is not suitable for determination on a summary basis.

(2) Duress

(1) Ukraine submits that wrongful and illegitimate acts alleged against Russia constitute duress under English law, and that the issuance of the Eurobonds on 24 December 2013 was voidable as a result, and was avoided by the moratorium suspending payments of 18 December 2015 (see *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm)).

(2) The Trustee contends that the conduct of Ukraine subsequent to the transaction constitutes affirmation of the transaction so that Ukraine cannot now purport to rescind the transaction on grounds of duress. However, the court agrees with Ukraine that the question of affirmation is not suitable for determination on a summary basis.

(3) Affirmation aside, the Trustee's response to the duress defence is that, as a matter of law, it is non-justiciable in the English court. The most recent authority is *Belhaj v Straw* [2017] UKSC 3. Judgments were handed down by the Supreme

Court on the first morning of the hearing, and the parties have been able to take full account of it in their contentions.

(4) Ukraine submits that this issue is unsuitable for summary determination. The Trustee's response is that summary determination is appropriate because it is clear that the matters raised by Ukraine in its duress defence are non-justiciable, and cannot afford a defence. However, the court does not agree with the Trustee that the justiciability issue is a clear one, regarding it on the contrary as an issue of difficulty.

(5) But the case law appears to show such issue being considered prior to a trial, in effect as a threshold issue. If therefore the Trustee can establish non-justiciability as a matter of law on a sufficient factual foundation, complexity or the fact that the case law is evolving should not stand in the way of a decision at the summary judgment stage.

374. The court's conclusions are as follows:

(1) Ukraine has made out a strong case that economic pressure applied by Russia by way of trade restrictive measures during 2013 along with threats led to its Government's decision not to sign the EU Association Agreement at the Vilnius Summit on 28 November 2013, and to accept Russian economic support instead of which the Notes issuance was part.

(2) Ukraine has also made out a strong case that it is necessary to see this as more than simply economic, since drawing closer to the EU was a fundamental national policy objective, so that both the nature of the pressure and its effects were of profound consequence to the state.

(3) There is also strength in Ukraine's submission that since the Trustee brings the claim at the direction of, and for the benefit of, Russia as Noteholder, a defence of duress, if otherwise available, should not in principle be precluded by the interposition of the Trustee in the transactional structure, but the court need not decide that point.

(4) Ukraine's case is that the issue is justiciable because it has to be decided as part of a determination of its English law rights, that is, whether the English law contracts to which it is party are voidable (*Shergill v Khaira* [2015] AC 359 at [43]).

(5) However, it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law" (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at p.499F-G).

(6) Assessing the trade restrictive measures relied on by Ukraine would inevitably involve adjudication by the court upon transactions entered into between states on the plane of international law. Effectively, that is what Ukraine seeks to establish as its duress defence.

(7) Further, assessment of the measures would require interpretation by the court of treaties/agreements which are not incorporated into English law. In *Belhaj* at [123], it was said by the Supreme Court "… that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts".

(8) The defence falls therefore within these fundamental prohibitions established in the case law.

(9) The court's conclusion is that Ukraine's case is non-justiciable in this respect under the foreign act of state doctrine. It raises matters which the court will "abstain or refrain from adjudicating upon" (see *Belhaj* at [11(iii)(c)] and [151], and *Buttes Gas* at p 934). The Trustee is entitled to summary judgment on this issue.

375. If its case as to economic pressure is non-justiciable, Ukraine submits that threats of the use of force by Russia fall within the public policy exception to the foreign act of state doctrine.

376. This again is an issue which is comprehensively reviewed in the *Belhaj* case. The Supreme Court did not equate *jus cogens* for these purposes with the public policy exception (e.g. at [106]).

377. The court's conclusions are as follows:

(1) In oral argument, the Trustee tended to diminish the significance of the threats made in 2013. However, Ukraine is right to say that the threat of the use of force in 2013 has to be seen against the actual use of force in 2014.

(2) Ukraine relies on *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 where problems of justiciability were overcome by pointing to violations of the UN Charter and Security Council Resolutions (*Belhaj* at ([80]), the violations being admitted.

(3) Nevertheless, the *Belhaj* case makes clear that the *Kuwait Airways* case is exceptional. The prohibition on the use of armed force and on aggression are described as "central areas of abstention" and "giving rise to core examples of issues upon which domestic courts should refrain from adjudicating" under the foreign act of state doctrine (e.g. at [107(iii)]).

(4) Applying this statement of the rule, the threats of the use of force by Russia which are relied upon by Ukraine as vitiating the Eurobond transaction fall within the foreign act of state doctrine as issues upon which the court should refrain from adjudicating. They concern threats, and ultimately aggression, by a state and armed conflict between states. On the authorities, these acts are non-justiciable, and fall outside the public policy exception, and cannot give rise to a defence of duress in English law. The Trustee is entitled to summary judgment on this issue.

(5) If it is not arguably justiciable, then enforceability cannot be precluded by a permanent stay.

(3) Implied terms

(1) Ukraine relies on the principle that, "In general, a term is necessarily implied in a contract that neither party will prevent the other from performing it" (Lewison, *The Interpretation of Contracts* (6th ed 2015) at §6.14). It submits that the minimum content is an implied term which prohibits Russia from preventing or hindering performance, or from preventing or hindering performance arising from breaches of clearly established principles of international law. Performance means Ukraine meeting its obligations under the Notes.

(2) In that regard, Ukraine can powerfully contend that military action by Russia in Crimea and eastern Ukraine has the economic effect of severely impeding the State's ability to meet its obligations under the Notes.

(3) Further, it is not in dispute that the Trustee acts on Russia's directions in this matter, and that Russia will be the beneficiary of repayment under the Notes so long as it retains them.

(4) However, it is at this point that the legal nature of the transaction becomes decisive. The reason that the room for the implication of terms is limited in the case of financial instruments such as the Notes is that transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts (*BNY Mellon Corporate Trustee Services Limited v LBG Capital* [2016] UKSC 29 at [30]). Otherwise, the scope of transferability would be severely limited, and the market thereby compromised.

(5) The fact that Russia may have intended to retain the Notes does not impinge on their transferability. The fact that Russia has not transferred the Notes is not legally relevant, because the question of the implication of terms has to be decided at the time of contracting, and not *ex post* (*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742 at [21]).

(6) Further, the proposed terms which Ukraine seeks to imply even in their minimum form would render the Notes unworkable and untradable, and would thereby contradict their express terms (*BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20). The Notes, in form and substance transferable, would effectively cease to be transferable.

(7) The legal test for the implication of terms is accordingly not satisfied, and the Trustee is entitled to summary judgment on this issue.

(4) Countermeasures

(1) Ukraine's contention is that countermeasures is a principle of public international law, and that if it is otherwise obliged to make payment under the bonds, it is entitled, on the facts of this case, not to meet that obligation. Non-payment is a

proportionate countermeasure, given the severity of the effect of Russian interference on its territorial integrity and economy.

(2) The question whether the English court is competent to rule on the question of countermeasures in public international law was considered in *Westland Helicopters Ltd. v Arab Organisation for Industrialisation* [1995] 2 WLR 126. It was said at p. 311 that these were not matters that the court could or should consider. As Ukraine says, this finding was obiter. However, this court considers that it is correct in law and should be followed.

(3) In substance, the case on countermeasures is the same as the case on duress, but placed in the context of non-payment. The defence must fail for the same reasons. Where the underlying acts concerned are non-justiciable, they cannot result in legal consequences through this route. The Trustee is entitled to summary judgment on this issue.

Other compelling reasons for a trial

(1) Irrespective of its prospects of success on its four defences, Ukraine submits that there are compelling reasons to proceed to trial because the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost. Ukraine submits that these matters should be the subject of the full rigours of a public trial, and that the summary judgment process is not something to which Russia should be entitled to benefit given its egregious conduct.

(2) This point was powerfully put by Finance Minister Danyliuk in his evidence, and the court has given it careful consideration. However, ultimately, this is a claim for repayment of debt instruments to which the court has held that there is no justiciable defence. It would not be right to order the case to go forward to a full trial in such circumstances.

Conclusion

378. Accordingly, for the reasons set out above, the Trustee is entitled to summary judgment. The terms of that judgment require determination, and there are a number of consequential matters which the court will proceed to deal with. It is grateful to the parties for their assistance.

ANNEX

This Annex sets out the factual parts of Ukraine's Defence of 26 May 2016. The Defence was supported by the evidence referred to in paragraphs 5 and 6 of the judgment.

Summary

1. This claim is explicitly brought for the benefit of and upon the instruction of the Russian Federation. The claim forms part of a broader strategy of unlawful and illegitimate economic, political and military aggression by the Russian Federation against Ukraine and its people aimed at frustrating the will of the Ukrainian people to participate in the process of European integration. As part of that strategy, the Russian Federation applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by Viktor Yanukovych from signing an Association Agreement with the European Union, and to accept Russian financial support instead. The Trust Deed and Agency Agreement that are the subject of this action were the fruit of that pressure. When Mr. Yanukovych was removed from power following popular protests sparked by his administration's decision, procured by the Russian Federation, not to proceed with the Association Agreement, the Russian Federation responded with a campaign of unlawful aggression that has included the illegal invasion and occupation of sovereign Ukrainian territory, namely the Crimean peninsula, and military and other interference and unlawful use of force in eastern Ukraine. These Russian actions have killed thousands of Ukrainian citizens, injured tens of thousands, displaced millions, inflicted severe damage to Ukraine's economy and infrastructure and resulted in Russian seizure of Ukrainian state assets, which damage is measured in many billions of dollars.

2. The entry into the purported transaction which the Russian Federation seeks to enforce through this claim was, in fact, void since Ukraine lacked the relevant capacity to do so.

3. So far as (contrary to the foregoing) the contractual arrangements have any effect, they were procured by duress and Ukraine's purported consent to them was vitiated by unlawful and illegitimate threats and pressure exerted by the Russian Federation, including illegal trade restrictive measures and threats to Ukraine's territorial integrity and independence.

4. The Russian Federation's subsequent illegal invasion and unlawful occupation of the Crimean peninsula and intervention in the eastern regions of Ukrainian territory had the effect of depriving Ukraine of the entire purported economic benefit of the transaction which the Russian Federation now seeks to enforce through its instruction of the Trustee in these proceedings.

5. The Court should dismiss the claim, or decline to grant the Russian Federation the relief it seeks through the Trustee, or stay the claim unless and until the Russian Federation complies with its obligations under public international law.

The context for the Russian Federation's Attempts to Frustrate Ukraine's Entry into an Association Agreement with the European Union

6. Ukraine's policy since soon after its independence from the USSR in December 1991 has been to draw closer to and ultimately seek membership of the European Union. For example:

   6.1. In a decision of 2 July 1993, "On the Key Directions of the Foreign Policy," the Verkhovna Rada (the Ukrainian Parliament) stated that "*the priority of Ukrainian foreign policy is Ukrainian membership in the European Communities*."

   6.2. In 1994, Ukraine concluded a Partnership and Cooperation Agreement with the European Community, the preamble to which "*[r]ecogniz[ed] and support[ed] the wish of Ukraine to establish close cooperation with European institutions*."

   6.3. In 2007, negotiations began on what was to become a new Association Agreement between Ukraine and the European Union, including participation in a Deep and Comprehensive Free Trade Area ("DCFTA") at its core.

7. In response, the Russian Federation sought to deter Ukraine from the path of European integration and to encourage it instead to join the Eurasian Customs Union ("ECU") formed among Russia, Kazakhstan and Belarus in 2010. For example:

   7.1. In April 2011, Vladimir Putin (then Prime Minister) warned that the Russian Federation "*will have to introduce protective measures*" if Ukraine's participation in the DCFTA led to detrimental effects on Russia.

   7.2. At a press conference on 18 May 2011, then President Medvedev stated that "*if Ukraine … chooses the European vector, it would be hard for Ukraine to find any common grounds with the … Customs Union.*" He added that "*[a]ll shall understand that, including my Ukrainian friends and colleagues, -- You cannot 'sit on two chairs,' you have to make a choice.*"

8. Notwithstanding these Russian threats, negotiations between Ukraine and the European Union continued and significant progress was made by the two sides towards the conclusion of an Association Agreement:

   8.1. On 30 March 2012, the chief negotiators of the EU and Ukraine initialled the text of the political part of the Association Agreement, which also included integral provisions for the economic part (initialled subsequently), namely the establishment of the DCFTA. This event was the culmination of five years of discussions and evidenced the successful conclusion of negotiations of the Association Agreement, ahead of its formal conclusion.

   8.2. On 19 July 2012, the chief negotiators from both sides initialled the DCFTA, the economic part of the Association Agreement. Representatives of both the EU and Ukraine expressed their common commitment to undertake the further technical steps required to prepare for the conclusion of the Association Agreement.

   8.3. On 10 December 2012, the EU Foreign Affairs Council reaffirmed "*its commitment to the signing of the already initialled Association Agreement… possibly by the time of the Eastern Partnership Summit in Vilnius in November 2013*".

8.4. On 13 February 2013, the Cabinet of Ministers of Ukraine ("the CMU") approved a Plan on Priority Measures for the Integration of Ukraine into the European Union.

8.5. On 22 February 2013, a resolution was approved by 315 of the 349 registered members of the Verkhovna Rada stating that "*within its powers*" the Parliament would ensure that the 10 December 2012 EU Foreign Affairs Council "*recommendations*" would be implemented.

8.6. On 25 February 2013, at the Sixteenth EU-Ukraine Summit, the President of Ukraine, Viktor Yanukovych, the President of the European Council, Herman Van Rompuy, and the President of the European Commission, Jose Manuel Durao Barroso, reaffirmed their commitment to concluding the Association Agreement, with a view to doing so at the Vilnius Summit scheduled for 28 November 2013.

The context for the issue of Eurobonds to the Russian Federation in December 2013

Ukraine's borrowing needs during 2013 and history of borrowings

9. The poor state of Ukraine's public finances at this time left it particularly vulnerable to Russian economic pressure. During 2012 and 2013, Ukraine was reliant on external borrowing in order to fund its public finances. For example, during 2012 the Ukrainian State budget deficit was UAH 53.4 billion (approximately USD 6.7 billion,[4] and 3.8% of GDP). Further, the Law of Ukraine "On State Budget of Ukraine for 2013" No. 5515-VI dated 6 December 2012 ("the 2013 Budget Law"), as originally passed, imposed a limit for the Ukrainian State budget deficit in 2013 of UAH 50.532 billion (approximately USD 6.3 billion[5]), and permitted borrowings for the general fund of the State budget in that year of up to UAH 135.530 billion (approximately USD 17 billion).

10. In the period up to the end of 2012, Ukraine had borrowed some of the funds that it required from the International Monetary Fund ("IMF"), pursuant to its 2010 Standby Arrangement facility, but that facility was terminated as of 27 December 2012.

11. During 2012 and until April 2013, Ukraine had been able to raise a significant proportion of the external borrowing that it required through the international capital markets. In particular, Ukraine issued the following Eurobonds over that period:

Date	Sum borrowed	Interest rate payable	Maturity period (maturity date)
24 July 2012	USD 2 billion	9.25%	5 years (July 2017)
26 September 2012	USD 600 million	9.25%	5 years (July 2017)
28 November 2012	USD 1.25 billion	7.80%	10 years (November 2022)
11 February 2013	USD 1 billion	7.80%	10 years

[4] At the official exchange rate of UAH 7.9898 per USD set by the National Bank of Ukraine ("the NBU") as of 1 January 2012. This Defence refers to the NBU official exchange rate at the relevant time. The official exchange rate was UAH 7.993 per USD at all material times, save where otherwise stated.
[5] At the official exchange rate of UAH 7.993 per USD set by the NBU.

			(November 2022)
17 April 2013	USD 1.25 billion	7.50%	10 years (April 2023)

12. Each of the issues of Eurobonds above was oversubscribed, and in some cases very substantially so (for example, the Eurobonds issued in July 2012 were three times oversubscribed and the Eurobonds issued in April 2013 were 2.3 times oversubscribed). Some of the key factors that determined the existence and extent of Ukraine's ability to borrow funds on the capital markets on economically viable terms at this time were:

    12.1. The state of Ukraine's relationship with Russia, in light of the fact that Russia accounted for approximately a quarter of Ukraine's export market at this time;

    12.2. The market perception that, after several years of negotiations and reforms, Ukraine was preparing to enter into an Association Agreement with the European Union during the course of 2013. That market perception was in accordance with the progress that Ukraine had been making towards entry into of that Association Agreement.

    12.3. Ukraine's entry into the Association Agreement with the EU would be viewed favourably by the international capital markets, and would thereby improve Ukraine's ability to access international capital markets in order to satisfy its borrowing requirements.

13. After issuing the Eurobonds in April 2013 ("the April 2013 Eurobonds"), Ukraine intended to issue further Eurobonds in the international capital markets later in 2013, and on 1 July 2013 the First Deputy Prime Minister of Ukraine announced that it might do so later in 2013 once it became possible for Ukraine to borrow on more favourable terms.

14. Ukraine's intention and announcement (given all prevailing circumstances and expectations at the time) reflected the fact that it would be able to borrow on more favourable terms once Ukraine had entered into, or at least was on the verge of entering into, the Association Agreement later in 2013. As stated above, that was scheduled to take place at the Vilnius Summit on 28 November 2013.

15. If Ukraine had entered into the Association Agreement, this would have facilitated (and during 2013 was widely known to be likely to facilitate) Ukraine in borrowing further funds from both international capital markets and also supranational institutions, including the European Bank for Reconstruction and Development and the IMF, on economically attractive terms.

Russian actions during 2013

16. In June 2013, the Verkhovna Rada published the text of the draft Association Agreement on its website. As particularised further below, following the publication of the text the Russian Federation took a number of steps to threaten and put pressure on Ukraine with the aim of preventing it from entering into the Association Agreement. Those steps included the imposition by the Russian Federation of unlawful trade restrictive measures on Ukraine, and the making of threats by the Russian Federation to impose further trade restrictive measures on Ukraine, as well as

threats regarding the security of Ukraine's status as a sovereign state, including its territorial integrity, in the event that Ukraine entered into the Association Agreement. The Russian Federation also sought to use its influence and lobbying power with European governments and institutions in order to place obstacles in the path to the entry into by the EU of the Association Agreement with Ukraine.

17. The Russian Federation imposed trade restrictive measures and applied pressure to Ukraine including (without limitation) the following:

17.1. On or around 29 July 2013, immediately after President Putin had met with President Yanukovych, the Russian Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing (Rospotrebnadzor) imposed a ban on the import of confectionery products of a major Ukrainian chocolate manufacturer that had substantial annual exports to Russia (in 2012 worth around £350 million). The ban was purportedly justified on the basis that the confectionery was unsafe, but later the justification supposedly relied on was a purported breach of Russian labelling requirements. Kazakhstan, Kyrgyzstan and Moldova – which all imported the same products –did not impose any similar ban or restrictive measures on those products.

17.2. During July 2013, the Russian Customs Service added about 40 Ukrainian companies to a list of "high-risk" producers. This classification meant that the companies were suspected of providing unsatisfactory information to the Russian Customs Service in the past and so its exports had to be scrutinised meticulously before being permitted to cross the border. The practical effect of this was to block the exports of these goods from Ukraine to the Russian Federation.

17.3. On 14 August 2013, the Russian Customs Service extended the purported "high risk" categorisation to all Ukrainian producers. The practical effect of this was to create a *de facto* trade ban on all Ukrainian exports to Russia.

17.4. Although the *de facto* trade ban was lifted around a week later, Russia continued thereafter to apply "additional control procedures" to Ukrainian exports to Russia, severely inhibiting their passage. Further, in an interview given on 21 August 2013, Mr Sergei Glazyev, an Advisor to the President of the Russian Federation with responsibilities for the development of Eurasian integration, publicly stated that this *de facto* trade ban could be imposed on Ukraine on a permanent basis in the event that Ukraine entered into the Association Agreement with the EU (Mr Glazyev said *"if Ukraine signs the Association Agreement with the EU, the administration regime that has been temporarily introduced on the Russia- Ukraine border in order to verify the conformity of imported Ukrainian goods to the currently effective goods origin rules and the accuracy of declared customs value, may apply on a permanent basis."*)

17.5. In October 2013, the Lithuanian Foreign Minister, Linas Linkevičius, indicated that Russia had threatened to suspend gas supply to Ukraine should Ukraine proceed to sign the Association Agreement.

17.6. In November 2013, Russia introduced new customs procedures. On 4 November 2013, Russian customs officials stated publicly that at least 300 trucks exporting goods from Ukraine were lined up at the border.

17.7. On 26 November 2013, President Yanukovych reportedly told his Lithuanian counterpart by phone that President Putin had threatened to procure Russian banks to bankrupt factories in eastern Ukraine if Ukraine signed the Association Agreement.

18. Each of the above actions were illegitimate and/or unlawful in that:

18.1. The restrictions on trade with Ukraine at paragraph 17 were spurious and not applied for bona fide reasons and/or applied for an ulterior purpose, with the intention of applying pressure to Ukraine. In support of this position, Ukraine will rely on the facts that:

18.1.1. Each of the trade restrictive measures were imposed in the few months before the Vilnius Summit, and coincided with the application of pressure by the Russian Federation on Ukraine not to sign the Association Agreement, including the threats at paragraph 19 below;

18.1.2. Mr Sergei Glazyev publicly stated on 21 August 2013 that the imposition of checks on Ukrainian exports to Russia was in response to the possibility that Ukraine would sign the Association Agreement;

18.1.3. On 17 December 2013, when the parties announced that Ukraine would be borrowing funds from the Russian Federation, the Russian Federation also agreed to terminate a number of these trade restrictive measures, to be effective within a matter of months. (However, following the fall of the administration of President Yanukovych, and as pleaded further below, Russia subsequently reintroduced various trade restrictive measures and took other economic action against Ukraine.)

18.2. The measures at paragraphs 18.1 to 18.4 and 18.6 above were each breaches of:

18.2.1. Articles I:1, III:4, VIII:3, X:3(a), XI:1, XIII:1 and/or XXIII of the General Agreement on Tariffs and Trade 1994.

18.2.2. In the case of the trade restrictive measures at paragraph 18.1, Articles 2, 5, 7 and/or 8 of the Agreement on the Application of Sanitary and Phytosanitary Measures;

18.2.3. The 2011 Free Trade Agreement between Member States of the Commonwealth of the Independent States;

18.3. Each of the measures at paragraph 17 were also breaches of:

18.3.1. The 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation;

18.3.2. The Budapest Memorandum on Security Assurances 1994.

19. Representatives of the Russian Federation made threats of further action in the event that Ukraine entered into the Association Agreement. For example:

19.1. On 18 August 2013, at a time when Russia had imposed the *de facto* trade ban on Ukrainian exports pleaded at paragraph 18.3 above, Mr Glazyev stated: "*We are preparing to toughen customs administration in case Ukraine takes this suicidal step and signs the association agreement with the EU*".

19.2. On 21 August 2013, Mr Glazyev said that Russia could annul the CIS Free Trade Area Agreement (to which Ukraine had acceded in 2011) and cancel joint projects in a number of industries if Ukraine signed the Association Agreement with the EU.

19.3. On 22 August 2013, President Putin suggested that if Ukraine concluded the Association Agreement with the EU "*the member states of the [Eurasian] Customs Union will have to consider protective measures [against imports from Ukraine]*."

19.4. On 23 August 2013, Deputy Prime Minister Dmitri Rogozin announced the possibility that Russia would cease to co-operate with Ukraine in the production of the An-124 Ruslan transport aircraft.

19.5. On 9 September 2013, Russian Prime Minister Dmitry Medvedev warned that Ukraine would be barred from entry into the Eurasian Customs Union if it entered into the Association Agreement: "*I don't want there to be any illusions ... Practically, for our Ukrainian partners, entry into the Customs Union will be closed*".

19.6. On 19 September 2013, President Putin warned Ukraine that Russia would retaliate with protectionist measures if Ukraine entered into the Association Agreement: "*We would somehow have to stand by our market, introduce protectionist measures. We are saying this openly in advance*".

19.7. Speaking at a conference in the city of Yalta, Crimea, on 22 September 2013, Mr Glazyev:

19.7.1. Threatened that the tariffs and trade checks that Russia would impose if Ukraine entered into the Association Agreement could cost Ukraine billions of dollars and result in a default in its obligations to creditors. "*Who will pay for Ukraine's default, which will become inevitable*?" Mr Glazyev asked. "*One has to be ready to pay for that*." Saying that a default would cost Ukraine "*25 or even 35 billion euros*", he asked: "*Would Europe take responsibility for that?*"

19.7.2. Asserted spuriously that by signing the Association Agreement with the EU, the Ukrainian government would violate the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation. He threatened that if Ukraine signed the Association Agreement, Russia could no longer guarantee Ukraine's status as a State and could possibly intervene if pro-Russian regions of the country appealed directly to Moscow.

19.8. On 23 September 2013, Mr Glazyev threatened that Russia would support a partitioning of Ukraine if it signed the Association Agreement in two months' time. Mr Glazyev stated that Ukraine's Russian-speaking minority might break up the country in protest at such a decision, and stated wrongly that Russia would be legally entitled to support them.

19.9. On 1 November 2013, Mr Glazyev again stated spuriously that if Ukraine signed the Association Agreement, that would be a breach of the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, and that if the Association Agreement were signed "*we will have to start over [discussion of] all matters from the very beginning, including the issues of borders [between Ukraine and the Russian Federation]*".

20. Each of the above actions was illegitimate and/or unlawful in that:

20.1. The Russian Federation's public statements in offering to support the partitioning of Ukraine were:

20.1.1. A threat of the use of force, directly or indirectly, contrary to customary international law which rule has the status of *jus cogens* and/or Article 2(4) of the UN Charter.

20.1.2. A breach of the Russian Federation's duty under customary international law to refrain from intervention in the internal affairs of a sovereign State, namely Ukraine, which duty has the status of *jus cogens*.

20.2. The Russian Federation's public statements in threatening further trade restrictive measures were each threats of action that, if taken, would have been illegitimate and/or unlawful, and in breach of:

20.2.1. Articles I:1, III:4, X:3(a), XI:1, XIII:1 and/or XXIII of the General Agreement on Tariffs and Trade 1994;

20.2.2. The 2011 Free Trade Agreement between Member States of the Commonwealth of the Independent States;

20.2.3. The 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation;

20.2.4. The Budapest Memorandum on Security Assurances 1994.

The effect of Russian action during 2013 on Ukraine

21. These actions had a significant impact on Ukraine's economy. For example:

21.1. During 2013, Ukrainian exports to Russia were around 15% lower than during 2012 (although in sectors specifically affected by Russian trade restrictive measures, exports fell by around a third).

21.2. Overall trade between Ukraine and Russia during 2013 reduced by around 15% as well (as against 2012).

22. The matters referred to above significantly and adversely affected Ukraine's ability to access international capital markets in the period from summer 2013 onwards. In particular:

    22.1. Credit Default Swap bid prices for Ukrainian debt increased substantially throughout the period from June 2013 to October 2013;

    22.2. Ukrainian sovereign bond yields also increased substantially throughout this period;

    22.3. By around September 2013, Ukraine was unable to access international capital markets on terms that were economically viable.

23. Also, by around autumn 2013, Ukraine:

    23.1. Had the credit rating on each of its existing Eurobonds downgraded by each of three major credit rating agencies (Fitch, Moody's and Standard & Poor) between 20 September 2013 and 8 November 2013;

    23.2. Had borrowed several billion US dollars on domestic markets through short-term domestic government bonds that were repayable in 2014-2015. In practice, Ukraine was unable to raise any significant further funds from borrowing on the domestic market.

    23.3. Was due to repay sums totalling around USD 1.6 billion to the IMF by the end of November 2013;

    23.4. In December 2013, would either have had to repay or roll over (at the discretion of VTB Capital PLC ("VTB") and Sberbank of Russia ("Sberbank")) at an increased interest rate (9.5%) a total of USD 750 million in borrowings from VTB and Sberbank. Both of these banks were majority-owned by the Russian Federation.

The decision to borrow funds from the Russian Federation

24. It was clear that if Ukraine signed the Association Agreement Ukraine would face a grave threat to its national security and territorial integrity and that its economy would be intentionally and severely (if not irreparably) damaged by Russian action. That was clear from the actions taken, and threats made, by the Russian Federation, and in light of the seriously deteriorating ability of Ukraine to borrow the funds that it required from the international capital markets that was itself in substantial part a result of those actions and threats. If Ukraine signed the Association Agreement, the likely consequences of Russian actions were such that Ukraine would be unable to meet its future debt repayment obligations, unable to refinance them on economically viable terms, and/or unable to borrow any further funds sufficient to offset the consequences of the Russian actions and threatened actions.

25. As a consequence of the foregoing, during meetings in October 2013 and November 2013 between President Putin on behalf of the Russian Federation and President Yanukovych on behalf of Ukraine, the Russian Federation and Ukraine agreed that:

    25.1. Ukraine would not sign the Association Agreement;

    25.2. The Russian Federation would take steps to remove the restrictions on trade with Ukraine that it had imposed during 2013;

25.3. The Russian Federation would lend Ukraine up to USD 15 billion;

25.4. The Russian gas company, Gazprom, would sell Ukraine's national gas company, Naftogaz, natural gas at a discounted rate.

26. In the circumstances summarised at paragraphs 9 and 16 to 24 above, Ukraine had no practical choice but to accept these terms, and only did so as a result of the duress applied to it by the Russian Federation summarised in those paragraphs.

27. Thereafter, and pursuant to the agreement pleaded at paragraph 25 above:

27.1. On 21 November 2013 the CMU passed Order No. 905-p suspending the process of preparation to enter into the Association Agreement "*[w]ith the purpose of taking measures to ensure the national security of Ukraine, examining in more detail and elaborating a complex of measures that need to be taken to restore the lost production volumes and lines of trade and economic relations with the Russian Federation and other member states of the Commonwealth of Independent States …*".

27.2. Also on 21 November 2013, the Verkhovna Rada rejected some of the key pieces of legislation designed to meet the remaining preconditions of the European Union for Ukraine to sign the Association Agreement.

27.3. On 28 November 2013, the Vilnius Summit took place and the Association Agreement was not signed there as had been envisaged.

28. As a result of these steps, Ukraine's ability to access international capital markets became even more limited, indeed those markets became effectively closed to Ukraine. For example, Ukrainian sovereign bond yields increased throughout November 2013, and reached 14% during the first two weeks of December 2013.

The process of entering into the contractual documents

29. Pursuant to the agreement pleaded at paragraph 25 above, on 12 December 2013 the Ukrainian Minister of Finance, Mr Yuriy Kolobov, and the Head of the External Borrowing Department of the Ukrainian Ministry of Finance, Ms Galina Pakhachuk, visited Moscow to negotiate the final terms of the borrowing that Ukraine would undertake from the Russian Federation. They met there with the Minister of Finance of the Russian Federation, Mr Anton Siluanov and Deputy Ministers of Finance Sergei Storchak and Alexei Moiseev, ministerial aide Timur Maksimov, Director of the Department of International Financial Relations of the Ministry of Finance, Andrei Bokaryev and Deputy Director for Public Debt and Public Financial Assets, Petr Kazakevich.

30. As a result of those discussions, and in light also of the terms which were insisted on (through Minister Siluanov) by President Putin of Russia, the parties reached an arrangement under which:

30.1. As a first tranche, Ukraine would borrow around USD 3 billion from the Russian Federation. Initially, the Ukrainian delegates sought financing in the sum of around USD 1.6 billion, as this was, and was understood to be, the maximum sum that Ukraine was permitted to borrow by the 2013 Budget Law in force at that time (and taking into account the existing level of external borrowing at the time), as pleaded further below. However, at the insistence of

the Russian Federation (which arose from the precondition at paragraph 30.3 below for the benefit of the Russian Federation), this amount was increased to USD 3 billion.

30.2. The borrowing would take place through the issuing of Eurobonds. Amongst other reasons, a bilateral direct loan agreement between Ukraine and the Russian Federation would take much longer to implement, whereas the relevant documents in respect of a contemplated issue of Eurobonds had been substantially prepared (albeit for a different purpose, namely a capital markets offering) and could be adapted. Ukraine agreed to send a copy of the draft Eurobond Offering Circular to the Russian Federation for consideration.

30.3. It would be a precondition of any lending by the Russian Federation to Ukraine that around USD 1.6 billion out of the USD 3 billion would be used to permit or enable Naftogaz to make payment of a like sum forthwith to Gazprom, the Russian gas company, in respect of alleged debts of Naftogaz to Gazprom for gas supplies to Ukraine. Likewise, if the Russian Federation were to lend further funds – up to USD 15 billion – then USD 5 billion of that total lending would be required to be used to permit or enable Naftogaz to make payment of a like sum to Gazprom. Minister Kolobov explained at the meeting on 12 December 2013 that he had no authority to agree to such an arrangement, but nevertheless it was made clear by the Russian delegates that this was an essential precondition, whether the money to pay Gazprom came directly out of the loan monies to be advanced by Russia or indirectly through some other mechanism.

30.4. The remainder of the terms would be the subject of further negotiation between Ukraine and the Russian Federation.

31. The said Offering Circular identified, amongst other matters, the following "*Risk Factors*" that could "*individually or in the aggregate [with other Risk Factors] have a material adverse effect on Ukraine's capacity to repay principal and make payments of interest on the Notes*" (with emphasis added):

"Ukraine's economy depends heavily on its trade flows with Russia and certain other CIS countries and any major change in relations with Russia could have adverse effects on the economy, including as a result of the prices charged by Gazprom for natural gas supplied to Ukraine.

*Ukraine's economy depends heavily on its trade flows with Russia and other Commonwealth of Independent States (the "**CIS**") countries, largely because Ukraine imports a large proportion of its energy requirements, especially from Russia (or from countries that transport energy related exports through Russia). In addition, a large share of Ukraine's services receipts comprise transit charges for oil, gas and ammonia from Russia, which are delivered to the EU via Ukraine. Furthermore, in 2012, approximately 26.0 per cent. of all Ukrainian exports of goods went to Russia (although this decreased to 23.7 per cent. for the nine months ended 30 September 2013).*

Ukraine therefore considers its relations with Russia to be of strategic importance. Until recently, relations between Ukraine and Russia were strained to a certain extent due to factors including:

> ● *disagreements over the prices and methods of payment for gas delivered to, and transported through, Ukraine by the Russian gas supplier Gazprom;*
>
> ● *issues relating to the delineation of the Russia-Ukraine maritime border;*
>
> ● *issues relating to the temporary stationing of the Russian Black Sea Fleet (Chernomorskyi Flot) in the territory of Ukraine; and*
>
> ● *a Russian ban on imports of meat and milk products from Ukraine and anti-dumping investigations conducted by Russian authorities in relation to certain Ukrainian goods*
>
> *…*
>
> *If bilateral trade relations were to deteriorate or if Russia were to stop transiting a large portion of its oil and gas through Ukraine or if Russia halted supplies of natural gas to Ukraine, Ukraine's balance of payments and foreign currency reserves could be materially and adversely affected.*
>
> *Recently, pressure was placed on Russia-Ukraine bilateral relations arising out of the prospect of Ukraine signing the Association Agreement with the EU, including the threat of restrictive trade measures by Russia. For the nine months ended 30 September 2013, exports of Ukrainian goods to Russia decreased by 13.4 per cent. as compared to the corresponding period in 2012. As at the date of this Prospectus, discussions are ongoing between Russia and Ukraine in relation to restoring industrial cooperation and trade and economic relations between the two countries, following the decision of Ukraine to defer the signing of the Association Agreement with the EU. The work on the preparation of a "road map" for continuing negotiations between Ukraine and the EU remains in progress. If for any reason the announced economic and financial support is not forthcoming from Russia and Ukraine in the future signs the Association Agreement with the EU, this could impact trade and other aspects of Ukraine's bilateral relations with Russia and could lead to the imposition of trade and other punitive measures by Russia. These factors, in turn, could have a material adverse effect on the Ukrainian economy.*
>
> *Russia has, recently and in the past, threatened to cut off the supply of oil and gas to Ukraine in order to apply pressure on Ukraine to settle outstanding gas debts and maintain the low transit fees for Russian oil and gas through Ukrainian pipelines to European consumers. In line with its threats, Gazprom substantially decreased natural gas supplies to Ukraine in early January 2009, due to a failure to agree terms regarding the supply of natural gas.*
>
> *…*
>
> *Reduced revenue from Naftogaz, or any further adverse changes in Ukraine's relations with Russia, or an increased need for support, could put pressure on the State Budget and have a material adverse effect on Ukraine's ability to perform its obligations under the Notes.*"

32. On 17 December 2013, President Putin and President Yanukovych announced:

32.1. The intention of Russia to subscribe for up to USD 15 billion of Ukrainian sovereign debt before the end of 2014, including an initial tranche of USD 3 billion that is the subject matter of these proceedings, which sovereign debt would be in the form of Eurobonds and other instruments having a maturity of two years and an affixed interest rate of five per cent per annum; and

32.2. A substantial reduction in the price of gas to be supplied by Gazprom to Naftogaz. It was agreed that the price of gas would not exceed USD 268.50 per 1,000 cubic metres, compared to the then-prevailing price of around USD 400 per 1,000 cubic metres.

33. On 18 December 2013, the CMU adopted Decree No. 904 ("the CMU Decree") that resolved:

33.1. To effectuate external state borrowings through the issuance of notes (referred to therein as "the notes");

33.2. To confirm the Terms and Conditions of the issuance of the notes attached thereto. The CMU Decree attached an outline of certain terms of the notes, which provided at point 7 that "*the placement of the notes shall be as determined in the issue prospectus*" but which did not include:

33.2.1. Reference to any covenant entitling the Russian Federation call an Event of Default and to procure the Trustee to demand early repayment of the full principal and interest outstanding under the notes in the following circumstances:

(a) violation of a requirement that the total of Ukrainian State debt and State guaranteed debt must not exceed an amount equal to 60 per cent of the annual nominal gross domestic product of Ukraine (whether this was permitted by then-prevailing Ukrainian law or not) ("the GDP Ratio Clause");

(b) default by Ukraine in repayment of any Relevant Indebtedness exceeding USD 25 million. Since Relevant Indebtedness was in due course defined as including (amongst other matters) any indebtedness to any noteholder, and the Russian Federation was entitled to sell the notes to any third person without notice to Ukraine, in practice this Clause required Ukraine not to default on any indebtedness exceeding USD 25 million to any person ("the Cross-Default Clause");

33.2.2. The Clause prohibiting Ukraine from claiming or exercising any right of set off in respect of the payment obligations under the notes ("the No Set Off Clause");

33.3. For the Ministry of Finance to issue the notes pursuant to the Terms and Conditions approved by the CMU Decree.

34. However, as at the date of the CMU Decree:

34.1. The final terms of the Trust Deed and the Terms and Conditions of the notes had not been agreed;

34.2. There was no agreement in respect of the Conditions summarised at paragraphs 33.2.1 to 33.2.2 above, which conditions were onerous and unusual in Eurobonds generally and/or certainly in Eurobonds being purchased by a sovereign wealth fund and/or being issued by a sovereign state;

34.3. The CMU did not have access to and had not been provided with the draft Terms and Conditions of the notes;

34.4. The CMU did not have access to and had not been provided with the Expert Opinion required under the Rules of Procedure of the Cabinet of Ministers of Ukraine, as pleaded further below.

35. Thereafter, Ukraine purported to enter into the Trust Deed and Agency Agreement both dated 24 December 2013.

36. On 17 December 2013, a draft Amendment Law to the 2013 Budget Law had been registered with the Verkhovna Rada that proposed to increase the permitted level of external State borrowing for the general fund during 2013 by a sum of UAH 4,575,426,000 (equivalent to an increase of around USD 0.6 billion).

37. However, the said Amendment Law:

37.1. Was not passed by the Verkhovna Rada until 19 December 2013, was only signed by President Yanukovych on 27 December 2013 and by its own terms was not effective until the day after its publication. The Amendment Law was published on 28 December 2013, and accordingly took effect on 29 December 2013. It did not have retrospective effect as a matter of Ukrainian law.

37.2. In any event, did not increase the permitted level of external State borrowing for the general fund sufficiently to accommodate a further USD 3 billion in borrowing.

The Trust Deed and Agency Agreement

37.3. As was public knowledge from the joint statement made by President Putin and President Yanukovych on 17 December 2013, and as was recorded in the terms of the Prospectus at page 4, and as the Trustee was aware:

37.3.1. The purpose of the arrangements to be entered into pursuant to which Ukraine would issue USD 3 billion of Eurobonds was for the Russian Federation to provide "economic support" to Ukraine as part of a larger USD 15 billion package.

37.3.2. To that end, the Russian Federation was to be the sole subscriber for and Noteholder of the USD 3 billion Eurobonds.

37.4. Clause 5 of the Trust Deed provides that the Conditions shall be binding on Ukraine and the Noteholders (i.e. the Russian Federation);

37.5. Clause 25.2 of the Trust Deed provides that Ukraine irrevocably agreed that the Courts of England shall have exclusive jurisdiction to settle any disputes as therein defined, which agreement was for the exclusive benefit of the Trustee and each of the Noteholders (i.e. the Russian Federation);

37.6. Clause 8 of the Trust Deed and Condition 13 of the Terms and Conditions of the Notes provides that the Noteholders (i.e. the Russian Federation) themselves may proceed directly against Ukraine in certain circumstances;

37.7. Clause 3.6 of the Trust Deed provides that in certain circumstances, including a failure to pay principal in respect of any Note at maturity, a Noteholder may require the Issuer to issue the Noteholder with Definitive Original Notes in place of the relevant Original Global Note.

38. The effect of the matters pleaded at paragraphs 37.1 to 37.5 above is that:

38.1. The Russian Federation is able to enforce the obligations of Ukraine through the Trustee or directly. In support of the foregoing, Ukraine will also rely on the fact that solicitors acting for the Ministry of Finance of the Russian Federation sent a letter dated 2 February 2016 in anticipation of the present proceedings, apparently on the basis that the Russian Federation considered itself entitled and intended to seek to enforce Ukraine's purported obligations directly.

38.2. The Russian Federation's rights, and Ukraine's obligations, are not affected by the mechanism by which the Russian Federation takes enforcement action.

38.3. It was an implied term of the Trust Deed, necessary to give effect to the obvious shared intention of the parties (including the Russian Federation as Noteholder) and/or business efficacy that the Trustee would not be able to enforce, and the Russian Federation would not instruct the Trustee to enforce and the Trustee would not accept any instruction to enforce, any purported obligation of Ukraine if the Russian Federation could not itself enforce any such purported obligation of Ukraine or would not itself be able to enforce any such obligation if it were owed directly to the Russian Federation (whether by reason of duress applied by the Russian Federation or otherwise).

The Notes

39. It is denied that the issuing of the Notes was valid or effective for the reasons pleaded in this Defence.

Lack of capacity

40. The transaction that the Russian Federation seeks to enforce in the present proceeding is void because as a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into it.

41. As a matter of Ukrainian law:

41.1. Article 19 (2) of the Constitution of Ukraine dated 28 June 1996, as amended ("the Constitution") stipulates that *"Agencies of State power and agencies of local self-government and the officials thereof be obliged to operate only on the basis of and within the limits of powers and by the means which have been provided for by the Constitution and the laws of Ukraine.*"

41.2. Article 170 of the Civil Code of Ukraine (the "Civil Code") provides that the "*The State shall acquire and effectuate civil rights and duties through*

agencies of State power within the limits of their competence established by law".

41.3. Pursuant to Article 19(2) of the Constitution, and as consolidated and elaborated by Article 2(3) of the 2005 Code on Administrative Proceedings of Ukraine, decisions adopted and/or performed by agencies of State power and officials must satisfy various legal criteria, including that they must:

41.3.1. Be adopted on the basis of and within the limits of powers and by a means provided by the Constitution and laws of Ukraine;

41.3.2. Be substantiated, that is, taking into account all circumstances having significance for the adoption of the decision (or performance of the action);

41.3.3. Be adopted sensibly, that is, pursuant to a procedure that accords with common sense and that reaches an outcome that accords with common sense.

42. By Article 85 of the Constitution, the Verkhovna Rada was responsible for, amongst other matters, approving the State Budget of Ukraine and introducing any necessary changes therein.

43. By Article 39 of the Ukrainian Budget Code dated 8 July 2010 ("the Ukrainian Budget Code") and Article 159(6) of the Law of Ukraine "On the Reglament of the Verkhovna Rada of Ukraine" dated 10 February 2010, the Verkhovna Rada was required to approve the State Budget for the forthcoming calendar year by 1 December of the previous calendar year by a Law on the State Budget of Ukraine ("the Budget Law" for each year).

44. By Articles 16(1) and 40 of the Ukrainian Budget Code, the Budget Law for any given year must specify limits on (amongst other matters) the financing of the annual Budget by reference to certain coded categories. Accordingly, the Budget Law for each year, including the 2013 Budget Law, specified limits as to the amount of monies that could be borrowed by Ukraine by way of external borrowings (i.e. borrowings from foreign creditors, including foreign States) for the general fund of the State budget.

45. By Article 116(6) of the Constitution, the CMU was responsible for (amongst other matters) ensuring the implementation of the Budget Law passed by the Verkhovna Rada.

46. By Article 3(2) of the Law of Ukraine on the Cabinet of Ministers of Ukraine dated 7 October 2010 ("the CMU Law"): "*The Cabinet of Ministers of Ukraine shall effectuate executive power on the basis of, within the limits of, and by the means provided by the Constitution and laws of Ukraine.*"

47. By Article 4 of the CMU Law:

"(1) The Cabinet of Ministers of Ukraine shall be guided in its activity by the Constitution of Ukraine, this Law, other laws of Ukraine and also by acts of the President of Ukraine;

(2) The organisation, powers, and procedure of activity of the Cabinet of Ministers of Ukraine shall be determined by the Constitution of Ukraine and by this and other laws of Ukraine."

48. The effect of the provisions pleaded at paragraphs 41 to 47 above is that, for relevant purposes, during 2013 Ukraine, acting through the Cabinet of Ministers of Ukraine, only had capacity to enter into external borrowings for the general fund of the State budget:

    48.1. Within the limits specified by the 2013 Budget Law;

    48.2. Insofar as it complied with the legal criteria pleaded at paragraph 41.3 above.

Lack of capacity: Budget Law limits

49. As at 18 December 2013 when the CMU Decree was adopted and/or 24 December 2013 when Ukraine purported to enter into the Trust Deed and Agency Agreement:

    49.1. The 2013 Budget Law provided that the limit on external borrowings for the general fund of the State budget during 2013 was UAH 36,540,000,000 (around USD 4.6 billion);

    49.2. Ukraine had already accumulated external borrowings for the general fund of the State budget during 2013 of UAH 23,979,000,000 (USD 3 billion)**;**

    49.3. Accordingly, the CMU had no capacity to approve or permit further external borrowings during 2013 that exceeded UAH 12,561,000,000 (around USD 1.6 billion).

50. Further, if (contrary to Ukraine's primary case) the capacity of Ukraine, acting through the CMU, is to be ascertained as at 31 December 2013, the Amendment Law only increased the permitted external borrowings for the general fund of the State budget by UAH 4,575,426,000 (equivalent to an increase of around USD 0.6 billion).

51. Accordingly, whether as at 18, 24 or 31 December 2013:

    51.1. As a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into, or to permit the Minister of Finance to enter into, the Trust Deed or Agency Agreement, or to issue the Eurobonds or otherwise to borrow USD 3 billion;

    51.2. In the premises, as a matter of English law (being the law governing the Trust Deed and the Terms and Conditions of the Notes), the Trust Deed and Agency Agreement, and the Eurobonds issued thereunder, are void and of no effect.

Lack of capacity: Breach of Constitutional criteria

52. Point 55 of the Rules of Procedure of the Cabinet of Ministers of Ukraine ("the CMU Procedural Rules") required:

"*After processing by the Secretariat of the Cabinet of Ministers, the draft act of the Cabinet of Ministers shall be placed on the agenda of the next meeting of the Cabinet of Ministers. In addition to the materials submitted by the principal draftsman, the draft act shall also be accompanied by an Expert Opinion of the Secretariat of the*

Cabinet of Ministers, which shall be obligatory for consideration at the session of the Cabinet of Ministers."

53. Point 52(3) of the CMU Procedural Rules prescribes the nature and contents of the said Expert Opinion. This included that the Secretariat should:

"*(1) verify the draft act for conformity to the Constitution and laws of Ukraine, acts of the President of Ukraine, international treaties of Ukraine in force, the Program of Activity of the Cabinet of Ministers, State special-purpose programs, programs of the President of Ukraine, as well as coordination with acts of the Cabinet of Ministers and conformity with requirements established by the present Reglament;*
(2) study the sufficiency of financial and economic calculations;
(3) verify the completeness of coordination with interested agencies;
(4) evaluate the effectiveness of the means chosen for normative-legal regulation of the problem, whether the socio-economic and other indicators of the results of the realization of the act are realistic …"

54. In breach of the CMU Procedural Rules:

54.1. The Secretariat of the CMU only received the draft of the CMU Decree and supporting documents on 19 December 2013 (i.e. the day after the CMU Decree was passed);

54.2. The said Expert Opinion was only issued on 19 December 2013 (i.e. the day after the CMU Decree was passed) and was not before the CMU when it passed the CMU Decree.

55. In the premises, the adoption of the CMU Decree was not substantiated nor adopted sensibly, in breach of the legal criteria at paragraph 48.3 above, and was thereby in breach of Article 19(2) of the Constitution, and Article 2(3) of the 2005 Code on Administrative Proceedings of Ukraine.

56. Accordingly:

56.1. As a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into, or to permit the Minister of Finance to enter into, the Trust Deed or Agency Agreement, or to issue the Eurobonds or otherwise to borrow USD 3 billion;

56.2. In the premises, as a matter of English law (being the law governing the Trust Deed and the Terms and Conditions of the Notes), the Trust Deed and Agency Agreement, and the Eurobonds purportedly issued thereunder, are void and of no effect.

Lack of capacity: Breaches of non-delegation principle and principle of legal certainty; the scope of the CMU Decree

57. Article 16(1) of the Budget Code provided that:

"*The Cabinet of Ministers shall determine the conditions for the effectuation of the State borrowing, including the type, currency, term and interest rate of the State borrowing.*"

58. By an Instruction to Carry Out External State Borrowings in 2013 dated 16 January 2013 ("the January 2013 Instruction"), the CMU permitted Minister of Finance Kolobov to effectuate (but not determine the conditions of) external state borrowings but only (a) within the limits provided for by the 2013 Budget Law and (b) on the terms stipulated by the CMU.

59. However, the purported effect of point 7 of the Annex to the CMU Decree pleaded at paragraph 34.2 above was to delegate the non-delegable right to formulate the conditions of the bond issue to another person, other than the CMU. That was:

    59.1. In breach of Article 16(1) of the Budget Code;

    59.2. Beyond the Minister of Finance's power to effectuate (but not determine the conditions of) the State borrowing.

60. Further or alternatively, point 7 of the Annex was in breach of the principle of legal certainty under Ukrainian law.

61. Accordingly:

    61.1. As a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into, or to permit the Minister of Finance to enter into, the Trust Deed or Agency Agreement, or to issue the Eurobonds or otherwise to borrow USD 3 billion on the terms thereof;

    61.2. In the premises, as a matter of English law (being the law governing the Trust Deed and the Terms and Conditions of the Notes), the Trust Deed and Agency Agreement, and the Eurobonds issued thereunder, are void and of no effect.

62. Further or alternatively, as pleaded at paragraphs 33 and 34 above:

    62.1. The CMU did not approve draft Terms and Conditions of proposed Notes that included the GDP Ratio Clause or the Cross-Default Clause or the No Set Off Clause;

    62.2. On its proper construction, the CMU Decree did not permit the Minister of Finance to:

        62.2.1. Enter into any agreement or issue Eurobonds that exceeded the limits on external State borrowings contained in the 2013 Budget Law;

        62.2.2. Enter into any agreement or issue Eurobonds that contained additional essential terms not envisaged by the CMU Decree, including the GDP Ratio Clause or the Cross-Default Clause or the No Set Off Clause. These were unusually onerous terms and/or (in the case of the GDP Ratio Clause and the Cross-Default Clause) terms that materially conflicted with the maturity date of 20 December 2015 provided for under the CMU Decree, in that there was a material risk that there would be a breach of the GDP Ratio Clause and/or the Cross-Default Clause and thereby entitle the noteholder or the trustee to accelerate the maturity date.

63. Accordingly:

63.1. As a matter of Ukrainian law, Ukraine, acting through the CMU, had no capacity to enter into, or to permit the Minister of Finance to enter into, the Trust Deed or Agency Agreement, or to issue the Eurobonds or otherwise to borrow USD 3 billion.

63.2. Further or alternatively, the Minister of Finance had no authority to enter into the Trust Deed or Agency Agreement on behalf of Ukraine, or to issue the Eurobonds pursuant thereto.

63.3. As a matter of English law (being the law governing the Trust Deed and the Terms and Conditions of the Notes), the Trust Deed and Agency Agreement, and the Eurobonds issued thereunder, are void and of no effect.

Duress

64. Further or alternatively, in light of the matters pleaded at paragraphs 9 and 16 to 24 above, and in particular the wrongful and illegitimate acts and threats of the Russian Federation, at the time of entering into the Trust Deed and Agency Agreement and issuing the Eurobonds:

64.1. Through a series of unjustified trade restrictive measures and threats against Ukraine's territorial integrity, the Russian Federation had placed considerable political, economic and financial pressure on Ukraine from July 2013 onwards, thereby demonstrating its will and ability to harm the Ukrainian economy if Ukraine did not accede to Russia's pressure that it suspend signature of the EU Association Agreement and accept Russian financial support instead.

64.2. Ukraine had urgent need of substantial further sums to meet its budgetary obligations, including meeting salaries to state employees and social payments, including pensions, to its citizens;

64.3. Ukraine effectively had no access to the international capital markets;

64.4. Ukraine had no effective ability to raise funds from the EU or the IMF or any other supranational institution;

64.5. Further, Ukraine was not able to raise sufficient funds in the domestic market in order to meet its needs;

64.6. In those circumstances, Ukraine had no realistic choice other than to borrow from the Russian Federation, through the postulated Eurobond structure, and to accept the onerous and unfavourable terms including the GDP Ratio Clause and the Cross-Default Clause and the No Set Off Clause insisted on by the Russian Federation. Ukraine sought to resist the imposition of those terms by the Russian Federation, but the Russian Federation rejected such attempts out of hand.

65. The wrongful and illegitimate acts and threats of the Russian Federation pleaded at paragraphs 16 to 24 above constitute duress and Ukraine entered into the Trust Deed and Agency Agreement and issued the Eurobonds as a result of the duress applied to Ukraine.

66. The Trust Deed and Agency Agreement (and the issue of the Eurobonds thereunder) was voidable as a result, and has been avoided by the CMU passing a moratorium suspending payments in respect of the Notes dated 18 December 2015, alternatively is hereby avoided, and in particular:

66.1. The Trustee is unable to enforce its purported rights under the Trust Deed on the instructions of and for the sole benefit of the Russian Federation in circumstances where the Russian Federation applied duress to Ukraine and would not itself be permitted to enforce any purported obligation of Ukraine, or would not itself be able to enforce any such obligation if it were owed by Ukraine directly to the Russian Federation;

66.2. Further or alternatively, and as pleaded at paragraph 38.3 above, it was an implied term of the Trust Deed that the Trustee would not be able to enforce its purported rights under the Trust Deed on the instructions of and for the sole benefit of the Russian Federation in circumstances where the Russian Federation applied duress to Ukraine and would not itself be permitted to enforce any purported obligation of Ukraine, or would not itself be able to enforce any such obligation if it were owed directly to the Russian Federation;

66.3. In any event, and insofar as it is necessary for Ukraine so to allege, the wrongful and illegitimate acts and threats of the Russian Federation pleaded at paragraphs 16 to 24 were public knowledge and/or reflected in the Prospectus for the Eurobonds and/or matters of which the Trustee was either aware or had constructive notice.

Continuing duress: Russian interference in Crimea and eastern Ukraine

67. The decision made by the CMU on 21 November 2013 to suspend Ukraine's signing of the Association Agreement resulted in mass protests in the Ukrainian capital, Kyiv. Following President Yanukovych's decision not to sign the Association Agreement at the Vilnius Summit on 28 November 2013, these protests grew significantly in size. Protests became larger in scale in the coming months. Following the killings of scores of civilians on 18 and 20 February 2014, President Yanukovych was reported to have fled Kyiv on 21 February 2014 and was ultimately relieved of his duties by a constitutional majority of the Verkhovna Rada on the grounds that he had withdrawn in an unconstitutional manner from performing his duties under the Constitution. Oleksandr Turchynov, temporarily exercising the duties of President in Yanukovych's place, announced in a televised address on 23 February, 2014, that his government would return Ukraine to the path of European integration.

68. Following these developments, the Russian Federation applied intensified duress to Ukraine, involving economic and political pressure and military aggression, including as pleaded at paragraphs 71 to 77 below.

69. As pleaded at paragraph 30 above, at the meeting between representatives of Ukraine and the Russian Federation on 12 December 2013, representatives of the Russian Federation insisted that it would be a precondition of any lending to Ukraine that around USD 1.6 billion of or deriving from the first tranche USD 3 billion of lending would be used to put Naftogaz in a position to pay a like sum to Gazprom in respect of alleged debts of Naftogaz to Gazprom for gas supplies to Ukraine.

70. In accordance with this precondition, Naftogaz duly paid to Gazprom USD 2.145 billion by way of various payments made during the first quarter of 2014. Those funds were paid partly from the USD currency reserves of the NBU, which had in turn been derived from the funds loaned to Ukraine by the Russian Federation through the Eurobonds. On 14 February 2014, Ukraine had provided further capital to Naftogaz in the sum of around UAH 11.1 billion (equivalent to around USD 1.3 billion[6]), which permitted Naftogaz to make the aforesaid payment to Gazprom.

71. In February 2014, the Russian Federation cancelled its future commitment to lend up to a further USD 12 billion which had been a fundamental part of the overall agreement reached between President Putin and President Yanukovych on the basis of which the Eurobonds had been issued.

72. On or around 2 April 2014, following the unlawful occupation of Crimea pleaded at paragraphs 75 to 77 below, the Russian Federation purported to terminate the Agreement dated 21 April 2010 between Ukraine and the Russian Federation Regarding the Issues of Stationing of the Russian Federation Black Sea Fleet in the Territory of Ukraine (the "Kharkiv Accord"). Pursuant to the Kharkiv Accord, stationing of the Russian Black Sea fleet in Crimea was extended from 2017 until the year 2042 in exchange for a discount on the price of gas, given in the form of the abolition of gas export duty for Ukraine. In diplomatic correspondence, Ukraine made clear that it considered that the Kharkiv Accord remained in effect. As a matter of public international law, the Russian Federation's purported unilateral termination of the Accord was therefore ineffective. The Russian Federation nonetheless reinstated gas export duty, substantially increasing the price of gas. The Russian Federation purported to justify the termination of the Kharkiv Accord by reference to the fact that it had annexed Crimea (which matter is addressed below). That action was itself unlawful and ineffective, as was the purported termination of the Kharkiv Accord.

73. During spring 2014, the Russian Federation procured Gazprom to cease to continue its discounted pricing of natural gas for Ukraine under the agreement dated 17 December 2013, and increased the price to around USD 400 per 1,000 cubic metres (excluding the export duty of around USD 100 per 1,000 cubic metres that the Russian Federation was imposing as pleaded above). The effect of the decision to cease to continue the discounted pricing of natural gas and the decision to reinstate export duty increased the price of gas by approximately 80%, to a level unaffordable to Ukraine in the medium to long term, as it was intended by the Russian Federation to be. In June 2014, Gazprom ceased to provide gas supplies to Ukraine.

74. During 2014 and 2015, the Russian Federation commenced various trade restrictive measures on imports from and trade with Ukraine, each of which was spurious and not applied for bona fide reasons and/or applied for an ulterior purpose, with the intention of applying pressure to Ukraine, and was illegitimate and/or unlawful for the reasons pleaded at paragraphs 18 and 20 above. For example:

    74.1. Since July 2014, Russia has banned the import of certain Ukrainian milk and dairy products, and all juice products including baby food.

[6] At the official exchange rate of UAH 8.6309 per USD set by the NBU.

74.2. Since July 2014, Russia has suspended the import of railway rolling stock, railroad switches, other railroad equipment, and parts thereof from Ukraine.

74.3. Since August 2014, Russia has banned imports of alcoholic beverages (beer, beer-containing beverages and distilled spirits) from Ukraine.

74.4. Since September 2014, Russia has banned the import of all Ukrainian confectionery products.

74.5. Since October 2014, Russia has banned the import of Ukrainian cheese products (and, since November 2014, cheese-like products) and certain wood chipboards.

74.6. During the first half of 2015, Russia banned the import of Ukrainian food salt, detergents, cleaning agents, wallpapers and similar wall coverings.

75. More significantly, the Russian Federation took steps to interfere in, and ultimately proceeded unlawfully to occupy, the Crimean Peninsula:

75.1. Russian military activity in connection with the invasion of Crimea began on 20 February 2014. A significant troop transfer of special forces to Crimea began on 26 February 2014. On 28 February 2014, the Ukrainian Presidential Representative in Crimea reported an unprecedented military operation and 13 landings of Russian paratroopers in Crimea. On 27 February 2014, at 4:25 am, 50 heavily-armed men, with equipment only available to the newly-created Russian Special Operations Forces, seized the Crimean Parliament and raised the Russian flag over the building.

75.2. The President of the Russian Federation, Vladimir Putin, stated (in an interview in March 2015) that he raised the issue of "re-incorporating" Crimea within the Russian Federation with the four most senior representatives of the Russian security services in February 2014.

75.3. On 1 March 2014, the Russian Parliament approved President Putin's request to use force in Ukraine. By the end of 5 March 2014, various units of the Russian armed forces had joined the 810th Marines Brigade which was stationed in Crimea.

75.4. A purported referendum on Crimea's status was held on 16 March 2014, while the Crimean Peninsula was effectively under Russian military control.

75.5. Immediately following the referendum, the Russian Federation purported to recognise the independence of Crimea and proceeded purportedly to annex it as a subject of the Russian Federation.

75.6. Once in effective control of Crimea, the Russian authorities and their local proxies engaged in a discriminatory campaign of unlawful expropriation targeting Ukrainian state and privately owned assets.

75.7. The steps taken by the Russian Federation in Crimea constitute clear violations of customary public international law and/or Article 2(4) of the United Nations Charter. Further, on 24 March 2014, by a vote of 100 in favour to 11 against (with 58 abstentions), the General Assembly of the United Nations called on all States, international organizations and specialized

agencies not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the 16 March referendum "*and to refrain from any action or dealing that might be interpreted as recognizing any such altered status*.".

76. In addition to unlawfully occupying the Crimean Peninsula, the Russian Federation also fuelled and supported separatist elements in, interfered militarily in and succeeded in destabilising and causing huge destruction across eastern Ukraine:

    76.1. In April 2014, large cities in eastern Ukraine saw a wave of what appeared to be well organised and coordinated protests by crowds of pro-Russian demonstrators. In the cities of Donetsk, Lugansk and Kharkiv, the protestors seized the main governmental buildings and proclaimed "People's Republics".

    76.2. In July 2014, in response to a ramping up of the military operation against pro-Russian insurgents in eastern Ukraine by the Ukrainian government, the Russian Federation increased its military support for the self-proclaimed Donetsk and Lugansk People's Republics in the form of supplying weapons, hardware, training and soldiers. A Buk missile system provided by the Russian Federation was used from separatist-controlled territory to shoot down a Malaysian Airlines civil flight, resulting in the deaths of 298 civilians and aircrew.

    76.3. By mid-August 2014, the Russian Federation, in addition to continuing covertly to supply weapons and training, resorted to more direct action in assisting the insurgents, including use of regular Russian troops. For example, Ukraine's forces in and around Ilovaisk were attacked by 4 battalions of tactical groups of the Russian armed forces (about 2,000 soldiers) that had been secretly deployed from across the border.

    76.4. Russia's support for the separatists has resulted in huge damage to eastern Ukraine, in terms of large scale loss of life, relocation of persons and destruction and damage to property and infrastructure, in effect crippling large parts of that area, which forms the industrial heartland of Ukraine, and reducing its economic output dramatically.

    76.5. The well-known involvement of the Russian Federation in destabilising eastern Ukraine is a clear violation of customary public international law and/or Article 2(4) of the UN Charter.

77. As a result of Russian military action in and unlawful occupation of Crimea, its military action in eastern Ukraine and the economic measures adopted in 2014 and thereafter by the Russian Federation towards Ukraine:

    77.1. More than 9,000 people have lost their lives and 21,000 people have been injured in the conflict.

    77.2. More than 1.7 million Ukrainian citizens have been displaced within Ukraine, and in addition around 1.4 million Ukrainian citizens have fled to other countries.

    77.3. Ukraine has sustained billions of dollars of damage to its infrastructure, and lost industrial capacity and production.

77.4. The Russian Federation has expropriated assets from Ukrainian state-owned entities and private persons worth billions of dollars without paying any compensation.

77.5. Bilateral trade between Russia and Ukraine reduced by some 39% in 2014 (as against 2013) from USD 44 billion to USD 27 billion, followed by a further 41% fall in 2015.

77.6. Ukraine has lost control of Crimea and large portions of eastern Ukraine, and hence significant sources of productive economic capacity and its ability to collect tax and other revenue from these areas.

77.7. Such action has been the predominant cause of a severe and ongoing recession in Ukraine. According to the IMF, Ukraine's real GDP fell 6.8% in 2014 (the fall accelerated to 14.4% in the fourth quarter) and a further 11% in 2015. Industrial output shrank by 10.1% in 2014.

77.8. The USD : UAH rate moved from 1 : 8.24 on 1 January 2014 to 1 : 15.84 on January 2015, a 48% depreciation.

78. Alternatively to the foregoing, if the Trust Deed and Agency Agreement are binding and enforceable as against Ukraine, and in light of the matters pleaded at paragraphs 37 and 38 above, it was an implied term of the Trust Deed, necessary to give effect to the obvious shared intention of the parties (including the Russian Federation as Noteholder) and/or business efficacy that Ukraine would be excused performance of its obligations (including obligations to make any repayment under the Eurobonds) and/or the Russian Federation would not insist on repayment, or procure the Trustee to insist on such repayment if:

78.1. Either the Trustee or the Russian Federation (as Noteholder) deliberately and/or unlawfully deprived Ukraine of the economic benefit of the loan received by Ukraine through the issue of the Eurobonds and/or frustrated the economic purpose of the loan;

78.2. Either the Trustee or the Russian Federation (as Noteholder) deliberately and/or unlawfully acted in such a way as to make it impossible or impracticable for Ukraine to comply with its obligations under the Trust Deed (including the Conditions), or deliberately and/or unlawfully and/or unreasonably interfered with or took steps to prevent, hinder or delay its ability to do so.

79. By its actions pleaded at paragraphs 71 to 77 above, the Russian Federation has (amongst other things):

79.1. Severely disrupted the economy of Ukraine, directly and indirectly in the manner pleaded at paragraph 84 above;

79.2. Required Ukraine substantially to increase public spending on Ukrainian defence and security, from approximately UAH 45 billion during 2013 (around USD 5.6 billion) to approximately UAH 64 billion during 2014

(around USD 8 billion), UAH 96 billion in 2015 (around USD 6 billion) and UAH 115 billion in 2016 (around USD 4.8 billion);[7]

79.3. Required Ukraine to increase expenditure to cater for the needs of large numbers of internally displaced persons.

80. The effect of this action has been to:

80.1. Continue to prevent Ukraine from accessing international capital markets;

80.2. Require Ukraine to enter into an Extended Fund Facility with the IMF in March 2015 to borrow some USD 17.5 billion from the IMF and a further USD 7.2 billion pursuant to assorted bilateral and multilateral arrangements.

81. As a condition of borrowing the required funds from the IMF:

81.1. Ukraine had to implement a "debt operation" under which Ukraine would restructure its borrowings such that some USD 15.3 billion due in repayments to creditors in the period up to 31 December 2018 ("the IMF Program Period") would not be required to be paid during the IMF Program Period, either by deferring or reducing those repayments.

81.2. In order to implement this debt operation, on 12 November 2015 Ukraine issued further Eurobonds (maturing on dates no earlier than 2019 and in each case outside the IMF Program Period) ("the 2015 Eurobonds") to its creditors in exchange for their existing debt, on terms that, in summary, represented a discount of up to 20% on the sums due under the existing obligations. This was achieved by issuing to existing creditors new Notes in a principal amount of USD 800 for every USD 1000 in existing debt and a further notional value of USD 200 in GDP-linked Securities.

81.3. By Condition 14 of the 2015 Eurobonds, Ukraine is prohibited from making any payment to its other (alleged) creditors unless it offers similar terms to the holders of the 2015 Eurobonds. The effect of this is to prevent Ukraine from making payment to the holders of the Notes that are the subject of these proceedings or the Trustee in accordance with the alleged contractual terms relied on by the Trustee in these proceedings. Condition 14 was included in the 2015 Eurobonds to encourage the highest possible participation by all of Ukraine's bondholders in the debt operation so as to enable Ukraine to meet the financing targets set out in the IMF Extended Fund Facility. All bondholders other than the Russian Federation participated in, or by virtue of supermajority voting were bound by, the debt operation, so it is only payments to the holders of the Notes that are the subject of these proceedings (i.e. the Russian Federation) that would be subject to the effect of Condition 14 of the 2015 Eurobonds.

81.4. Without prejudice to Ukraine's case that it has no contractual entitlement to be repaid, the Russian Federation has refused to participate in this debt operation.

[7] All figures are as at 1 January for the relevant calendar years pleaded. Exchange rates used: 1 USD = 7.993 UAH as at 1 January 2013; 1 USD = 7.993 UAH as at 1 January 2014; 1 USD = 15.76 UAH as at 1 January 2015; 1 USD = 24.00 UAH as at 1 January 2016. Source: NBU official exchange rate.

82. In the premises, and without prejudice to Ukraine's case that it is under no contractual obligation to make such repayment, if Ukraine were to repay the Russian Federation and/or the Trustee the sums claimed:

    82.1. That would be a breach of Condition 14 of the 2015 Eurobonds and constitute an Event of Default thereunder, entitling the holders of the 2015 Eurobonds to declare that the 2015 Eurobonds are immediately due and payable at their outstanding principal amount plus accrued but unpaid interest;

    82.2. Such outstanding principal plus accrued but unpaid interest as at 23 May 2016 was approximately USD 13.3 billion;

    82.3. If Ukraine were required to make such payments:

        82.3.1. The fact that these payments fell due in the IMF Program Period would mean that the IMF would decline to lend further tranches under the Extended Fund Facility; and

        82.3.2. Ukraine would be unable to make the accelerated payments to the holders of the 2015 Eurobonds.

83. Accordingly:

    83.1. It would be impossible or impracticable for Ukraine to repay the Russian Federation and/or the Trustee.

    83.2. If Ukraine were to repay the Russian Federation and/or the Trustee, then that would deprive Ukraine of the economic benefit of the loan represented by the Eurobonds that is the subject of these proceedings.

84. Further, the Russian action pleaded at paragraphs 71 to 77 above deliberately and/or unlawfully and/or unreasonably interfered with or involved steps to prevent, hinder or delay Ukraine's ability to repay the loan in accordance with its terms.

85. In the premises:

    85.1. Ukraine has no obligation to repay the sums borrowed by Ukraine;

    85.2. The Russian Federation and/or the Trustee has no right to request, demand or require Ukraine to do so.

86. In the further alternative, and in light of the matters at paragraphs 37 and 38 above, if the Trust Deed and Agency Agreement are binding and enforceable as against Ukraine, it was an implied term of the Trust Deed, necessary to give effect to the obvious shared intention of the parties (including the Russian Federation as Noteholder) and/or business efficacy that Ukraine would be excused performance of its obligations (including obligations to make any repayment under the Eurobonds) and/or the Russian Federation would not insist on repayment, or procure the Trustee to insist on such repayment if:

    86.1. The Russian Federation was in breach of its obligations towards Ukraine under public international law not to use force against Ukraine and/or not to intervene internally in the affairs of Ukraine; and/or

86.2. The Russian Federation was in breach of its obligations towards Ukraine as pleaded at paragraph 85.1 above, and this had been a significant cause of loss to Ukraine and/or had deprived Ukraine of the economic benefit of the loan represented by the Eurobonds.

Countermeasures and discretion

87. Further or alternatively, in the circumstances pleaded at paragraphs 85.1 and 85.2 above:

87.1. Ukraine is entitled to decline to make the payment demanded by or for the benefit of the Russian Federation, and thereby breach the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, in circumstances where that is an appropriate and proportionate countermeasure under public international law for the purpose of inducing the Russian Federation to comply with its obligations under public international law.

87.2. In any event, as a matter of the Court's discretion the Court should decline to grant the discretionary relief sought by the Trustee unless and until Russia ceases to act in breach of public international law in its relations with Ukraine.

Non-payment

87.3. It is denied that Ukraine was obliged to make the alleged or any payments in respect of the Notes.

END OF ANNEX