

<p>1 Monday, 6 February 2017 2 (10.30 am) 3 MR MALEK: May it please your Lordship, I appear on behalf 4 of the defendant, Kazakhstan, with my learned friends 5 Mr Harris and Mr Wee. The claimant is represented by my 6 learned friend my learned friends Mr Sprange and 7 Ms Byrne who is not here today but will be tomorrow. 8 MR JUSTICE KNOWLES: Could I raise one thing just to start 9 with which is the question whether this particular 10 matter should be in private rather than in open court or 11 public. 12 Obviously one's well used to arbitration matters 13 being heard in private, but both the compass of this 14 case and the end point sought by one side, which is to 15 invoke the assistance of the Court in the area of 16 enforcement in due course, mean that there might be 17 a particular case for being in public. Do you have any 18 views? 19 MR MALEK: I'm proceeding on the basis it is in public. 20 I think it was in public but Mr Justice Popplewell and 21 I can't see any basis on which this case could be in 22 private. 23 MR JUSTICE KNOWLES: Can I see if Mr Sprange takes a 24 different view? 25 MR SPRANGE: I don't disagree with any of that, my Lord.</p> <p style="text-align: center;">Page 1</p>	<p>1 I don't think anything is going to turn on them but just 2 one I would relating to KPMG my learned friends made 3 an addition to the definition of KPMG it's important to 4 keep in mind there are two KPMG entities. There is the 5 KPMG Tax and Advisory LLC and then there's a KPMG Audit 6 LLC and it may be that that is important but it may be 7 convenient to roll them up together in the way that my 8 learned friend has done so. 9 Your Lordship should have two skeletons, and the 10 timing is three days. I'm not sure we will need all 11 that time but we will see how we get on. 12 MR JUSTICE KNOWLES: Thank you and your teams for the 13 skeletons. 14 MR MALEK: Can I identify the six topics that I will cover 15 in my oral submissions. 16 Submissions by MR MALEK 17 MR MALEK: The first is to give your Lordship what I might 18 call the procedural background, a brief overview of the 19 various proceedings in London Sweden and Washington in 20 the arbitration proceedings you have heard about 21 secondly I will then identify the issues for 22 determination. Thirdly I will then give the legal 23 framework, it's very short, because I don't think 24 there's in I dispute about that, the fourth topic is our 25 case on the prima facie case in fraud that the award was</p> <p style="text-align: center;">Page 3</p>
<p>1 The only caveat I would wish to impose, if there is 2 anything that crops up, that either party wishes to 3 apply to you to have heard in private, if we could have 4 that allowance. 5 MR JUSTICE KNOWLES: Alert me if that arises. So we'll 6 proceed in public and the case henceforth will be, so 7 far as the administration allows, not listed as A v B 8 but listed by its name. 9 MR MALEK: I actually overlooked the listing. I hadn't seen 10 that. I apologise for that. 11 MR JUSTICE KNOWLES: None needed. Thank you very much both 12 of you. 13 Housekeeping 14 MR MALEK: Just a few housekeeping points for 15 your Lordship's assistance. There is a transcript, but 16 no LiveNote. There is also core bundles volumes 1 and 17 2. They came a bit late so it may be we will have to 18 see how much use is made of them, but they are there. 19 And we'll make reference to the core bundles where 20 necessary so that your Lordship could come away with as 21 few papers as possible. 22 MR JUSTICE KNOWLES: Thank you, it's been helpful to me so 23 far. 24 MR MALEK: There is a chronology. We went first and my 25 learned friend updated there is also a dramatis personae</p> <p style="text-align: center;">Page 2</p>	<p>1 obtained by fraud. The fifth point is whether 2 Kazakhstan should have discovered the fraud and argued 3 it before the tribunal which the parties have referred 4 to Westacre limb 1. And the sixth issue is an issue 5 estoppel arising out of the proceedings you have heard 6 of in Sweden and it appears Washington as well, but 7 I will deal with Washington very shortly in the 8 overview. 9 As far as the background, we cover that in our 10 skeleton at paragraphs 9 to 13. My learned friend 11 covers it in his skeleton at paragraphs 6 to 16. And 12 before looking at these background points let me just 13 start off by looking at the award. Your Lordship should 14 have the award in bundle D1, volume 10 at tab 23. And 15 it goes into a separate file D1, volume 11. It was 16 given on 19 December, a three party tribunal, and as 17 your Lordship can see from D1 volume 10 tab 23 18 page 2975, you can see the members of the tribunal 19 professor Bockstiegel we will see was the Chairman, 20 there were two co-arbitrators Mr Haigh and Mr Lebedev, 21 and the secretary to the tribunal was Ms Simpson. 22 Professor Bockstiegel and Professor Lebedev were 23 appointed by the Arbitration Institute of the Stockholm 24 Chamber of Commerce, the SCC, Mr Haigh was appointed by 25 the Stati parties, and as your Lordship knows the seat</p> <p style="text-align: center;">Page 4</p>

<p>1 of the arbitration was Sweden, under the 2010 2 arbitration rules, and as we point out in our skeleton, 3 and perhaps your Lordship can keep that to hand, 4 the tribunal found that Kazakhstan had breached the 5 Energy Charter Treaty by certain of its actions taken 6 against claimants, ordered to pay in excess of 7 \$500 million comprising sums awarded in respect of 8 certain contracts permitting the exploration and 9 extraction of hydrocarbons and illiquefied petroleum gas 10 plant, the LPG plant which features so heavily in the 11 submissions before the court.</p> <p>12 If you can turn to the second volume, you can see at 13 3388 that there were partial dissents but as far as 14 I can see neither arbitrator sought to explain the 15 reasons for the dissents. And the award is obviously 16 very lengthy and it will only be necessary for the 17 purpose of today to make brief references to it.</p> <p>18 If we can then go back to the award and start at 19 page 2975, you can see who the parties are, the 20 claimants. There are four claimants. The first and 21 second claimants are father and son. They are dual 22 nationals of Moldova and Romania and of themselves are 23 businessmen. The third claimant, Ascom, is a company 24 incorporated in Moldova and owned and controlled 25 a hundred per cent by the first claimant. It is a Stati</p> <p style="text-align: center;">Page 5</p>	<p>1 seems to have happened is that the award sets out the 2 argument but if it doesn't actually arise the tribunal 3 really says nothing about it whatsoever. It's a strange 4 way of writing in the sense to deal in extensive detail 5 about arguments which are moot, but if you take for 6 example expropriation which starts in D bundle 7 volume 111 at 3205, you can see how the award is 8 drafted. So that it starts off at 3205 "whether the 9 claimants interest were expropriated" and a reference to 10 the article 13 and then you have "arguments by the 11 claimants" and then that goes over starts there and 12 finishes at -- using the numbering of the bundling, 13 3235, and it's, you can see from the top there, 258 of 14 414, and then the tribunal's reasoning is set out at 3. 15 So essentially it comes to the conclusion it doesn't 16 need to deal with the point.</p> <p>17 And that happens over and over again, it happens in 18 relation to the -- 3238 dealing with the argument as to 19 whether Kazakhstan provide the most scant protection, 20 and security of the claimant that starts at 3238, using 21 the numbering of bundles and the argument goes through 22 to 2344, and then the tribunal basically says it doesn't 23 have to deal with it over the page.</p> <p>24 I am not making any kind of criticism but you will 25 see when it comes to issues we're concerned with in</p> <p style="text-align: center;">Page 7</p>
<p>1 ate main corporate entity and involved in oil and gas 2 exploration and associated activity. Then the fourth 3 claimant, Terra Raf Trans Traiding, is a company 4 incorporated in Gibraltar and owned and controlled by 5 the first and second claimants, 50 per cent each. It was 6 the fourth claimant which owns the Tolkyneftega LLP TNG 7 which in turn owned 50 per cent of the LPG plant at the 8 centre of the allegations. I'm not entirely clear 9 whether that is contention or not because we know that 10 Vitol was involve but if you want citations from what 11 I have just said to your Lordship, you get those from 12 the claimant's Statement of Claim in the ECT arbitration 13 and the references are paragraphs 2, 32 and 62, and the 14 reference to the bundle -- I'm not going to take 15 your Lordship to it now but to give the reference it's 16 D1 volume 2, tab 5, 334, 347 and 360.</p> <p>17 So that's the first point about the parties.</p> <p>18 The second point is that in the document -- it's 414 19 pages long -- there is in fact very little analysis by 20 the tribunal members. In fact the first 151 pages are 21 introductory formalities and the style -- the technique 22 that this tribunal awarded is that they parrot the 23 arguments and then set out the reasoning. So the actual 24 writing by the tribunal, after this 414 page 25 introduction on my calculation is 31 pages. And what</p> <p style="text-align: center;">Page 6</p>	<p>1 terms of the LPG plant in terms of what we call our 2 fraud argument they don't actually deal with it. 3 Effectively they delegate with it on a demura and that's 4 perhaps one of features that we need to look at when we 5 look at the award dealing with the LPG plant.</p> <p>6 So that's all I wanted to say at the moment in terms 7 of the award.</p> <p>8 As your Lordship knows, there have been various 9 proceedings and let me just deal with London briefly. 10 We can put those files away for the moment and pick up 11 volume A. I think I can go through this relatively 12 quickly. The claim form is at tab 1. It was issued on 13 4 February and the claimants made their application 14 under section 101(2) of the 1996 Act. In the usual way 15 the application was without notice. And the application 16 notice is the next tab at pages 4 to 6. And the 17 evidence in support -- I'm not going to take 18 your Lordship to it it's in bundle B, it's B1 tab 1, 19 Mr Fleuriet and Ms Walker gave her evidence I think at 20 tab 2 page 15 and her evidence gives details of the 21 arbitration agreement between claimant and Kazakhstan, 22 and she sets out is relief in the award.</p> <p>23 The order of Mr Justice Burton is at bundle A tab 7 24 and he give permission to the permission sought and also 25 gave permission to serve out. And your Lordship can</p> <p style="text-align: center;">Page 8</p>

<p>1 perhaps see at paragraph 5 how it works. So they've 2 given permission in the first part check of the order, 3 service out, we then have to acknowledge, and then at 5 4 the award must not be enforce until the end of that 5 period or until any application made by the defendants 6 within that 21 period has been finally disposed of. So 7 the way this works is once we issue our application then 8 effectively the award is stayed, and that's familiar to 9 your Lordship.</p> <p>10 There was an issue in terms of the timing in the 11 sense that -- and the reference here is to 12 Ms Nacimiento's first statement, bundle B, tab 10, 13 page 188 where he points out that in fact there was 14 a delay in service until 14 January and there's a point 15 about the time of service under the State Immunity Act, 16 but it doesn't matter now, but the point is that the 17 order of Mr Justice Burton did not give the appropriate 18 time to acknowledge service of the proceedings, and that 19 resulted in the consent order which is at tab 10 to -- 20 which gives us the time in which to make the application 21 and you are not going to have to deal with any service 22 points but if you can see that paragraph 29 there is 23 an outstanding cost issue just perhaps for 24 your Lordship's note at paragraph 4 of that order.</p> <p>25 And she refers in her evidence to the various</p> <p style="text-align: center;">Page 9</p>	<p>1 There was a reference in her evidence about a failure to 2 consider evidence, but that wasn't the fraud that we're 3 dealing with, so the fraud that we were dealing with was 4 not raised in that application, and in fact the tribunal 5 itself did not deal with the fraud because it was not 6 raised. So it's not one of those cases that you have 7 seen in the authorities where the fraud was argued 8 before the tribunal and it's then being reargued at the 9 enforcement stage, this is one of those cases where the 10 fraud was not before the tribunal, and that's obviously 11 a point of substance.</p> <p>12 If I could ask your Lordship to turn to bundle B and 13 her third statement, which is 17 July, tab 12. This was 14 the evidence which first raised the fraud allegations. 15 It's at bundle B tab 12 it's dated 17 July, 2015. And 16 then at paragraph 5 Ms Nacimiento sets out the topics 17 that she's going to cover and the only one that matters 18 for present purposes is the one at page 238(6), dealing 19 with the significance of documents that have recently 20 been disclosed pursuant to an order on 22 June 2015 by 21 the United States District Court for the Southern 22 District of New York and which reveal for the first time 23 that.</p> <p>24 "The claimants withheld crucial information and 25 mislead ...(Reading to the words)... to the LPG plant in</p> <p style="text-align: center;">Page 11</p>
<p>1 proceedings, because on 19 March 2014 Kazakhstan filed 2 a motion to annul the award in the Svea Court of Appeal. 3 She also refers in her evidence -- I'm not going the 4 take to your Lordship to it -- to proceedings in 5 Washington commenced on 1 February 2014, where there was 6 a petition filed in the United States District Court of 7 the District of Columbia to confirm the award and she 8 dealt with the status of that proceedings and if 9 your Lordship has our skeleton I think it's at 10 paragraph 9 that we deal with the position in relation 11 to the -- in fact it's our application that we issued on 12 7 April pursuant to section 102 of the Arbitration Act 13 to set aside the order of Mr Justice Burton dated 14 28 February and that document is in A tab 4, page 12 15 where we set out the various grounds which are in 16 essence -- your Lordship's familiar with them -- that 17 there was no proposed notice of the appointment to the 18 arbitrator so the argument was the composition of 19 the tribunal was not correct, there's an argument about 20 no valid arbitration and failure to comply with the 21 cooling off provision, and then there were complaints 22 about serious procedural errors. And that application 23 was supported by Ms Nacimiento's second statement and 24 reference there is bundle B tab 11 page 139. But 25 obviously the evidence has been overtaken by events.</p> <p style="text-align: center;">Page 10</p>	<p>1 respect of which they're awarded sum \$199 million." 2 And what she does, if the Court turns forward to 3 251, she deals with this at 251 at the bottom there 4 about the disclosure and she takes it up further in her 5 later evidence. So I don't need to deal with this in 6 any great detail, but your Lordship will see the 7 reference to disclosure obtained from three arbitrations 8 involving the claimants, and she sets out at 9 paragraph 44 the procedure that was followed and makes 10 reference to correspondence. And then at paragraph 46 11 she explains the arbitrations that you probably heard 12 about involving amongst other people Vitol and there are 13 three of them, there's the Montvale arbitration and 14 there's a convenient summary about what that arbitration 15 is about, there is a second arbitration, the TNG 16 arbitration and the reference to what happened in 17 relation to that, and then at paragraph 48 there's 18 a reference to what's called the JOA arbitration. And 19 you'll see references to those arbitrations but that's 20 a convenient summary in a nutshell about what those 21 arbitrations are about.</p> <p>22 As we explain I think in our skeleton at 23 paragraph 10, this is a summary in terms of how the 24 fraud came to light and that's referred to in 25 paragraph 10 and then it's also covered in more detail</p> <p style="text-align: center;">Page 12</p>

<p>1 if your Lordship could please turn to bundle B, tab 17, 2 where Ms Nacimiento deals with how the matter came to 3 light and in essence what she's saying is that the 4 evidence only came to light in late June 2015, and that 5 is why the fraud is being raised at this point in time 6 and not earlier. And if you can turn briefly to 7 page 320 at paragraph 39, there's a summary of how the 8 documents were obtained in the SDNY disclosure in June 9 2015 and then there's a summary and she footnotes at the 10 top there at footnote 24, her earlier evidence which 11 we've briefly I think looked at in B tab 12 at page 239 12 at 252.</p> <p>13 So what then happened is on 27 August Kazakhstan 14 issued its application to amend the application to 15 introduce a contention that in the light of the 16 claimants' fraud, the enforcement of the award in this 17 jurisdiction would conflict with English public policy 18 pursuant to subsection 3 of the Act, and if 19 your Lordship turns please to bundle A, tab 6, at 19A 20 there is amended application and as I've said that was 21 on 27 August, and that was the background to when the 22 matter came before this court in September 2015 where as 23 your Lordship has seen from the papers, 24 Mr Justice Popplewell stayed the application and the 25 amendment application pending the determination of the</p> <p style="text-align: center;">Page 13</p>	<p>1 this is that the grounds before the Swedish court were 2 amended to include the contention that in the light of 3 the claimants' fraud the award should be declared 4 invalid it was contrary to Swedish public policy. And 5 the reference there to some evidence is Mr Foerster's 6 statement of 13 January and I'm not going take you to it 7 but the reference is paragraphs 7 to 10 and it's 8 bundle B, tab 19 at page 322.</p> <p>9 So that's London. Sweden, on 9 December last year 10 the Swedish court hand down its judgment and dismissed 11 Kazakhstan's claim to invalidate or set aside the award 12 including on the basis that the award has been obtained 13 by fraud, and as you see from our skeleton we accept 14 that we're precluded from pursuing the original grounds 15 as advanced before the English court, but the position 16 in relation to the amendment application is different 17 and that remains live. And if your Lordship has our 18 skeleton at paragraph 37, and in front of you, 19 your Lordship can see that we make various points about 20 the Swedish court's decision.</p> <p>21 The first being that the Swedish court decided 22 a different issue to the one that's before your Lordship 23 which is that the award was contrary to Swedish public 24 policy. The issue before the court today is a different 25 issue, which is whether or not enforcement of the award</p> <p style="text-align: center;">Page 15</p>
<p>1 defendant's application to set aside the award in the 2 Svea County Court and ordered that both applications 3 should be relisted once the Swedish court had ruled on 4 Kazakhstan's challenge to the fraud. And the judgment 5 of Mr Justice Popplewell, your Lordship will find -- I'm 6 not going the to take you to it now but it's at D2 7 volume 9 at page 2586 and the order of 8 Mr Justice Popplewell is in this bundle at the back, at 9 tab 17, bundle A, page 32. Your Lordship can see that 10 this order was made on 3 September and that's the 11 background which your Lordship's familiar with.</p> <p>12 But in essence what Mr Justice Popplewell did was to 13 make a case management decision. The hearing went for 14 much shorter than anticipated and as the order reflects, 15 at paragraph 1, it was an application made on the 16 Court's own motion, particularly in the light of the 17 judge's view of the importance of what was taking place 18 in Sweden and of course the judge's prediction turned 19 out to be correct in the sense that the Swedish court's 20 decision has certainly narrowed the issues as far as 21 enforcement and in fact the only things that are left 22 now are the fraud based objections, the non-fraud 23 contentions have gone.</p> <p>24 He also dismissed the claimant's application to post 25 security for the adjournment and what happened after</p> <p style="text-align: center;">Page 14</p>	<p>1 would be contrary to English public policy.</p> <p>2 The second point that we make is that the Swedish 3 court did not in fact make any determination as to 4 whether Kazakhstan had succeeded in proving its 5 allegations of fraud; it merely decided that even 6 assuming Kazakhstan's allegations of fraud to be true, 7 Swedish public policy did not require the award to be 8 invalidated or set aside and the question whether there 9 was a fraud as Kazakhstan alleges has accordingly never 10 been determined. And as I said earlier it's as if the 11 Swedish court dealt with the issue on the demura basis. 12 I will need to explain to your Lordship how the Swedish 13 court came to that decision but my submission to 14 your Lordship is that English courts take a completely 15 different approach to fraud and that there is no 16 question of an issue estoppel arising out the Swedish 17 court's decision.</p> <p>18 That follows from the next point which is that the 19 Swedish court does not preclude Kazakhstan from 20 demonstrating in these proceedings that the award was 21 obtained by fraud and that it ought not as a matter of 22 English public policy to be recognised or enforced in 23 this jurisdiction.</p> <p>24 The current position, and that's covered by 25 Mr Foerster in his latest evidence at tab 4 page 332, is</p> <p style="text-align: center;">Page 16</p>

1 there is a process going on called an extraordinary
 2 review, but that probably does not affect the matters
 3 before your Lordship in the sense that the Swedish court
 4 has refused permission to appeal, but that's we're left
 5 we have this extraordinary review and that's dealt with
 6 by my learned friends in tab 7 page 1344.

7 As far as Washington is concerned, your Lordship
 8 will see that there's a dispute between us that's
 9 emerged from the skeleton. Until the skeleton I thought
 10 it was common ground that there was no -- that the
 11 Washington proceedings had no relevance at all to what
 12 was going on in London. But if your Lordship turns,
 13 please, to my learned friend's skeleton at paragraph 13,
 14 he refers to an order of the District Court of the Court
 15 of Colombia on 11 May and which is quoted in
 16 a footnote and he makes the point I think at page 7,
 17 where we see the heading "The consequence of the Swedish
 18 and United States decisions" and he also makes the point
 19 at paragraph 35 where he refers to the US court's
 20 decision in support of his position, and also at
 21 paragraph 57 where he refers again to the US court's
 22 decision. But with the greatest respect the US court
 23 has not made any determination that has any relevance to
 24 the matters before you. It does not give rise to
 25 an issue estoppel, no attempt has been made to show that

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1 it can give rise to an issue estoppel and we served some
 2 evidence on Friday from Mr Kirtland which
 3 your Lordship -- I don't know whether your Lordship's
 4 had an opportunity of looking at it, but it's in
 5 bundle B at the very back there at tab 19, where
 6 Mr Kirtland explains what has happened and brings the
 7 court up to date, but there is nothing that happened in
 8 Washington that gives rise to a ruling which either
 9 gives rise to an issue estoppel or gives rise to any
 10 considerations of weight, because when you see
 11 Mr Kirkland's evidence you can see how the point was
 12 raised, and I don't propose to say anything more about
 13 Washington until I've heard what my learned friend says
 14 its relevance is.

15 So that's all I wanted to do by way of a brief
 16 procedural overview of where we've got in terms of the
 17 proceedings.

18 So we have the arbitrations we have the ECT
 19 arbitration you have the related proceedings involving
 20 the claimants which came to light in the circumstances
 21 set out in our evidence and then you have to proceedings
 22 in Sweden and then enforcement in London and Washington.

23 Now, as far as the issues for determination, which
 24 is my second topic, in essence there are two broad
 25 issues that arise.

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1 The first and principal issue is whether Kazakhstan
 2 can have permission to run the fraud case. And
 3 your Lordship can see how it was left before
 4 Mr Justice Poplewell; we made an application and that's
 5 been left over. That's the first in issue. Then there
 6 are a number of sub-issues within that which I'll come
 7 to in a moment. But the key point to make for the
 8 present purpose is you are not being asked to determine
 9 whether or not we are right, in fact whether there was
 10 in fact a fraud. The only question for the court at
 11 this stage is whether we can raise that issue. And that
 12 then gives rise to the second issue which is how should
 13 that matter be determined? And if I can get that matter
 14 out of the way, that second issue is if we do get
 15 permission to run the fraud case it's our submission
 16 that the court should direct a trial.

17 If you can turn briefly to our skeleton submissions
 18 at paragraph 18, your Lordship can see the type of
 19 procedure that is followed and we give really just as
 20 a couple of analogues, the Heinz case the IPCO case, one
 21 could even add the Westacre cases. These are case where
 22 the court actually determined issues, where evidence has
 23 been filed and the court has then dealt with them. It's
 24 important keep in mind that that is all were really
 25 arguing about.

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1 So we prepared a draft order which sets out some
 2 proposals and of course it will be a matter for
 3 your Lordship in terms of what needs to be determined.
 4 We've dealt on our draft order with only the fraud
 5 issue, but if your Lordship feels it's appropriate one
 6 could add to that the Westacre I or the estoppel
 7 arguments as well, because in some sense they do raise
 8 factual issues, they do raise issues about what was
 9 known from time to time and the estoppel case does raise
 10 issues of Swedish law in the sense that one needs to
 11 understand what Swedish public policy is. But as
 12 I understand what my friend saying is that he wants you
 13 to determine those other issues rather than hiving them
 14 off, but obviously it's a matter for the court because
 15 this in essence is a case management decision as to what
 16 overriding objective is required. So that is what
 17 I call the second sub-issue which is what should happen
 18 if your Lordship is minded to give us permission to
 19 raise the fraud allegation.

20 But if I can come back to the first issue, which is
 21 whether or not we should have permission to run the
 22 fraud case, if the Court turns to our skeleton
 23 submission at paragraph 14, you can see how we've
 24 identified the issues, but in essence there are three
 25 issues.

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<p>1 The first is the nature of the fraud alleged. Does 2 the evidence meet a sufficient merits threshold to allow 3 the fraud allegations to be raised? We say that there 4 was a fraud on the tribunal and that it was causative. 5 So that's the first issue about the fraud and that 6 coincides with the structure of the argument which I'm 7 going to deal with -- that's my point 4. 8 The second point is whether Kazakhstan should have 9 raised the fraud case before the tribunal. And we've 10 called that in the submissions as the Westacre limb one 11 that's the matter that I'm going to cover in my topic 5. 12 Then the third issue is does the Swedish judgment 13 mean that permission to raise the fraud allegation 14 should be refused? In other words an issue estoppel 15 abuse of process argument on the basis all we are doing 16 is seeking to recycle points that have been provided 17 against us by the Svea Court of Appeal and that is the 18 third issue. 19 So sub-issue 1 is about the fraud, sub-issues 2 and 20 3 are about defence to the fraud case and I've said 21 before, one of the points that comes out of this matter 22 with all these documents is what is the appropriate way 23 to deal with these types of cases on a case management 24 basis. 25 I mean there's a lot of paperwork here and it is</p> <p style="text-align: center;">Page 21</p>	<p>1 before the Swedish court, but the Swedish court did not 2 make any findings. But we contend that the court should 3 be very slow to conduct some sort of mini trial and 4 should be focusing on directions for a trial, and in 5 circumstances where all these issues are being canvassed 6 we would submit that that is a very powerful factor for 7 saying that we need to get on with this; the evidence is 8 in essence there and rather than spending time going 9 through all these arguments it's better from a case 10 management perspective to move on to fraud provided of 11 course that I can satisfy the Court that there is no 12 knockout point based on the contention on Westacre (I) 13 or for that matter the estoppel. 14 The third point is this if the Court concludes that 15 the fraud allegation can be raised, it's most unlikely 16 that the Court will want to go into the merits in any 17 detail on the basis that it is for the Court to 18 determine the matter to deal with the fraud case. 19 We refer in paragraph 22 of our skeleton, and could 20 I ask your Lordship to turn to that, to the IPCO case 21 and one of the points emerging from that case is 22 an indication of the type of approach that should be 23 adopted. Perhaps for that purpose if your Lordship 24 could pick up, please, our bundle of authorities, 25 the second one at tab 15. If your Lordship looks at the</p> <p style="text-align: center;">Page 23</p>
<p>1 an issue as to how far the court needs to go into this. 2 I will continue and make my submissions. But that case 3 management issue is an important one. 4 Now, before I go on to the next topic can I just 5 deal with a few observations about the materials and the 6 way forward. If you could please pick up bundle B and 7 turn to Ms Nacimiento's evidence at tab 17, 8 your Lordship has read the summary of the underlying 9 fraud, and I'm obviously going to take your Lordship 10 through it, but that's where she summarises what the 11 case is. Of course at this stage all we're seeking is 12 permission to raise this case, we're not asking the 13 court to try it, but in essence what she's making are 14 three points: that the KMG offer was not a credible 15 guide, that the tribunal was misled in relation to the 16 valuation of the LPG plant, and that the tribunal was 17 misled into think that the claimants had invested some 18 \$245 million in the development of the construction of 19 the LPG plant. 20 So that's the fraud in a nutshell. 21 The second point is that in effect you are faced 22 with what might be described as a summary judgment type 23 threshold issue. And the oddity of the situation before 24 the Court is that there is clearly a lot of material on 25 the fraud issue. It's very similar to evidence that was</p> <p style="text-align: center;">Page 22</p>	<p>1 headnote, it was an incredibly complicated set of facts 2 about the history of proceedings. It was actually 3 before the Supreme Court last week, but I don't think 4 anything that was said there affects us. 5 If your Lordship turns to the headnote, page 7, 6 left-hand column, your Lordship can see what is said 7 there by reference to the judgment of 8 Lord Justice Christopher Clarke. Just glance through 9 subparagraph (4) on page 7, left-hand side, at the 10 bottom there: 11 "The question was a preliminary and threshold one 12 which was to be determined on a relatively brief 13 assessment and without reference to any answer that may 14 be put forward." 15 And that is taken up in more detail in the passages 16 referred to and if you can turn, please, to I think it's 17 paragraph 192, in terms of the approach, where you see 18 a reference to a preliminary and threshold one which is 19 to be determined on a relatively brief assessment and 20 without any reference to any answer that may be put 21 forward. 22 The point there is obviously a sensible one. One 23 sees it in the context of summary judgment: you don't 24 have summary judgments that go on for days and days, the 25 point is to make an assessment and a brief assessment</p> <p style="text-align: center;">Page 24</p>

<p>1 and if the court concludes that there is something in 2 the case, particularly in the context of this case, 3 where the issues have been ventilated but not decided, 4 we would submit that is a good indication to a possible 5 type of approach in this type of case. 6 The fourth point that I have to make at this stage, 7 if you can go back to our skeleton, is at paragraph 18 8 where we make the point that -- in fact I think I've 9 already dealt with it in terms of how one can deal with 10 these types of cases and I don't need to repeat what 11 I've said on this. 12 The only other point to make is on the estoppel case 13 at stage, because on the issue estoppel case it's our 14 case that the claimants need to satisfy you that English 15 public policy is the same as Swedish public policy, such 16 that the issue of whether the award was contrary to 17 English public policy has already been determined 18 between the parties by the finding that it was not 19 contrary to Swedish public policy. And we submit that 20 there are three big problems with that case. 21 First of all, the Swedish court did not decide any 22 of the factual issues on the merits. So there's no 23 possibility of any factual issue estoppel. Accordingly 24 the claimant's case is limiting to proving that the 25 scope of Swedish and English policy possible are</p> <p style="text-align: center;">Page 25</p>	<p>1 operative comparative to English public policy. So I-- 2 MR JUSTICE KNOWLES: We'll come to that. 3 MR MALEK: As far as the evidence before the Court, clearly 4 a lot has happened since the evidence before 5 Mr Justice Poplewell. We've updated the evidence about 6 what we know of the fraud, and we've also updated our 7 evidence as to how we put the case in light of the 8 Swedish judgment. What is striking about the claimants' 9 evidence is that we got two statements which 10 your Lordship finds in bundle B at tab 7 and 9. They 11 don't in our submission take the matter further, they 12 summarise the procedural events and as my learned friend 13 says, he relies on Mr Nielson's evidence which is at 14 been tab 9. 15 It's said repeatedly in the skeleton evidence, 16 unchallenged, but he doesn't in fact deal with the 17 independent evidence that we've put in. The other point 18 in their case, there's no evidence explaining the 19 alleged fraud. In fact there's no evidence denying it. 20 The nearest we get in their skeleton is where they say 21 that they do not accept that there was a fraud and 22 your Lordship can see that from their skeleton. And as 23 I've said earlier there's no evidence establishing that 24 the US proceedings give rise to res judicata or abusive 25 process.</p> <p style="text-align: center;">Page 27</p>
<p>1 identical. 2 Secondly, we know that public policies of different 3 states are generally different. So this is a very high 4 burden on the claimants and then we can see immediately 5 in this case that public policy is not the same in 6 England and Sweden, what is known as the false evidence 7 doctrine and your Lordship has seen reference to that. 8 If I present a document to your Lordship which is 9 fraudulent then that is objectionable but if another 10 party does it, then although I know that it's fraudulent 11 and that person's innocent then that's okay. That's the 12 difference on false evidence and it will be my 13 submission that when we come to look at the issue 14 estoppel, English public policy is not limited that way. 15 It's formalistic, it doesn't represent English law. 16 Then the third point to make is that they in fact 17 have not adduced any evidence about Swedish public 18 policy. In fact the only evidence before the court is 19 from our side from Dr Scholdstrom and we submit that his 20 evidence is effectively unchallenged about public policy 21 and we will come to look at it when I deal with issue 6, 22 dealing with the issue estoppel point. 23 MR SPRANGE: I rise to say, to be fair to Mr Malek, I will 24 be relying on the first witness statement of Mr Wilson 25 tab 9 of bundle B as evidence of Swedish public policy</p> <p style="text-align: center;">Page 26</p>	<p>1 So that's topic 2. 2 Let me deal briefly with the legal framework. 3 MR JUSTICE KNOWLES: I suppose it's put more categorically 4 in the heading at page 19C of their skeleton. 5 MR MALEK: Yes. 6 MR JUSTICE KNOWLES: That's where the heading is there was 7 no fraud. 8 MR MALEK: Yes. I mean what I was referring to -- if 9 your Lordship turns to paragraph 4 -- I don't want that 10 take a bad point but just explain what I had in mind. 11 If you take 4(3) you can see how at (3) they take the 12 points about we can't show the Westacre I point which is 13 4.3, the second point is "We cannot establish that the 14 fraud allegations have substantial effect on 15 the tribunal's findings". That's the question of 16 causation, was it decisive, did it influence 17 a reasoning? Then the third that there has been a fraud 18 on the tribunal or indeed at all. And then that section 19 is dealt with in the heading "no fraud in any event" at 20 page 25, paragraph 55. And the bit I was focusing on is 21 three lines from the end of this section: 22 "The claimants do not accept that there 23 a prima facie case of underlying fraud." 24 That's all I was referring to. 25 MR JUSTICE KNOWLES: Yes.</p> <p style="text-align: center;">Page 28</p>

<p>1 MR MALEK: Now, as far as the statutory framework in the 2 context of a public policy challenge, your Lordship 3 knows how the fraud has been dealt with. We have the 4 same issue that's been considered in Sweden which of 5 course is the competent authority in the language of the 6 New York Convention. And London and Washington which 7 are enforcing courts of the language of the New York 8 Convention. 9 The second point is I'm only dealing with the London 10 proceedings. The arguments in Washington may be 11 different and nothing I say is intend to affect the 12 proceedings in Washington the proceedings in Washington 13 will take their own course. 14 The third point in terms of the structure is that 15 the remaining ground of challenge is based on public 16 policy and if we can briefly look at the way the Act 17 works. If you could pick up the authorities bundle at 18 volume 1. If your Lordship can look at the front sheet, 19 at the contents, your Lordship can see that the 1958 20 New York Convention is at tab 1 and the Act is at tab 2. 21 If we then can turn to the Act using the numbering 22 page 65 in the bottom, your Lordship sees that we're 23 concerned with part 3, recognition and enforcement of 24 certain foreign awards. Section 100 makes the point 25 about the New York Convention. So this is implementing</p> <p style="text-align: center;">Page 29</p>	<p>1 recognise or enforce the award." 2 And unlike the other grounds, this is a ground that 3 the court can raise of its own motion, it doesn't have 4 the kind of language one sees in 103(2). 5 Just a few points on that. The first point is that 6 public policy there's no dispute that that covers 7 an award obtained by fraud. 8 The second point is that the Act talks of public 9 policy but doesn't state what that public policy is. 10 But in fact if your Lordship turns back to the previous 11 tab, where the New York Convention is there, that 12 question is answered in Article 5(2)(b), which is at 13 page 3, where your Lordship can see that it's stated 14 that: 15 "... recognition or enforcement of the award would 16 be contrary to the public policy of that country." 17 In other words the enforcing state. 18 So we are talking about public policy but we are 19 also talking about English public policies. So what's 20 significant is that the public policy is by the national 21 standards of the enforcing state, and that of course as 22 we will see differs from state to state and states have 23 freedom to shape their own public policy standards. So 24 that's an important point when we come to look at 25 issue 6.</p> <p style="text-align: center;">Page 31</p>
<p>1 the New York Convention. Section 101(2) states: 2 "The New York Convention made leave of the course 3 being enforced in the same manner as judgment order to 4 same effect." 5 Then 101(3) where it says: 6 "Where leave is given judgment may be enforced in 7 terms of the award." 8 102 deals with the evidence to be provided. I don't 9 think I need to deal with that. Then if we go over the 10 page to 67, "refusal of recognition or enforcement" and 11 section 103 starts off with the starting point which is 12 "recognition shall not be refused except in following 13 cases" and then at 103(2) it talks about the award may 14 be refused if the person against whom it is invoked 15 proves and then various grounds are set out. So it's 16 expressed in terms of a discretion and there's been case 17 law on that, but I don't think that matters for present 18 purposes. So if the person against whom it is invoked 19 puts the burden of proof on the party resisting 20 enforcement. 21 Then the next one is at the bottom, 103(3), that 22 recognition or not of the court may be refused if the 23 award is in respect of a matter which is not capable of 24 systematic by arbitration, which doesn't arise here: 25 "... or if it would be contrary to public policy to</p> <p style="text-align: center;">Page 30</p>	<p>1 And that leads to the third point, which is that 2 public policy is inevitably different in each country, 3 and that was a point that Lord Justice Rix made in the 4 Yukos case which we will look at and that's [2012] EWCA 5 Civ 855, where he makes the point -- it's tab 13 I'm 6 told of our authorities, bundle 2. In fact it probably 7 is -- it is so important that it is worth looking at it 8 at this stage. 9 If your Lordship turns to 484 at page 150, there the 10 issue is whether or not the annulment decisions were 11 partial and dependent and it is at 151 where the point 12 is that public policy is different from state to state. 13 And there's another authority which has been referred to 14 and that's in the Diag Human case Czech Republic which 15 is in the same bundle at tab 11. The point is also made 16 in very similar terms about public policy and issue 17 estoppel and the point I think made there is that it's 18 quite rare for a public policy issue to succeed. Let me 19 just see if I can find the reference. I think I had it 20 for my learned friend's ... It's in the section dealing 21 with 108 and there's a discussion about public policy 22 which is paragraph 58. That was the passage I was 23 looking at and what is said at paragraph 58, where 24 Mr Justice Eder says towards the end: 25 "I also readily accept that the questions of</p> <p style="text-align: center;">Page 32</p>

<p>1 arbitrary ...(Reading to the words)... ordinarily give 2 rise to an issue estoppel in England." 3 Of course that's in the context of different 4 decision in the law of the seat, but in my submission 5 it's the same principle which is that it will not 6 ordinarily give rise to an estoppel, and the reason for 7 that is that the public policies are different, so it's 8 not the same issue that's being determined. 9 The next point to make is that we accept of course 10 that there is a pro-enforcement bias, but that has 11 limited relevance in the context of a fraud case, 12 because if you can turn back to the IPCO decision which 13 is in our authorities at tab 2/15 at paragraph 185, 14 right-hand column, 184, there's a reference to the 15 proposition -- it doesn't arise here because my friend 16 isn't arguing this point, but there's a reference -- and 17 he's right not to argue it -- about six lines from the 18 bottom: 19 "In any event as the judge pointed out the 20 ...(Reading to the words)... not in dispute." 21 This is passage I was looking at 185: 22 "In deciding whether the award was obtained by fraud 23 the court will not be engaged in review that pays any 24 deference to the award itself since the issue will be 25 whether unbeknownst to tribunals it was obtained by</p> <p style="text-align: center;">Page 33</p>	<p>1 skeleton, which is the reference to Westacre and it 2 starts at paragraph 29 where we have set out the 3 approach of Lord Justice Waller, where he agrees with 4 the judge -- that's Mr Justice Colman: 5 "Normally the conditions to be fulfilled will be 6 ...(Reading to the words)... and if answered must have 7 that result." 8 And that language is seen elsewhere and we'll come 9 to a decision of Mr Justice Blair later on. Decisive is 10 in the sense it must have had a substantial effect. 11 So there in be some causative element. And that's 12 really the two limbs of Westacre. Westacre limb 1, the 13 evidence to establish the fraud was not available to 14 Kazakhstan at the time of the arbitration, and I'll deal 15 with that. But as your Lordship knows, we contend that 16 the fraud only became discoverable in 2015 as a result 17 of the documents obtained through the discovery petition 18 in New York. That's a well-known article 1782 provision 19 that we're all familiar with. And the only reason the 20 1782 petition was filed is that Kazakhstan learned 21 purely by chance of the enforcement proceedings that are 22 being brought by in the Kazakh courts by Vitol against 23 the company controlled by the Statis called Montvale. 24 That all occurred long after the conclusion of the 25 arbitration, so it follows that the evidence to</p> <p style="text-align: center;">Page 35</p>
<p>1 fraud." 2 So that is the approach where one is dealing with 3 a fraud case and it's a principle that you do not pay 4 any deference to the award in that exercise, for the 5 reason given by Lord Justice Christopher Clarke. 6 As far as the English court attitude to fraud, 7 I don't think there's any dispute about this. We refer 8 in our skeleton at paragraph 7 to the well-known remarks 9 of Lord Bingham in the HIH Casualty case where there's 10 a reference to English public policy where fraud is 11 a thing apart: 12 "This is not a mere slogan ...(Reading to the 13 words)... and all transactions whatsoever." 14 And I would submit that the reason for the public 15 policy, to defer fraud and prevent fraudsters from their 16 own wrong, is a principle that is reflected in other 17 contexts and perhaps the best context is the fraud 18 exception in letters of credit, the United City 19 Merchants v Royal Bank of Canada case 1983 where 20 Lord Diplock said that. 21 "The exception for fraud on the part of the 22 beneficiary ...(Reading to the words)... to be used by 23 dishonest person to carry out a fraud." 24 Now, the other point about the legal framework, if 25 I could just pick up what we say at paragraph 29 of our</p> <p style="text-align: center;">Page 34</p>	<p>1 establish the fraud was not available to Kazakhstan at 2 the time of the arbitration. That's the point I'll deal 3 with later. 4 And then the second point that arises, Westacre 5 limb 2, the evidence must be so strong that it will be 6 reasonably be expected to be decisive to the hearing and 7 if answered must have the result. And the nature of the 8 second limb of the Westacre test was recently explained 9 by Lord Justice Christopher Clarke in the IPCO case. If 10 I can just turn back to that authority once again, it's 11 in the defendant's authorities, bundle 2, tab 15. The 12 passage I had in mind was at paragraph 191. It may be 13 that your Lordship already saw that. Halfway down 14 Lord Justice Christopher Clark says this: 15 "The purpose of Lord Justice's Waller's test is to 16 assess ...(Reading to the words)... which itself my 17 prove false." 18 So that's all I wanted to say on that topic in terms 19 of the legal structure. I then move on to the fourth 20 topic, which is the prima facie case in fraud. What I'd 21 wish to do is to cover three topics before I come to the 22 fraud: first of all, the LPG plant; secondly the dispute 23 before the tribunal; thirdly the tribunal's decision; 24 and then I'll move to the prima facie fraud case. 25 Now the LPG plant, that's a convenient way to put</p> <p style="text-align: center;">Page 36</p>

<p>1 that in context, is if your Lordship picks up bundle D1, 2 tab 2, which is the claimants' statement of claim, where 3 there is a short description -- a convenient description 4 of the plant. If you can turn then to page 329, which 5 is where it starts, the Statement of Claim. 6 Paragraph 2 -- 7 MR JUSTICE KNOWLES: Am I in the wrong -- 8 MR MALEK: It's D1, volume 5, tab 9. 9 MR JUSTICE KNOWLES: Thank you. 10 MR MALEK: So that's the statement of claim prepared by the 11 Stati parties. Then if we turn to page 334, you can see 12 that they set out what their investments are. As 13 your Lordship knows, this type of treaty is about 14 investments, so investments are protected in certain 15 circumstances. Then you see there the reference to the 16 various parties that we looked at. Paragraph 3 refers 17 to the subsale contracts and then paragraph 5 refers to 18 the LPG plant, where it's said that: 19 "To support the wells and production ...(Reading to 20 the words)... investing more than \$245 million ..." 21 That's a figure you are going to see over and over 22 again in the submissions: 23 "... in it's development and construction." 24 And then if we then turn to 360, paragraph 62, you 25 can see the LPG plant referred to again and the</p> <p style="text-align: center;">Page 37</p>	<p>1 developed the LPG plant and would have been able to 2 develop the evidence needed to establish the FMV [fair 3 market value] of the plant." 4 Then there's a table and you can see how it works 5 out. You have as 245 the investment cost and then the 6 prospective value of putting it to 239 and the 7 prospective value is the 84 million. So they wanted 8 245 million, in other words their costs, plus part of 9 the 84 million that they say would have been worth more 10 than the cost. 11 The claimants also propose a prospective DCF 12 discounted cash flow value of FTI and that is referred 13 to over the page at 1696. In this context the claimants 14 relied on the offer made by KMG as 199 and your Lordship 15 can see there the reference there, in 66 of part of 16 paragraph 1694, where that offer is referred to. As 17 I say, it's the offer by KazmunayGas, KMG, that's 1999, 18 and it refers to the fact that that offer was made. And 19 as we will see, it's that offer that we'll be looking 20 at: that was based on falsely inflated costs. And in 21 the early submissions FTI applied the book value of the 22 plant as a proxy for a fair market value that's at 1701, 23 which is the value of 208.5 million which was said to be 24 very conservative. Then at 1707 over the page -- sorry, 25 it is 3346 at 1707, where it says:</p> <p style="text-align: center;">Page 39</p>
<p>1 rationale behind it is identified in terms of how 2 whether gas would be acquired, what it was going to 3 produce, and also deals with the whole question of 4 delivery. And there's one point that we will come to 5 later: it was located in the Borankol field -- that's 6 four lines from the bottom of that paragraph. Then at 7 paragraph 64 you can see the statement that the 8 claimants invested more than \$245 million in development 9 and construction of the LPG plant, and that's 10 a paragraph that we quote in our evidence. 11 So that's the LPG plant that we're talking about and 12 we'll look at the question of cost later. 13 The next topic to deal with is the nature of the 14 damages dispute before the tribunal, and for that 15 purpose we need to go back to the award at D volume 11, 16 tab 24 at paragraph 1693, which is at page 3342 of 17 bundle D1 volume 11. 18 If we look at the bottom there there's a reference 19 to the slowing down following the investigation order, 20 and that's what 493 is about in terms of how the 21 activities reduced. 22 At 1694, the claimants seek to recover their 23 investment cost of \$245 million and lost opportunity. 24 It says: 25 "But for Kazakhstan's actions claimants would have</p> <p style="text-align: center;">Page 38</p>	<p>1 "Deloitte ..." 2 Who were acting for Kazakhstan: 3 "... disregard the possibility that TNG could have 4 sold the plant to a third party." 5 And goes on to talk about: 6 "The KMG EMP ...(Reading to the words)... not of DCF 7 basis." 8 I'm told that I should take you to 1700 as well, 9 where I thought I covered it, my apologies, I think 10 I went to 1701: 11 "FTI based its assessment ...(Reading to the 12 words)... and were reviewed by KPMG." 13 And then the Tristan Oil annual report is also 14 referred to. 15 So that's 1700. If we can go back to 1707, where 16 there's a reference to Deloitte. 17 Now as far as the Kazakh case was concerned, 18 Kazakhstan said that the LPG plant was a failed project, 19 an abandoned project, that had been constantly delayed 20 in completion, had gone far over budget. If you turn to 21 1712 you can see the arguments being set out there, 22 about the project being a failed project. Then at 1715 23 Kazakhstan said, relying on Gaffney Cline, that it would 24 cost another 100 million to finish the plant. They also 25 relied on Deloitte's -- I think that's at 1721 --</p> <p style="text-align: center;">Page 40</p>

<p>1 argument that the investment value is not a proper 2 valuation methodology and that the 245 figure is 3 irrelevant. That's 1724. And then Kazakhstan relied on 4 an RBS valuation report conducted as part of the KPMG 5 due diligence which estimated the value of the plant 6 between 47 to 86 million with a median of 67. That is 7 dependent on the availability of third party gas. 8 Finally Kazakhstan denied that the KMG and the other 9 indicative bids were irrelevant as they had only been 10 made in order to gain access to the data room and not 11 final offers, and the reference to that is 1736. 12 As I said, one important factor is, as I said 13 earlier, no allegations of fraud were made in relation 14 to the quantum aspects of the case, which obviously is 15 important. 16 So that's what the rival positions of the parties 17 were. Then if we can turn to the tribunal's decision. 18 It starts at paragraph 1743, page 3355. It is 19 characteristically brief, extending to just six 20 paragraphs. Your Lordship has read that and in effect 21 what the tribunal did is rather than -- it didn't engage 22 in the various technical experts' reports and it decided 23 that the best evidence was the contemporaneous bids made 24 for the LPG plant. The tribunal rejected the evidence 25 that these bids were only indicative to gain access to</p> <p style="text-align: center;">Page 41</p>	<p>1 and so it was obviously not covered in the evidence 2 before the tribunal. And before I go into the details 3 can I make just a few overview points about the fraud 4 case. 5 As I said earlier, the reason to go into the fraud 6 case at this time is not to invite the court say that it 7 existed. The only issue is whether my clients should be 8 allowed to raise this issue and if it is allowed to 9 raise the issue then how should that issue be 10 determined. 11 The second point is it will be necessary to take the 12 court to the main features of the fraud we say existed. 13 It may be unnecessary to go into all the underlying 14 materials, but I will take your Lordship to what 15 I consider to be the main ones that your Lordship needs 16 to know about. 17 The third point is that the principal evidence is in 18 Nacimiento's fifth witness statement dated 19 13 January 2017, which I know your Lordship has read, 20 which is in bundle B tab 17 at page 299. And as is 21 pointed out in the evidence, that's not the first time 22 that the fraud case has been made out. In essence it's 23 an update of a previous evidence in her fourth statement 24 but the intention is to make it freestanding so that 25 your Lordship does not have to go back and look at the</p> <p style="text-align: center;">Page 43</p>
<p>1 the data room and held that KMG's bid was of particular 2 relevance since it was made by a state owned entity. 3 And your Lordship can see all of that from 4 paragraph 1746. And at 1747 the reference to the KPMG 5 report: 6 "On the other hand the tribunal considers it to be 7 of particular relevance that an offer was made for 8 the plant by state owned KMG at the time for 9 199 million. The tribunal considers that to be the 10 relatively best source of informs for the valuation of 11 the LPG plant among the various sources of information 12 submitted by the parties regarding the valuation of the 13 LPG plant during the relevant period." 14 The valuation date is accepted by the tribunal. At 15 paragraph 1748: 16 "Therefore this is the amount of damages 17 the tribunal accepts in this context." 18 So that's the tribunal's decision on the quantum 19 issue. 20 That then allows me to go into the question of what 21 we say is the prima facie fraud, which is the main point 22 of this part of my submissions. 23 The fraud case has been covered in the evidence that 24 we've submitted to the court. And of course 25 the tribunal in Kazakhstan did not know about the fraud</p> <p style="text-align: center;">Page 42</p>	<p>1 earlier allegations. 2 The fourth point is that the claimants have not put 3 in any evidence about the fraud case. Now there may be 4 tactical reasons for that, but the point is there's no 5 challenge by evidence on the facts of what is alleged 6 and your Lordship has seen what is said in the skeleton 7 about that and we'll look those passages in the 8 skeleton. 9 Now, the fraud -- 10 MR JUSTICE KNOWLES: I'm reminded and apologise for not 11 being more vigilant that we should take a shorthand 12 break. So shall we do that now? 13 MR MALEK: Yes. 14 MR JUSTICE KNOWLES: If that would be convenient. 15 MR MALEK: When what would your Lordship want us back? 16 MR JUSTICE KNOWLES: Five minutes. 17 (11.58 pm) 18 (A short break) 19 (12.05 pm) 20 MR MALEK: My Lord, I gave a reference to Ms Nacimiento's 21 evidence about the fraud in a fifth statement, I should 22 also have referred to the Deloitte expert report. 23 I don't know whether your Lordship had it -- for some 24 reason I didn't put it on my reading list, that's my 25 mistake, I apologise for that. But it is quite short.</p> <p style="text-align: center;">Page 44</p>

<p>1 Your Lordship will find it at C volume 1 and it's at 2 tab 1, dated 12 January. They gave a lot of evidence in 3 the context of the Swedish proceedings, and also in fact 4 in the arbitration which your Lordship can see at page 4 5 about the various quantum stages that were looked at. 6 3 refers to the decision that we just looked at. They 7 then go on to talk about the annulment proceedings at 4 8 and 5. They then at 5 deal with the role that they 9 played in the annulment proceedings and in the 10 enforcement proceedings and the work that they carried 11 out. So there's a lot of material. So the point to 12 make here is that in assessing the material before the 13 court it's important to realise that a lot of ground has 14 already been covered. 15 Then over the page at page 6 there's a reference to 16 the assignment in connection with the enforcement 17 proceedings and make the point that they're not going to 18 repeat everything that has been said again. 19 Then over the page there's the statement of 20 independence. 21 Then at page 9 there is a document head "Main 22 conclusions of the Deloitte experts' reports previously 23 submitted" and what is said at paragraph 27: 24 "The key result of our experts' results that be 25 summarise as follows: the awarded damages amount for the</p> <p style="text-align: center;">Page 45</p>	<p>1 "With these inevitable limitations with regard 2 ...(Reading to the words)... by an amount of 3 approximately £130 million." 4 Then the conclusion: 5 "Because of the clear valuation formula stated in 6 KPMG's indicative offer letter and its mathematical 7 precision it can be concluded that KMG's indicative 8 offer amount was significantly affected by such 9 misstatement of the historical cost." 10 And if we just go back to the analysis of the 11 various columns, page 9, we will see that when we come 12 to look at the tribunal's reasoning, it focused on the 13 KMG indicative offer. And of course that offer was made 14 by KMG without knowledge of any kind of inflation of 15 cost. And although it was based on the historical cost 16 of the LPG plant, that wasn't relevant for the fraud, 17 and irrelevant, and therefore as we will come to see, 18 the Swedish public policy is incredibly narrow; it's 19 just looking at that section the KMG indicative offer. 20 Since KMG made that offer unaware of the inaccuracies, 21 there was no public policy engaged, notwithstanding the 22 fact that the historical costs were within that offer 23 and there was historical costs were known to be false by 24 the claimants, and that is really in essence what the 25 public policy point is which we'll come to in terms of</p> <p style="text-align: center;">Page 47</p>
<p>1 LPG plant of 199 million is based on the amount 2 stipulated in KMG's indicative offer letter. This price 3 in turn is based on the historical cost of the LPG plant 4 shown in TNG's financial statements as one of the two 5 determinatives of the calculation formula stipulated in 6 KMG's offer letter. We conclude that these historical 7 costs are massively inflated in several ways without 8 a cause or justification. This unjustified inflation 9 has a direct impact on KMG's indicative offer amount and 10 consequently on the amount awarded by the arbitral 11 tribunal." 12 Then the stages of the analysis are the historical 13 cost of the LPG plant that get carried through into the 14 KMG indicative offer amount, and then the awarded 15 damages compensation amount. 16 Then over the page at 28 they deal with the 17 indicative offer letter. I'm going to come back to that 18 offer letter when I deal with my submissions. 19 Then over the page at page 11 they summarise the way 20 that the historical costs have been significantly and 21 unjustifiedly inflated. There were various figures that 22 we are going to look at in terms of my submissions that 23 I'm about to make. And reference then to the 24 information memorandum. Over the page the conclusion at 25 E is that:</p> <p style="text-align: center;">Page 46</p>	<p>1 what are the differences between English public policy 2 and Swedish public policy. Swedish public policy takes 3 a very formalistic, narrow view of public policy and 4 it's really focusing just on that. It's our case -- 5 I'll come to issue 6, but just so that you know, that's 6 what we are looking at and why we say that Swedish 7 public policy and English public policy are not the 8 same. 9 So that's in terms of the material in terms of the 10 fraud case. I'm going to go through the various 11 particular elements of the fraud in a moment, but as you 12 know our case is that there were three principal 13 respects in which we contend that there's enough 14 material to allow this case to go forward in terms of 15 the fraud on the tribunal. 16 First, in the sense that the claimants knowingly 17 presented a false damages claim for the tribunal. That 18 case was based on construction costs of the LPG plant 19 which had been deliberately inflated as part of earlier 20 and unconnected underlying schemes by the Stati parties 21 and you can see Deloitte conclusion that it was 22 a massive figure: \$130 million. 23 The second is that the claimants relied in support 24 of their damages case upon the indicative offer that 25 they'd received for their Kazakh assets, including the</p> <p style="text-align: center;">Page 48</p>

<p>1 LPG plant, from KMG, KazmunayGas Exploration Production, 2 as the claimants knew the pricing of that offer were 3 expressly based on the inflated construction costs of 4 the LPG plant and in the arbitration the claimants 5 deployed that indicative offer in support of the damages 6 case. And as we will see, the KMG offer used 7 a construction cost asserted by the claimants to 8 establish the amount of their indicative bid, and I've 9 summarised what that case is.</p> <p>10 Then the third point is that they fail to disclosure 11 the Perkwood agreement and many other documents 12 responsive to the alleged construction cost of the 13 defendant, despite the fact that those documents fell 14 within the scope of the arbitral tribunal's document 15 production orders. So that goes to the question of how 16 the fraud was concealed.</p> <p>17 Now, a brief overview of how the case is put. As 18 I've said, and your Lordship probably picked this up 19 already by what I've said, there are four elements. 20 First of all the overstatement in costs by the 21 claimants. The second is using those inflated costs in 22 order to sell those assets and that obviously involved 23 Renaissance Capital who produced the information 24 memorandum and we will show that it included the 25 inflated cost. The third element stage is to see how</p> <p style="text-align: center;">Page 49</p>	<p>1 use is made of it -- I am only joking -- at the opening 2 statement at core 1, tab 24 at the back there. This is 3 at tab 24 and it's -- in fact it's at D1, volume 5, 4 tab 12 at page 1330. You can see that at lines 4 to 6, 5 the LPG costs is a cost as of May 2009 of 245 million -- 6 that's the investment cost in that facility.</p> <p>7 Then just a few other references perhaps. Staying 8 in the core at tab 9, you have the witness statement of 9 Artur Lungu Ascom at paragraph 27, and what he says 10 halfway down, he refers to the startup: 11 "... when the state seized KMG and TNG ...(Reading 12 to the words)... LPG plant was over 90 per cent 13 complete."</p> <p>14 The next one is in fact tab 10, Anatolie Stati, 15 which is page 936, where he says four line down: 16 "I chose this May 2009 to postpone the LPG plant 17 having already spent more than 245 million towards its 18 construction."</p> <p>19 And there was oral evidence to that effect also, 20 tab 22. Page 1076, two pages in, where there's 21 a reference to having invested the -- 248 it's stated 22 there, and going back to tab 21 of the same core, you 23 have another reference to TNG having spent 24 a total -- lines 9 to 11 -- of some 245 million, and 25 that's at 1422. Your Lordship may want to just put</p> <p style="text-align: center;">Page 51</p>
<p>1 KMG relied on the information memorandum and the costs 2 there in their indicative bid. Then the final phase is 3 the claimants deploying the KMG indicative bid in the 4 arbitration.</p> <p>5 KPMG knew nothing about the overstatement of cost, 6 they were not involved in the fraud, they were not aware 7 of anything. It's how that offer was deployed which we 8 say constitutes the fraud on the tribunal and that's 9 where we say English and Swedish public policy diverge.</p> <p>10 Now, the claimants' damages claim, your Lordship has 11 seen it already. Their final case before the tribunal 12 was that the tribunal should award damages in respect of 13 the LPG plant corresponding to their investment in the 14 facility, plus an additional profit that they contended 15 they would have realised in the LPG plant valued on 16 a DCF basis. In relation to those investment costs the 17 claimants repeatedly stated in their submissions, 18 witness statements and experts' reports that they 19 invested 245 million in the plant. And we've looked 20 earlier this morning at the statement of claim to see 21 how that was done. Perhaps we could just look at it 22 once again. It's at D1, volume 2, tab 5. We saw that 23 at paragraph 5 at page 335, and then at paragraph 64, 24 page 360, and you can see that figure there.</p> <p>25 If we can then pick up the core bundle, so that some</p> <p style="text-align: center;">Page 50</p>	<p>1 a note down at the bottom there just to make it 2 clear: this is from D1, volume 5, tab 12 at page 1422.</p> <p>3 Then, just as an example of expert evidence on this 4 from FTI, if your Lordship could please turn to D1, 5 tab 4 at 1024, paragraph 9.3(2), where they say: 6 "The value of the claimants' total investment in the 7 current state for the LPG plant is 245 million." 8 And there's a break-down of how that figure is 9 broken up: there is a 2008 valuation date and 37 million 10 invested through May 2009.</p> <p>11 Then just a couple of other references. If you 12 could pick up, please, at D1 volume 7, tab 15, this is 13 an extract from the claimants' first post-hearing brief 14 at page 1938. You can see that figure there at the 15 bottom there that we've seen before, the 245 investment 16 cost, and if we then go forward to 1969, same document, 17 we can see the request for relief at 664 in relation to 18 the LPG plant was at 245 million. And it got carried 19 through into the second post-hearing brief as well. I'm 20 not going to take your Lordship to it but if I can just 21 give a reference for a note it's at D1 volume 1 tab 22 22 at paragraphs 354, 386 and 396.</p> <p>23 So all these statements and evidence were false and 24 known to be false because they all involved investment 25 cost of 245 which we show has been deliberately inflated</p> <p style="text-align: center;">Page 52</p>

<p>1 and I'll come to that in a moment. 2 The other point to make at this stage, having 3 explained what their case is, is to refer to Perkwood. 4 Perkwood Investments Limited was central to the 5 fraudulent scheme involving the inflation of cost. The 6 claimants wanted to present Perkwood as an independent 7 company but in fact it was a puppet company and they 8 pulled the strings. It was an English company that was 9 ultimately under the ownership and control of the Stati 10 parties, and there was a lot of material as to what 11 Perkwood was in terms of the Swedish proceedings. 12 If I can just take your Lordship to C1 -- this is 13 from a Deloitte report -- C1 at page 154. This document 14 starts at 147. It's November 2015. This was 15 a supplementary expert report and of course at this 16 stage the other side hadn't raised the white flag in 17 relation to they are control of Perkwood, so this was in 18 effect dealing with what Perkwood was. If you turn to 19 149 there's a reference to Perkwood Investments Limited 20 and then there's a discussion about Perkwood and various 21 new information that had come to light. It's quite 22 interesting just to look at 154 to 156 to see what 23 Perkwood actually was. 24 It starts at 154, you can see the reference to the 25 company name. It's shareholders is somebody called</p> <p style="text-align: center;">Page 53</p>	<p>1 then he talks at paragraph 61 he says: 2 "TNG engaged an Ascom affiliate, Perkwood 3 Investments, to manage the acquisition of most of the 4 equipment and services for the LPG plant project." 5 And then there's a reference there to what Perkwood 6 was doing. And if I can just read on: 7 "Perkwood charged TNG ...(Reading to the words)... 8 financial systems and statements total 44 million." 9 And we'll come back to that in a moment. 10 If I can just give your Lordship a reference to 11 where one can find the statement which makes good that 12 it's dated 11 October 2013, it's at D2, volume 8, and as 13 you can see it's at 2332. 14 So the point about Perkwood being an affiliate was 15 concealed in the ECT arbitration and was only finally 16 admitted during the oral hearing in the Swedish 17 proceedings. And if your Lordship can then turn to core 18 tab 12 -- and this was all in the context of a debate 19 about what Perkwood was and at page 31 of the internal 20 miniscript, and for your Lordship's note in the main 21 bundles it's at D3 volume 4 tab 40, page 1049. 22 Mr Nilsson, who is counsel for the Stati parties, says 23 at lines 12, referring to a general attorney that we 24 have: 25 "Those documents ...(Reading to the words)..."</p> <p style="text-align: center;">Page 55</p>
<p>1 Sarah Petre-Mears, and then down at point 20 it filed 2 dormant accounts for the years 2004 to 2009, it filed 3 dormant accounts for 2006 to 2009, it was dissolved in 4 May 2011, and then over the page there's references to 5 research into Sarah and Edward Petre-Mears. Petre-Mears 6 was the company secretary, as your Lordship can see from 7 page 154, and there's references to an article and sham 8 directors and "running 1,200 companies from a Caribbean 9 rock". 10 So that was the background information -- in fact if 11 you then go on to 156 you can see the result of 12 a company search, and paragraph 30 at page 156: 13 "The fact that Perkwood filed dormant accounts 14 ...(Reading to the words)... we did not find any 15 indications of any operation of Perkwood." 16 Now, the interesting thing is while the claimants 17 admitted in the JOA arbitration that Perkwood was 18 theirs, they concealed it in the ECT arbitration. And 19 if we can just look at that briefly and go back to the 20 core bundle. It's in volume 1 tab 8. This was the 21 Artur Lungu who describes this is at 2311, so it's 22 volume 1 of the core bundle, tab 8 at page 2311. This 23 is the Ascom Vitol arbitration that you told you about 24 earlier this morning. What they says at paragraph 61, 25 he talks about the -- in the context of quantum, and</p> <p style="text-align: center;">Page 54</p>	<p>1 opposing counsel." 2 So that's when the concession is made. 3 The general powers of attorney to Anatolie and 4 Gabriel Stati for the years 2005 to 2009, could 5 your Lordship please turn to volume D2 volume 1 at 6 page 66. You can see there the powers of attorney. 7 At page 66, that's for November 2005, there's another 8 one at page 69 of D2 volume 1 dated 14 September 2006 9 and then there's another one for 22 August 2007 which is 10 at page 71. And there's another one at page 74. 11 And 76. So there's a whole series of general powers of 12 attorney. 13 The point is that notwithstanding that Perkwood was 14 a related party, Perkwood was presented to the world as 15 an independent third party. Among other matters, the 16 financial statement of TNG, TNG, KMG, Tristan Oil for 17 the periods 2006/2009 did not disclose that Perkwood was 18 a related party in breach of applicable accounting 19 standards. And we can make good that statement by 20 looking at volume C1, the Deloitte report at 21 paragraphs 32 onwards. So it's C volume 1, page 13. If 22 your Lordship could just look at paragraphs 32 through 23 to paragraph 37. 24 (Pause) 25 MR JUSTICE KNOWLES: Thank you.</p> <p style="text-align: center;">Page 56</p>

<p>1 MR MALEK: Now, there are a number of ways in which the 2 costs were inflated, there was a gradual process, but 3 all the matters that I'm about to mention had taken 4 place by the time of the indicative offer which 5 your Lordship will recall was in September 2008. And 6 there are at least four major parts but others were 7 discussed in the Swedish courts. But if I may now come 8 to four of them: there's the management fee fraud, 9 there's the repurchase fraud, there's the equipment or 10 construction fraud and then there's the interest fraud. 11 So those are the four matters that I want to look at. 12 The management fee fraud, which we already touched 13 on already, is that the Stati parties caused TNG to pay 14 Perkwood a sum of almost \$44 million and in the passage 15 that we just looked at from the JOA, the joint operating 16 agreement, arbitration, he described that as 17 a management fee and the reference there is core 18 volume 1 tab 8, and those are the passages that I looked 19 at at D2 volume 8, 2332, paragraphs 61 to 62. 20 The so-called management fee had no contractual 21 basis in the Perkwood agreement. If your Lordship could 22 turn first of all to D2, volume 2, I think the relevant 23 extracts in the core but let's just look at it first of 24 all in D2, volume 2 at page 355. I think if we can turn 25 to core 2 at tab 39 we can see that the extracts are set</p> <p style="text-align: center;">Page 57</p>	<p>1 and if I can just give an example of that, if we can go 2 to D2 volume 1 at page 25. You see the description with 3 the 9s there at page 25. This is really just backing up 4 what Deloitte have said. And just for your Lordship's 5 note, the ones for 2008 is at D2 volume 1 pages 31 to 6 36; for 2007 it's D2 volume 1, 37 to 42; and to 2009 7 it's D2 volume 1 pages 43 to 45. 8 So that's the first point which we make as to why 9 there was no consideration for these management 10 fees: the dormant accounts. 11 The second one is Mr Zaja, the senior site engineer 12 who oversaw the construction of the LPG plant, confirmed 13 he never saw Perkwood or anyone purporting to represent 14 Perkwood at the site. The references to his evidence -- 15 I'm not going to take your Lordship to it, it's at 16 bundle B, tab 15, page 290, paragraph 9; his second 17 statement is B tab 16 page 298 at paragraph 12. 18 The next point is there is no documentary evidence 19 verifying or particularising the purported management 20 fees or the services to which these fees relate. The 21 reference to that is at D2 -- if I could ask 22 your Lordship to go to that, please, it's at D2, 23 volume 8 at 2409. This is from the expert report of 24 David Stern, it's dated 23 January 2014 and it was filed 25 by Vitol in the JOA arbitration. What he says at 4.52:</p> <p style="text-align: center;">Page 59</p>
<p>1 out there and there's nothing in there giving rise to 2 that management fee. And what Mr Justice Cooke observed 3 in the proceedings that we referred to, and you will 4 find the relevant extract in the core bundle volume 1 at 5 tab 18, and this is a decision from 2014, at 2519 it 6 starts. Your Lordship can see the parties, it's Vitol 7 and Ascom, and what Mr Justice Cooke said is: 8 "Ascom experted it paid a management fee...(Reading 9 to the words)... it appears that this 'fee' was simply 10 paid at will." 11 And we contend that TNG receive no or no adequate 12 consideration for the purported management fees that it 13 paid to Perkwood. And this can be inferred from 14 a number of matters, in particular that Perkwood filed 15 dormant accounts for each year for the period 2006 to 16 2009, the very period in which it is said to have 17 provided these services to TNG. So that's the first 18 point we make. 19 If your Lordship can turn, please, to D2, volume 1 20 at page 46, starting at 46, at page 61 your Lordship can 21 see the reference there to dormant companies at the 22 bottom there, 9999. So that's the classification for 23 dormant companies. 24 And Perkwood's accounts for the years 2006 to 2009, 25 each of which bears the dormant classification code --</p> <p style="text-align: center;">Page 58</p>	<p>1 "If addition, as discussed above...(Reading to the 2 words)... in support of these values." 3 So we say the management fees were fictitious sums, 4 artificially inflated and that they artificially 5 inflated the construction costs of the LPG plant 6 advanced by the claimants. 7 Now if we can turn briefly to my learned friend's 8 skeleton at 51.6, at page 21, what he says is this: 9 "Vitol agreed in the JOA arbitration to exclude the 10 value...(Reading to the words)... actually part of the 11 network of Ascom affiliated companies." 12 But with respect that doesn't justify claiming this 13 cost from Kazakhstan. It's a fictitious cost, it's not 14 a real cost, and as I say, no evidence that Perkwood 15 provided services let alone management fees of 16 44 million. 17 The only other way that it's dealt with is in the 18 annex 1 to the witness statement of Dzhazoyan, which is 19 at bundle B, tab 8. If your Lordship can see what's 20 called, at item 3, the management fee fraud, at 162, and 21 see what's said there, which in our respectful 22 submission doesn't really provide any evidence at all in 23 the sense that the evidence before the tribunal in the 24 JOA indicated that the -- he admits the fee was not 25 shared investment, we have the point that you already</p> <p style="text-align: center;">Page 60</p>

<p>1 heard about the accounts of Perkwood, and Stati does not 2 identify any evidence to support the notion that it 3 actually performed any services, the Court's in the dark 4 as to a what those management services actually were who 5 performed them and when, and the table that's given 6 there doesn't in our respectful submission provide any 7 support for the proposition that this was anything other 8 than a fictitious figure. 9 My Lord, that's all I wanted to say about the 10 management fee fraud. So let me then deal with the 11 second one, which is the repurchase agreement. 12 If we can go back to the Perkwood agreement. If we 13 can go to D2, tab 2 at page 355. It's also in the core 14 at tab 39 of core 2. If your Lordship turns to the 15 annex number 2 of the Perkwood agreement, which using 16 the D2 volume 2 reference is at 361 -- as I say it 17 should be in the core as well. You can see that annex 2 18 concerns the purchase of three main units for the LPG 19 plant, and you can see them there coming to 93 million. 20 But our case is that these three main units that 21 Perkwood sold to TNG under the Perkwood agreement had in 22 fact already been supplied by a genuine independent 23 third party supplier, Tractebel Gas Engineering GMBH, 24 that's TGE, to the claimants, that's Ascom Azalia. You 25 can see that from the TGE contract which is in two</p> <p style="text-align: center;">Page 61</p>	<p>1 as we understand it, is in the -- or the only way it's 2 dealt with is in the schedule that we've looked at, 3 annex 1, if we can turn to that again, which is in 4 bundle B tab 8 at page 157, where there is a description 5 of the Perkwood -- of the repurchase fraud and you can 6 see that the matter was raised before the tribunal but 7 in our respectful submission there's certainly no answer 8 to the points that we have made. 9 And of course the judgment, although it talks about 10 these columns, the fraud, the Swedish proceedings, and 11 this Svea Court of Appeal judgment, the point is that 12 the judgment you see repeated references in all these 13 columns to paragraph 5.3.1 which is quoted at page 155 14 at the bottom there, 5.3.5. Your Lordship has seen this 15 already. 16 But the point is that the tribunal just simply has 17 not dealt with the underlying facts and dismisses the 18 claim based on its view of Swedish -- well, on its view 19 of Swedish public policy. So that's all that column 20 says; all it does is just demonstrate that the tribunal 21 felt it unnecessary to engage in the underlying 22 allegations. I'll deal later with how these costs get 23 carried through. Just going through them one by one. 24 The next one, the third out of the four is the 25 equipment for construction fraud. This is where the</p> <p style="text-align: center;">Page 63</p>
<p>1 places, it's in the core bundle at volume 2 at tab 38 2 and it's also in the D bundles at D2, volume 1 at 3 page 144. You can see at 144 the three items, the same 4 units, and we can see the sale price if we go on to 5 page 150 in the middle there, the three units, but this 6 time, instead of the 93 million that we see, we have 7 a euro figure of 28 million euros that translates into 8 an approximate dollars figure of the 35 million. So 9 Stati buys the units for 35 million and you can see from 10 4.1 that they are delivered, this is page 150, to 11 Bulgaria and the units are resold on paper from Ascom 12 Azalia to Perkwood. We don't have that contract but we 13 know that Perkwood sold under the Perkwood agreement. 14 But we've seen a moment ago that the Perkwood figure is 15 93 million. So that gives rise to a 58 million profit. 16 Now, none of these steps were disputed in the 17 Swedish proceedings. The question is whether this 18 increase has any legitimate explanation. And in our 19 submission there is no legitimate explanation for it. 20 You cannot claim compensation as if this is 21 an investment cost and we say it's to be inferred that 22 Perkwood did not in fact supply equipment to TNG as set 23 out in the Perkwood agreement, the Perkwood agreement 24 was simply a means of artificially inflating the 25 construction cost of the project, and the answer to it,</p> <p style="text-align: center;">Page 62</p>	<p>1 Stati parties represented that the construction costs of 2 the LPG plant included over \$72 million worth of 3 equipment that had purportedly been delivered but not 4 incorporated into the LPG plant when construction was 5 abandoned. If we can look at that and turn, please, to 6 bundle D2, volume 6, and if your Lordship could please 7 turn to page 1723. 8 This is the expert accountant's report in the 9 Ascom Vitol arbitration. It starts off at page 1707, 10 Charles River Associates CRA, it's dated 11 11 October 2013. At 1723 is a passage I want to look at. 12 You can see there's a summary of the construction costs 13 at that page. Your Lordship can see the construction in 14 progress figures are given there and we'll come back to 15 those figures in a moment. But what we say is that on 16 the evidence it indicates that that equipment never 17 existed, and you can get that from C1 volume 1 tab 2, 18 which is the expert report of TGE, Mr Calvert, starting 19 at page 19, dated 12 January 2017 and what he says at 20 paragraph 113 which is at page 53. If you can just read 21 to yourself what's said there at 111 through to 113. 22 (Pause). 23 MR JUSTICE KNOWLES: Yes. 24 MR MALEK: Just pausing there, TGE are the people who 25 supplied the equipment and built the plant. So what's</p> <p style="text-align: center;">Page 64</p>

<p>1 said at 113: 2 "There's no possible explanation for why equipment 3 worth over 72 million would remain to be incorporated 4 when the plant was substantially complete and TGE had 5 already supplied all the principal items of equipment 6 for a much lower purchase price of approximately 7 35 million." 8 Your Lordship can see that. 9 Then if I can just give a reference rather than take 10 your Lordship to it Mr Zaja's second statement 11 paragraphs 9 to 11, bundle B tab 16 pages 294 to 297. 12 He gives evidence to the effect that he did not see any 13 such equipment at the site and that there were no 14 facilities at or in the vicinity of the valuable 15 equipment. 16 The next point to make is if you can pick up at 17 bundle B tab 17, page 313, at paragraph 27(2), where 18 just putting it in context: 19 "Claimants were required to respond ...(Reading to 20 the words)... on the LPG plant is undisputed among the 21 parties." 22 My Lord, I don't know if that's a convenient time to 23 take the break. 24 MR JUSTICE KNOWLES: Thanks very much. 25 (1.03 pm)</p> <p style="text-align: center;">Page 65</p>	<p>1 Your Lordship may remember this morning that the 2 LPG Plant was at the Borankol and the reference there is 3 at C4/901. So there's no answer -- certainly no answer 4 that can be said that this contention should not be 5 allowed to go ahead. 6 That allows me to go on to the last of the frauds, 7 which we call the interest fraud. 8 The Stati parties included within the construction 9 cost of the LPG Plant interest which they alleged had 10 accrued on the fictitious construction costs. And if 11 I can take the court to Ms Nacimiento's fifth statement, 12 which is in bundle B, to the see how the point is put. 13 It is tab 17, page 314. And at 28, page 314 14 paragraph 28: 15 "Under the interest fraud the Stati parties claim 16 that ...(Reading to the words)... fact been incurred." 17 It was common ground in the Swedish proceedings that 18 the sum of 245 that was claimed by the claimants to 19 comprise construction cost included approximately 20 60 million that represented interest, plainly to the 21 extent that the claimant's construction cost to the 22 LPG Plant included fictitious sums. 23 She goes on: 24 "Any interest purportedly charged in respect of 25 those sums ...(Reading to the words)... was similarly</p> <p style="text-align: center;">Page 67</p>
<p>1 (The short adjournment) 2 (2.00 pm) 3 MR MALEK: So just picking up where we left off. I was 4 looking at the equipment for construction fraud and two 5 main points seem to be taken against us in relation to 6 this. If your Lordship would be so kind to go to my 7 learned friend's skeleton submissions at 51.10, page 22. 8 So that's the first point that's made, that basically 9 the Customs authorities found no violation of local laws 10 and didn't find any irregularity in relation to the 11 declarations. 12 Then 51.11 is a point made in relation to the MEMR, 13 that's Ministry of Energy and Mineral Resources, and 14 again, it's said that they found nothing irregular. 15 But the points in response are that the Customs 16 never checked whether the goods existed, or their value, 17 it wasn't a full audit, and similarly as far as the MEMR 18 is concerned, it may be that that's what the books 19 stated in terms of uninstalled equipment of about 20 60 million, but there was no on-site inspection of the 21 LPG Plant and you can see that by looking at D2 volume 5 22 at 1351 which is the document that's being referred to. 23 It starts at 1329. This was an unscheduled inspection. 24 Then at 1351, you can see under "Conclusions", line 4, 25 that the inspection was at the Tolkyin field.</p> <p style="text-align: center;">Page 66</p>	<p>1 without any legitimate interest." 2 So that's how the case is put. 3 As far as the interest figure itself is concerned, 4 if the Court could turn to D2, volume 6 at page 1723. 5 We looked at this schedule before and I said I would 6 come back. You see there under "Interest" -- this is 7 3.3.6. Per IC database there's an interest figure there 8 in tenges then in dollars it's I think 68 million. 9 So that's the interest rate and so the next issue -- 10 we can put that away -- is how the issue of the inflated 11 cost get carried through to being a fraud on 12 the tribunal. As your Lordship is aware, in the ECT 13 arbitration the claimants relied upon indicative offers 14 made in 2008 in order to obtain due diligence material 15 for the sale price access as a good benchmark of market 16 value prior to Kazakhstan's alleged breaches of the ECT, 17 and indeed they described the KMG offer as being low or 18 a lowball offer and we can see that in a number of 19 places. Perhaps I can just give your Lordship the 20 reference. It's a statement of claim dated 18 May 2011 21 at D1, volume 2, tab 5 at 338, paragraph 12, and at 33 22 to 364 paragraphs 71 to 73 and page 486 paragraph 38(a). 23 It's also in first post-hearing brief dated 8 April, at 24 D1 volume 6, tab 14, 1791, paragraph 35 and at page 1754 25 paragraph 131. And one more reference, D1 volume 7</p> <p style="text-align: center;">Page 68</p>

<p>1 tab 15/1836 paragraphs 343 at page 1912 at 2 paragraph 519. And finally page 1934 paragraph 569. 3 Then if we can just look at a couple of references in 4 the core bundle, there's the statement of Artur Lungu, 5 which is in core bundle tab 9 at paragraphs 32 to 33, 6 where the various indicative bids were referred to, so 7 that's core volume 1, tab 9, paragraph 32 to 33. And if 8 your Lordship just wants to write in the reference to 9 the 119, that's in D1, volume 1, tab 9 at 119. Then one 10 other reference is in tab 10, which is the witness 11 statement of Mr Anatolie Stati at paragraphs 4 through 12 to 5. And the reference there for your Lordship's note 13 at the bottom there, where you see 923, that should read 14 D1, volume 4, tab 9 at 923. 15 So that was the KMG offer that was referred to. 16 But in fact as we now know, the KMG offer was not 17 a reliable benchmark for the value of the LPG Plant. As 18 the claimants knew, the pricing of that offer was based 19 directly on the inflated construction cost of the 20 LPG Plant as recorded in TNG's financial statements. 21 You can get that first of all if we look at the offer 22 itself, and for that purpose could your Lordship please 23 pick up D2, tab 3 -- it's in the core bundle as well. 24 Only the first page. So in fact if we can just go to D2 25 volume 3 at 852. This is the indicative bid that</p> <p style="text-align: center;">Page 69</p>	<p>1 can see also at 854 any key assumptions under (f) and 2 valuation methodology that you've used in arriving at 3 the level of the consideration including the variables 4 in which your final valuation is most sensitive and what 5 they say is: 6 "In formulating our indicative offer we have relied 7 upon the information contained in the information 8 memorandum and other certain other publicly available 9 information. Our valuation depends upon this 10 information and assumptions being substantiated in the 11 next round through due diligence materials and 12 meetings." 13 Going three down then you can see that: 14 "The value of the LPG Plant was calculated as 15 an arithmetical average basis between a matrix of 16 comparative method value and cost method value. EBITDA 17 multiple of 5 times was used as a basis for comparative 18 method. Historical costs of 193 million were used as 19 a base for cost method valuation." 20 So we then have to go to the information memorandum 21 which -- we can put this document aside -- is in core 22 volume 2 tab 33. But it's also in D1, volume 1, tab 2 23 at 27. If we can just turn to that, please. It's just 24 behind tab 2. 25 This was prepared, as I indicated earlier, by</p> <p style="text-align: center;">Page 71</p>
<p>1 your Lordship has heard so much about. And it's dated 2 25 September 2008, I think. It's from KMG and if you 3 then turn to 854 you can see at the top there: 4 "We estimate the value of the Borankol field ..." 5 And going on: 6 "... and the value of the LPG Plant at 199 million." 7 And just pausing there, if your Lordship could turn 8 back to the presentation of KMG, which is in this bundle 9 at D2 volume 3 at page 835 -- in fact it starts off at 10 page 835, the presentation called "Project Zenith"; 11 that's the presentation upon which this is based. And 12 if you turn then to page 4849, you can see how that 13 figure has been calculated. What is done is if you can 14 look at the basic assessment results, you can see that 15 on the right-hand column, results for the liquidation 16 during the comparative analysis, the average range value 17 is \$205 million, and then the value in cost approach you 18 can see the adopted balance sheet of the outstanding 19 construction is 193 million. So what the calculation is 20 based on is you add the 205 million to the 193, and then 21 you divide it and that reaches the averaging of both 22 methods and that's the figure of 199, so you see how 23 that figure has been calculated and it's clearly based 24 on the historic cost of TNG. 25 If we can then go back to the indicative bid, you</p> <p style="text-align: center;">Page 70</p>	<p>1 Renaissance Capital, it's in August 2008 and that's 2 page 27. If one then turns using the numbering at the 3 bottom right-hand corner to page 81, you can see that 4 there's a reference at 5.4.1 by way of an overview and 5 you can see that the second paragraph says: 6 "The LPG Plant is expected to be commissioned in the 7 second quarter of 2009 with a total CAPEX requirement of 8 233 million. As at 1 July 2008 TNG has spent 9 approximately 139 million on the LPG Plant." 10 So that's been spent then and it's expected to go up 11 at 233. 12 Then the financial information contained in the 13 information memorandum was derived from the financial 14 statements of TNG and it related companies. You can see 15 that if you go back to page 31 of this document, where 16 you see that the presentation of financial information 17 is set out there and then you can therefore see the 18 references to the financial statements of TNG and its 19 related companies. 20 We can see that at D2 volume 2, so if we can -- 21 I know we have a lot of documents open but if we go to 22 D2 volume 2 you can see the interim financial statements 23 and this is at 622 of D2 volume 2. This is the interim 24 financial statements and at 622 of volume D2 volume 2 25 you can see going along one from the right-hand side,</p> <p style="text-align: center;">Page 72</p>

<p>1 liquid petroleum gas plant. Then various figures are 2 given, but the balance is 193 million. So that's where 3 that figure shows. 4 That's been confirmed, this analysis, by Deloitte 5 and if I could ask the Court to turn to C1 at page 9, 6 which is the passage that we looked at this morning. So 7 it's C volume 1 page 9. You can see those three 8 boxes: historical cost, the indicative offer and then 9 awarded damage compensation amount. Then at 10 paragraph 27 your Lordship has been -- I read that and 11 the conclusion that has been reached, that there has 12 been a massive inflation in historic cost and you can 13 see at page 11 the matters that I took the Court through 14 earlier today in terms of the inflation of historic 15 costs at (c) and one can see the 58 million resulting 16 from the prices of equipment, equipment for construction 17 of 72 million, evidence that the underlying expenses did 18 not exist and the respective interests, interest must 19 not be capitalised and the point about the management 20 fee. 21 So it's all backed up by what we will contend is 22 independent expert evidence. And if you look at the 23 passage that we've looked at, it explains how the 24 historic costs have been inflated and this refers to the 25 overstatement of costs that we've looked at. It is the</p> <p style="text-align: center;">Page 73</p>	<p>1 "This was a critical document that was not disclosed 2 ...(Reading to the words)... that would otherwise would 3 have remained concealed." 4 So if we can then move on to the next -- within this 5 topic, which is Westacre 2, the effect of the fraud on 6 the award. For that purpose could I ask the court to 7 turn to our skeleton submission, paragraph 33 onwards. 8 And our case on that is set out at paragraph 33 through 9 to 36. 10 If I can just remind the Court of what was said by 11 the tribunal, it's in D1, tab 11 at 3355 to 3356. 12 Your Lordship has seen this passage before, but you can 13 see in particular how the award is being used at 14 1743: it's relatively the best source of information and 15 that is the basis upon which the figure of 1748 is 16 calculated. 17 So we submit that the tribunal's findings on quantum 18 were therefore directly influenced by the claimants' 19 fraudulent reliance on the KMG offer as a credible 20 benchmark for determining the market value of the 21 LPG Plant. And as we say in our skeleton, the figures 22 on quantum were also influenced by the representation 23 and evidence that they invested 245 million in the 24 plant, which necessarily informed and provided 25 reassurance to the tribunal in relation to its findings</p> <p style="text-align: center;">Page 75</p>
<p>1 causative link between the fraudulent scheme and the 2 outcome of the arbitration and there be can no doubt 3 that the KMG offer was on a cost basis for the LPG plant 4 and if there's any doubt about that one can see that 5 from D1 volume 1, which is the expert evidence, that's 6 the FTI of Howard Rosen and Laura Hardin(?), and if you 7 turn to 239 you can see at page 239 at the top there the 8 valuation methodology which is referred to there at 239: 9 "Market approach for Borankol cost basis for the 10 LPG Plant." 11 The only other matter before I deal with the effect 12 of the fraud on the award, if you could turn, please, to 13 the tribunal's decision regarding document request. 14 That's in D1 volume 4 ... in fact I think it's easier to 15 look at it in the core. It's in core 1, tab 20. Then 16 there's a document request at 108 at page 920XXX and so 17 the claimants were ordered to disclose to the defendant: 18 "... all documents in their possession ...(Reading 19 to the words)... basic facilities of the plant." 20 But the Perkwood agreement was not disclosed. If 21 I could turn in tab B17 at 299 to the fifth statement of 22 Ms Nacimientto at paragraph 38(2), where in a slightly 23 different context about whether or not we should have 24 found out about the fraud the point she makes at 38(2) 25 is that the Perkwood agreement itself, page 319:</p> <p style="text-align: center;">Page 74</p>	<p>1 on quantum. We also rely on their failure to disclose 2 the Perkwood agreement in breach the tribunal's order. 3 And when we come to see the next issue, which is 4 essentially that we should have picked this up, we 5 submit it's very difficult to see how that argument to 6 be made when the Perkwood agreement was concealed in 7 breach of the tribunal's order, and whatever may be said 8 about Perkwood there's certainly no evidence that we 9 knew that Perkwood was in effect Stati's and in our 10 respectful submission there's no answer to that point. 11 As we point out in our skeleton, the influence of 12 the claimants' fraud is not refined the quantum and had 13 the tribunal known that the claimants' case on quantum 14 in relation to LPG Plant was fraudulent, that might well 15 have influenced the tribunal's perception of the 16 claimants and their witnesses more generally and may 17 have influenced the findings on jurisdiction and 18 liability. 19 So that's all I wanted to say on that particular 20 topic of the fraud. There are points that are made by 21 my learned friend in his skeleton but it's probably 22 makes more sense for me to reply to them rather than to 23 deal with them now. 24 Let me then deal with the fourth topic in my list 25 which is that the evidence to establish the fraud was</p> <p style="text-align: center;">Page 76</p>

<p>1 not available to Kazakhstan at the time of the 2 arbitration Westacre limb 1. I propose to deal with 3 this relatively shortly, simply because it's dealt with 4 in our written submissions and it's starting really at 5 paragraph 30 where we set out the circumstances in which 6 the fraud was discovered by reference to Nacimiento's 7 fifth witness statement and your Lordship can see how we 8 deal with that. Paragraph 31 makes a point that this is 9 a paradigm case of concealment. They concealed the true 10 statements of Perkwood, the main vehicle for the 11 claimants' fraud, even from their own auditors KPMG. In 12 fact the fact that Perkwood was a related party was only 13 conceded by the claimants in the course of the Swedish 14 proceedings, as we mentioned earlier.</p> <p>15 Moreover, the point I've already made, which is that 16 the Perkwood agreement was concealed and not disclosed 17 in the arbitration, and we make reference to the Heinz 18 case Mr Justice Burton dealing with concealment, that's 19 authority 2 tab 10, and the suggestion that such 20 evidence was available to Kazakhstan at the time of the 21 arbitration should be rejected. In the absence of any 22 innocent explanation for the alleged fraud, which of 23 course there is none, it would amount to an assertion by 24 the claimants that their fraud was so brazen and obvious 25 that Kazakhstan should have discovered it earlier. So</p> <p style="text-align: center;">Page 77</p>	<p>1 succeeded in proving its allegations of fraud. It 2 follows that there has been no judicial determination of 3 the questions that Kazakhstan is now asking the English 4 court to decide, and the third is that even if contrary 5 to the above points the Swedish judgment were capable of 6 creating an issue estoppel and these proceedings, it's 7 well established that the court nevertheless has 8 a discretion in the operation of a doctrine and if 9 necessary Kazakhstan will submit that the discretion 10 should be exercised in this case so that no issue 11 estoppel arises.</p> <p>12 So those are in a nutshell what the main points are. 13 But keep in mind this point my Lord, is that it's for 14 the claimants to positively establish that there is 15 issue estoppel here and they seek to satisfy this 16 summarily and we submit that contrary to what my learned 17 friend says there is no satisfactory evidence about 18 Swedish public policy. They rely on Mr Nilsson's 19 witness statement. He's disqualified because he's 20 counsel in the case. But I'll come back to that to 21 indicate precisely what the material is on Swedish 22 public policy.</p> <p>23 Now if we can then go back to the skeleton. 24 Paragraph 38 makes the point that the Swedish judgment 25 has not created an issue of estoppel. The requirements</p> <p style="text-align: center;">Page 79</p>
<p>1 paragraph 32 of our skeleton makes the point that the 2 first limb of the Westacre test is satisfied, and in our 3 respectful submission nothing is said by my learned 4 friends on that which is an answer and I will deal with 5 them in reply if necessary.</p> <p>6 That leads me to the final topic of my list which is 7 issue estoppel as to whether an issue estoppel has been 8 created by the Swedish judgment. Again if I can just 9 pick up what we say about that by reference to our 10 written submissions. Your Lordship sees that that 11 starts at paragraph 37 and the three points that we make 12 there, your Lordship can see first is that although the 13 Swedish judgment dismiss the contention that the 14 enforcement of the award would be contrary to Swedish 15 public policy, this did not create an issue estoppel on 16 the question of whether the enforcement of the award 17 would, in light of the claimants' fault, be contrary to 18 English policy public policy. It is apparent from the 19 outcome of Sweden alone that the contents of Swedish 20 public policy must be different from that of its English 21 equivalent. The second point is that the Swedish 22 judgment did not determine either the same issue that 23 the English court will consider in determining whether 24 the award was obtained by fraud, or two, whether as 25 a matter of fact and on the evidence Kazakhstan</p> <p style="text-align: center;">Page 78</p>	<p>1 for issue estoppel are set out in paragraph 39 by 2 reference to The Sennar (No 2) in the speech of 3 Lord Brandon. Paragraph 40 makes the point about the 4 cautious approach in cases where it is alleged that 5 a foreign judgment creates an issue estoppel and have 6 recognised important limits and the various points are 7 made there in terms of why there should be a cautious 8 approach and it's to do with modes of procedure in 9 foreign courts, there has to be a full contestation and 10 a clear decision on the issue and the overriding 11 consideration is that the principle must be applied so 12 as to work justice and not injustice.</p> <p>13 Paragraph 41, sets out our case there. Our 14 contention is that the Court can decide at this stage 15 that there is no issue estoppel, but if the Court thinks 16 that there may be more material then of course it can 17 direct that that issue forms part of the other issues 18 that go to a trial. We don't feel embarrassed or -- if 19 that's the way that the Court wants to deal with it we 20 are happy for that to proceed but on the other hand we 21 submit that it's clear that there is no issue estoppel 22 for the reasons that I will now explain.</p> <p>23 Paragraph 42 explains our position in relation to 24 the original grounds. But the point of distinction 25 between the original grounds, which we are not pursuing,</p> <p style="text-align: center;">Page 80</p>

<p>1 and the fraud case is that the point is in the fraud 2 case that the Swedish court did not decide any of the 3 factual issues going to fraud case. Instead it simply 4 ruled that even if Kazakhstan was right that the 5 claimants had run a dishonest and fraudulent damages 6 claim, had put forward fraudulent evidence which had 7 been relied upon by an innocent third party, that's KMG, 8 in making a bid which was then relied upon by 9 the tribunal, that did not fall within the scope of 10 Swedish public policy. So the first point is that the 11 Swedish court was necessarily applying Swedish public 12 policy where is in this court we concerned with English 13 public policy. 14 The next point is at 43 which I've already covered 15 in my opening remarks about public policy under the 16 New York Convention. 17 Paragraph 44 makes a point that it is 18 well-established that there are distinctions when it 19 comes to public policy between states. You won't find 20 any convention that says "this is what public policy is" 21 and in fact the whole point of the New York Convention 22 is that it finds public policy by national 23 considerations. So references to public policy in other 24 areas in our submission are not going to help you. 25 So if we can just look at what Professor Hill says,</p> <p style="text-align: center;">Page 81</p>	<p>1 in these proceedings." 2 And there's repeated references throughout my 3 learned friend's submissions to the effect that public 4 policy in Sweden and England is the same. And if we can 5 just pick up the references where this is made, at 6 paragraph 2.6 they say: 7 "The claimants have adduced unchallenged evidence 8 ...(Reading to the words)... setting aside 9 an enforcement of arbitrary awards." 10 That overstates dramatically what Mr Nilsson says 11 and factually speaking very little weight should be 12 attached to his evidence in circumstances where he's not 13 giving evidence as an expert. 14 At paragraph 20 the same point is made -- I'm 15 referring to the skeleton -- where it's said in the last 16 three lines of paragraph 20: 17 "Both Mr Nilsson's evidence and the Swedish decision 18 itself confirm that there is no material difference in 19 the relevant public policy approach of England and 20 Sweden." 21 And in paragraph 32: 22 "Moreover, as already mentioned there is no material 23 difference between the approach in Sweden and the 24 approach to how it deals with fraud as a matter of 25 public policy."</p> <p style="text-align: center;">Page 83</p>
<p>1 it's in our authorities bundle volume 2 at the very back 2 I think. This is an article by Professor Hill, who's at 3 the University of Bristol, a well-known writer on 4 conflicts of law. He explains in his article at 547 5 what the principle here is about public policy, which is 6 the passage which we quote. Just reading on, clearly if 7 the public policy is the same then obviously there is 8 a possibility of an issue estoppel arising, but in our 9 respectful submission where there are differences, or 10 arguably where there are differences, issue estoppel by 11 virtue of a decision on public policy has no 12 application. And those the passages that we rely upon 13 which I've already referred to you of Lord Justice Rix 14 in the Yukos case and Mr Justice Eder in the Diag Human 15 case at page 58 which I read earlier. It's our 16 submission therefore that public policy of Sweden is 17 different, or rather that the public policies do in fact 18 differ from state to state. 19 And what is said is that -- this is where the 20 difference is, this is paragraph 46: 21 "It appears from Mr Nilsson's evidence, 22 paragraphs 29 to 35, that the claimants will contend 23 that the decision of the Swedish court applying 24 standards of Swedish public policy should of itself and 25 without further analysis create a binding issue estoppel</p> <p style="text-align: center;">Page 82</p>	<p>1 That's their case, but as I've said your Lordship 2 has the point about the differences in public policy be 3 inevitably different and the claimants will need to 4 satisfy you that Swedish public policy is identical to 5 English public policy, but there's absolutely no 6 evidence at all to support that proposition and you will 7 not find any support in support of that proposition in 8 Mr Nilsson's evidence. But we put before you the 9 evidence of Dr Scholdstrom and your Lordship is aware 10 that he was until March 2016 a judge of the Svea 11 Court of Appeal, the very court whose decision we are 12 concerned with. And notably Mr Nilsson does not in fact 13 disagree with anything that he says and he makes 14 a rather weak attempt at paragraph 27 to suggest that 15 Dr Scholdstrom can form a view of the case from 16 reviewing the judgment, but otherwise there's nothing to 17 say. 18 So in effect we're looking now at unchallenged 19 evidence about Swedish public policy and therefore can 20 I take your Lordship to see what Dr Scholdstrom says and 21 it's in C volume 1, tab 3. My Lord, it starts at 22 page 59. And he says at the end of paragraph "my CV is 23 attached". It isn't. Can I just hand it up to 24 your Lordship. It's a model of brevity, if I may say 25 so. It is certainly shorter than most of the people in</p> <p style="text-align: center;">Page 84</p>

<p>1 this room. (Handed). 2 MR JUSTICE KNOWLES: Thanks. 3 MR MALEK: Let's just pick up the main points that he makes. 4 The first point is paragraph 6, where he says: 5 "Swedish public policy is understood to be a very 6 narrow concept. It is intended to embrace only the most 7 fundamental notions of Swedish law." 8 The next point is paragraph 8, that the courts have 9 interpreted section 33 very restrictively, it's 10 a provision on which the challenge is made: 11 "Indeed no arbitral award has ever been invalid 12 under section 33 since the Act became operational in 13 1999 although many attempts have been made to obtain 14 such declarations." 15 He then goes on to say at paragraph 11 that in 16 essence there are two types of public policy: 17 substantive public policy and procedural public policy. 18 Substantive relates to awards where the subject matter 19 of the award is something the court would have refused 20 to entertain, those based on contracts for gambling or 21 commission of crimes, payment of bribes and that's 22 paragraph 11. And the Svea court said it wasn't engaged 23 in that type of process and that point is made by 24 Dr Scholdstrom at paragraph 12. 25 Then we can go on to procedural public policy. That</p> <p style="text-align: center;">Page 85</p>	<p>1 so is made prior to the arbitration and was an authentic 2 document: 3 "The fact that its material contents, the very 4 information that was put forward in support of their 5 damages case by the claimants and relied upon by 6 the tribunal, was a direct result of the claimants' 7 fraud was irrelevant and did not make the document false 8 evidence for Swedish purposes." 9 So that's the reason that the tribunal didn't go 10 into the evidence and it's obviously the key point that 11 we need to look at. 12 Then at paragraph 20, importantly Dr Scholdstrom 13 notes that the Svea court did not make any decision as 14 to the facts. 15 Now, what are the key points that we make in 16 relation to this part of the case? The first point to 17 make to the Court is that the key element therefore is 18 that the Swedish court applied a specific doctrine of 19 Swedish law in relation to false evidence, which is 20 apparently of a very narrow compass. That's my first 21 point, the false evidence, that was what was applied and 22 it's a very narrow compass. 23 The second point is that there is no equivalent 24 doctrine in English law. And the point I made earlier 25 to my Lord which is that the Swedish doctrine appears to</p> <p style="text-align: center;">Page 87</p>
<p>1 relates to something affecting the arbitral process 2 which is contrary to Swedish public policy. And 3 Dr Scholdstrom points out how the Svea court approached 4 this from paragraph 14 onwards. And everything that he 5 says there in our submission is very important. And in 6 essence, what he points out is that the court relied on 7 the concept of false evidence which required it to be 8 shown that the evidence was decisive for the outcome: 9 "If it was decisive it is necessary next to consider 10 whether it was directly or indirectly decisive. If the 11 former, it must be clear that it was decisive. If only 12 indirectly it must be obviously decisive, a higher 13 standard." 14 And that's really what he's saying in paragraph 16. 15 Then what he goes on to say at paragraph 17 to 18 in 16 the relation to the fraudulent evidence put forward in 17 the arbitration by the claimants the Svea court 18 dismissed most of it as irrelevant for public policy 19 purposes because the tribunal had not, it's said, relied 20 on it so it wasn't decisive for the outcome. That's 21 through 17 to 18. 22 Then in relation to the indicative bid, on which 23 the tribunal did rely, the Svea court considered that it 24 did not fall within the apparently extraordinarily 25 narrow definition of the false evidence in Swedish law,</p> <p style="text-align: center;">Page 86</p>	<p>1 be formalistic and the example I gave to your Lordship 2 was that if I produce a certificate which I know to 3 contain fraudulent untruths, that's caught by Swedish 4 public policy because I'm doing it directly, but if on 5 the other hand I present a certificate produced by 6 somebody else who believes it to be true but which is 7 based on false information that I have given that 8 person, and I know that to be false, that is fine if not 9 caught by Swedish policy and that in my submission is 10 really the essence of the difference. 11 Now, the third point is: well, if that's false 12 evidence then it has no equivalent in English law. My 13 next submission, my third submission, is that public 14 policy is not so narrow or formalistic. It's well-known 15 that English courts do not define English public policy 16 with the sort of precision that appears to be the case 17 in relation to the false evidence standard in Sweden and 18 we refer in our submissions to the Gater Assets case 19 which is in the authorities tab 8 paragraph 41 where 20 Lord Justice Tomlinson said it was never wise to attempt 21 an exhaustive definition of public policy. Remarks like 22 that had been made many times and it's a flexible 23 concept which meets the justice of the case, and I would 24 submit that English law recognises that fraud can be 25 committed in many ways and that in order for the</p> <p style="text-align: center;">Page 88</p>

<p>1 doctrine to have any teeth the public policy standard 2 must be a flexible one and contrary to the approach in 3 Sweden the doctrine must be one of substance rather than 4 form which seems to have driven the reasoning of the 5 Swedish court. 6 Of course can I make this absolutely clear in case 7 there's no misunderstanding: I'm not making any 8 criticism about Swedish public policy. Swedish public 9 policy is Swedish public policy and it's not for me to 10 criticise it, and similarly considerations of comity 11 would require that we do not criticise public policies 12 of other states, but the point is that you are mandated 13 under the New York Convention to apply English public 14 policy and if there's a difference, there's 15 a difference, so there's no question of comity or 16 deference that's being engaged when the courts apply 17 English public policy. And of course it's easier in the 18 sense that the Swedish court did not go into the facts 19 of the fraud because essentially it dealt with it on 20 a demura basis and I have gone into the facts and would 21 wish to go into the facts if the court allows us to 22 amend our application. 23 Now, the fourth point I make is that the clearest 24 guidance in the authorities as to when enforcement of 25 an arbitral award would be contrary to English public</p> <p style="text-align: center;">Page 89</p>	<p>1 formulation. It has to be contributed in a substantial 2 way to the obtaining of the award, so it has to be 3 causative. 4 Then he goes on to talk about how: 5 "Where as in the present case the allegation is 6 fraud ...(Reading to the words)... time and would have 7 had an important influence on the result." 8 So that's the test. And the key question identified 9 by Mr Justice Blair, namely some form of reprehensible 10 or unconscionable conduct has contributed in some 11 substantial way to the obtaining of the award, is we 12 submit a broader test than that applied by the Swedish 13 court. And in particular we submit that if Kazakhstan 14 succeeds in proving all the matters set out in 15 Ms Nacimiento's fifth statement, this test would readily 16 be satisfied and the fact that the indicative 17 (inaudible) was in fact submitted would not, as in 18 Sweden, alter this conclusion. 19 As I've said, if one looks what's being said here 20 and the distinction and the example that I've given to 21 your Lordship a couple of times, the effect of both acts 22 are the same, namely the person receiving the document 23 has been deceived; it's a matter of indifference whether 24 that deception is done directly by the party or whether 25 that party uses another person. Fraud is done in very</p> <p style="text-align: center;">Page 91</p>
<p>1 policy is to be found in the jurisprudence in section 2 68.2G of the Arbitration Act, which as your Lordship 3 will recall is the award being obtained by fraud, or the 4 way in which it was procured was being contrary to 5 public policy. And for present purposes may I refer to 6 the summary given by Mr Justice Blair in the Double K 7 Oil Products v Neste case, which if your Lordship could 8 turn to the authorities bundle at volume 2 tab 9, that 9 was a decision in 2009. I don't think the facts of the 10 case really matter. Your Lordship can see the wording 11 of section 48 in paragraph 15 at page 345 using the 12 numbering at the bottom there. In the judgment it's 13 page 145 and it's paragraph 15. You can see the 14 reference to section 68 and G is dealt with just above 15 paragraph 16. Then at 33 Mr Justice Blair says: 16 "The authorities show that the applicable principles 17 are as follows." 18 Then he makes a reference to section 68 and goes on 19 to say: 20 "It will normally be necessary to satisfy the Court 21 that some form of reprehensible or unconscionable 22 conduct has contributed in a substantial way to the 23 obtaining of the award." 24 So you've heard about language about being decisive, 25 this is another but in my submission the same</p> <p style="text-align: center;">Page 90</p>	<p>1 different ways. And a certificate containing false 2 material has exactly the same affect: the person is 3 deceived. And therefore from an English perspective 4 this distinction that appears to be found in Swedish law 5 is in my respectful submission not one that we 6 recognise. And again, as I say, no criticism at all, 7 that is what the position is. And I would submit 8 furthermore that to the extent that there is an issue of 9 what is the right approach, the distinction that seems 10 to be made in the Swedish test simply creates loopholes 11 for fraudsters and would leave a victim without redress, 12 and that's not a situation that English law permits, the 13 notion that if you do it directly then that's caught by 14 public policy, but if you do it indirectly, albeit that 15 the effect is exactly did same, that's okay. 16 So our fundamental point is therefore that it is 17 clear that Swedish public policy is materially different 18 from English public policy. That's not a surprising 19 contention when one looks at the dicta which we've 20 looked at earlier about public policy and how it varies 21 from state to state and the remarks of Mr Justice Eder 22 as to how rare it will be for an estoppel to arise based 23 on an -- of a public policy. 24 You could also do this by way of a reality test. 25 Forget about Swedish law for a moment, forget about</p> <p style="text-align: center;">Page 92</p>

<p>1 Swedish public policy, just simply presenting the facts 2 as they are and as we've asserted, would an English 3 court say that that does not engage public policy? 4 Your Lordship has my submissions on that. The English 5 court will not allow themselves to be used as 6 instruments for fraud, and the simple expedient of 7 relying on an honest person's reputation of a fraudulent 8 statement would not stop English public policy being 9 engaged in a way that seems to be precluded by the 10 operation of Swedish public policy. 11 So if we apply that to the facts, what we have here 12 is that the tribunal chooses to rely on the KMG bid, 13 which the claimants have put before it as reliable 14 evidence of market value, when they knew that the 199 15 figure it contained was the product of fraudulent 16 accounting as to the cost of the LPG Plant in their 17 audited accounts. And as I say from an English public 18 policy perspective it makes no difference that the 19 claimants were not the authors of that document or that 20 KMG were equally deceived, what matters is the claimants 21 knowingly put a document before the tribunal which 22 contained false information for which they were the 23 source. 24 As I said to your Lordship, it may be that my friend 25 is going to invite your Lordship to decide the issue</p> <p style="text-align: center;">Page 93</p>	<p>1 to read particular passages. 2 MR MALEK: Could we just look at the core bundle volume 1 at 3 tab 3. 4 MR JUSTICE KNOWLES: I think one of the things I was 5 wondering, because there are two translations, is 6 whether I need to worry about differences between the 7 translations? 8 MR MALEK: I don't think there's any difference. I don't 9 know with one you've been using but I'm not aware of any 10 issue of translation. And the one we've put in is at 3. 11 My Lord, I'm just wondering -- we are going to take 12 a break now, I wonder if we can take a break and 13 your Lordship can read 5.3 again at page 1754. 14 MR JUSTICE KNOWLES: Yes. 15 MR MALEK: So if your Lordship can just read 1754 through to 16 1756, and we'll come back. 17 MR JUSTICE KNOWLES: That's great. Again, I have read the 18 judgment, including all these extracts, but at any stage 19 give me page references if you want to. You don't need 20 to read things out. 21 Anyway, we will take five minutes. 22 (3.08 pm) 23 (A short break) 24 (3.15 pm) 25 MR MALEK: My Lord, I'm grateful for looking at it again but</p> <p style="text-align: center;">Page 95</p>
<p>1 estoppel issue now, and if he does invite the Court to 2 decide whether it's for or against it, in my respectful 3 submission the English court should say no English 4 public policy is engaged by this case; alternatively as 5 said earlier, if your Lordship feels that this is 6 a matter that needs to be looked at from the entirety 7 this in the context of a trial, I'm not objecting to 8 that either. 9 My Lord, as far as the residual discretion is 10 concerned I can deal with this quickly. It's dealt with 11 in our skeleton at paragraph 57 through to 58, 59 and 60 12 and I don't propose to repeat anything I say there. 13 So my Lord, I've gone quicker than I anticipated but 14 unless I can assist your Lordship that's all I wish to 15 say at this moment. 16 MR JUSTICE KNOWLES: No, that's helpful I have no questions 17 at this stage. I may have some in reply. 18 MR MALEK: My Lord, is your Lordship on top of the Swedish 19 judgment or would it assist your Lordship if I was to 20 take your Lordship through it? Because I realise I made 21 references to it throughout but I think your Lordship 22 has read it, but I'm very happy to take your Lordship 23 through it once again. 24 MR JUSTICE KNOWLES: I have. No need to take me through it. 25 By all means give me some page references if you want me</p> <p style="text-align: center;">Page 94</p>	<p>1 I have no further submissions. 2 MR JUSTICE KNOWLES: Thank you very much. 3 Mr Sprange. 4 Submissions by MR SPRANGE 5 MR SPRANGE: My Lord, I plan to address you on three 6 headline issues in detail. The first is the estoppel 7 point. The second point is the question of whether 8 these are allegations that could and should have been 9 made in the arbitration by Kazakhstan on the basis of 10 reasonable diligence. And the third point I'm going to 11 address is the second limb in Westacre, that is whether 12 these allegations, even if established, have that 13 sufficient causative link to the heart of the award that 14 Mr Malek described to you in his closing a few moments 15 ago. 16 Before I do, I just want to make three general 17 observations about each of those issues before I delve 18 into them. 19 On the estoppel point my Lord, there needs to be 20 a real dose of reality here. What has happened in 21 Stockholm is a very lengthy trial that was spread out 22 over four weeks, it's about 13 or 14 hearing dates, 23 dealing with every piece of evidence that Mr Malek 24 showed you today and lots more and findings were made 25 about very critical issues, in particular that causative</p> <p style="text-align: center;">Page 96</p>

<p>1 issue that I've just alluded to: did the fraud 2 allegations even if established impact the tribunal's 3 ultimate decision. And also the indicative bid whether, 4 even if all of the fraud allegations are true and 5 accurate, do they influence the indicative bid. In 6 other words is that tainted. That has also has been 7 decided as a matter of fact. 8 Now, if you were to accept as a matter of principle 9 Kazakhstan's approach, what that would mean is that the 10 New York Convention is a nice piece of paper but fairly 11 useless, because what you would have is you would have 12 key issues of fact -- leave aside public policy, key 13 issues of fact that relate to the challenge to an award 14 re-litigated in every single jurisdiction that a party 15 who have won the award would sought to enforce and that 16 would be so because the defendant would say it was the 17 public policy of a different jurisdiction even if it was 18 the seat, and if the policies are somehow different you 19 just open the door. 20 And just to make good that submission, my Lord just 21 imagine in this court if we prevail on the causative 22 link point at a trial and we also prevail on the 23 question of whether the indicative bid was tainted by 24 the false evidence, we won on those issues and under 25 English public policy the challenge enforcement was</p> <p style="text-align: center;">Page 97</p>	<p>1 can't walk into this court making lots of noises about 2 things you say are scandalous unless they really relate 3 very clearly to a piece of the award. 4 So my Lord, if I can turn to estoppel, and perhaps 5 I can start with some common ground. I accept that the 6 Swedish decision does not decide whether the Perkwood 7 management fee and the transfer pricing and so on and so 8 forth was a fraud or not. I accept it did not decide 9 that. I also accept that the Swedish decision was 10 focused on Swedish public policy, which is not English 11 public policy. I say there is not a material difference 12 and I'll come on to that later, but I accept that as 13 a point. 14 Where Mr Malek and I part company is as follows. 15 His words that I took down were "none of the facts 16 relating to the fraud were decided". On that I do 17 disagree. What I say has been decided is whether as 18 a matter of fact the fraud allegations had any impact on 19 the award, and second, whether the indicative bid in any 20 way invoked fraudulent evidence if established. 21 Now, my Lord, before we delve into the Swedish 22 decision itself and the reasoning and the evidence that 23 was relied upon, I do want to show you briefly some of 24 the authorities that relate to question of estoppel and 25 I refer you to these authorities to make good two</p> <p style="text-align: center;">Page 99</p>
<p>1 thrown out. Kazakhstan could turn up the next day in 2 any other jurisdiction where enforcement was sought and 3 say "Oh, that was English public policy, it's slightly 4 different, here we go again" and there would be all 5 these documents and we go back for a trial. 6 The other headline point, my Lord, before I move on, 7 is this. The word "fraud" has been thrown around a lot 8 in this case, in these documents and skeletons and again 9 before you today. Now, I suggest that when the word 10 "fraud" is used, substantial caution is needed. 11 Particularly when you look at what fraud against whom in 12 what way. Because here a lot is said about inflated 13 management fees and transfer pricing and big interest 14 charges, but as the cases show us, when you're talking 15 about a public policy fraud it has to be something 16 that's very important to the award itself and 17 the tribunal's reasoning and if you look at famous cases 18 like Westacre, like IPCO, they involved allegations of 19 either corruption or forged documents that went to the 20 heart of the case. So what you're going to hear from me 21 on the fraud going to be primarily focused on that. Not 22 whether there are big costs being put on on top of 23 actual costs or anything like that but the focus of 24 where does all of this go to, because that's the real 25 inquiry that we need to undertake in these cases. You</p> <p style="text-align: center;">Page 98</p>	<p>1 propositions. The first is no litigant should, in 2 normal circumstances, effectively have three bite of the 3 same apple. So if you have an award, or a judgment, 4 there's then a challenge or an appeal and you've lost in 5 both of those, you shouldn't then be able to re-litigate 6 issues that have arisen in the first two, or at least 7 the second, anywhere else. And the second proposition 8 is this: when we look at estoppel we are not tethered by 9 a very broad requirement that there be absolute parity 10 between the decisions, or cause of action, what we are 11 looking for is the same issue, whether they've been 12 decided, and they could be issues of fact and they could 13 be quite discrete issues of fact as I'm going to show 14 you in some of the cases. 15 So my Lord, if we could start with the decision of 16 House of Spring Gardens v Waite. That's in the 17 claimants' authorities bundle at tab 11. My Lord, 18 I don't know if you have any familiarity with this 19 decision but it's what I would describe as the Irish 20 bullet-proof vest case in the sense there was a very 21 bitter commercial dispute about an inventor of 22 a bullet-proof vest and one of his business partners. 23 They were selling these bullet-proof vests to the 24 Libyans and they made a lot of money and there was 25 a very bitter fight about who had the copyright and</p> <p style="text-align: center;">Page 100</p>

<p>1 whether certain monies should be paid from one to the 2 other. My Lord, if you go to page 245, under the heading 3 "Background" you will see that Mr Sacks invented 4 a bullet-proof vest and then there is a Mr Waite who is 5 the key protagonist. 6 My Lord, there was a trial in Ireland relating to 7 the issues. If you pick it up at 247, paragraph C, this 8 is the judge's holding, this is the first instance 9 judge, Costello J. He held that: 10 "The Waites were in breach of the settlement 11 agreement ...(Reading to the words)... in breach of 12 copyright. Damages were assessed." 13 My Lord, there was then an appeal and during the 14 course of appeal there was also an application to reopen 15 on the basis of the first trial and the judgment being 16 tainted by fraud, in other words there was new evidence 17 that suggested that the judgment couldn't survive. 18 My Lord, if you drop down to H: 19 "Mr Seamus Waite launched proceedings in the 20 Republic of Ireland against the three plaintiffs 21 claiming that Mr Sacks had obtained the judgment by 22 fraud." 23 And my Lord, go to page 248. You'll see in line B: 24 "Egan J ..." 25 And that was the judge who dealt with the question</p> <p style="text-align: center;">Page 101</p>	<p>1 "A foreign judgment that is final and conclusive on 2 its merits and is not impeachable on the ground of fraud 3 is conclusive as to any matter thereby adjudicated upon 4 and cannot be impeached for any error of fact or law." 5 Now, my Lord, the analogous decision here isn't the 6 award, but the Svea decision, because the Svea decision 7 is the decision that's reached important factual 8 findings about the fraud. And that is a foreign 9 judgment that is subject to exactly that qualification 10 that you see there. 11 My Lord, if you could pick it up at F on page 251: 12 "I have no doubt that the judge was correct to hold 13 on the material ...(Reading to the words)... on which to 14 challenge the judgment of Costello J." 15 Of course the analogue here is that Kazakhstan 16 agreed to arbitration under the ECT Treaty, which 17 includes arbitration in Stockholm, so they chose the 18 Svea court as the supervisory court. 19 My Lord, having upheld the position on estoppel the 20 court went on to deal with abuse of process. We see 21 that on page 254. Lord Justice Stuart-Smith says: 22 "In my opinion the same result can equally be 23 reached by this route, which is untrammelled by 24 technicalities of estoppel." 25 Then he quotes Lord Diplock's decision in Hunter:</p> <p style="text-align: center;">Page 103</p>
<p>1 of whether the first judgment had been obtained by 2 fraud: 3 "... rejected the Waites' case that the previous 4 judgment had been obtained by fraud and dismissed the 5 action with costs." 6 There was then proceedings in this jurisdiction to 7 enforce the judgment and what happened is that Mr Waite 8 and another defendant that hadn't been involved in the 9 proceedings before Egan J stepped in and they said "You 10 can't enforce the judgment in this jurisdiction because 11 it was tainted by fraud". What they sought to do was 12 basically re-argue what had already been argued in 13 Ireland before Egan J and lost. There was a hearing 14 before Sir Peter Pain in this court and he threw the 15 case out on the basis of various points but in 16 particular that it was an abuse to come back before this 17 court and try and re-run the fraud issues. That 18 decision was appealed and this is the Court of Appeal's 19 decision in respect of that appeal. 20 My Lord, if I could take you to page 250, this is 21 the threshold question: 22 "Were the Waites estopped by the judgment of Egan J 23 from contending that the judgment of Costello J was 24 obtain by fraud?" 25 The key passage:</p> <p style="text-align: center;">Page 102</p>	<p>1 "It would nevertheless be manifestly unfair to 2 a party ...(Reading to the words)... among right 3 thinking people." 4 Now, my Lord, what you see here before you with the 5 attempt to avoid the impact of the Swedish judgment is 6 exactly what the court describes here: 7 "The court would not permit a collateral attack on 8 the decision of a court of competent jurisdiction. 9 The principle has recently been applied in this court to 10 analogous cases. Where issues of fact have been 11 litigated exhaustively in sample cases it is an abuse of 12 process for a litigant who is not one of the sample 13 cases to re-litigate." 14 Well here it's even worse because they were the 15 primary litigant. 16 And he concludes: 17 "In my judgment it would not ...(Reading to the 18 words)... would run the risk of inconsistent verdicts." 19 And then lastly: 20 "Public policy requires that there should be an end 21 of litigation and that a litigant should not be vexed 22 more than once in the same cause." 23 So my Lord that's the position where you're dealing 24 with a foreign judgment that has already decided the 25 issue that's before the court. In my submission the</p> <p style="text-align: center;">Page 104</p>

<p>1 vigour with which those principles apply is even greater 2 when you look at the position with respect to arbitral 3 awards and decisions relating to arbitral award. The 4 reason for that is it is not in dispute that the 5 New York Convention and our Arbitration Act has 6 a predisposition in favour of the enforcement of 7 arbitral awards, so in addition to all the sensible 8 reasons that Lord Justice Stuart-Smith referred to in 9 House of Spring Gardens, you have the added factor that 10 when you look at enforcement of awards there is a 11 predisposition in favour of upholding them. 12 My Lord, there are a few decisions I want to briefly 13 take you to; I can take you to them quickly. The first 14 is the Court of Appeal decision in Westacre. Now, 15 my Lord, you may recall that Mr Justice Colman had -- in 16 short this was -- it seems there's a military theme to 17 these cases because this was an arms deal between 18 a Yugoslavian company and the Kuwaitis and there was 19 a consulting agreements in place and the arbitration in 20 question was brought to try to enforce payment 21 obligations under that consultancy agreement. The 22 arbitration was won, there was a challenge to the Swiss 23 Federal Supreme Court that failed and the matter came 24 before Colman J on enforcement and there was an attempt 25 to block enforcement on the basis that the underlying</p> <p style="text-align: center;">Page 105</p>	<p>1 page 309. This is just a link between House of Spring 2 Gardens and the arbitration jurisdiction. You see at F 3 the judge sets down the conditions where there is going 4 to be an attempt to impeach an award by making 5 allegations of fraud and as has been articulated very 6 clearly in the skeletons, we have called those the first 7 and second Westacre limbs. 8 Having set those out, he deals with the question of 9 whether it's appropriate that the fraud allegation 10 should have first been brought before the supervisory 11 court and then says this: 12 "I'm anxious about making that aspect too inflexible 13 a condition since it is clear that if an application to 14 a local court is made and fails the result may be 15 estoppel as per House of Spring Gardens v Waite." 16 Just pausing there my Lord, there's been reference 17 to the Yukos decision, Lord Justice Rix's conclusion 18 that public policy ranges from jurisdiction to 19 jurisdiction. You were also shown Mr Justice Eder's 20 decision in Diag and the point was made there. I don't 21 say that simply because there is a decision of the court 22 of the seat on particular issues there is automatically 23 no ability to then go and challenge an award, that is 24 not the case at all. What I do say is this: you can't 25 take it too far other way and simply say because public</p> <p style="text-align: center;">Page 107</p>
<p>1 contract of the consultancy agreement was a corrupt 2 agreement and should not be enforced and is contrary to 3 English public policy. Very strong evidence was 4 submitted to the court in respect of the alleged 5 corruption. 6 The matter was appealed to the Court of Appeal and 7 this is the Court of Appeal's judgment, my Lord. There 8 was a dissenting decision from Mr Justice Waller which 9 I'll briefly cover, then the majority refused to re-open 10 the case and upheld the award. The passage I wish to 11 draw your Lordship's attention to is this, if you could 12 take up page 306, top of: 13 "As the judge [this is Mr Justice Colman he is 14 referring to] pointed out ...(Reading to the words)... 15 Convention awards." 16 My Lord, the position here of course is even 17 stronger because it's not the tribunal we're talking 18 about here, it's the Svea Court of Appeal. 19 My Lord, what the judge then does is a comparative 20 overview of the various cases that deal with the 21 question of whether there should be an enquiry into the 22 new allegations. I'm going to come back to those 23 because they really deal with the question of could they 24 and should they have raised it in the underlying case. 25 The key passage with respect to estoppel we find on</p> <p style="text-align: center;">Page 106</p>	<p>1 policies vary there is never an estoppel. Where this 2 leaves us is that we must leave look carefully in each 3 case at the decision of the supervisory court on the key 4 issues and see if any of those same issues arise in the 5 enforcement jurisdiction, and if they do if those same 6 issues arise then there ought to be an estoppel. 7 My Lord, if I could turn to the decision of 8 Mr Justice Flaux in CAT v GDT, that's at tab 1 of the 9 claimant's authorities bundle. This is an important 10 recent decision my Lord, that deals with two issues that 11 arise on our case. I'm going to show it to you in the 12 context of the second limb in Westacre. But in the 13 meantime if I could take you to paragraph 316 -- 14 unfortunately my copy of this decision is not paginated, 15 but paragraph 316 is towards the very end. 16 MR JUSTICE KNOWLES: Sure. 17 MR SPRANGE: Now, my Lord, just to give some colour, so you 18 understand what the issues were. This case involved the 19 construction of a vessel. There were a number of tests 20 undertaken during the course of the construction of the 21 vessel and Mr Justice Flaux found as matter fact that 22 evidence presented during the course of the arbitration 23 was false and was fraudulent and that there had been 24 concealment of important test results that would have 25 been arguably very relevant to the question of whether</p> <p style="text-align: center;">Page 108</p>

<p>1 there had been a design mishap and therefore liability 2 in the underlying arbitration. That was the crux of the 3 issue insofar as the challenge went. 4 As an ancillary question, there were some 5 proceedings in France -- although London was the seat of 6 arbitration there was proceedings in France and in those 7 proceedings various factual decisions had been made 8 about some of the issues -- not all of them, some of 9 them -- and the question arose in this case as 10 an ancillary point is Mr Justice Flaux found the fraud 11 didn't go to the heart of the award so wasn't a basis to 12 set aside. But on the estoppel, and we see this here at 13 316, was that, a little like Kazakhstan are doing here, 14 you'll see 316: 15 "CAT's case by the end of the hearing...(Reading to 16 the words)... GDF documents." 17 And then lists out the points. 18 The reason that is critical to this case, my Lord, 19 is, as I said to you earlier, when you're looking at 20 issue estoppel and you are looking at the decision of 21 a foreign court you don't take this broad brush 22 approach: oh, that was Swedish public policy, we are 23 English so it's just different. And you don't 24 say: well, they simply didn't deal with fraud so that's 25 out. You have to be a lot more in my respectful</p> <p style="text-align: center;">Page 109</p>	<p>1 ...(Reading to the words)... to be most strongly 2 deprecated." 3 My Lord, lastly if I could just go back to Diag, 4 which is tab 6 of the claimants' authorities bundle. 5 My Lord, Mr Malek has already taken you to this so 6 I won't rehash all of that but if you could take up 775, 7 paragraph F you'll see there he's noted that: 8 "Mr Cox originally advanced a very broad proposition 9 that in proceedings to enforce under the New York 10 Convention issue estoppel cannot arise from decisions on 11 other states on enforcement itself." 12 Paragraph 58 on the next page G: 13 "As formulated I do not accept Mr Cox's broad 14 proposition." 15 And then we have seen that passage that Mr Malek 16 took you to accepting that there are differences in 17 public policy. 18 Then at paragraph 59 over the page: 19 "However in circumstances where a foreign court 20 decides an award is not binding I see no reason in 21 principle why that decision should not give rise to 22 an issue estoppel." 23 And my Lord, just so you have the context, in Diag 24 there was -- it related to a Czech award and whether 25 that Czech award was properly subjected to a review or</p> <p style="text-align: center;">Page 111</p>
<p>1 submission rigorous in looking at the decision of the 2 Swedish court and seeing whether anything overlaps here. 3 And if there is an overlap whatever was decided in 4 Sweden stops that issue being re-litigated here. 5 My Lord, one last authority that I wish to show you 6 on this. If you could go to tab 14 of that same 7 authorities bundle. Page 331, a decision of 8 Mr Justice Colman. This was a CIETAC arbitration in 9 china. There was a challenge to the supervisory court 10 that made the decision, there was a failure to follow up 11 the remedy from that supervisory decision and then 12 a challenge to enforcement in this jurisdiction. 13 I accept, my Lord, this was dealing with procedural 14 defects rather than fraud but the principle espoused, in 15 my submission, holds true. 16 So my Lord, if we pick it up just below B: 17 "In a case where a remedy for an alleged defect 18 ...(Reading to the words)... the courts of the 19 supervisory jurisdiction." 20 And he sets out some exceptional cases which I say 21 just simply don't arise here, because there is no doubt 22 that the Swedish courts have a rigorous approach to 23 these points and they can be raised. 24 Then he concludes: 25 "Any suggestion under the guise of allegations</p> <p style="text-align: center;">Page 110</p>	<p>1 not. The Austrian Supreme Court in some related 2 enforcement proceedings determined it the award was not 3 binding on an application of Czech law principles and 4 what Mr Justice Eder concluded was that that decision of 5 the Austrian court on whether the Czech award was 6 binding on not was an issue estoppel here. So that's 7 a discrete and important point. 8 Now, it may eventually spread out to public policy 9 issues ultimately but where it is decided, as it was by 10 the Austrian Supreme Court, the party that sought to 11 hide behind it was estopped from doing so in this case. 12 And you see that paragraph 62, my Lord, where he says: 13 "However that argument was rejected by the Supreme 14 Court ...(Reading to the words)... the award was not 15 binding." 16 So my Lord that's what we say is the key 17 jurisprudence. 18 That then brings us, my Lord, to the Swedish 19 decision. What I submit, given that jurisprudence is 20 vital, is what did the Svea court decide, what was it 21 asked to decide as a matter of fact, what did it decide, 22 and is that the same or largely the same as any issues 23 that this court would be called upon to decide in 24 considering Kazakhstan's application? If the answer to 25 those is yes, then they're estopped and they comply</p> <p style="text-align: center;">Page 112</p>

<p>1 proceed.</p> <p>2 My Lord, if we could take out the Svea</p> <p>3 Court of Appeal decision, the version I've been using is</p> <p>4 in D3(6) tab 56. If I could start with this, and I do</p> <p>5 think this is common ground as I read the papers, what</p> <p>6 the Svea court does is it set out carefully the</p> <p>7 allegations and contentions that are made by each party</p> <p>8 and then it sets out its reasoning and for me it's</p> <p>9 important if you look at the reasoning in a judgment you</p> <p>10 want to know what issues were levied by each of the</p> <p>11 parties because it's important as to the interpretation</p> <p>12 of the reasoning.</p> <p>13 In showing you these points, my Lord, in the</p> <p>14 judgment I want to emphasise something very clearly.</p> <p>15 You were shown today some passages from Ms Nacimiento's</p> <p>16 witness statement, you were shown the Deloitte expert</p> <p>17 report and the chart with the calculation relating to</p> <p>18 the KMG indicative offer, you were shown some of the</p> <p>19 KPMG due diligence reports and the Renaissance Capital</p> <p>20 information sheet. All of that evidence was the basis</p> <p>21 for the allegations that are recorded in this judgment.</p> <p>22 That evidence was exhaustively explored during the Svea</p> <p>23 proceedings over a one month period, with</p> <p>24 cross-examination of the witnesses and lengthy</p> <p>25 submissions. So make no mistake, the issues that the</p> <p style="text-align: center;">Page 113</p>	<p>1 "Incorrect and misleading information from the</p> <p>2 investors to the companies' accountants the Russian</p> <p>3 investment bank Renaissance Capital and KPMG laid at the</p> <p>4 basis for the indicative offer."</p> <p>5 So there's a contention that the false case, the</p> <p>6 false evidence, was the basis for the indicative offer.</p> <p>7 That's very important because what they're contending,</p> <p>8 and you have seen how they did it, there was a series of</p> <p>9 assumptions, one of which was the investment cost. And</p> <p>10 their case here was that investment cost, which was</p> <p>11 false on their case, lay at the basis for the indicative</p> <p>12 offer. That is a factual issue that they raised in</p> <p>13 Sweden, they elaborately raised all of the arguments</p> <p>14 that Mr Malek has raised today and it was live before</p> <p>15 the Swedish court.</p> <p>16 The next point is this, my Lord. On page 13, this</p> <p>17 is really the hammer of their case on the false</p> <p>18 evidence. Second paragraph at the top of page 13:</p> <p>19 "With regard to to method of valuing set out in the</p> <p>20 indicative bid ...(Reading to the words)... that formed</p> <p>21 the basis of KMG's indicative bid."</p> <p>22 And this is the fact issue contention that they've</p> <p>23 put before the court:</p> <p>24 "The arbitral tribunal's assessment ...(Reading to</p> <p>25 the words)... has influenced the outcome of the case."</p> <p style="text-align: center;">Page 115</p>
<p>1 court is flagging up here as having been presented as</p> <p>2 issues of fact by Kazakhstan and then it's then deciding</p> <p>3 was following a very extensive analysis and it's exactly</p> <p>4 the same material that Mr Malek would like to put before</p> <p>5 you or another judge of this court at a trial -- exactly</p> <p>6 the same.</p> <p>7 My Lord, if you could start on page 11 of that</p> <p>8 report, under the heading "Investors have presented</p> <p>9 false evidence", you will see there:</p> <p>10 "The fraudulent arrangement was intended to mislead</p> <p>11 the arbitral tribunal as well as Kazakhstan and thus</p> <p>12 obtain significantly higher damages through arbitration</p> <p>13 than would otherwise be possible."</p> <p>14 That's the headline question. Then you go to the</p> <p>15 next page my Lord under the heading "The valuation of</p> <p>16 the LPG Plant":</p> <p>17 "The arbitral tribunal took note of the false</p> <p>18 evidence ...(Reading to the words)... regarding both</p> <p>19 jurisdiction and questions of liability."</p> <p>20 So their assertion is that this false evidence that</p> <p>21 they've set forth probably influenced the tribunal's</p> <p>22 evaluation of the evidence generally and conclusions</p> <p>23 regarding both jurisdiction and the question of</p> <p>24 liability.</p> <p>25 The next contention is made the next paragraph.</p> <p style="text-align: center;">Page 114</p>	<p>1 Having presented all of the evidence, at great cost,</p> <p>2 in my respectful submission they then have to live by --</p> <p>3 absent an appeal to the Supreme Court of Sweden, which</p> <p>4 as we know from the evidence is fantasy, they have to</p> <p>5 live by the decisions that flow from all of that. Those</p> <p>6 my Lord we find on page 40 of the judgment. If I could</p> <p>7 start under the heading at 5.3.1, "Annulment due to the</p> <p>8 fraudulent arrangement, false evidence misleading</p> <p>9 information" et cetera. My Lord, you see "the</p> <p>10 Court of Appeal makes the following assessment" and then</p> <p>11 a colon and then we see it all set out there. The first</p> <p>12 finding or the first comment that the court makes deals</p> <p>13 with the general question of public policy, is there</p> <p>14 anything about this agreement that makes it contrary to</p> <p>15 Swedish public policy and they mention corruption and so</p> <p>16 on and find it's not and so move on. Then we see in the</p> <p>17 next paragraph:</p> <p>18 "In the arbitration the investors invoked evidence</p> <p>19 in the form of oral testimony ... as corroboration of</p> <p>20 the fact that the investment costs in the LPG Plant</p> <p>21 correspond to amount claimed."</p> <p>22 This is a finding of fact, based on all of the</p> <p>23 evidence:</p> <p>24 "It is clear from the award however that</p> <p>25 the tribunal based its decision regarding the damages</p> <p style="text-align: center;">Page 116</p>

<p>1 for the LPG Plant on the indicative bid by KMG." 2 So they can't argue with that, in my submission, 3 anymore. 4 "Next, as the court has described above, the scope 5 of the public order provision ...(Reading to the 6 words)... directly determinative of the outcome." 7 My Lord, that, as I'm going to unpack for you in 8 a bit more detail in a moment, is the same as the 9 approach this court takes. You can't just turn up and 10 say there was fraud, you have to turn up, prove there 11 was fraud, prove that the fraud went directly to causal 12 link between the fraud and the tribunal's decision. 13 "Situations may however be envisaged where the 14 invoking ...(Reading to the words)... of the decisive 15 importance the outcome of the case." 16 So my Lord, again I would actually submit that the 17 position in England is somewhat more robust because it 18 seems that in Sweden if it's an direct influence but it 19 could have been of decisive importance you may be able 20 to challenge the award. The position in England is it 21 has to be directly causative of the tribunal's decision, 22 and I will come to what Mr Justice Blair said in DTT and 23 what Mr Justice Flaux said in CAT to make that good. 24 But that's the Swedish court setting out the 25 parameters. Here is their findings and this my Lord is</p> <p style="text-align: center;">Page 117</p>	<p>1 it does, it's a factual conclusion that this court has 2 reached; it can't be re-litigated here. 3 Then my Lord: 4 "Because Kazakhstan raised it as an issue and 5 because ...(Reading to the words)... offer is thus not 6 to be regarded as false evidence." 7 So Kazakhstan might not like it, but as the 8 Court of Appeal tells us in House of Spring Gardens, it 9 is not for the English court to look at a decision in 10 the context of a factual estoppel and say "We may have 11 reached a decision", or "We don't like it" or "It 12 doesn't make sense". It is what it is and that's the 13 conclusion they have reached, that the indicative offer 14 was not false. That finding's made even if potentially 15 incorrect details of what was invested in the LPG Plant 16 through the annual reports had been among the factors 17 that KMG took into account when calculating the size of 18 the bid. 19 So that factual finding is made even on the basis 20 that Kazakhstan is right on all the fraud allegations, 21 which we're long way from. 22 This is another finding: 23 "The allegedly false information in the annual 24 reports ...(Reading to the words)... amount to 25 an invocation of false evidence."</p> <p style="text-align: center;">Page 119</p>
<p>1 critical for estoppel: 2 "Since the tribunal based its decision on the 3 indicative bid the evidence invoked by the investors in 4 the form of oral testimony ..." 5 That's all Mr Malek's "\$245 million, it was false" 6 evidence. 7 "... evidence which Kazakhstan has claimed was false 8 has not been of direct significance for the outcome." 9 That is a factual finding by the Svea 10 Court of Appeal based on evidence. That issue my Lord, 11 with the greatest of respect to Kazakhstan, simply 12 cannot be re-litigated anywhere and certainly not in 13 this jurisdiction. 14 "This circumstance alone means that this evidence 15 ...(Reading to the words)... for considering the award 16 to be invalid." 17 So that closes off that issue. Then there's another 18 factual finding: 19 "Neither is it obvious according to the court that 20 this evidence through an indirect influence on 21 the tribunal was an decisive importance to outcome of 22 the case." 23 That's another factual finding that it can't have 24 had an indirect influence on decisive importance. Now, 25 that may not even arise under English law but let's say</p> <p style="text-align: center;">Page 118</p>	<p>1 That is a factual finding. This court, my Lord, may 2 not have decided the fraud, it may not have said "Yes, 3 Perkwood was a fraud" and grappled with all of that. 4 What it did find is even if it all was, indicative bid 5 did not amount to an invocation of the false evidence 6 and that's a factual finding that simply can't be 7 disturbed in my respectful submission. 8 My Lord, I don't propose to go back to Mr Foerster's 9 evidence and Ms Nacimiento's evidence that lies behind 10 those allegations that were made because Mr Malek has 11 shown you. If however it would be helpful I would be 12 happy to do you before I move on? 13 MR JUSTICE KNOWLES: Not for my part. 14 MR SPRANGE: My Lord, I note time. I'm happy to keep going; 15 this is also a convenient moment. 16 MR JUSTICE KNOWLES: Let's keep going for 15 minutes. 17 MR SPRANGE: Thank you, my Lord. 18 So my Lord, I then turn to the next piece of the 19 analysis. That is other issues that I have flagged up 20 for you that have been determined by the Swedish court, 21 issues that arise in this case, before you now -- 22 because if they are then we say there is an estoppel. 23 Now, probably the best way to do this is to show you 24 what Kazakhstan say is to be decided in this case. If 25 you could take up their skeleton argument at page 23,</p> <p style="text-align: center;">Page 120</p>

<p>1 helpfully for my purposes under a heading "What the 2 English court is being asked to decide". So my Lord 3 paragraph 55: 4 "The clearest guidance in the authorities is 68.2G 5 a principle I tend to agree with. For present purpose 6 it is sufficient to refer to the summary given by 7 Blair J in Double K Oil Products." 8 Then it's summarised in the next paragraph: 9 "... some form of reprehensible unconscionable 10 conduct has attributed in a substantial way to the 11 obtaining of the award." 12 So in considering the fraud allegations that's 13 something the English court has to decide. 14 My Lord, I think it's helpful if I show you some 15 more colour on that analysis. If we could go back to 16 Mr Justice Flaux's decision -- I'm not sure if I should 17 be calling him something else right now. 18 MR MALEK: As he then was. 19 MR SPRANGE: As he then was. 20 It may still be tab 1 of the claimants' authorities 21 bundle. Perhaps because I am going to tomorrow morning 22 address the second limb in Westacre on these issues, 23 I might as well show you all of the relevant passages of 24 this judgment. 25 MR JUSTICE KNOWLES: Yes.</p> <p style="text-align: center;">Page 121</p>	<p>1 applies to our case. So in paragraph 56 there's 2 a reference to Lord Justice Rix's decisions in 3 Kriti Palm: 4 "... a case which provides a salutary reminder to 5 any judge of the importance of being satisfied to the 6 necessary heightened standard of proof that what is 7 involved in dishonesty and of the fact that the 8 explanation for something is much more likely to be 9 human error rather than dishonesty." 10 They continuing on: 11 "... must establish that the award itself was 12 obtained by fraud ..." 13 And there's a reference to Aken J as he was in 14 Vivendi: 15 "An award will only be obtained by fraud if the 16 party ...(Reading to the words)... favour of the other 17 successful party." 18 In other words this is Mr Justice Flaux: 19 "There has to be have been a fraud in the 20 arbitration ...(Reading to the words)... and misled 21 the tribunal." 22 Then my Lord there's a further passage which I just 23 ask you to read because it will be relevant to my 24 submissions tomorrow on whether that evidence was 25 available or not.</p> <p style="text-align: center;">Page 123</p>
<p>1 MR SPRANGE: Again I apologise for the page numbering on 2 this report but it's paragraph 39 which is only five or 3 seven pages in. My Lord, perhaps if I could just ask 4 you to read paragraph 39 which is the neatest summary of 5 the alleged fraud allegations in this case. 6 MR JUSTICE KNOWLES: Thank you. 7 (Pause) 8 MR SPRANGE: Mr Hurst, who appeared on behalf of the 9 applicant that case, as noted in the second paragraph, 10 did not shirk away from the allegation that this 11 concealment went to the highest levels within GTT and 12 then it was a serious and reprehensible fraud. 13 Having set that background out the judge then went 14 to the principles and we see those at paragraph 53. 15 My Lord, we see here more detailed recitation of 16 Mr Justice Blair's reasoning in Double K Oil and if 17 I could just refer your Lordship to the last passage in 18 that paragraph: 19 "The latter point takes effect ...(Reading to the 20 words)... injustice to the applicant." 21 My Lord, although it's by a different route I say 22 the same applies to a foreign arbitral award. 23 My Lord, paragraph 56 -- bear in mind that 24 everything I refer you to here Kazakhstan accepts, 25 because they accept that 68.2G is the best guide --</p> <p style="text-align: center;">Page 122</p>	<p>1 Now, my Lord, I show you that because it's important 2 in the context of asking the rhetorical question in my 3 submission as to whether there's anything that's called 4 to be decided by the English court that's already been 5 decided in the Swedish proceedings. And in my 6 submission that analysis that you see there of the test 7 in England which Kazakhstan have put in paragraph 55 and 8 56 of their skeleton, represent factual questions which 9 are same as the factual questions that the Svea court 10 has decided, which I will show you, and just to be 11 perfect crisp about that, they are as follows: 12 "Would the fraud if established have an important 13 impact on the result." 14 In Sweden it was decided it didn't, it didn't have 15 a direct substantive impact. And my Lord, I say that 16 there can be no mischief and no attempt to look at the 17 Swedish language in the Swedish judgment "directly 18 determinative for the outcome" and compare that to the 19 causative link between the deliberate concealment and 20 the decision in the award. You can't draw nuanced 21 text-based distinctions. This is a factual 22 question: the decision the tribunal reached, was it 23 impacted by the false evidence? 24 The second point is this my Lord: if we are right on 25 that there can't be a trial for fraud in this case and</p> <p style="text-align: center;">Page 124</p>

<p>1 there can't be because they are estopped on this issue. 2 And that would mean that even if there was a full trial 3 on the fraud allegations here and even if this court 4 reached the conclusion that there was a fraud, it could 5 not, because of the estoppel, do anything other than 6 conclude it wouldn't have had an impact on the result. 7 There is a further reason my Lord, and that is 8 this: even if Kazakhstan were able to establish that the 9 involvement of Perkwood in the transfer pricing was 10 a fraud, it would be estopped from arguing that that 11 fraud impacted the KMG indicative offer and made it 12 itself false, because that's been decided against them 13 in Stockholm. 14 So we would have a fraud trial that would take us 15 nowhere. We would have a fraud trial that might decide 16 the position in relation to how the financing for the 17 construction of an LPG plant came about. But on the two 18 critical points, did it go to the tribunal's decision 19 and was the KMG indicative offer tainted by that fraud, 20 they've litigated and lost. They can't go over it 21 again. 22 My Lord, if you still have the CAT decision still 23 open, my Lord I think I was at paragraph 58. 24 MR JUSTICE KNOWLES: You'd asked me to read 59. 25 MR SPRANGE: Yes.</p> <p style="text-align: center;">Page 125</p>	<p>1 "CAT must still establish the element of causation 2 of the disclosure of the true position would probably 3 have affected the result of the arbitration." 4 That's the principle we have already discussed. 5 Then in 293 we have Mr Hirst's submissions which I must 6 say when I first read them I found incredibly powerful. 7 He essentially says that the concealment of the test, if 8 they had come out would have changed the entire tone of 9 the arbitration. He made point that: 10 "Contrary to what was being submitted ...(Reading to 11 the words)... changing the whole focus of the 12 arbitration." 13 So a perception argument, but I will submit my Lord 14 a much more powerful perception argument because that 15 went to the heart of case: was there a concealment 16 relating to liability issue. 17 Don't forget here what Kazakhstan is trying to say 18 would have made a fundamental difference to tribunal's 19 decision is some financial reports referred to in 20 a due diligence, a hundred page due diligence report, 21 that are then referred to in indicative bid-offer then 22 referred to in the course of arbitration where there's 23 several. 24 So it's effectively -- I will do this in more detail 25 tomorrow but it's effectively four times removed. And</p> <p style="text-align: center;">Page 127</p>
<p>1 MR JUSTICE KNOWLES: Which I've done. 2 MR SPRANGE: Thank you, my Lord. If we could then finish, 3 there's a reference to the various tests, which I can 4 cover tomorrow in more detail but that relates to the 5 could and should they have. 6 My Lord, what I want to do now is just in the last 7 few minutes finish off at this. What is interesting is 8 that when you carefully consider Kazakhstan's skeleton 9 argument, which is really the first word on why they're 10 allowed to continue to persevere with these fraud 11 allegations despite the finding of the Svea court, the 12 highest they put it is the perception: oh, if 13 the tribunal had known about all of this that would have 14 changed everything. They both have just thought that 15 Mr Stati was such a bad man and so is Mr Lungu they 16 would have looked at everything in a very, very 17 different light. 18 Now, leaving aside the fact that that is not 19 an argument that I say is available to them, it's not 20 an argument available to them because of estoppel. It's 21 also simply not an argument that arises under English 22 law. I realise I'm trespassing slightly into the second 23 Westacre point but it fits best here. And the 24 demonstration for that is the CAT case again. If you 25 could turn to 292:</p> <p style="text-align: center;">Page 126</p>	<p>1 what's more my Lord, it goes to an issue how to value 2 quantum that Kazakhstan argued successfully was 3 an irrelevancy. So while Mr Hirst could make with 4 considerable force an argument that the concealment of 5 some test results in a design fault case might have been 6 a game-changer, in my respectful submission Kazakhstan 7 simply can't make such a submission and that's why quite 8 rightly, very skilful advocacy, it's put as highest 9 would have changed the tribunal's perception. 10 My Lord, we will see here that what Mr Justice Flaux 11 concluded -- if you go to 311. I will tomorrow cover 12 this in a bit more detail in the context of the other 13 topic I will address. But if you look at 311: 14 "For all those reasons, although I have concluded 15 there was a fraud ...(Reading to the words)... affected 16 the result of the arbitration." 17 Now, my Lord, I'm slightly mixing issues. The 18 reason I do all that my Lord is I've shown you what was 19 decided in Sweden and how it was decided, because 20 Kazakhstan raised it because they produced the evidence, 21 showing you that there's an obvious very clear overlap 22 between the issues to be decided, and I've also shown 23 you by reference to the English cases that the English 24 test is probably a little less onerous than the Swedish 25 test. I've also shown you, my Lord, that where you are</p> <p style="text-align: center;">Page 128</p>

1 talking about impacting the result of the award it has
2 to be very, very significant and has to go to the heart
3 of it. And it is perhaps no surprise that the Svea
4 Court of Appeal reached the decision it reached,
5 considering how far removed the TNG financials were from
6 its award on quantum and the fact that Kazakhstan were
7 saying investment costs is totally irrelevant, you
8 shouldn't take them into consideration and they were
9 correct.

10 So my Lord I note the time, what I'll do is I'll
11 pick it up tomorrow and cover the second two headline
12 issues. I imagine I will be 90 minutes to two hours and
13 I will try and keep it as close to 90 minutes as
14 possible.

15 MR JUSTICE KNOWLES: Fine. That's great. Helpful to have
16 an indication.

17 Thanks very much, 10.30.
18 (4.15 pm)

19 (The hearing was adjourned until
20 the following day at 10.30 am)

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