PCA CASE NO. 2017-16

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH

THE AGREEMENT BETWEEN THE GOVERNMENT OF THE CABINET OF MINISTERS OF UKRAINE AND THE RUSSIAN FEDERATION ON THE ENCOURAGEMENT AND MUTUAL PROTECTION OF INVESTMENTS DATED 27 NOVEMBER 1998

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

-between-

(i) NJSC NAFTOGAZ OF UKRAINE (UKRAINE), (ii) NATIONAL JOINT STOCK COMPANY CHORNOMORNAFTOGAZ (UKRAINE), (iii) JSC UKRTRANSGAZ (UKRAINE), (iv) LIKVO LLC (UKRAINE), (v) JSC UKRGASVYDOBUVANNYA (UKRAINE), (vi) JSC UKRTRANSNAFTA (UKRAINE), (vii) SUBSIDIARY COMPANY GAZ UKRAIINY (UKRAINE)

(the "**Claimants**")

-and-

THE RUSSIAN FEDERATION

(the "**Respondent**," and together with the Claimants, the "**Parties**")

PARTIAL AWARD

The Arbitral Tribunal
Judge Ian Binnie, C.C., Q.C. (Presiding Arbitrator)
Dr. Charles Poncet
Professor Dr. Maja Stanivuković

Registry
Permanent Court of Arbitration

22 February 2019

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

AmSOC	Claimants' Amended Statement of Claim, dated 12 December 2017
annexation	The change that occurred in the status of the Crimean Peninsula in February-March 2014, without prejudice to any determination of its lawfulness or unlawfulness under international law
Annexation Treaty	Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, dated 18 March 2014
BIT	Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998
Chornomornaftogaz	National Joint Stock Company Chornomornaftogaz
Claimants' Answers	Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018
Crimea	"Autonomous Republic of Crimea" under the Ukrainian Constitution and the "Republic of Crimea" under the Russian Constitution
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment
Gaz Ukraiiny	Subsidiary Company Gaz Ukraiiny
ICJ	International Court of Justice
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
Independence Resolution	Resolution No. 1745-6/14 of the State Council of the Republic of Crimea "On the Independence of Crimea," dated 17 March 2014
JAA	Agreement No. 1 on the Joint Venture in the Sea of Azov Between Chornomornaftogaz and Ukrgasvydobuvannya, 24 October 2000
Krymgaz	Public Joint Stock Company Krymgaz

Law on Admission	Federal Constitutional Law of the Russian Federation No. 6-FKZ "On the Admission of the Republic of Crimea to the Russian Federation, and the Formation of New Constituent Entities within the Russian Federation – the Republic of Crimea and the Federal City of Sevastopol," dated 21 March 2014
Likvo	Likvo Limited Liability Company (formerly Subsidiary Company Likvo)
Naftogaz or Claimants	The Claimants referred to collectively
Nationalization Decree	Resolution No. 2085-6/14 of the State Council of the Republic of Crimea "On the Issues of Management of Property of the Republic of Crimea," dated 20 April 2014
Nationalization Resolution	Resolution No. 1758-6/14 of the State Council of the Republic of Crimea "On the Issues of Energy Security of the Republic of Crimea," dated 17 March 2017
NJSC Naftogaz	National Joint Stock Company Naftogaz of Ukraine
Notice of Arbitration	The Claimants' Notice of Arbitration, dated 14 October 2016
Notice of Dispute	The Claimants' Notice of Dispute, dated 15 February 2016
Parties	The Claimants and the Respondent
PCA	Permanent Court of Arbitration
Russia or Respondent	The Russian Federation
Russian Objection	Letter from Ms. O.V. Zentsova, Deputy Director of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation, dated 19 January 2017
Sevastopol or city of Sevastopol	"City of Special Status Sevastopol" under the Ukrainian Constitution and "city of federal importance Sevastopol" under the Russian Constitution
Sevastopolgaz	Public Joint Stock Company Sevastopolgaz
Special Operations Forces Day	27 February of each year
Submission of Ukraine	Submission of Ukraine as Non-Disputing Party to the Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the

	Encouragement and Mutual Protection of Investments, dated 13 March 2018
Tr.	Hearing transcript
Treaty	Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998
Ukrgasvydobuvannya	Joint Stock Company Ukrgasvydobuvannya
Ukrtransgaz	Joint Stock Company Ukrtransgaz
Ukrtransnafta	Joint Stock Company Ukrtransnafta
UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on International Trade Law, 1976
VCLT	*Vienna Convention on the Law of Treaties*, dated 23 May 1969
VCST	*Vienna Convention on the Succession of States in respect of Treaties*, dated 23 August 1978

PART 1 - OVERVIEW

1. The Claimants are state-owned and/or state controlled companies[1] established in Ukraine in the gas and oil sector. They claim direct expropriation of their investments in the Crimean Peninsula, including the city of Sevastopol, by the Russian Federation through the adoption of a combination of legislative acts and physical interference in the period between 3 March 2014[2] and 30 April 2014.[3] The measures followed the Russian Federation's occupation and purported annexation[4] of Crimea,[5] "transferring almost all of the Claimants' Crimea-based assets to a Russian state-owned company."[6] In addition to expropriation, the Claimants claim breach of the undertaking of full and unconditional legal protection[7] and various other breaches of the *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments*, dated 27 November 1998 (the "**Treaty**" or the "**BIT**").[8]

2. The Respondent in this arbitration is the Russian Federation which declined to participate in these proceedings except to file an objection to jurisdiction.

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[1] Notice of Arbitration, dated 14 October 2016 (hereinafter "**Notice of Arbitration**"), ¶ 3: "Ukraine state-owned gas and oil group Naftogaz…" Notice of Arbitration, ¶ 7: "Naftogaz is a Ukrainian state-owned group of companies…Naftogaz…is the national oil and gas company of Ukraine." Transcript of the Hearing (hereinafter "**Tr.**"), 212:24 et seq.: Naftogaz was directly owned by the state, and Chornomornaftogaz is a subsidiary owned by Naftogaz itself. But in a broad sense, it was indirectly controlled by the state, which is part of the public law sector.

[2] Notice of Arbitration, ¶¶ 32-33; Amended Statement of Claim, dated 12 December 2017 (hereinafter "**AmSOC**"), ¶¶ 164-165.

[3] The date of completion of nationalization is somewhat uncertain. In the Notice of Arbitration, ¶ 49 and AmSOC, ¶ 94, the Claimants stated that the last date of expropriation was 21 May 2014. However, at the hearing, the Claimants stated that: "by late April 2014 Russia had expropriated the entirety of Naftogaz's business in Crimea...Russia adopted a series of legal acts, and between 18th March and 30th April expropriated all of Claimants' investments in Crimea." (Tr. 7:12, 17:6-8). "I note that the acts underlying the expropriation occurred on three key dates, which are 18 March, 11 April and 30 April 2014." (Tr., 98:23-25). "... there can be no doubt that by the end of April 2014, Naftogaz's investments in Crimea had been irretrievably lost." (Tr., 114:6-8).

[4] Notice of Arbitration, ¶ 23; AmSOC, ¶ 110.

[5] The term "**Crimea**" as used throughout this Partial Award refers to the region known as the "Autonomous Republic of Crimea" under the Ukrainian Constitution and the "Republic of Crimea" under the Russian Constitution. "**Sevastopol**" or the "**city of Sevastopol**" refers to the city known as the "city of special Status Sevastopol" under the Ukrainian Constitution and the "city of federal importance Sevastopol" under the Russian Constitution. The term "**annexation**" is used to refer to the change that occurred in the status of the Crimean Peninsula in February-March 2014, without prejudice to any determination of its lawfulness or unlawfulness under international law.

[6] Notice of Arbitration, ¶ 4.

[7] AmSOC, ¶¶ 189-192.

[8] AmSOC, ¶¶ 193-205.

3. Ukraine is a non-disputing party which filed written submissions but did not appear at the hearing.

4. By way of background, Naftogaz and the other members of the Claimant group[9] constituted in February 2014 the largest participants in natural gas exploration, production, transport, storage, processing and distribution in Crimea.

5. On or about 27 February 2014, armed members of the Russian military entered Crimea and over subsequent days effectively occupied the region. The military occupation was accompanied by a step by step takeover of the institutions of government by individuals who were supportive of Crimea joining the Russian Federation. On 15 March 2014, the Ukrainian Parliament stripped the Crimean Parliament of its powers.[10] Thereafter, until 21 March 2014, the only duly constituted legislative and executive authority in Crimea was the government of Ukraine (which was ousted effective 18 March 2014).

6. On 21 March 2014, the Russian Federation enacted federal constitutional Law 6-FKZ (the "**Law on Admission**"), admitting the Republic of Crimea and the Federal City of Sevastopol to the Russian Federation effective 18 March 2014.[11] As will be described, the annexation was coupled with Russia's taking of the Claimants' assets.

7. While the Crimean Parliament purported to seize the Claimants' assets on 17 March 2014, it had already been stripped of its powers two days previously and its attempted takeover was without legal effect. However, effective 18 March 2014, Russia integrated Crimea into its

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[9] The claimants in this arbitration are National Joint Stock Company Naftogaz of Ukraine (hereinafter "**NJSC Naftogaz**"), registered at 6, B. Khmelnitskogo Str., Kyiv, Ukraine, 01601; National Joint Stock Company Chornomornaftogaz (hereinafter "**Chornomornaftogaz**"), registered at 26, B. Khmelnitskogo Str., office 505, Kyiv, Ukraine, 01030; Joint Stock Company Ukrtransgaz (hereinafter "**Ukrtransgaz**"), registered at 9/1, Kloskiy Uzviz, Kyiv, Ukraine, 01021; Likvo Limited Liability Company (formerly Subsidiary Company Likvo) (hereinafter "**Likvo**"), registered at 32, Sinna Str., Kharkiv, Ukraine, 61109; Joint Stock Company Ukrgasvydobuvannya (hereinafter "**Ukrgasvydobuvannya**"), registered at 26/28, Kudriavska Str., Kyiv, Ukraine, 04053; Joint Stock Company Ukrtransnafta (hereinafter "**Ukrtransnafta**"), registered at 18/7, Kutuzova Str., Kyiv, Ukraine, 01133; and Subsidiary Company Gaz Ukraiiny (hereinafter "**Gaz Ukraiiny**"), registered at 1, Sholudenka Str., Kyiv, Ukraine, 04116 (hereinafter collectively referred to as "**Claimants**" or "**Naftogaz**").

[10] First Expert Report of Dr. Irina Paliashvili, dated 14 September 2017 (hereinafter "**First Paliashvili Report**"), ¶ 132.

[11] First Expert Report of Professor Paul B. Stephan, dated 14 September 2017 (hereinafter "**First Stephan Report**"), ¶ 56.

Federation and subsequently took legislative steps to seize the Claimants' assets, culminating on 30 April 2014 when the State Council of the Republic of Crimea, exercising its newly conferred legislative authority under the Russian Constitution, decreed "all state property (of the state of Ukraine) and abandoned property located in the territory of the Republic of Crimea shall be considered the property of the Republic of Crimea" (the "**Nationalization Decree**").[12]

8. There is no dispute that the Claimants' assets were seized without compensation. The issues are whether the Claimants qualify as "investors" and their seized assets as "investments" within the protection of the BIT, and if so, whether the seizure is attributable to Russia. A resolution of these issues is required to determine whether this Tribunal has jurisdiction to deal with the claim and if so, whether there is any BIT liability on the part of Russia.

9. The Russian Government takes the position that the BIT does not apply because, at the time of the initial investment, the assets in question were located in Ukraine, not Russia. The Claimants, it is said, never made any investment in the Russian Federation. The seizure occurred before the annexation of the Republic of Crimea and the city of Sevastopol by the Russian Federation and is therefore not attributable to the Russian Federation.[13]

10. The Tribunal by majority is of the view that the critical date is not the date of the initial investment. The Tribunal's jurisdiction depends upon the facts existing (1) at the date of the alleged breaches of the BIT, (2) as well as at the date of the initiation of these proceedings. The Tribunal, by a majority, rules that on those two dates, the Claimants satisfy the requirements of the BIT, properly interpreted, and therefore the Tribunal does have jurisdiction to determine the dispute.

11. Further, on the facts, a majority determines that the Claimants assets were expropriated by the Respondent, the Russian Federation, without compensation contrary to the BIT. The dissent concludes *inter alia* that the investments do not qualify for BIT protection unless "foreign" *ab initio*, which the investments were not.

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[12] First Stephan Report, ¶ 93.

[13] Letter No. 06-5928/17 from the Ministry of Justice of the Russian Federation to the Permanent Court of Arbitration, dated 19 January 2017 (**CE-383**).

12. As the issue of quantum was bifurcated from the issue of jurisdiction and liability, the Tribunal will convene a further hearing to assess the quantum of the Claimants' losses.

PART 2 - THE PARTIES

13. The Claimants in the arbitration are:

National Joint Stock Company Naftogaz of Ukraine ("**NJSC Naftogaz**"), registered at 6, B. Khmelnitskogo Str., Kyiv, Ukraine, 01601

National Joint Stock Company Chornomornaftogaz ("**Chornomornaftogaz**"), registered at 26, B. Khmelnitskogo Str., office 505, Kyiv, Ukraine, 01030

Joint Stock Company Ukrtransgaz ("**Ukrtransgaz**"), registered at 9/1, Kloskiy Uzviz, Kyiv, Ukraine, 01021

Likvo Limited Liability Company (formerly Subsidiary Company Likvo) ("**Likvo**"), registered at 32, Sinna Str., Kharkiv, Ukraine, 61109

Joint Stock Company Ukrgasvydobuvannya ("**Ukrgasvydobuvannya**"), registered at 26/28, Kudriavska Str., Kyiv, Ukraine, 04053

Joint Stock Company Ukrtransnafta ("**Ukrtransnafta**"), registered at 18/7, Kutuzova Str., Kyiv, Ukraine, 01133

Subsidiary Company Gaz Ukraiiny ("**Gaz Ukraiiny**"), registered at 1, Sholudenka Str., Kyiv, Ukraine, 04116

14. The Respondent in this arbitration is the Russian Federation, a sovereign State ("**Russia**" or the "**Respondent**" and together with the Claimants, the "**Parties**"). Russia did not appoint any

representative or otherwise participate in these proceedings other than to file a threshold objection to jurisdiction.

15. The Republic of the Ukraine ("**Ukraine**") was admitted as a non-disputing party. It filed a written submission contending that it "maintains sovereignty over Crimea" and that the Autonomous Republic of Crimea and the City of Sevastopol continue to form "an inseparable part of Ukraine," even though both are presently occupied by, and under the effective control and jurisdiction of, the Respondent.[14] It follows, Ukraine says, that "any treaty right or obligation pertaining to sovereignty" in respect of Crimea, be it under bilateral or multilateral treaties, remains in effect.[15] That said, Ukraine accepts the "practical reality of [Russia's] occupation and, accordingly, [Russia's] current exercise of jurisdiction and effective control over Crimea", admitting that it "is presently unable to fulfil its obligations in respect of Crimea."[16] Ukraine notes that it is Russia which has "assumed international obligations in its administration of Crimea," notably including BIT obligations regarding investments based in Crimea.[17]

PART 3 - PROCEDURAL HISTORY

16. By letter dated 15 February 2016 (the "**Notice of Dispute**"), the Claimants notified the Respondent, pursuant to Article 9(1) of the Treaty, of the existence of a dispute between the Parties.[18] The Respondent did not respond to the Claimants' Notice of Dispute.

17. On 17 October 2016, the Claimants commenced these arbitration proceedings by serving on the Respondent the **Notice of Arbitration**, dated 14 October 2016, pursuant to Article 9(2)(c) of the Treaty and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the "**UNCITRAL Rules**").

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[14] Submission of Ukraine as Non-Disputing Party to the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Mutual Protection of Investments, dated 13 March 2018, ¶¶ 2, 52 (hereinafter "**Submission of Ukraine**").

[15] Submission of Ukraine, ¶ 48.

[16] Submission of Ukraine, ¶ 51.

[17] Submission of Ukraine, ¶ 51.

[18] AmSOC, ¶ 158, *referring to* Notice of Dispute (**CE-368**).

1. *Constitution of the Tribunal and Communications From the Respondent*

18. In their Notice of Arbitration, the Claimants appointed Dr. Charles Poncet, a Swiss national, as the first arbitrator in these proceedings. Dr. Poncet's address is Rue Bovy-Lysberg 2, P.O. Box 5871, 1211 Geneva 11, Switzerland.

19. On 22 November 2016, following the Respondent's failure to appoint an arbitrator within 30 days of notification of the appointment of the Claimants' party-appointed arbitrator, the Claimants requested the Secretary-General of the Permanent Court of Arbitration (the "**PCA**") to designate an appointing authority to appoint an arbitrator on behalf of the Respondent pursuant to Article 7(2) of the UNCITRAL Rules.

20. On 19 December 2016, in response to the Claimants' request, and having sought comments from the Respondent but having received no reply, the Secretary-General of the PCA designated Dr. Michael Hwang as the **Appointing Authority** in these proceedings for all purposes under the UNCITRAL Rules.

21. By letter dated 22 January 2017, the Claimants requested Dr. Hwang to appoint an arbitrator on behalf of the Respondent, in accordance with Article 7(2)(b) of the UNCITRAL Rules, due to the Respondent's failure to appoint an arbitrator.

22. On 3 February 2017, the PCA received a letter dated 19 January 2017 from Ms. O.V. Zentsova, Deputy Director of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation (the "**Russian Objection**"), objecting to the constitution of an arbitral tribunal to hear the present dispute, the jurisdiction of the Tribunal, and to the admissibility of the Claimants' claims.

23. In the **Russian Objection**, Ms. Zentsova stated:

> According to item 1 of Article 1 of the Agreement the term "investments" shall mean any kind of tangible or intangible assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation. The property, which is the subject of the dispute, is located in the territory of the Republic of Crimea and the city of Sevastopol, which had previously been a part of the Ukraine. The assets of claimants are not investments, because they have not been made in the territory of the Russian Federation, and, if ever made,

> they have been made prior to the accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in accordance with the legislation of the Russian Federation. No taxes have been collected on these assets in accordance with the legislation of the Russian Federation and they have not contributed to the economic development of the Russian Federation.
>
> On the basis of the foregoing, the Russian Federation does not recognize the jurisdiction of the international arbitration at the Permanent Court of Arbitration to hear the present dispute.[19]

24. By letter dated 8 February 2017, Dr. Hwang provided the Claimants with a copy of the Russian Objection and invited them to comment thereon.

25. By letter dated 13 February 2017, the Claimants disagreed with the contentions in the Russian Objection. The Claimants maintained that the Respondent may only raise jurisdictional objections once the tribunal has been constituted. In the same letter, the Claimants reiterated their request that Dr. Hwang appoint an arbitrator on behalf of the Respondent.

26. On 14 February 2017, Dr. Hwang, on behalf of the Respondent, appointed Professor Dr. Maja Stanivuković, a Serbian national, as second arbitrator, pursuant to Article 7(2)(b) of the UNCITRAL Rules. Professor Stanivuković's address is Radnička 26, 21000 Novi Sad, Republic of Serbia.

27. On 13 April 2017, in response to a request from the Claimants, and having sought comments from the Respondent but having received no reply, Dr. Hwang appointed Judge Ian Binnie, C.C., Q.C. a Canadian national, as the presiding arbitrator in these proceedings pursuant to Articles 7(3) and 6(3) of the UNCITRAL Rules. Judge Binnie's address is c/o Lenczner Slaght, 130 Adelaide Street West, Suite 2600, Toronto, Ontario, Canada, M5H 3P5.

2. *Fixing of the Procedural Timetable*

28. By letter dated 1 May 2017, the Tribunal communicated draft Terms of Appointment and the draft Rules of Procedure to the Parties, inviting them to comment thereon. By letter dated

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[19] Letter No. 06-5928/17 from the Ministry of Justice of the Russian Federation to the Permanent Court of Arbitration, dated 19 January 2017 (**CE-383**).

22 May 2017, the Claimants submitted their comments. The Respondent did not provide any comments.

29. On 19 July 2017, having considered the comments received, the Tribunal issued the document previously circulated to the Parties under the title "Terms of Appointment" as its **Procedural No. 1**, in which, the Tribunal, *inter alia*, appointed the PCA to act as registry in and administer these arbitral proceedings.

30. On the same day, the Tribunal issued **Procedural Order No. 2**, in which it fixed The Hague, the Netherlands as the place of arbitration and established in Section 2.1 a Procedural Timetable for the proceedings on the basis that all issues of jurisdiction, admissibility, liability, and quantum would be heard together. Pursuant to the timetable, the Claimants were required to file their Statement of Claim by 15 September 2017, after which the Respondent would have until 5 January 2018 to file a Statement of Defence or any objections to jurisdiction or admissibility. In the event the Respondent were to fail to file its Statement of Defence, Section 2.2 of Procedural Order No. 2 established an accelerated timetable.

31. By letter dated 11 August 2017, the Claimants requested the Tribunal to issue a confidentiality order, enclosing therewith a draft of its Proposed Confidentiality Order.

32. On 14 August 2017, the Tribunal circulated the Claimants' Proposed Confidentiality Order and requested the Respondent to comment thereon by 21 August 2017. The Respondent did not submit any comments.

33. By letter dated 30 August 2017, the Tribunal issued its **Confidentiality Order** to the Parties.

3. *Filing of the Statement of Claim; Respondent's Failure to Submit a Statement of Defence; Bifurcation; and Amendments to the Timetable*

34. On 15 September 2017, in accordance with the timetable established in Procedural Order No. 1, the Claimants submitted their **Statement of Claim**, together with factual exhibits CE-1 to CE-605, legal authorities CLA-1 to CLA-103, eight witness statements, and three expert reports.

Under separate cover, the Claimants also submitted a request for the designation of certain exhibits as "Highly Confidential Information," in accordance with the Tribunal's Confidentiality Order.

35. On 25 September 2017, the Tribunal, having invited the Parties' comments, issued **Procedural Order No. 3**, whereby the Tribunal amended the Procedural Timetable contained in Section 2.2 of Procedural Order No. 2, moving the date of the hearing on jurisdiction, admissibility, and merits (including quantum) to 14-18 May 2018.

36. On 31 October 2017, in response to the Claimants' request to file the "Highly Confidential" documents without disclosure to the Respondent, the Tribunal expressed "great concern receiving into the arbitral record documents relevant to issues before the Tribunal, which might potentially lead to an Award against the Respondent, while withholding disclosure of the documents to the Respondent." As most documents sought to be classified as Highly Confidential relate only to quantum, the Tribunal invited the Claimants to consider applying for bifurcation of the proceedings so that jurisdiction and liability would be dealt with first, and the Tribunal would only address quantum, if necessary, at a subsequent date.

37. By letter dated 9 November 2017, the Claimants requested the Tribunal to bifurcate the proceedings into two phases, *i.e.*, jurisdiction and liability, on the one hand, and quantum, on the other hand.

38. On 8 December 2017, having requested the Respondent's comments on the Claimants' bifurcation request but having received no response, the Tribunal issued its **Procedural Order No. 4**, bifurcating jurisdiction and liability to be dealt with at a hearing on 14-18 May 2018, and quantum to be addressed, if necessary, at a subsequent date.

39. By letter dated 12 December 2017, and in accordance with Section 3.2 of Procedural Order No. 4, the Claimants withdrew from the record: (1) those sections of the Statement of Claim that address the Claimants' quantum of loss; (2) all exhibits and authorities submitted exclusively in support of the Claimants' quantum of loss, including all exhibits designated as Highly Confidential Information; and (3) the Expert Witness Statement of Gaffney Cline & Associates. By the same letter, the Claimants submitted an **Amended Statement of Claim**, an Amended Exhibit Index,

and an Amended Table of Authorities, deleting those sections of the three documents that pertain exclusively to quantum.

40. The Respondent failed to submit its **Statement of Defence** by 5 January 2018, the deadline fixed by the Tribunal in the Procedural Timetable contained in Section 2.1 of Procedural Order No. 2.

41. By letter dated 9 January 2018, after noting the Respondent's failure to file its Statement of Defence, the Tribunal ordered the proceedings to continue pursuant to Article 28(1) of the UNCITRAL Rules.

42. On 12 January 2018, as a result of the Respondent's failure to file its Statement of Defence, the Tribunal posed **Questions to the Parties** with respect to issues of jurisdiction and liability, in accordance with the timetable established in Section 2.2 of Procedural Order No. 2.

43. On 23 February 2018, the Claimants submitted their Answers to the Tribunal's Questions (the "**Claimants' Answers**"), together with factual exhibits CE-606 to CE-794, legal authorities CLA-104 to CLA-171, amendments of previously submitted factual exhibits and legal authorities, and two supplemental expert reports. The Respondent filed no responses to the Tribunal's Questions.

44. On 15 March 2018, the PCA informed the Parties that it had received copies of the following documents from the Embassy of Ukraine in The Hague: (i) *Note Verbale* from the Embassy of Ukraine to the PCA, dated 14 March 2018; (ii) a letter from the Ministry of Foreign Affairs of Ukraine to the Tribunal, dated 13 March 2018; and (iii) Submission of Ukraine as Non-Disputing Party to the Treaty, dated 13 March 2018 (the "**Submission of Ukraine**"). The PCA also provided the Parties and the Tribunal with copies of the first two items and, on behalf of the Tribunal, requested the Parties' comments on whether the third item should be admitted into the record.

45. On 29 March 2018, the Claimants submitted their comments on Ukraine's request to admit its Submission into the record in this arbitration. The Respondent filed no comments.

46. On 4 April 2018, the Tribunal convened a pre-hearing conference call with the Parties to discuss organizational matters related to the Hearings on 14-18 May 2018. The Claimants participated in the call. The Respondent did not participate despite having been duly notified.

47. On 5 April 2018, the Tribunal issued its **Procedural Order No. 5**, in which it, *inter alia*, admitted the Submission of Ukraine into the record and granted the Parties until 19 April 2018 to submit comments on the Submission of Ukraine. The Claimants submitted their comments on that date. The Respondent did not submit any comments.

48. By letter dated 7 May 2018, the Claimants advised the Tribunal "that Limited Liability Company Likvo ha[d] succeeded to the claims of Subsidiary Company Likvo asserted in this proceeding" and requested "that the Tribunal recognize Likvo LLC as a party in this arbitration, in place of Subsidiary Company Likvo."

49. On 11 May 2018, the Claimants sought leave to submit into the record in this arbitration the award on the merits in *Everest Estate LLC et al. v. The Russian Federation*, PCA Case No. 2015-36. By letter of the same date, the Tribunal granted the Claimants' request.

4. *Hearing*

50. The hearing on jurisdiction and liability was held on 14-17 May 2018 in The Hague. The Respondent, although duly notified of the schedule and having been invited to participate, did not take part in the hearing. The following individuals were in attendance:

Tribunal:

Hon Ian Binnie, C.C., Q.C.	President
Dr. Charles Poncet	Arbitrator
Professor Dr. Maja Stanivuković	Arbitrator

Claimants:

Mr. Yaroslav V. Teklyuk Ms. Olga Khoroshylova Ms. Olga Ivaniv Mr. Vladyslav Byelik	NJSC Naftogaz of Ukraine

Counsel for the Claimants:

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Mr. Denis Lysenko Mr. Pavlo Byelousov Mme. Myroslava Savchuk	Aequo Law Firm Attorney at Law Association 4 A, Behkterevskyi Lane, n/p 19 Kyiv, Ukraine, 04053

Fact Witnesses:

Ms. Svetlana V. Nezhnova
Mr. Andriy Kobolyev

Expert Witnesses:

Dr. Irina Paliashvili
Prof. Paul B. Stephan

For the Permanent Court of Arbitration:

Dr. Levent Sabanogullari
Mr. Byron Perez
Ms. Willemijn van Banning

Court Reporter:

Mr. Trevor McGowan

Interpreter:

Mr. Yuri Somov

51. On 15 May 2018, in accordance with Section 2.5 of Procedural Order No. 5 dated 5 April 2018, the Tribunal issued its **Questions to the Parties** for their respective closing statements.

52. The Parties' closing statements were delivered on 17 May 2018.

53. An electronic transcript of the hearing was delivered to the Parties at the end of each hearing day. By letter dated 18 May 2018, the PCA circulated the audio recording of the hearing to the Parties and sent hard copies of the complete transcript to the Respondent. By the same letter the PCA, on behalf of the Tribunal, invited the Parties to propose any corrections. The Claimants submitted their proposed corrections by letter dated 8 June 2018. The Respondent submitted no comments on the transcript.

5. *Post-Hearing Proceedings*

54. By letter dated 18 May 2018, the Tribunal granted the Claimants' request that it recognize Likvo LLC as a party in this arbitration, in place of Subsidiary Company Likvo.[20]

55. By letter dated 22 May 2018, the Claimants requested that the Tribunal grant the Parties an opportunity to provide short written submission in response to a question posed by the Chairman during the Claimants' closing statement at the hearing.[21] By letter dated 25 May 2018, the Tribunal rejected the Claimants' request, as it did not consider that further submissions on this question were required.

56. By letter dated 23 May 2018, the Claimants provided the Tribunal and the Registry with electronic copies of the following materials distributed in hard copy by the Claimants to the Tribunal at the hearing: (1) The award on the merits issued in *Everest Estate et al. v. Russian Federation*, PCA Case No. 2015-36;[22] (2) an article titled "What Constitutes a Taking of Property under International Law" by Professor George C. Christie;[23] an updated version of Annex C to the Claimants' Answers to the Questions of the Tribunal dated 23 February 2018;[24] (4) an Amended Exhibit Index and an Amended Table of Authorities, and errata sheets for typographical errors in the witness statement of Svetlana V. Nezhnova and the expert reports of Irina Paliashvili and Paul

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20 Tr., 193:16-19.

21 Tr., 374:19-375:2.

22 *Everest Estate LLC et al. V. Russian Federation*, PCA Case No. 2015-36, Award on the Merits, 2 May 2018 (**CLA-174**).

23 George C. Christie, *What Constitutes a Taking of Property under International Law ?* 38 BRIT. Y.B. INT'L. L. 307 (1962) (**CLA-175**).

24 Revised Annex C to Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018 (**CE-795**).

B. Stephan. On 25 May 2018, the Tribunal confirmed receipt of the enclosures and stated that the Claimants would provide the Respondent with hard copies of the enclosures if the Respondent so requested.

57. By letter dated 19 June 2018, enclosing factual exhibits CE-797 to CE-805, the Claimants informed the Tribunal that, due to recent amendments to the laws of Ukraine, the names of Claimants Chornomornaftogaz, Ukrtransgaz, Ukrtransnafta, and Ukrgasvydobuvannya had changed, and requested that the Tribunal update the caption in this arbitration to take account of the above Claimants' new names.

58. On 22 June 2018, the Tribunal invited the Respondent to provide any comments on this request. No comments were received from the Respondent within the time limit specified by the Tribunal or to date.

59. By letter dated 10 July 2018, the Tribunal granted the Claimants' request and changed the style of cause in this arbitration to reflect the above Claimants' new names.

60. By letter dated 11 September 2018, the Claimants informed the Tribunal that one of the persons who submitted a witness statement in support of the Claimants' claims, Ms. Anastasia Tsybulska, had pleaded guilty to criminal charges in her role to inflate the purchase price of two drilling rigs that Chornomornaftogaz purchased in 2011.[25] In the same letter, the Claimants indicated that the charges "do not relate to the testimony Ms. Tsybulska provided in this arbitration."

61. By letter dated 13 September 2018, the Tribunal invited the Respondent's comments on the Claimants' letter of 11 September 2018. The Respondent did not provide any comments.

62. By letter dated 5 October 2018, the Tribunal, noting the Respondent's failure to provide any response to the Tribunal's letter of 13 September 2018, admitted the Claimants' correspondence of 11 September 2018 into the record.

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[25] Letter from the Claimants dated 11 September 2018, *referring to* Sentence, Case No. 761/43004/17, Proceeding No. 1-кп/761/962/2018, 25 July 2018 (**CE-807**).

63. On 8 November 2018, the Claimants sought leave from the Tribunal to submit two judgments and an accompanying press release issued by the Swiss Federal Supreme Court in connection with *PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, and *Stabil LLC et al. v. Russian Federation*, PCA Case No. 2015-35, together with English translations, into the record of this arbitration. Alternatively, the Claimants requested that the Tribunal take judicial notice of these judgments.

64. By letter dated 23 November 2018, the Tribunal invited the Respondent to provide any comments on this request by 7 December 2018. The Respondent did not submit any comments.

65. By letter dated 18 December 2018, the Claimants noted that the Swiss Federal Supreme Court issued opinions explaining its full reasoning in reaching the aforementioned judgments and sought leave from the Tribunal to submit the opinions into the record, together with English translations. Alternatively, the Claimants requested that the Tribunal take judicial notice of these opinions.

66. On 7 January 2019, the Tribunal advised the Parties that it was in the final stage of deliberation and, on this basis, declined to receive further submissions or case law, rejecting the Claimants' request.

PART 4 - THE CLAIMANTS AND THEIR OPERATIONS AND INVESTMENTS IN CRIMEA

67. Taken together, the Claimants comprise a Ukrainian group of state-owned companies that are engaged in the exploration, production, transport, storage, processing, and sale of oil and gas.[26]

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[26] Naftogaz of Ukraine Annual Report 2014, 64 (**CE-145**) (hereinafter "**2014 Annual Report**"); Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018 (hereinafter "**Claimants' Answers**"), ¶¶ 4.3-4.4, *referring to* Amended Statement of Claim, ¶¶ 17-33; Letter of S.V. Prokopchuk to Y. Teklyuk No. 11-01/35/472, 9 February 2018 (**CE-769**); Letter of V. Volovyk to Y. Teklyuk No. 31/15-451, 13 February 2018 (**CE-768**); Extract from the Uniform State Register for Chornomornaftogaz, 1 February 2014 (**CE-639**); Extract from the Uniform State Register for Ukrtransgaz, 1 February 2014 (**CE-640**); Extract from the Uniform State Register for Ukrgasvydobuvannya, 1 February 2014 (**CE-641**); Extract from the Uniform State Register for Ukrtransnafta, 1 February 2014 (**CE-642**); Extract from the Uniform State Register for Subsidiary Company Likvo, 1 February 2014 (**CE-643**); Extract from the Uniform State Register for Gaz Ukraiiny, 1 February 2014 (**CE-644**); Extract from the Uniform State Register for Chornomornaftoga, 17 October 2016 (**CE-722**); Extract from the Uniform State Register for Ukrtransgaz, 17 October 2016 (**CE-723**); Extract from the Uniform State Register for Ukrgasvydobuvannya, 17 October 2016 (**CE-724**); Extract from the Uniform State Register for Ukrtransnafta, October 17, 2016 (**CE-725**);

The Claimants operate primarily in the gas sector.[27] In the year 2013, the Claimants produced a total of 18.7 billion cubic meters of gas.[28]

68. As of February and March 2014, the Claimants maintained operations and investments, and were active in Crimea, the Black Sea, and the Sea of Azov.[29] During the same period, Naftogaz's valued its investments in Crimea at over USD 5 billion.[30]

1. *NJSC Naftogaz's Operations and Investments*

69. **NJSC Naftogaz** was a "100-percent" Ukrainian State-owned public joint stock company,[31] whose primary businesses include the importation of gas into Ukraine, the wholesale trading of gas, and the supply of gas to Ukrainian consumers.[32] NJSC Naftogaz sells gas either to regional gas-distribution and supply companies or directly to district-heating and industrial consumers.[33]

70. As of February 2014, NJSC Naftogaz's operations in Crimea included the following: (i) investments in its subsidiaries, such as Chornomornaftogaz;[34] (ii) purchase of gas from Chornomornaftogaz for onwards sale to residential consumers;[35] (iii) exploration and production of oil and gas prospects in the Black Sea by virtue of three special permits issued by the State Service for Geology and Subsoil of Ukraine;[36] (iv) lease of existing gas distribution pipelines to

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Extract from the Uniform State Register for Subsidiary Company Likvo, 17 October 2016 (**CE-726**); Extract from the Uniform State Register for Gaz Ukraiiny, 17 October 2016 (**CE-727**); Tr., 6:23-7:2.

[27] Naftogaz Europe, Gas Production in Ukraine, 2013-2014, 1 February 2015 (**CE-334**) (hereinafter "**Gas Production in Ukraine, 2013-2014**"); Tr., 7:3-5.

[28] Gas Production in Ukraine, 2013-2014 (**CE-334**).

[29] AmSOC, ¶¶ 12-13, *referring to* Naftogaz, Prospectus for Bond Issue by Public Joint Stock Company National Joint Stock Company 'Naftogaz of Ukraine', Series A, B, and C ¶ 2.9 (2013) (**CE-124**); Andrew G. Robinson, *Regional and Petroleum Geology of the Black Sea and Surrounding Region*, American Association of Petroleum Geologists, 13 (1997) (**CE-21**); Luiza Ilie, *Black Sea Oil & Gas to Start Offshore Gas Production in 2019*, Reuters, 1, 24 May 2017 (**CE-391**); *Turkish Vessel to Begin Deep-Sea Drilling in Black Sea*, Daily Sabah (19 March 2017) (**CE-385**); Witness Statement of Andriy V. Kobolyev (hereinafter "**WS Koboylev**").

[30] Tr., 7:6-9. *See also* Claimants' Opening Presentation, slides 7-32.

[31] Charter of Public Joint Stock Company "National Joint-Stock Company 'Naftogaz of Ukraine'," 14 December 2016 (**CE-68**); Cabinet of Ministers of Ukraine, Resolution No. 747, 25 May 1998 (**CE-28**); Claimants' Answers, ¶ 4.1, *referring to* 2014 Annual Report, 48, 64-66 (**CE-145**); Naftogaz of Ukraine Annual Report 2015 (hereinafter "**2015 Annual Repor**t"), 212 (**CE-696**), and Naftogaz of Ukraine Annual Report 2016 (hereinafter "**2016 Annual Report**"), 2-3, 168 (**CE-366**).

[32] 2014 Annual Report, 64 (**CE-145**); Tr., 10:8-13.

[33] 2014 Annual Report, 74 (**CE-145**).

[34] AmSOC, ¶ 19.

[35] 2016 Annual Report, 90 (**CE-366**).

[36] By virtue of Special Permit No. 3907, 22 December 2010 (**CE-83**), Special Permit No. 4125, 5 April 2012 (**CE-109**), and Special Permit 4300, 17 January 2013 (**CE-125**); Claimants' Answers, ¶ 7.4; Tr., 10:16-17.

Public Joint Stock Company Krymgaz ("**Krymgaz**");[37] and (v) construction of new gas distribution pipelines.[38]

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[37] Pipeline Lease Agreement No. 14/1375 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 3 November 2003 (**CE-60**); Pipeline Lease Agreement No. 14/1178/04 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 15 December 2003 (**CE-62**); Pipeline Lease Agreement No. 14/1177/04 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 1 September 2004 (**CE-65**); Tr., 10:17-19.

[38] Construction Financing Agreement No. 100 and Account Reconciliation Report for Gas Pipeline Construction, 31 December 2013 (**CE-144**); Construction Financing Agreement No. 120 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 29 August 2012 (**CE-118**); Construction Financing Agreement No. 101 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 30 July 2012 (**CE-115**); Construction Financing Agreement No. 100 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 30 July 2012 (**CE-144**); Construction Financing Agreement No. 99 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 30 July 2012 (**CE-116**); Construction Financing Agreement No. 182 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 3 November 2011 (**CE-106**); Construction Financing Agreement No. 14/1709/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 12 September 2011 (**CE-103**); Construction Financing Agreement No. 14/1708/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 12 September 2011 (**CE-104**); Construction Financing Agreement No. 14/1707/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 12 September 2011 (**CE-105**); Construction Financing Agreement No. 14/1368/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 July 2011 (**CE-99**); Construction Financing Agreement No. 14/1367/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 July 2011 (**CE-100**); Construction Financing Agreement No. 14/1366/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 July 2011 (**CE-101**); Construction Financing Agreement No. 14/1365/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 July 2011 (**CE-102**); Construction Financing Agreement No. 14/1215/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 15 June 2011 (**CE-96**); Construction Financing Agreement No. 14/1214/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 15 June 2011 (**CE-97**); Construction Financing Agreement No. 14/385/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 February 2011 (**CE-86**); Construction Financing Agreement No. 14/387/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 February 2011 (**CE-87**); Construction Financing Agreement No. 14/386/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 February 2011 (**CE-88**); Construction Financing Agreement No. 14/388/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 February 2011 (**CE-89**); Construction Financing Agreement No. 14/384/11 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 25 February 2011 (**CE-90**); Construction Financing Agreement No. 14/913/09 Between NJSC Naftogaz, DDC Sevastopol City Administration, and Affiliated Enterprise Naftogazmerezhi, 24 September 2009 (**CE-75**); Construction Financing Agreement No. 14/223/10 Between NJSC Naftogaz, DDC Sevastopol City Administration, and Affiliated Enterprise Naftogazmerezhi, 11 March 2010 (**CE-79**); Construction Financing Agreement No. 14/1265/09 Between NJSC Naftogaz, OJSC Krymgazbud, and Affiliated Enterprise Naftogazmerezhi, 9 October 2009 (**CE-76**); Construction Financing Agreement No. 14/1264/09 Between NJSC Naftogaz, OJSC Krymgazbud, and Affiliated Enterprise Naftogazmerezhi, 9 October 2009 (**CE-77**); Construction Financing Agreement No. 14/1260/09 Between NJSC Naftogaz, Skalyste Village Council, and Affiliated Enterprise Naftogazmerezhi, 9 October 2009 (**CE-78**); Construction Financing Agreement No. 14/913/09 Between NJSC Naftogaz, DDC Sevastopol City Administration, and Affiliated Enterprise Naftogazmerezhi, 24 September 2009 (**CE-75**); Construction Financing Agreement No. 273 Between NJSC Naftogaz, OJSC Krymgazbud, and Affiliated Enterprise Naftogazmerezhi, 9 February 2010 (**CE-632**); Agency Agreement No. 24 Between NJSC Naftogaz and Krymgaz, 15 December 2005 (**CE-790**); Agency Agreement No. 11-761 Between NJSC Naftogaz and Ukrtransgaz, 27 September 2004 (**CE-791**); Agency Agreement No. 11-576 Between NJSC Naftogaz and Ukrtransgaz, 29 June 2004 (**CE-792**); Agency Agreement No. 11-1308 Between NJSC Naftogaz and Ukrtransgaz, 29 December 2002 (**CE-793**); Construction Financing Agreement No. 14/1212/11 Between NJSC Naftogaz and Chornomornaftogaz, 14 June 2011 (**CE-634**); Construction Financing Agreement No. 14/1213/11 Between NJSC Naftogaz and Chornomornaftogaz, 14 June 2011 (**CE-635**); Construction Financing Agreement No. 119 Between NJSC Naftogaz and Krymgaz, 29 August 2012 (**CE-637**).

71. NJSC Naftogaz also: (i) held ownership interests in gas pipelines used to transport gas that NJSC Naftogaz sold to residential consumers;[39] (ii) held ownership over 675 million cubic meters of gas in the Hlibovske underground storage facility;[40] (iii) held ownership over two offshore vessels;[41] (iv) held a 25 percent ownership in Krymgaz;[42] and (v) held a 25 percent, plus one share, interest in Public Joint Stock Company Sevastopolgaz ("**Sevastopolgaz**").[43]

2. ***Chornomornaftogaz's*** *Operations and Investments*

72. As NJSC Naftogaz's primary subsidiary in Crimea, Chornomornaftogaz maintained substantial operations in Crimea. Its operations consisted of, *inter alia*, onshore and offshore exploration and production of gas, condensate, and oil,[44] direct sales to industrial and residential customers,[45] direct sales of condensate and oil to refiners or trading companies,[46] operation of 854 kilometres of gas pipelines,[47] and gas storage.[48]

73. Chornomornaftogaz's investments in Crimea included: (i) 15 special permits for subsoil use;[49] (ii) equipment and infrastructure for exploration, development, and production of gas,

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[39] Pipeline Lease Agreement No. 14/1375 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 3 November 2003 (**CE-60**); Pipeline Lease Agreement No. 14/1178/04 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 15 December 2003 (**CE-62**); Pipeline Lease Agreement No. 14/1177/04 Between NJSC Naftogaz and Public Joint Stock Company Krymgaz, 1 September 2004 (**CE-65**); Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015 (**CE-353**).

[40] Chornomornaftogaz-NJSC Naftogaz Gas Storage Agreement No. 14293213, 15 April 2013 (**CE-129**); Claimants' Answers, ¶¶ 7.11-7.14; Tr., 10:19-21.

[41] Ship's Patent No. 03186 for "Olvia-1," 27 June 2001 (**CE-48**); General State Ships Registrar Inspection No. 019386 for Yacht 737, 5 April 2001 (**CE-44**); Classification Certificate for Yacht 737, undated (**CE-45**); Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015 (**CE-353**).

[42] Naftogaz Securities Account Statement as of 31 March 2014, 10 April 2014 (**CE-248**) (showing shareholdings in Krymgaz and Sevastopolgaz); SMIDA Database for Krymgaz as of 31 March 2017 (**CE-387**); Tr., 11:3.

[43] Naftogaz Securities Account Statement as of 31 March 2014, 10 April 2014 (**CE-248**) (showing shareholdings in Krymgaz and Sevastopolgaz); SMIDA Database for Krymgaz as of 31 March 2017 (**CE-387**); Tr., 11:3.

[44] Annual Report 2016, 97 (**CE-366**); Tr., 11:13-14.

[45] Annual Report 2014, 77 (**CE-145**).

[46] AmSOC, ¶ 21.

[47] Minutes No. 39-11 of the Meeting of the Central Inventory Commission of NJSC "Chornomornaftogaz" (2012) (**CE-107**); License for Transportation of Natural Gas No. 507432, 3 May 2011 (**CE-92**).

[48] License for Storage of Natural Gas No. 507431, 13 May 2011 (**CE-93**); Letter No. 04/1-768 from A. Shabaiev to V.P. Trikolich 24 February 2014 (**CE-153**).

[49] Special Permit No. 4478, 27 December 2013 (**CE-141**); Special Permit No. 5280, 13 January 2011 (**CE-84**); Special Permit No. 4991, 21 July 2009 (**CE-74**); Special Permit No. 3481, 21 January 2009 (**CE-72**); Special Permit No. 4594, 18 December 2007 (**CE-70**); Special Permit No. 2692, 29 December 2004 (**CE-66**); Special Permit No. 3293, 9 December 2003 (**CE-61**); Special Permit No. 2379, 12 August 2003 (**CE-57**); Special Permit No. 2378, 12 August 2003 (**CE-58**); Special Permit No. 2377, 12 August 2003 (**CE-59**); Special Permit No. 1632, 11 April 2011 (**CE-46**); Special Permit No. 2188, 24 March 2000 (**CE-40**); Special Permit No. 2113, 6 January 2000 (**CE-38**);

condensate, and oil, including wells, production platforms, and subsea pipelines;[50] (iii) the right to use Ukraine's gas distribution system in Crimea;[51] (iv) the right to operate the Hlibovske underground gas storage facility;[52] (v) four jack-up drilling rigs;[53] (vi) 22 supply vessels;[54] (vii) three helicopters;[55] (viii) exploration and production equipment;[56] and (ix) a 15.45 percent interest in Krymgaz.[57]

Special Permit No. 2112, 6 January 2000 (**CE-39**); Special Permit No. 2092, 24 December 1999 (**CE-37**); Tr., 11:17-18.

[50] Odeske Field Development Plan 2013 (Excerpt) (**CE-132**).

[51] License for Transportation of Natural Storage, Gas Methane No. 507432, 13 May 2011 (**CE-92**); Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, 4 February 1999 (**CE-32**); Russian Chernomorneftegaz Report for Gas Transport (March 2014) (**CE-161**); Tr., 11:18-21.

[52] Special Permit No. 2187, 24 March 2000 (**CE-326**); License for Storage of Natural Storage, Gas Methane No. 507431, 13 May 2011 (**CE-93)**; Letter No. 04/1-768 from A. Shabaiev to V.P. Trikolich, 24 February 2014 (**CE-153)**; Tr., 11:22.

[53] Reissued Ship's Patent No. 002656 for the "Pedro Hodovanets", 17 October 2014 (**CE-315**); Reissued Certificate of Ownership No. 003316 for the "Pedro Hodovanets", 17 October 2014 (**CE-316**); Reissued Ship's Patent No. 002657 for the "Ukraine", 17 October 2014 (**CE-317**); Reissued Certificate of Ownership No. 003317 for the "Ukraine", 17 October 2014 (**CE-318**); Reissued Ship's Patent No. 002626 for the "Tavrida", 1 September 2014 (**CE-281**); Reissued Certificate of Ownership No. 003527 for the "Tavrida", 1 September 2014 (**CE-282**); Reissued Ship's Patent No. 002641 for the "Sivash", 2 September 2014 (**CE-296**); Reissued Certificate of Ownership No. 003547 for the "Sivash", 2 September 2014 (**CE-297**).

[54] Reissued Ship's Patent No. 002646 for the "Fedor Uriupin", 1 September 2014 (**CE-283**): Reissued Ship's Patent No. 002645 for the "Mys Tarkhankut", 1 September 2014 (**CE-284**); Reissued Ship's Patent No. 002642 for the "Alaid", 2 September 2014 (**CE-298**); Reissued Ship's Patent No. 002640 for the "FS-645," September 2014 (**CE-299**); Reissued Ship's Patent No. 002639 for the "Chernomorsk", 2 September 2014 (**CE-300**); Reissued Ship's Patent No. 002640 for the "FS-645", 2 September 2014 (**CE-300**); Reissued Ship's Patent No. 002638 for the "Kaptain Bulgakov", 2 September 2014 (**CE-301**); Reissued Ship's Patent No. 002637 for the "Krepkii-1", 2 September 2014 (**CE-302**); Reissued Ship's Patent No. 002636 for the "Krepkii-2", 1 September 2014 (**CE-285**); Reissued Ship's Patent No. 002635 for the "Neptune-3", 1 September 2014 (**CE-286**); Reissued Ship's Patent No. 002634 for the "Gousan-5", 1 September 2014 (**CE-287**); Reissued Ship's Patent No. 002633 for the "Chornomorets-15", 1 September 2014 (**CE-288**); Reissued Ship's Patent No. 002632 for the "Skhval", 1 September 2014 (**CE-289**); Reissued Ship's Patent No. 002631 for the "Inya", 1 September 2014 (**CE-290**); Reissued Ship's Patent No. 002630 for the "Kalos Limen", 1 September 2014 (**CE-291**); Reissued Ship's Patent No. 002629 for the "Ocheretay", 1 September 2014 (**CE- 292**); Reissued Ship's Patent No. 002627 for the "Centaur", 1 September 2014 (**CE-293**); Reissued Certificate of Ownership No. 003546 for the "Naftogaz-68", 2 September 2014 (**CE-303)**; Reissued Certificate of Ownership No. 003303 for the "Yarylgach", 2 September 2014 (**CE-304**); Reissued Certificate of Ownership No. 003538 for the "Delfin", 1 September 2014 (**CE-294**); Reissued Certificate of Ownership No. 003545 for the "Briz", 2 September 2014 (**CE-305**); Reissued Certificate of Ownership No. 003548 for the "Kalkan", 2 September 2014 (**CE-306**); Reissued Certificate of Ownership No. 003536 for the "Don", 1 September 2014 (**CE-295**).

[55] Certificate of Aircraft Registration No. 3811, 24 January 2013 (**CE-126**); Certificate of Aircraft Registration No. 3489, 16 August 2012 (**CE-117**); Certificate of Aircraft Registration No. 3666, 27 April 2009 (**CE-73).**

[56] Excerpt from BDO Accounting Report for Chornomornaftogaz, 13 October 2013 (**CE-135**).

[57] Chornomornaftogaz Securities Account Statement, 31 March 2014 (**CE-388**); SMIDA Database for Krymgaz as of 31 March 2017, 31 March 2017 (**CE-387**).

3. *Ukrtransgaz's* *Operations and Investments*

74. Ukrtransgaz is a subsidiary of NJSC Naftogaz that is engaged in gas-transmission and gas storage, which for these purposes operates 38,600 kilometers of pipeline as well as underground storage facilities.[58] In Crimea, Ukrtransgaz operated a 429-kilometer pipeline.[59] Through its sub-branch office in Feodosia, Ukrtransgaz managed the daily flow of gas through the pipelines, and stored maintenance equipment, emergency equipment, excavators, cranes, trucks, cars, and other vehicles. [60]

75. Ukrtransgaz's investments in Crimea consisted of: (i) the right to use the Ukrainian State's gas distribution system, including pipelines, fill gas inventory within those pipelines, and associated equipment;[61] and (ii) vehicles to maintain and build new sections of those pipelines.[62] In addition, Ukrtransgaz also owned a Dolphin training facility and the Shtormove health resort.[63]

4. *Likvo's* *Operations and Investments*

76. With an office in the city of Chornomorske, Likvo is NJSC Naftogaz's subsidiary[64] that provides emergency services to NJSC Naftogaz's oil and gas operations in Crimea.[65] To fulfil these, Likvo maintained investments in specialized firefighting equipment, materials for use in emergency response operations and pipeline, vehicles for emergency response situations, and gas compressors.[66]

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[58] 2016 Annual Report, 174 (**CE-366**); 2014 Annual Report, 78 (**CE-145**); Charter of PJSC "Ukrtransgaz," Article 1.9, 25 December 2012 (**CE-122**); Tr., 12:5-8.

[59] Witness Statement of Petr F. Slesar (hereinafter "**WS Slesar**"), ¶ 4; Agreement No 19/2 between Naftogaz and Ukrtransgaz, 17 June 1999 (**CE-34**).

[60] WS Slesar, ¶¶ 3-4.

[61] Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, 4 February 1999 (**CE-32**); License No. 507432 for Pipeline Transportation of Natural Gas, Oil Gas, and Coalbed Methane, 31 May 2011 **(CE-92)**; Summary of Ukrtransgaz Gas Balances in Crimea (**CE-531**).

[62] Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015 (**CE-353**).

[63] Certificate of Ownership of the Shtormove Resort, 9 September 1999 (**CE-36**). *See also* Tr., 12:9-12.

[64] Charter of Subsidiary Company "Paramilitary (Gas) Emergency Rescue Services 'Likvo' of Naftogaz of Ukraine", 9 July 2012 (**CE-112**).

[65] Articles of Association of Likvo (Restated), 23 February 2016 (**CE-365**); Witness Statement of Danylo V. Rymchuk (hereinafter "**WS Rymchuk**"), ¶¶ 3-4; Tr., 12:16-18.

[66] Letter No. 1/297 of D.V. Rymchuk to A.A. Misinev, 5 June 2015 (**CE-347**). *See also* Tr., 12:19-23.

5. ***Ukrgasvydobuvannya's*** *Operations and Investments*

77. Being the largest producer of gas, and as one of the largest producers of oil, gas condensate, and liquefied petroleum gas in Ukraine,[67] Ukrgasvydibuvannya's primary activity in Crimea in February 2014 involved its participation in a joint activity agreement (the "**JAA**") with Chornomornaftogaz for the development of the Odeske, Bezimenne, Ryftova, and East Kazantypske gas fields in the Black Sea and the Sea of Azov.[68] Ukrgasvydobuvannya likewise maintained a health resort, the Pivdennyi resort,[69] as well as a "luxury motorboat," the "Bavaria."[70]

6. ***Ukrtransnafta*** *Operations and Investments*

78. Although not engaged in operations involving the transport and storage of crude oil in Crimea as of February 2014, Ukrtransnafta[71] owned a resort complex in Crimea that was under construction and was more than 50 percent complete in February 2014.[72]

7. ***Gaz Ukraiiny*** *Operations and Investments*

79. Gaz Ukrainny[73] engaged in the collection of debts due to NJSC Naftogaz from Crimea and held assets, including a tractor, an excavator, transport vehicles, and office equipment.[74]

80. The assets listed above will be collectively referred to as the "**Seized Assets**".

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[67] Charter of PJSC "Ukrgasvydobuvannya," 27 December 2012 (**CE-123**); 2014 Annual Report, 87 (**CE-145**).

[68] Agreement No. 1 on the Joint Venture in the Sea of Azov Between Chornomornaftogaz and Ukrgasvydobuvannya, 24 October 2000 (**CE-43**); Tr., 13:1-4.

[69] Excerpt from Real Estate Property Register recording property rights with respect to the unfinished resort in the Autonomous Republic of Crimea, 28 November 2012 (**CE-121**); Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015 (**CE-353**).

[70] Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015 (**CE-353**).

[71] Charter of PJSC "Ukrtransnafta," 14 June 2011 (**CE-95**); Cabinet of Ministers of Ukraine, Decree No. 256-p, 23 June 2001 (**CE-47**).

[72] Excerpt from Real Estate Property Register Recording Property Rights Unfinished Resort in the Autonomous Republic of Crimea, 28 November 2012 (**CE-121**); State Committee of Ukraine for Land Resources, Excerpt from Technical Documentation for Determining Normative Cash Value of a Land Parcel, T-0001, 19 May 2010 (**CE-633**).

[73] Charter of "Gaz Ukraiiny" Subsidiary company of Naftogaz of Ukraine, 25 January 2011 (**CE-85**).

[74] Agreement No. 17/10-100 with the Municipal Public Utility Enterprise for Heat Networks of the City of Armiansk, as Amended 18 March 2010 (**CE-80**); Agreement No. 17-17/12-443 with N.V. Kolnoguz, 1 October 2012 (**CE-119**).

PART 5 - THE EVENTS IN THE CRIMEAN PENINSULA OF FEBRUARY-MARCH 2014

81. The seizure of the Claimants' assets arises out of the events of February-March 2014 that culminated in the accession of the Crimean Peninsula to the Russian Federation. The Claimants provided a detailed factual narrative of these events in their Amended Statement of Claim supported by extensive documentation.[75] Based on the information, including media reports submitted by the Claimants, these events may be summarized as follows.

82. Between the months of November 2013 and February 2014, civil protests in Ukraine, called the "Euromaidan Revolution," advocated "Ukraine's increased integration into Europe" and an end to the rule of then-President Viktor Yanukovych. The violent dispersal of the protesters led by the "Berkut," President Yanukovych's special forces, caused a significant number of deaths.[76] Ultimately, the Euromaidan Revolution resulted in President Yanukovych's removal from power on 22 February 2014.[77]

83. On 14 February 2014, a week before the ouster of President Yanukovych, one of President Vladimir Putin's advisers, Vladislav Surkov, met in Crimea with Crimean Prime Minister Anatoly Mogilev, Crimean Parliament Speaker Vladimir Konstantinov, and Sevastopol Governor Vladimir Yatsuba to discuss the eventual Russian takeover of Crimea.[78]

84. On 19-20 February 2014, Speaker Konstantinov, along with other officials of the Crimean Parliament met in Moscow with top Russian officials to discuss the next course of action in furtherance of Russia's takeover of Crimea.[79] Following this, Speaker Konstantinov, on 20 February 2014, "publicly announced the possibility that Crimea would 'secede' from Ukraine."[80]

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[75] *See* AmSOC, ¶¶ 34-107. *See also* Claimants' Opening Presentation, slides 33-76.

[76] Office of the United Nations High Commissioner for Human Rights, *Accountability for Killings in Ukraine from January 2014 to May 2016*, 8, 14 July 2016 (**CE-371**).

[77] BBC, 'Ukraine Crisis: Timeline' 14 November 2014 (**CE-323**).

[78] Claimants' Answers, ¶ 44.15, *referring to* The Moscow Times, 'Will Putin Seize Crimea' 23 February 2014 (**CE-152**); Yaroslav Lukov, 'Crimea: Next Flashpoint in Ukraine's Crisis' *BBC News*, 24 February 2014 (**CE-154**).

[79] Claimants' Answers, ¶ 44.16, *referring to* Taras Berezovets, *Annexation: Island Crimea, Chronicles of a Hybrid War* (2015) 40 (**CE-699**).

[80] Claimants' Answers, ¶ 44.16, *referring to* Interfax, 'The Speaker of Crimea Parliament: Crimea may secede from Ukraine if Ukraine breaks apart' 20 February 2014 (**CE-150**).

85. On 20 February 2014, the Russian Federation launched a military operation to seize Crimea.[81] As would later be reported, Russian Minister of Defense Sergey Shoigu awarded medals to members of the Russian Armed Forces who participated in the invasion of Crimea.[82] President Vladimir Putin would later on acknowledge that, on the night of 23-24 February 2014, he held an emergency meeting with the leaders of the Russian Ministry of Defense and the Russian Special Forces to rescue President Yanukovych.[83] By the end of the meeting, President Putin instructed the attendees to "begin the work to bring Crimea back into Russia."[84]

86. On 24 February 2014, Russian paratroopers landed in Crimea.[85] The paratroopers "wore green uniforms with the camouflage pattern of the uniforms of the Russian Armed Force," although their uniforms bore no insignia.[86] These men themselves, and President Putin, would later on acknowledge that they were of Russian origin.[87] Around the same time, Mr. Oleg Belaventsev, an envoy of President Putin, arrived in Crimea to coordinate the secession and annexation process.[88]

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[81] BBC News, 'Putin Reveals Secrets of Russia's Crimea Takeover Plot' 9 March 2015 (**CE-339**) (hereinafter "**Putin Reveals Secrets**").

[82] Free Russia Foundation, *Putin. War. An Independent Expert Report. Based on Materials from Boris Nemtsov* (2015) 14 (**CE-345**) (hereinafter "**Nemtsov Report**"). *See* AmSOC, ¶ 41, *stating* that the medals read: "[f]or the Return of Crimea 20 February 2014-18 March 2014"; ¶ 41 also explains that 20 February 2014 represents the day on which the invasion began and 18 March 2014 represents the day on which Russia purported to annex Crimea into the Russian Federation; Tr., 17:22-18:10.

[83] Putin Reveals Secrets (**CE-339**).

[84] AmSOC, ¶ 42, *referring to* Radio Free Europe/Radio Liberty, 'News Analysis: The Plot To Seize Crimea Putin Reveals Secrets of Russia's Crimea Takeover Plot' 11 March 2015 (**CE-340**); Tr., 18:14-18.

[85] Nemtsov Report, 13 (**CE-345**).

[86] AmSOC, ¶ 43, *referring to* Nemtsov Report, 13 (**CE-345**); BBC News, 'Little Green Men" or "Russian invaders?' 11 March 2014 (**CE-181**). *See also* Claimants' Opening Presentation, slide 38.

[87] Alan Taylor, 'Believed to Be Russian Soldiers' *The Atlantic*, 11 March 2014 (**CE-346**) (noting "direct interviews with several soldiers" had "identified the troops as Russian." and providing photographic evidence of same); Meduza, 'I Serve the Russian Federation!' Soldiers Deployed During the Annexation of Crimea Speak' 16 March 2015 (**CE-341**); Channel One, Rossiya-1, and Rossiya-24, 'Direct Line with Vladimir Putin, President of Russia' 17 April 2014 (**CE-256**) (President Putin acknowledging: "Of course, the Russian servicemen did back the Crimean self-defense forces...[O]ne cannot apply harsh epithets to the people who have made a substantial, if not the decisive, contribution to enabling the people of Crimea to express their will. They are our servicemen.").

[88] Claimants' Answers, ¶ 44.19, *referring to* Vedomosti, 'Interview with Rustam Temirgaliev' 16 March 2015 (**CE-342-Am**) (hereinafter "**Interview with Temirgaliev**"); Oleg Belaventsev, 'Where the Motherland Orders…' Eto Kavkaz (TASS), 28 July 2017 (**CE-750**) (hereinafter "**Where the Motherland Orders**"); Mikhail Zygar, The Kremlin's Men: Inside the Court of Vladimir Putin (2016) 750 (**CE-719**).

87. On 27 February 2014, armed men in fatigues without identification were reported to have taken control of the building of the Crimean Parliament in Simferopol[89] and hoisted a Russian flag above that building.[90] On the same day, Russian troops took control over the civilian airport in Simferopol and the military airport at Sevastopol.[91] The Russian Federation would later declare 27 February as "**Special Operations Forces Day**."[92]

88. Also on 27 February 2014, Sergey Aksyonov, a "pro-Russian politician", was installed as the new Prime Minister of the Autonomous Republic of Crimea.[93] The Crimean Parliament "purported to vote to hold a referendum on the independence of Crimea," behind closed doors where journalists were excluded and Members of the Crimean Parliament had their cell phones confiscated.[94]

89. On 28 February 2014, Mr. Sergei Glazyev, an advisor to President Putin, told Mr. Konstantin Zatulin, a senior Russian politician, that the Respondent was "ready to provide specialists…in legal matters to have them draft resolutions and laws [in Crimea]."[95]

90. On 6 March 2014, Crimean Parliament voted for Crimea "[t]o become part of the Russian Federation as a Constituent Entity" and scheduled the Referendum to be held on 16 March 2014.[96] According to Deputy Crimean Prime Minister Rustam Temirgaliev, Russian envoy Mr. Belaventsev (who would later on become President Putin's permanent representative in

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[89] Michael Kofman, Katya Migacheva, Brian Nichiporuk, Andrew Radin, Olesya Tkacheva and Jenny Oberholtzer, *Lessons from Russia's Operations in Crimea and Eastern Ukraine* (RAND Corporation, 2017) 8 (**CE-378**) (hereinafter "**Lessons from Russia's Operations**").

[90] The Guardian, 'Crimean Parliament Seized by Unknown Pro-Russian Gunmen' 27 February 2014 (**CE-155**); Interview with Temirgaliev (**CE-342**).

[91] Lessons from Russia's Operations, 9 (**CE-378**); Radio Free Europe/Radio Liberty, 'Gunmen Blockade Crimean Airports; Parliament Urges Respect For Sovereignty' 28 February 2014 (**CE-159**).

[92] President of Russian Federation, Decree No. 103, 26 February 2015 (**CE-336**).

[93] AmSOC, ¶ 45, *referring to* First Paliashvili Report, ¶¶ 117-123.

[94] AmSOC, ¶ 45, *referring to* Autonomous Republic of Crimea, Resolution No. 1630-6/14, 27 February 2014 (**CE-157**); The Prosecutor of the International Criminal Court, Report on Preliminary Examination Activities, ¶ 155 (2016) (**CE-375**); Alissa de Carbonnel, 'How the Separatists Delivered Crimea to Moscow' *Reuters*, 12 March 2014 (**CE-185**).

[95] Claimants' Answers, ¶ 44.23, *referring to* Censor.Net, 'Chronicles of the Seizure of Crimea. Wire-tapping of Putin's Advisor' 28 February 2014 (**CE-764**).

[96] Autonomous Republic of Crimea, Resolution No. 1702-6/14, Arts. 1-2, 6 March 2014 (**CE-176**). That day, the City Council of Sevastopol purported to vote in favour of Sevastopol also becoming part of the Russian Federation and declared its support for the referendum approved by the Crimean Parliament. *See* Sevastopol City Council, Decision No. 7151, ¶¶ 1-2, 6 March 2014 (**CE-177**).

Crimea), played a significant role in the scheduling of the referendum as well as in the integration of Crimea into Russia, a statement that Mr. Belaventsev would later confirm.[97] Mr. Glazyev, meanwhile, provided instructions to Prime Minister Aksyonov on the conduct of the referendum, including formulation of the questions on the ballot "to ensure that there was no viable option to preserve Crimea's status within Ukraine."[98] Deputy Crimean Prime Minister Temirgaliev also confirmed in an interview that the Crimean authorities "naturally...consulted [with the relevant Russian institutions]" on the Referendum and that the whole operation was "carefully planned…by someone here, in Moscow, in the Kremlin."[99]

91. **On 15 March 2014, the Ukrainian Parliament stripped the Crimean Parliament of its powers.**[100] Measures subsequently adopted by the Crimean Parliament were without legal authority or legal effect. Authority was restored only when legislative powers were conferred by the Russian Federation, effective 18 March 2014.

92. On 16 March 2014, during the Referendum, voters in Crimea were asked to choose between supporting (i) the unification of Crimea with Russia as a part of the Russian Federation or (ii) *de facto* independence from the rest of Ukraine in the form of restoring Crimea's 1992 Constitution and the status of Crimea in that constitution.[101] There was no option to vote for Crimea to remain within Ukraine.

93. On 17 March 2014, the Crimean State (through its purported Parliament of the "**Republic of Crimea**") adopted Resolution No. 1745-6/14 (the "**Independence Resolution**"), in which *inter alia*: (i) Crimea purported to proclaim itself an independent sovereign State – the "Republic of Crimea, in which the city of Sevastopol has a special status" without leave of Ukraine; (ii) proposed to the Russian Federation that Russia integrate Crimea as "a new Constituent Entity of

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[97] Interview with Temirgaliev (**CE-342-Am**); Claimants' Answers, ¶ 44.20; Claimants' Answers, ¶ 44.25, *referring to* Where the Motherland Orders (**CE-750**).

[98] Claimants' Answers, ¶ 44.26, *referring to* Financial Times, 'Ukraine Gathers Evidence to Try to Force Russia to Court' 12 September 2016 (**CE-721**), Meduza, 'Kiev Releases Audio Tapes It Says Prove Russia's Masterminding of Separatism in Crimea and Eastern Ukraine' 22 August 2016 (**CE-720**).

[99] Interview with Temirgaliev (**CE-342-Am**).

[100] First Paliashvili Report, ¶ 132.

[101] U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014* (25 June 2015) 66 (**CE-349**); Noah Sneider, '2 Choices in Crimea Referendum but Neither is "No,"' *The New York Times*, 14 March 2014 (**CE-193**).

the Russian Federation with the status of a republic"; (iii) declared that "State property of Ukraine, located in the territory of the Republic of Crimea...shall become state property of the Republic of Crimea"; and (iv) proclaimed that "[a]ll institutions, enterprises and other organizations established by or with the participation of Ukraine in Crimea shall become institutions, enterprises and other organizations established by the Republic of Crimea."[102]

94. On 18 March 2014, a treaty was made between the Russian Federation and the Republic of Crimea on the *Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities within the Russian Federation* (the "**Annexation Treaty**"). The Treaty was signed in Moscow.[103] The Treaty purported to create two entities called the Federal City of Sevastopol and the Republic of Crimea which were "deemed to have been admitted to the Russian Federation from the date of signing of this Treaty," on 18 March 2014,[104] and provided for a transitional period until 1 January 2015 in order to integrate legal rights and duties of the Republic of Crimea into the Russian legal system.[105]

95. On 20 March 2014, the State Duma of the Russian Federation approved the Annexation Treaty, followed by adoption by the Federation Council on the following day.[106]

96. On 21 March 2014, the Russian Parliament enacted:

(a) a federal law ratifying the Annexation Treaty;[107]

(b) a constitutional law "On the Admission of the Republic of Crimea to the Russian Federation, and the Formation of New Constituent Entities within the Russian

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[102] Autonomous Republic of Crimea, Resolution No. 1745-6/14, Art. 1, 17 March 2014 (**CE-199**).

[103] Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, 18 March 2014 (**CE-224-Am**) (hereinafter "**Annexation Treaty**").

[104] Annexation Treaty, Art. 1.1 (**CE-224-Am**). *See* First Stephan Report, particularly ¶¶ 45, 51-54, which states that: "[o]n 18 March 2014, upon signing the Annexation Treaty, President Putin requested a ruling on the Annexation Treaty's constitutionality from the Constitutional Court of the Russian Federation. The next day, the Constitutional Court issued a judgment recognizing the Annexation Treaty as consistent with the Russian Constitution." Professor Stephan refers to the Constitutional Court of the Russian Federation, Resolution No. 6-P, Art. 1, 19 March 2014 (**CE-225**).

[105] First Stephan Report, ¶ 48.

[106] Russian Federation, Federal Law No. 36-FZ, 21 March 2014 (**CE-229**).

[107] Russian Federation, Federal Law No. 36-FZ, 21 March 2014 (**CE-229**).

Federation – the Republic of Crimea and the Federal City of Sevastopol" (the "**Law on Admission**").[108]

97. The federal law ratifying the Annexation Treaty was made effective as of 18 March 2014, being the date of the Annexation Treaty.[109] The Law on Admission similarly provided for a transitional period[110] during which Ukrainian entities could continue to operate in Crimea until their legal status could be determined under Russian law, and recognized the continuing validity of "all documents issued by state and other official bodies of Ukraine…including records of property rights [and] rights of use".[111]

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108 Russian Federation, Federal Constitutional Law No. 6-FKZ, 21 March 2014 (**CE-230**).

109 First Stephan Report, ¶¶ 45, 56. Article 1(3) of the Law on Admission provided that "the Republic of Crimea [including Sevastopol] shall be considered admitted to the Russian Federation from the date of signing of the Treaty between the Russian Federation and the Republic of Crimea on the Admission of the Republic of Crimea to the Russian Federation and the Formation of New Constituent Entities within the Russian Federation." Accordingly, the annexation was made retroactive to 18 March 2014.

110 First Stephan Report, ¶ 56.

111 First Stephan Report, ¶¶ 57-58. The Law on Admission provided in relevant part as follows:

> *Article 1. Grounds and timing of admission of the Republic of Crimea to the Russian Federation*
>
> 1. The Republic or Crimea shall be admitted to the Russian Federation, in accordance with the Constitution of the Russian Federation and Article 4 of the Federal Constitutional Law of 17 December 2001 No. 6-FKZ "On the process of formation and admission to the Russian Federation of a New Constituent Entity of the Russian Federation";
>
> 2. The grounds for admitting the Republic or Crimea to the Russian Federation are:
>
> 1) The results of the Crimean referendum conducted on 16 March 2014 in the Autonomous Republic of Crimea and the city of Sevastopol, where the issue of reunification of Crimea with Russia as a constituent entity of the Russian Federation was endorsed;
>
> 2) The Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol, and also the Treaty between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation;
>
> 3) The proposal by the Republic of Crimea and the City with special status of Sevastopol on the admission of the Republic of Crimea, including the City with special status of Sevastopol, to the Russian Federation;
>
> 4) This Federal Constitutional law.
>
> 3. The Republic of Crimea shall be considered admitted to the Russian Federation from the date of signing of the Treaty between the Russian Federation and the Republic of Crimea on the Admission the Republic of Crimea to the Russian Federation and the Formation of New Constituent Entities within the Russian Federation.
>
> *Article 2. Formation of new constituent entities within the Russian Federation, their names and status*
>
> 1. From the date of admission of the Republic or Crimea to the Russian Federation, two new constituent entities shall be formed: the Republic of Crimea and the federal city of Sevastopol.
>
> 2. The names of the new constituent entities of the Russian Federation – the Republic of Crimea and the federal city of Sevastopol – are entitled to be included in Part I, Article 65 of the Constitution of the Russian Federation.
>
> 3. The new constituent entities of the Russian Federation shall have the status of a republic and a federal city, respectively.

PART 6 - THE SEIZURE OF THE CLAIMANTS' ASSETS

98. The Claimants submit that their investments were seized through a "well-planned scheme"[112] of the Russian Federation acting together with complicit Crimean authorities. According to the Claimants, the following events led to the taking of their investments.

99. On 3 March 2014, Crimean Prime Minister Aksyonov issued Order No. 66-rp, naming Andrey Ilyin as the new Chairman of Chornomornaftogaz in place of Sergiy Holovin.[113]

100. On 6 March 2014, Crimean Deputy Prime Minister Temirgaliev announced that "[a]ll Ukrainian state-owned enterprises will be nationalized and transferred to ownership of the Autonomous Republic of Crimea".[114]

101. On 10 March 2014, Crimean Prime Minister Aksyonov told Russian News Agency RIA Novosti that "[e]nergy and mineral resources belong to the people of the Autonomous Republic [of Crimea]. All state-owned enterprises in the energy sector will become property of the Autonomous Republic."[115]

102. On 12 March 2014, Crimean Deputy Prime Minister Temirgaliev "publicly identified Chornomornaftogaz and its assets as targets for nationalization," when he stated (referring to Chornomornaftogaz's Russian name, Chernomorneftegaz):

> In the nearest future, the Supreme Council of Crimea will make a decision on the transfer of number of facilities previously owned by Ukraine and located on the territory of Crimea. We are talking about the company

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4. The official languages of the Republic of Crimea are Russian, Ukrainian and Crimean Tatar.
[…]
Article 24. Entry of this Federal Constitutional Law into effect
This Federal Constitutional Law shall become effective as of the effective date of the Treaty between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and the Formation of New Constituent Entities within the Russian Federation.

[112] AmSOC, ¶ 47.

[113] Chairman of the Verkhovna of the Autonomous Republic of Crimea, Order No. 66-rp, 3 March 2014 (**CE-164**). *See also* Ukrainian News, 'Aksenov Appoints Ilyin as the Head of Chernomorneftegaz' 4 March 2014 (**CE-165**).

[114] Interfax-Ukraine, 'Ukrainian Property will be Nationalized, says First Deputy Chairman of Council of Ministers' 6 March 2014 (**CE-178**).

[115] Ria Novosti, 'Interview with Sergey Aksyonov' 10 March 2014 (**CE-180**).

> Chernomorneftegaz and all its assets, including the production derricks located far from the Crimean coast. This company will be nationalized.[116]

103. On 13 March 2014, Crimean Deputy Prime Minister Temirgaliev again made public statements on the Crimean authorities' plan to nationalize Naftogaz's investments, when he told Russian state-owned television Channel One that the nationalization plans referred "in particular [to] the production company [Chornomornaftogaz] which for many years has exploited Crimean mineral resources".[117] On the same day, Speaker Konstantinov declared that oil and gas deposits in the Black Sea and the Sea of Azov, including those fields wherein Chornomornaftogaz had exploration and production rights, "will be fully owned by the Republic of Crimea."[118] Speaker Konstantinov stated that Crimean authorities were receiving direction from and coordinating with Russian authorities.[119]

104. In a CNN report on 13 March 2014, Crimean Deputy Prime Minister Temirgaliev was quoted as stating that there were "consultations" as to whether Chornomornaftogaz "will remain the property of the Republic of Crimea or will become part of Gazprom."[120]

105. Also on 13 March 2014, Crimean Prime Minister Aksyonov, through Order No. 110-rp, installed a new chairman of Chornomornaftogaz, Nikolay Khartinov, to replace Mr. Ilyin.[121] Mr. Ilyin and Crimean Deputy Prime Minister Temirgaliev, accompanied by armed men, would later that day appear at Chornomornaftogaz's headquarters in Simeferopol to implement the order.[122]

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[116] AmSOC, ¶ 54, *referring to* Interfax Ukraine, 'Chernomorneftegaz, Ukrzaliznitsya Facilities in Crimea Will Be Nationalized' 12 March 2014 (**CE-186**).

[117] Channel One Russia, 'Journalists from Different Countries have Already Arrived in Crimea to Cover the Referendum' 13 March 2014 (**CE-187**).

[118] RIA Novosti, 'Speaker of the Supreme Council of Crimea, "Ukraine is the Sinking Titanic. Crimea is sailing away from it."' 13 March 2014 (**CE-190**) (hereinafter "**Ukraine – Sinking Titanic**").

[119] Ukraine – Sinking Titanic (**CE-190**).

[120] AmSOC, ¶ 60, *referring to* CNN, 'As Russian Troops Stage Drills Nearby, Ukraine Leader Says Peace is Still Possible' 13 March 2014 (**CE-188**).

[121] Chairman of the Council of Ministers of the Autonomous Republic of Crimea, Order No. 110-rp, 13 March 2014 (**CE-189**).

[122] Inna Koval, 'How "Little Green Men" Presented Chornomornaftogaz to Gazprom' *Forbes Ukraine*, 17 March 2014 (**CE-213**) (hereinafter "**Little Green Men**").

106. On 14 March 2014, Crimean Deputy Prime Minister Temirgaliev again made a public statement that "[a]fter nationalizing [Chornomornaftogaz], we will publicly decide, if there is a major investor like Gazprom or others, to do this (privatization) under an open tender."[123]

107. On 15 March 2014, as earlier noted, the Ukrainian Parliament stripped the Crimean Parliament of all lawful authority.

108. On 17 March 2014, the Crimean Parliament, now denuded of any constitutional authority nevertheless issued Resolution No. 1758-6/14 (the "**Nationalization Resolution**").[124] The Nationalization Resolution purported, *inter alia*, to expropriate: (i) Chornomornaftogaz's 15 special permits for subsoil use;[125] (ii) Chornomornaftogaz's right to use Ukraine's gas pipeline in Crimea;[126] (iii) Chornomornaftogaz's right to operate the Hlibovske underground gas storage facility;[127] (iv) Ukrtransgaz's right to use Ukraine's gas pipeline system in Crimea;[128] and (v) the movable and immovable properties of both Chornomornaftogaz and Ukrtransgaz that are located in the territory of the Republic of Crimea, its continental shelf and exclusive maritime zone.[129] Further, Ukrgasvydobuvannya's rights under its JAA with Chornomornaftogaz were rendered "worthless," as the Nationalization Resolution expropriated Chornomornaftogaz's permits to explore the Odeske, Bezimenne, Ryftova, and East Kazantypske gas fields in the Black Sea and the Sea of Azov fields under the JAA.[130]

109. The **Nationalization Resolution** of 17 March 2014 also purported to authorize the Council of Ministers of the Republic of Crimea to form a Republic of Crimea-owned enterprise, called Crimean Republican Enterprise 'Chernomorneftegaz,' to which Chornomornaftogaz's and Ukrtransgaz's properties were to be transferred,[131] and which would conduct business in

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[123] Ekonomichna Pravda, 'Crimean Authorities Plan to Privatize Chornomornaftogaz' 14 March 2014 (**CE-191**) (hereinafter "**Plan to Privatize Chornomornaftogaz**").
[124] State Council of the Republic of Crimea, Resolution No. 1758-6/14, 17 March 2014 (**CE-202**).
[125] Claimants' Answers, ¶ 10.5.
[126] Claimants' Answers, ¶ 10.5.
[127] Claimants' Answers, ¶ 10.5.
[128] Claimants' Answers, ¶ 10.5.
[129] State Council of the Republic of Crimea, Resolution No. 1758-6/14, Art. 1, 17 March 2014 (**CE-202**). Claimants' Answers, ¶ 10.8.
[130] Claimants' Answers, ¶ 10.13.
[131] State Council of the Republic of Crimea, Resolution No. 1758-6/14, Art. 4, 17 March 2014 (**CE-202**); Council of Ministers of the Republic of Crimea, Order No. 165-r, 17 March 2014 (**CE-204**). *See* Claimants' Answers, ¶ 8.19,

accordance with and based on the permits already issued to Chornomornaftogaz.[132] On the same day, Crimean Deputy Prime Minister Temirgaliev told RT, the Russian Television network, that "Chernomorneftegaz will become part of the powerful Russian energy complex."[133] Also on 17 March 2014, the Republic of Crimea's Ministry of Fuel and Energy issued Order No. 1, approving the charter of the Russian 'Chernomorneftegaz', and appointed Mr. Khartinov as its General Manager.[134]

110. On 18 March 2014, armed men arrived at the offices of Chornomornaftogaz in Simferopol.[135]

111. On 19 March 2014, Gazprom personnel arrived at Chornomornaftogaz's offices.[136] According to Vitaly Ivanyshyn, the then Head of Chornomornaftogaz's Drilling Department, these Gazprom personnel tried to convince them to remain in Crimea as employees of the Russian Chernomorneftegaz.[137]

112. On 20 March 2014, the Ministry of Fuel and Energy, through Order No. 3, assigned Chornomornaftogaz's and Ukrtransgaz's properties to the Russian Chernomorneftegaz.[138]

113. On or about 20 March 2014, Ukrtransgaz's convoy of vehicles, including cranes, excavators, and trucks that were on the way out to continental Ukraine from Crimea, was intercepted by armed men and forced into a police impound lot.[139]

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which provides that "Crimean Republic Enterprise," or the Russian Chernomorneftegaz, later changed its name to "State Unitary Enterprise of the Republic of Crimea 'Chernomorneftegaz '" on 25 November 2014.

[132] Claimants' Answers, ¶ 8.17, *referring to* State Council of the Republic of Crimea, Resolution No. 1758-6/14, Art. 5, 17 March 2014 (**CE-202**).

[133] RT, 'Exclusive Interview: Rustam Temirgaliev' 18 March 2014 (Russian transcription and English translation of video interview taped 17 March 2014, in which Temirgaliev refers to "yesterday's" – *i.e.*, 16 March 2014 – referendum) (**CE-223**).

[134] Ministry of Fuel and Energy of the Republic of Crimea, Order No. 1, ¶ 2, 17 March 2014 (**CE-203**); Little Green Men (**CE-213**).

[135] Witness Statement of Vitaly Y. Ivanyshyn (hereinafter "**WS Ivanyshyn**"), ¶ 5.

[136] WS Ivanyshyn, ¶¶ 6-10.

[137] WS Ivanyshyn, ¶¶ 6-10.

[138] First Stephan Report, ¶¶ 85-86, *discussing* Ministry of Fuel and Energy of the Republic of Crimea, Order No. 3, Art. 1, 20 March 2014 (**CE-227**).

[139] WS Slesar, ¶¶ 7-9.

114. On 26 March 2014, the Ministry of Fuel and Energy transferred the nationalized properties of Chornomornaftogaz and Ukrtransgaz to the Russian Chernomorneftegaz, and tasked the latter with the "operational management" of the property.[140]

115. On 27 March 2014, Crimean Deputy Prime Minister Temirgaliev announced that the Russian Chernomorneftegaz would be sold through an "open tender" to major investors, like Gazprom.[141] Around the same time, a "female Gazprom executive arrived to oversee the Procurement Department's [of Chornomornaftogaz in Crimea] transition to the Russian Chernomorneftegaz."[142]

116. Also on 27 March 2014, military personnel on board a "GAZ Tigr, a troop-transport vehicle in regular use by the Russian Armed Forces" arrived in the Chornomornaftogaz offices in Simferopol.[143]

117. On 29 March 2014, Chornomornaftogaz employees on board a motor boat headed for an offshore platform in the Odeske gas field in the Black Sea were intercepted by Russian troops.[144] The troops told the Chornomornaftogaz employees that they were members of the Pskov Airborne Division of the Russian Armed Forces and that their mission was to protect the platform from the Ukrainian State Security Service.[145]

118. On or about 30 March 2014, Ukrtransgaz's convoy of vehicles that was intercepted by armed men on 20 March 2014 returned back to the Ukrtransgaz office in Feodosia.[146]

119. Around late March to early April 2014, officers of the Russian Chernomorneftegaz issued an ultimatum to Crimea-based employees of Chornomornaftogaz and Ukrtransgaz for them to either resign from the Ukrainian companies and join the Russian Chernomorneftegaz or be fired.[147]

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[140] Statement of Transfer and Acceptance of the Property Owned by the Republic of Crimea, 26 March 2014 (**CE-233**).

[141] Plan to Privatize Chornomornaftogaz (**CE-191**); RBC, 'Crimean Authorities Have Decided on the Date of the Auction for Chernomorneftegaz' 27 March 2014 (**CE-236**).

[142] AmSOC, ¶ 79, *referring to* Witness Statement of Anastasia M. Tsybulska (hereinafter "**WS Tsybulska**"), ¶ 5.

[143] AmSOC, ¶ 80, *referring to* WS Tsybulska, ¶¶ 3-4.

[144] Witness Statement of Svetlana T. Nezhnova (hereinafter "**WS Nezhnova**"), ¶ 14.

[145] WS Nezhnova, ¶ 15.

[146] AmSOC, ¶ 82.

[147] WS Slesar, ¶ 10; WS Nezhnova, ¶ 16; WS Tsybulska, ¶ 8.

All of the 115 employees of Ukrtransgaz's Feodosia office transferred to the Russian Chernomorneftegaz on 1 April 2014.[148]

120. On 2 April 2014, the Russian Federation blocked communication channels between Ukrtransgaz offices in Kherson, in continental Ukraine, and in Feodosia.[149] Representatives of the Russian Chernomorneftegaz also severed communications between every Ukrtransgaz gas distribution station in Crimea and Ukrtransgaz in continental Ukraine.[150] With respect to the pipeline communications system on the pipeline branch between the towns of Armyansk and Dzhankoy, the same were also severed by representatives of the Russian Chernomorneftegaz, ultimately preventing operators in continental Ukraine from controlling the flow of gas.[151]

121. On 7 April 2014, Mr. Khartinov, Chairman of the Russian Chernomorneftegaz, refused the removal of Likvo's property from Crimea, consisting of specialized firefighting tools and personal protecting equipment.[152]

122. Starting in mid-April 2014 until February 2015, Russian troops belonging to the Pskov, Tambov, and Kostroma Divisions of the Russian Armed Forces were present on Chornomornaftogaz's self-elevating jack-up drilling rigs in the Black Sea.[153]

123. **On 11 April 2014, the State Council of the Republic of Crimea, now operating under legislative authority conferred under the constitution of the Russian Federation, passed three resolutions adopting and effecting the nationalization of Naftogaz's assets**:

(a) Resolution No. 2032-6/14 stated that facilities of the Crimean gas supply system constructed with the financial participation of NJSC Naftogaz, as well as gas pipeline agreements between NJSC Naftogaz and Krymgaz, and other facilities of

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[148] WS Slesar, ¶ 11.

[149] Witness Statement of Mykola I. Omik (hereinafter "**WS Omik**"), ¶¶ 3-4; Ukrtransgaz, Dispatcher's Record Book, 2 April 2014 (**CE-242**).

[150] WS Omik, ¶ 5.

[151] WS Omik, ¶ 6.

[152] WS Rymchuk, ¶¶ 5-6; Likvo Order No. 49, 21 March 2014 (**CE-231**); Likvo Instruction No. 1-p, 27 March 2014 (**CE-237**).

[153] Witness Statement of Volodymyr I. Korchak (hereinafter "**WS Korchak**"), ¶¶ 3-4.

the Crimean gas supply system, had been nationalized.[154] The same resolution also cancelled Krymgaz's financial obligations to NJSC Naftogaz;[155]

(b) through Resolution No. 2033-6/14, the State Council of Crimea declared that the Nationalization Resolution had nationalized the Crimean gas pipeline system that had previously been owned by Ukraine or had been transferred by it to NJSC Naftogaz for its use, and decreed that it was the property of the Republic of Crimea;[156]

(c) through Resolution No. 2045-6/14, the State Council of Crimea nationalized the Pivdennyi resort complex maintained by Ukrgasvydobuvannya.[157]

124. On 30 April 2014, the State Council of Crimea issued Resolution No. 2085/6-14, which declared that during the transition period from 18 March 2014 to 1 January 2015, "all Ukrainian state-owned property and so-called 'abandoned property' located on the territory of the Republic of Crimea would be considered the property of the Republic of Crimea."[158]

125. On 21 May 2014, the State Council of Crimea passed Resolution No. 2141 to include the gas that NJSC Naftogaz stored in the Hlibovske underground gas storage facility as well as the gas that Chornomornaftogaz produced in the fields covered by the Nationalization Resolution.[159] The

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[154] First Stephan Report, ¶ 90, *discussing* State Council of the Republic of Crimea, Resolution No. 2032-6/14, Art. 1, 11 April 2014 (**CE-250**). Claimants' Answers, ¶ 10.6.

[155] First Stephan Report, ¶ 90; Claimants' Answers, ¶¶ 10.14-10.15.

[156] First Stephan Report, ¶ 91, *discussing* State Council of the Republic of Crimea, Resolution No. 2033-6/14, Art. 1, 11 April 2014 (**CE-251**). This property was then transferred to the Russian Chernomorneftegaz on 22 April 2014 by Ministry of Fuel and Energy of the Republic of Crimea No. 8. Ministry of Fuel and Energy of the Republic of Crimea, Order No. 8, Art. 1, 22 April 2014 (**CE-257**). *See also* Claimants' Answers, ¶ 10.6.

[157] First Stephan Report, ¶ 92, *discussing* State Council of the Republic of Crimea, Resolution No. 2045-6/14, Row 409-08, 11 April 2014 (**CE-252**); Claimants' Answers, ¶ 10.9.

[158] AmSOC, ¶ 93, *referring to* First Stephan Report, ¶¶ 93-95, *discussing* State Council of the Republic of Crimea, Resolution No. 2085-6/14, Art. 1, 30 April 2014 (**CE-259**). This resolution "further authorized the Crimean Council of Ministers to identify and perfect the Republic of Crimea's rights in this property," and "authorized the Council of Ministers to reorganize and liquidate state enterprises and other legal entities used to manage state property or property under the control of state organizations."

[159] First Stephan Report, ¶ 89, *discussing* State Council of the Republic of Crimea, Resolution No. 2141-6/14, ¶ 6, 21 May 2014 (**CE-271**) (amending State Council of the Republic of Crimea, Resolution No. 1830-6/14, ¶ 3, 26 March 2014 (**CE-234**); Claimants' Answers, ¶ 10.10.

gas would later on be transferred to the Russian Chernomorneftegaz.[160] The nationalization was complete.[161]

PART 7 - REQUEST FOR RELIEF

126. In the Amended Statement of Claim, the Claimants request that the Tribunal issue a partial final award:

(a) Finding the Russian Federation in breach of its obligations under the Russia-Ukraine BIT;

(b) Ordering the Russian Federation to pay Naftogaz's costs in these arbitration proceedings, including all attorneys' fees and expert witness fees, in an amount to be specified later together with interest thereon;

(c) Ordering the Russian Federation alone to bear the responsibility for compensating the Tribunal, the Appointing Authority, and the Permanent Court of Arbitration, and reimburse Naftogaz for any compensation that it has advanced to the Tribunal, the Appointing Authority, and/or the Permanent Court of Arbitration with interest thereon; and

(d) Ordering any other relief that the Tribunal may deem appropriate.[162]

PART 8 - KEY LEGAL PROVISIONS

127. The BIT was concluded on 27 November 1998 in Russian and Ukrainian language, with both texts having equal force.[163] The Treaty entered into force on 27 January 2000. There is no official English translation. (Unless otherwise indicated, this Award relies on the translation of the original Ukrainian and Russian documents provided by the Claimants.)

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160 First Stephan Report, ¶ 89, *discussing* State Council of the Republic of Crimea, Order No. 864-r, 2 September 2014 (**CE-307**) and Ministry of Fuel and Energy of the Republic of Crimea, Order No. 92, Charter, 25 November 2014 (**CE-327**).

161 AmSOC, ¶ 94.

162 AmSOC, ¶ 206.

163 Russia-Ukraine BIT (**CLA-99/CLA-169**).

128. Article 9 of the Treaty contains the Contracting Parties' **consent to arbitrate** with investors:

> **Article 9**
>
> **Resolution of Disputes between a Contracting Party and an Investor of the Other Contracting Party**
>
> 1. Any dispute between one Contracting Party and **an investor of the other Contracting Party** arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.
>
> 2. If the dispute cannot be resolved in this manner within six months from the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to:
>
> a) a competent court or arbitration court of the Contracting Party in the territory of which the investments were made;
>
> b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> c) **an "ad hoc" arbitration tribunal, in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL)**.
>
> 3. The arbitral award shall be final and binding upon both parties to the dispute. Each Contracting Party agrees to execute such award in conformity with its respective legislation.

129. Article 12 of the Treaty describes the **scope of application** of the Treaty:

> **Article 12**
>
> **Application of the Agreement**
>
> This Agreement shall apply to all investments **made by investors of one Contracting Party in the territory of the other Contracting Party**, on or after **January 1, 1992**.

130. Article 1(1) of the Treaty defines the term "**investments**":

> The term "**investments**" means any kind of tangible and intangible assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party **in accordance with its legislation**, including:

> a) movable and immovable property, as well as any other related property rights;
>
> b) monetary funds, as well as securities, commitments, stock and other forms of participation;
>
> c) intellectual property rights, including copyrights and related rights, trademarks, rights to inventions, industrial designs, models, as well as technical processes and know-how;
>
> d) rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources.
>
> Any alteration of the type of investments in which the assets are invested shall not affect their nature as investments, provided that such alteration is not contrary to legislation of a Contracting Party in the territory of which the investments were made.

131. Article 1(2) of the Treaty defines the term "**investor of a Contracting Party**":

> The term "**investor of a Contracting Party**" means:
>
> a) any natural person having the citizenship of the state of that Contracting Party and who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party;
>
> b) **any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party**, provided that the said legal entity is competent in accordance with legislation of that Contracting Party to make investments in the territory of the other Contracting Party.

132. Article 1(4) of the Treaty defines the term "**territory**":

> The term **"territory" means the territory of the Russian Federation** or the territory of Ukraine **as well as** their respective exclusive economic zone and the continental shelf, defined in accordance with international law.

133. Articles 2, 3, and 5 of the Treaty set forth the substantive protections said to be breached by the Respondent:

Article 2

Encouragement and Protection of Investments

> 1. Each Contracting Party will encourage the investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its legislation.

> 2. Each Contracting Party guarantees, in accordance with its legislation, **the full and unconditional legal protection** of investments by investors of the other Contracting Party.
>
> **Article 3**
>
> **National Treatment and Most Favored Nation Treatment**
>
> 1. Each Contracting Party shall ensure in its territory for the investments made by investors of the other Contracting Party, and activities in connection with such investments, **treatment no less favorable** than that which it accords to its own investors or to investors of any third state, which precludes the use of measures discriminatory in nature that could interfere with the management and disposal of the investments.
>
> […]
>
> **Article 5**
>
> **Expropriation**
>
> 1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party **shall not be expropriated**, nationalized or subject to other measures equivalent in effect to expropriation (hereinafter referred to as "expropriation"), except in cases where such measures are taken in the public interest under due process of law, are not discriminatory and are **accompanied by prompt, adequate and effective compensation**.
>
> 2. The amount of such compensation shall correspond to the **market value** of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable.

134. The key provisions of the **Vienna Convention on the Law of Treaties 1969** (the "**VCLT**")[164] are:

> **Article 29**
>
> **Territorial scope of treaties**
>
> Unless a different intention appears from the treaty or is otherwise established, a treaty is **binding upon each party in respect of its entire territory**.

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[164] UN Doc. A/Conf.39/27; 1155 UNTS 331, 23 May 1969 (**CLA-93**). Both Ukraine and the Russian Federation are parties to the VCLT.

Article 31

General rules of interpretation

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

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

a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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

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

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

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

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

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

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a) Leaves the meaning ambiguous or obscure; or

b) Leads to a result which is manifestly absurd or unreasonable.

PART 9 - RUSSIA'S CHALLENGE TO JURISDICTION AND ADMISSIBILITY

135. As previously mentioned, Russia has declined to participate in these proceedings but submitted a broad challenge to the jurisdiction of the Tribunal as follows:

> According to item 1 of Article 1 of the Agreement the term "investments" shall mean any kind of tangible or intangible assets which are **invested by an investor of one Contracting Party** in the territory of the other Contracting Party in accordance with its legislation. The property, which is the subject of the dispute, is located in the territory of the Republic of

> Crimea and the city of Sevastopol, which had previously been a part of the Ukraine. **The assets of claimants are not investments**, because they have not been made in the territory of the Russian Federation, and, if ever made, they have been made prior to the accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and **not in accordance with the legislation of the Russian Federation**. No taxes have been collected on these assets in accordance with the legislation of the Russian Federation and they have not contributed to the economic development of the Russian Federation.
>
> On the basis of the foregoing, the Russian Federation does not recognize the jurisdiction of the international arbitration at the Permanent Court of Arbitration to hear the present dispute.[165] (emphasis added)

136. The Tribunal thus understands Russia to raise the following jurisdictional issues: (1) the investments were not made "in the territory of the other Contracting Party [*i.e.*, Russia]" at the time when the investments were made; (2) the Claimants' investments were not made "in accordance with the legislation" of Russia on Russian territory but were Ukrainian; and (3) the investments did not further the purposes of the BIT in that prior to March 2014 the investments paid no Russian tax and did not "contribute to the economic development of the Russian Federation."

137. In addition to consideration of the broad objection of Russia, the Tribunal must satisfy itself, on the basis of the provisions of the Treaty and general principles of international law, that all of the other conditions under the BIT respecting jurisdiction are fulfilled. These include whether within the Treaty definitions:

(a) a dispute exists between the Parties;

(b) whether the Claimants were entitled to invoke the protection of the BIT (jurisdiction *ratione personae*);

(c) whether the assets seized from the Claimants are "investments" within the meaning of the BIT (jurisdiction *ratione materiae*);

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[165] Letter No. 06-5928/17 from the Ministry of Justice of the Russian Federation to the Permanent Court of Arbitration, dated 19 January 2017 (**CE-383**).

(d) whether the Claimants' claims are founded on obligations that were binding on Russia **at the relevant time** (jurisdiction *ratione temporis*); and

(e) whether the Claimants must have complied with the **notice** and negotiation requirements of the BIT.

138. The Claimants urge the Tribunal to resolve these issues in the Claimants' favour in light of previous awards accepting jurisdiction under comparable circumstances, including ***Everest Estate*** *LLC et al. v. Russian Federation*,[166] *Aeroport* ***Belbek*** *LLC and Mr. Igor Valerievich Kolomoisky v. Russian Federation*,[167] *PJSC CB* ***Privatbank*** *and Finance Company Finilon LLC v. Russian Federation*,[168] *PJSC* ***Ukrnafta*** *v. Russian Federation*,[169] and ***Stabil*** *LLC et al. v. Russian Federation*.[170] The Claimants point out that the tribunals in the aforementioned cases dismissed Russia's objections to jurisdiction and concluded that the Respondent is "obligated to protect Ukrainian investors in Crimea under the BIT."[171]

139. The Tribunal of course takes into account earlier awards for such persuasive value as it considers appropriate but will approach these issues from first principles and with an independent perspective.

PART 10 - ARE THE CLAIMANTS PROTECTED "INVESTORS" WITHIN THE SCOPE OF THE BIT? (JURISDICTION *RATIONE PERSONAE*)

140. Article 1(2) of the Treaty defines the term "investor of a Contracting Party" as follows:

> The term "**investor of a Contracting Party**" means:
>
> a) […]

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166 *Everest Estate LLC et al. v. Russian Federation*, PCA Case No. 2015-36, Decision on Jurisdiction, 20 March 2017, ¶ 163 (**CLA-29**) (hereinafter "***Everest - Jurisdiction***").

167 *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. Russian Federation*, PCA Case No. 2015-07, Interim Award, 24 February 2017 (**CLA-3**) (hereinafter "***Belbek***").

168 *PJSC CB Privatbank and Finance Company Finilon LLC v. Russian Federation*, PCA Case No. 2015-21, Interim Award, 24 February 2017 (**CLA-49**) (hereinafter "***Privatbank***").

169 *PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, Award on Jurisdiction, 26 June 2017 (**CLA-50**) (hereinafter "***Ukrnafta***").

170 *Stabil LLC Stabil LLC et al. v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, 26 June 2017 (**CLA-60**) (hereinafter "***Stabil***").

171 AmSOC, ¶ 110.

> b) **any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party**, provided that the said legal entity is competent in accordance with legislation of that Contracting Party to make investments in the territory of the other Contracting Party. (emphasis added)

141. Article 12 of the BIT limits protection to "investments" made by investors of one Contracting Party in the **territory** of the **other** Contracting Party, on or after **1 January 1992**.

142. Article 1(4) of the Treaty defines the term "territory":

> The term **"territory" means the territory of the Russian Federation** or the territory of Ukraine **as well as** their respective exclusive economic zone and the continental shelf, **defined in accordance with international law**. (emphasis added)

143. The issue is whether the Claimants were authorized by Ukrainian legislation to be investors in Russia and in fact held such investments at the relevant time(s). In this context, "competent in accordance with legislation" refers to corporate structure and powers.

144. It is clear that the assets in question were acquired by the Claimants while Crimea was part of Ukraine. The issue then is whether the critical date is the date of initial investment, as maintained by Russia and our colleague, Professor Stanivuković, or is it sufficient that the Claimants' assets were foreign property on the dates of the alleged violations of the BIT and the date of initiation of these proceedings on 17 October 2016 as maintained by the Claimants, and if the latter, whether the Claimants' Crimean assets were located in Russia at that time.

(a) The Claimants' Position

145. The Claimants submit that each of them is an "investor" within the definition of a legal entity duly incorporated in accordance with the legislation in force in the territory of Ukraine. This continues to be true until the present time.[172] Moreover, "nothing in [their] charters, nor any law of Ukraine prohibited [them] from making investments in the Russian Federation."[173] Therefore,

172 AmSOC, ¶ 139, *referring to* First Paliashvili Report, ¶ 51; Claimants' Answers, ¶ 5.4.
173 AmSOC, ¶ 141, *referring to* First Paliashvili Report, ¶ 60; Claimants' Answers, ¶ 5.4.

the Claimants maintain that at the critical time, they were (and are) investors under the Treaty qualified to bring this case.[174]

146. In so far as one of the purposes of the Treaty, is to attract *foreign* investment from one State to another, the Claimants accept that their investments were not initially "foreign," having been invested in Crimea, nevertheless the "only reason [the investments] became foreign is the fact that the control over [Crimea] moved."[175] It was Russia's annexation of Crimea that rendered the Claimants' investments as "foreign" and as such entitled them to protection under the BIT.[176]

147. The Claimants point out that after the annexation, Ukrainian investors had a choice either to re-register in accordance with Russian domestic laws or to "remain and be treated as a foreign company."[177] Thus, according to the Claimants, "Ukrainian investors were being treated as foreign investors who had an opportunity to become domestic investors after Russia annexed Crimea."[178]

(1) The Legality of the Russian Occupation is Said Not to be Relevant

148. If the Tribunal takes the view that the assets were seized prior to Russia's annexation of the region, the Claimants contend that Ukraine's non-recognition of Russia's purported annexation of Crimea, as well as the international community's treatment of Crimea as an occupied territory that has been **unlawfully** annexed by Russia, is **not relevant** to the applicability of the BIT.[179] The relevant frame of reference is the BIT itself, and whether under the terms of the BIT, Russia is in breach of its Treaty obligations in respect of the Claimants' investments in Crimea.[180]

149. The Claimants contend that the term "territory" under Article 1(4) of the Treaty is broad enough to cover "all territory over which Russia exercises **effective control and jurisdiction**, or asserts sovereignty," including Crimea and Sevastopol.[181] The Claimants insist that the Treaty's

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[174] AmSOC, ¶ 141. *See also* Claimants' Opening Presentation, slides 77-78.
[175] Tr., 75:24-77:5.
[176] Tr., 77:8-14.
[177] Tr., 77:15-18.
[178] Tr., 77:18-21.
[179] Claimants' Answers, ¶¶ 15.1-15.2.
[180] AmSOC, ¶ 137; Claimants' Answers, ¶ 42.1.
[181] AmSOC, III(A)(1); Tr., 68:18-24. *See also* Claimants' Opening Presentation, slides 93-111.

definition of "territory" "is in no way restrictive" and "is not tied to the concept of sovereignty."[182] Nor is the legality of Russia's annexation of Crimea under international law relevant.[183] The Tribunal is required "to take account **as a matter of fact** that the Russian Federation, which is a party to this treaty…**as a matter of Russian law, upon annexing Crimea, expropriated all of**… **Claimants' investments**."[184]

150. In support of a broad interpretation of the term "territory" under the Treaty, the Claimants refer to open-ended references to territory in the other BITs that Russia has concluded.[185] Ukraine, has, in its other investment treaties, agreed to a definition of "territory" that is based on sovereignty, and the fact Russia and Ukraine have not chosen to adopt the same in the present Treaty clearly illustrates a desire to leave sovereignty out of the definition.[186] The Tribunal should not read a requirement of sovereignty into the Treaty where the parties have not done so.[187]

151. Article 31(1) of the VCLT requires the BIT to be interpreted in good faith in accordance with the ordinary meaning to be given to the ordinary terms of the treaty in their context and in the light of its object and purpose.[188]

152. According to the Claimants, the ordinary meaning of the "territory of the Russian Federation" under the Treaty *at the relevant times* included Crimea.[189] The Claimants submit that

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[182] AmSOC, ¶ 111; Claimants' Answers, ¶ 26.14.

[183] AmSOC, ¶ 137; Claimants' Answers, ¶ 42.1.

[184] Tr., 37:7-22.

[185] AmSOC, ¶ 111, *referring to Agreement Between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Encouragement and Mutual Protection of Capital Investments*, dated 23 September 1997, Art. 1(4) (**CLA-98**); *Agreement Between the Government of the Kingdom of Denmark and Government of the Russian Federation Concerning the Promotion and Reciprocal Protection of Investments*, dated 4 November 1993, Art. 1(4) (**CLA-96**). The Claimants further explain that the Respondents practice also indicates that, if it had intended to limit the territorial scope of the Treaty, it would have done so. The Claimants refer to the *Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, Protocol*, dated 9 November 2006 (**CLA-101**); *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments*, dated 6 April 1989, Art. 1(e)(i) (**CLA-94**).

[186] AmSOC, ¶ 111, *referring to Agreement Between the Government of the Arab Republic of Egypt and the Government of Ukraine Concerning the Promotion and Reciprocal Protection of Investments*, dated 22 December 1992, Art. 1(4) (**CLA-95**); *Agreement Between the Government of Ukraine and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments*, dated 23 October 1992, Art. 1(4) (**CLA-97**).

[187] AmSOC, ¶ 111.

[188] AmSOC, ¶ 112; Claimants' Answers, ¶ 26.15.

[189] AmSOC, ¶ 113.

"territory" is defined by the Oxford English Dictionary and Black's Law Dictionary, respectively, as "all areas 'under the jurisdiction of a ruler, state, or group of people'"[190] and as a "geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a **state's exclusive possession and control**."[191] Based on these definitions, the Claimants assert that the term "'territory' is not limited to territory over which a state *lawfully* exercises sovereignty."[192] The Claimants cite Professor Ian Brownlie for the proposition that, territory may be "equate[d]…with **the actual and effective exercise of jurisdiction** even when it is clear that the state exercising jurisdiction has not been the beneficiary of any lawful and definitive act of disposition."[193] As applied to this case, Russia has exercised effective jurisdiction and control over Crimea since February 2014 and has indeed *asserted* sovereignty over the region.[194]

153. The Claimants contend that Russia's assumption of control over Crimea automatically put Russia under the obligation to protect Ukrainian investments in Crimea, as a result of Russia's undertaking in the Treaty to afford protection to those investments.[195]

(2) A Purposive Construction of the BIT is Required

154. The BIT must be interpreted purposively. Under the preamble to the Treaty, Russia and Ukraine intended to create and maintain favourable conditions for mutual investments and to protect existing investments.[196] Given this overarching intent of the parties, the Claimants argue that a narrow interpretation of the term "territory" would limit the Treaty's scope and create a gap in protection for investors. In *Sanum Investments Ltd. v. Lao People's Democratic Republic*[197] the tribunal, in concluding that China's obligations under the China-Laos BIT extended to the Macao Special Administrative Region, declared that "an inclusive interpretation of a treaty's

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190 AmSOC, ¶ 113, *referring to Territory*, Oxford English Dictionary (Online ed., 2017) (**CE-379**).
191 AmSOC, ¶ 113, *referring to Territory*, Black's Law Dictionary (10th ed., 2014) (**CE-146**).
192 AmSOC, ¶ 113 (emphasis added).
193 AmSOC, ¶ 113, *referring to* Ian Brownlie, *Principles of Public International Law* (7th ed., 2008) 112 (**CLA-79**).
194 AmSOC, ¶ 113; Tr., 137:13-25.
195 Tr., 74:13-23.
196 AmSOC, ¶ 114, *referring to* Russia-Ukraine BIT, Preamble (**CLA-99/CLA-169**).
197 *Sanum Investments Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶ 242 (**CLA-57**) (hereinafter "***Sanum***").

territorial scope 'is fundamentally compatible with [the treaty's] object and purpose, the more so that there is no other possibly competing treaty' applicable to the territory."[198]

155. The Claimants also cite *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic* for the proposition that interpretation of a treaty in good faith entails an interpretation that considers reasonableness beyond mere verbal or purely literal analysis.[199] Applying the pronouncements in *Sanum* and *Poštová* to this case, the Claimants assert that as the Treaty provides a "broad definition of territory with no limiting language...[i]ncluding Crimea in the definition of 'in the territory' of Russia is an eminently reasonable, good faith interpretation consistent with the [VCLT]."[200]

156. In furtherance of the argument that Crimea is included in the "territory of the Russian Federation," the Claimants also refer to Article 29 of the VCLT on the territorial scope of treaties.[201] The Claimants assert that, as the *Ukrnafta* tribunal explained, under Article 29 of the VCLT, "the application of a treaty to a State's 'territory' could include 'occupied zones' held by [a] State and that 'recognition under international law of the State and its territory is not required.'"[202] Applying this to the Respondent's annexation of Crimea, the Claimants maintain that as in *Ukrnafta*, "territory includes areas over which the Contracting Parties exercise jurisdiction and *de facto* control, even if they hold no lawful title under international law."[203]

(3) International Practice is Also Relevant

157. Interpreting the term "territory" under the Treaty to encompass territory over which the Respondent exercises effective control and jurisdiction is consistent with international practice. The Claimants rely on the decision in the *Case of Jaloud v. The Netherlands*,[204] *Case of Cyprus v.*

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198 AmSOC, ¶ 114.

199 Tr., 287:11-288:13; AmSOC, ¶ 115, *referring to Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 284 (**CLA-51**) (hereinafter "***Poštová***"*)*; Claimants' Answers, ¶ 26.15.

200 AmSOC, ¶ 115.

201 AmSOC, ¶ 116.

202 AmSOC, ¶ 116, *referring to Ukrnafta*, ¶ 151 (**CLA-50**); *Stabil*, ¶ 147 (**CLA-60**).

203 AmSOC, ¶ 117, *referring to Ukrnafta*, ¶ 150 (**CLA-50**); *Stabil*, ¶ 146 (**CLA-60**); Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 392 (**CLA-82**).

204 *Case of Jaloud v. The Netherlands*, ECtHR Application No. 47708/08, Judgment, 20 November 2014, ¶ 142 (**CLA-111**).

Turkey,[205] and *Schtraks v. Government of Israel*,[206] for the proposition that "a [S]tate with effective control and jurisdiction over territory can have international treaty obligations in respect of that territory, even if the territory is not under the [S]tate's sovereignty as a matter of international law."[207]

158. The Claimants acknowledge that neither the principles of treaty succession of States, as embodied in the 1978 *Vienna Convention on Succession of States in respect of Treaties* (the "**VCST**"), [208] nor the "Moving Treaties Frontier" Rule are applicable in the present circumstances.[209] With respect to the VCST, the Claimants refer to Professor Brownlie's *Principles of Public International Law* to submit that "[s]uccession is predicated upon the permanent displacement of sovereign power, and thus temporary changes resulting from belligerent occupation…are excluded."[210] There is no indication that Russia's occupation is temporary. As for the "Moving Treaties Frontiers" rule, the Claimants note that it only concerns triangular relationships involving a predecessor State, the successor State and a third State which concluded the treaty with the predecessor State.[211]

(b) Submission of Ukraine

159. Ukraine asserts that the territorial scope of the BIT's application includes all "territory" over which the Respondent exercises jurisdiction and effective control. This interpretation, so argues Ukraine, follows from the ordinary meaning of the term "territory" interpreted in light of the Treaty's other provisions, in good faith, and in light of its object and purpose as well as other "relevant rules of international law applicable between Ukraine and Russia".[212]

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[205] *Case of Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment, 10 May 2001, ¶ 77 (**CLA-113**).

[206] *Schtraks v. Government of Israel*, [1964] A.C. 556, 587 (H.L.1962) (**CLA-138**).

[207] Claimants' Answers, ¶¶ 26.17-26.18.

[208] 1946 UNTS 3, 23 August 1978 (**CLA-168**).

[209] Claimants' Answers, ¶¶ 16.1, 22.4.

[210] Claimants' Answers, ¶¶ 16.1-16.2, 17.1, 22.1, *quoting* James Crawford (ed.), *Brownlie's Principles of Public International Law* (8th ed., 2012) 423 (**CLA-155**). *See also* Claimants' Opening Presentation, slide 100.

[211] Claimants' Answers, ¶¶ 22.4-22.7, *referring to Belbek*, ¶ 185 (**CLA-3**) and *Privatbank*, ¶ 171 (**CLA-49**), *and distinguishing on this basis Sanum*, ¶¶ 231-300 (**CLA-57**).

[212] Submission of Ukraine, ¶¶ 8, 52. First, Ukraine notes that "[e]very arbitral tribunal to have considered this question agrees that the Treaty protections extends to Ukrainian investors and their investments in Crimea" (Submission of Ukraine, ¶ 5). To support its interpretation, Ukraine relies on dictionary definitions of the term "territory," particularly when it is used broadly and without reference to the concept of sovereignty, such as "all areas 'under the jurisdiction of a ruler or state'" and "lands that are 'in a state's exclusive possession or control'"

(Submissions of Ukraine, ¶ 9). Ukraine explains that the common use of the term in international law also militates in favour of a broad interpretation (Submission of Ukraine, ¶ 10). This is also evidenced by Article 29 of the VCLT, which according to Ukraine establishes a "default rule that a treaty applies to the 'entire territory' of the signatory" (Submission of Ukraine, ¶ 11, *referring to* Karl Doehring, 'The Scope of the Territorial Application of Treaties' (1967) 27 Heidelberg Journal of International Law, 483, 488-489; Syméon Karagiannis, "*Article 29: Convention of 1969*", in Olivier Corten & Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (2011), 731, 734-735, both noting the ambiguity of the phrase "entire territory"). Further, Ukraine notes that the term "territory" is used broadly in the Treaty and that it "does not entail the concept of a State's sovereignty or even lawful rule" (Submission of Ukraine, ¶ 9). Ukraine points out that it and its co-Contracting Party to the Treaty, the Respondent, agreed to a "non-restrictive approach" in the Treaty, following the Respondent's "preferred practice of leaving references to territory open-ended." Thus, Ukraine maintains that the Tribunal should not impose a restrictive definition on the term "territory" in the Treaty as the Contracting Parties thereto did not adopt one (Submission of Ukraine, ¶ 17, *referring to Ukrnafta*, ¶ 147 **(CLA-50)**; *Stabil*, ¶ 143 (**CLA-60**)). To confirm this understanding, Ukraine refers to State practice on the application of treaties to unlawfully occupied territories relating to the Baltic States (Submission of Ukraine, ¶¶ 14-15). Notably, under the 1990 Conventional Forces in Europe Treaty, the USSR's "territory" was specifically defined to include the Baltic States although those territories were viewed as unlawfully occupied (Submission of Ukraine, ¶ 14). Turning to the context of the Treaty, Ukraine stresses that the term "territory" in the Treaty is not "limited to sovereign territory" but rather demonstrates "a practical focus on effective control over territory." As examples of such focus on effective control, Ukraine draws the Tribunal's attention to Articles 2(1), 3(1), and 4 of the Treaty. According to Ukraine, the requirement imposed by these provisions on the Contracting Parties to "take affirmative measures" relating to *inter alia* the encouragement and favourable treatment of investments on their territories shows that the term "territory" must be understood to bind "the party that is in a position effectively to carry out those obligations." Ukraine argues that, if the Tribunal were to adopt any other interpretation, this would "leave gaps in the Treaty's coverage" which were "not contemplated by the [Contracting] Parties" (Submission of Ukraine, ¶¶ 19-20, *referring to Ukrnafta*, ¶ 154 (**CLA-50**); *Stabil*, ¶ 150 (**CLA-60**)). With respect to the object and purpose of the Treaty, Ukraine suggests that the objective of the Treaty to enhance "the legal framework under which foreign investment operates," would be served by the Treaty's application to "protect Ukrainian investors in Crimea under the Russian occupation" (Submission of Ukraine, ¶ 25). Thus, Ukraine submits that the Tribunal's task in the present case is to "construe the Treaty's geographic application in a manner that furthers the Treaty's investment protection and rule of law objectives" (Submission of Ukraine, ¶ 26), as a different interpretation would lead to Crimea becoming "a legal black hole for investment protection" (Submission of Ukraine, ¶¶ 27-28, *referring to Ukrnafta*, ¶ 162 (**CLA-50**); *Stabil*, ¶ 158 (**CLA-60**); *Belbek*, ¶ 265 (**CLA-3**)). Ukraine considers that such a "vacuum" would "permit the Russian Federation to discriminate against foreign investors under its jurisdiction" and would moreover be at odds with "relevant rules of international law applicable between Ukraine and the Russian Federation", including the relevant conventions and customary law on belligerent occupation, obligating the Respondent to "respect property rights in Crimea, a territory it occupies" (Submission of Ukraine, ¶¶ 28-29) and the European Convention on Human Rights and other human rights treaties (Submission of Ukraine, ¶ 30). Ukraine also argues that a good faith interpretation of the Treaty mandates an interpretation of the term "territory" that includes Crimea (Submission of Ukraine, ¶ 21). In Ukraine's words:

> [T]he Russian Federation cannot invade, occupy, and claim sovereignty over Crimea, yet refuse to be bound by its treaty obligations within that territory. The Russian Federation has unlawfully occupied Crimea by force, displacing Ukraine's power to exercise governmental authority and effective control. The Russian Federation has repeatedly claimed that Crimea forms an integral part of the territory of the Russian Federation. Yet it simultaneously maintained in other similar arbitration proceedings that its actions in Crimea cannot be regulated by the Treaty. A restrictive interpretation of the term "territory" in the Treaty that would allow Russia to profit from this inconsistency is fundamentally inconsistent with the principle of good faith interpretation. (Submission of Ukraine, ¶ 23.)

According to Ukraine, the Respondent's claims, in domestic legislation, that Crimea forms an integral part of its territory "carry legal consequences", although they are both "illegitimate and invalid". Since the Respondent claims the benefits of sovereignty over Crimea, it must also "accept the obligations that follow," including compliance with treaty rights of Ukrainian investors in that territory (Submission of Ukraine, ¶ 38, *referring to Ukrnafta*, ¶ 178 (**CLA-50**)). Ukraine concludes that the principle of good faith requires the Respondent to afford Treaty protection to the Claimants, even though the Respondent is not the lawful sovereign (Submission of Ukraine, ¶ 45).

160. In addition, Ukraine argues that Ukrainian investors are protected by the BIT "regardless of when such investors initially commenced their investment."[213] Ukraine notes that Article 1(1) of the BIT uses the present tense ("assets which are invested") to define protected investments, while Article 12 uses the past tense, stating that the BIT applies to "all" investments "made by investors of one Contracting Party in the territory of the other Contracting Party" after 1 January 1992.[214] In Ukraine's submission, it is the "clear intent" of Article 12 of the Treaty to "maximize the temporal application of the Treaty, specifically to cover investments that were not protected by the Treaty at the time they were initiated."[215] Ukraine adds that it "is a widely-held view that application of an investment treaty to pre-existing investments is generally presumed even where the agreement is silent on the question of temporal application. Under the Treaty, so long as the investment was made after 1 January 1992, it is irrelevant whether the Treaty applied at that time."[216]

(c) ***The Tribunal's Analysis***

161. The jurisdiction of the Tribunal rests on a treaty to which both Russia and Ukraine are parties. As the *Belbek* tribunal pointed out, "the juridical space" occupied by the BIT has not been modified[217] by annexation or otherwise since the BIT was concluded on 27 November 1998. The facts required to establish jurisdiction under the BIT do not turn on the legality or illegality of encroachments by one Contracting Party on the territory of the other. In the view of this Tribunal's majority, the plain terms of the BIT can be applied in their ordinary meaning to the situation in Crimea and Sevastopol at the relevant dates without resolving legal issues such as sovereignty extraneous to those stipulated by the Contracting Parties such as the legality or illegality of Russian's military intervention and subsequent constitutional absorption of Crimea into the Russian Federation.

162. Our colleague, Professor Stanivuković relies (at ¶ 49) in part on Professor Brownlie's acknowledgement that:

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[213] Submission of Ukraine, ¶ 34.

[214] Submission of Ukraine, ¶ 35.

[215] Submission of Ukraine, ¶ 36, *referring to Ukrnafta*, ¶ 163 **(CLA-50)**, *Stabil*, ¶ 159 (**CLA-60**).

[216] Submission of Ukraine, ¶ 36 (internal citations omitted).

[217] *Belbek*, ¶ 180 (**CLA-3**).

> It may happen that the process of government over an area, with the concomitant privileges and duties, falls into the hands of another state. […] The important features of 'sovereignty' in such cases are the continued existence of a legal personality and the attribution of territory to the legal person **and not to holders for the time being**. (emphasis added)

163. Professor Stanivuković states that "holders for the time being" is a situation "more akin to the present one." In the majority view, however, any notion that Russia is a temporary "holder for the time being" is, with respect, at odds with the facts. Russia has incorporated Crimea and Sevastapol into the Russian Federation and the incorporation has been blessed by the Russian Supreme Court. Ukraine may possess legal arguments, but Russia possesses Crimea and Sevastapol and it is incumbent on the Tribunal, in the interpretation of the BIT, to recognize the legal consequences of a *fait accompli*.

164. The Tribunal is satisfied on the uncontradicted and well-supported expert evidence of Dr. Irina Paliashvili, that "at the time the Claimants made their investments in the ARC [the Autonomous Republic of Crimea] and from the material time until the present, nothing in the Claimants' charters, nor any law of Ukraine, prohibited the Claimants from obtaining [a cross-border] NBU [National Bank of Ukraine] License or from making investments in the Russian Federation."[218]

165. Most of the Russian objections accepted by our colleague ultimately rest on the proposition that Russia's liability under the BIT turns on the state of affairs at the time of the initial investment. However, in the majority view, orthodox principles of treaty interpretation require the jurisdictional facts to be ascertained as of the date of the alleged breach, not the date of the initial investment, plus the date of the initiation of the proceedings.

166. Our colleague, Professor Stanivuković objects (¶¶ 171 et seq.) that the Claimants' assets do not meet an "inherent" meaning of the term investments, which, in her view, must be overlaid on the text agreed to by the parties. The majority does not agree to the reading in of an additional limitation. However, insofar as this objection is also based on the peculiarities of "state-owned property", it must be remembered that when the BIT was concluded in 1998, the economic systems

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[218] First Paliashvili Report, ¶ 60.

of both Ukraine and Russia were founded on the concept of state-owned property. The Contracting Parties cannot have intended to exclude state-owned property from the scope of investor protection as such an interpretation would effectively gut the BIT of any real significance.

167. Article 29 of the Vienna Convention on the Law of Treaties 1969 provides that:

> **Territorial scope of treaties**
>
> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

168. The ILC commentary on Article 29 does not reference either "sovereignty" or the "lawfulness" of occupation and control as relevant considerations.

169. The Tribunal's jurisdiction is derived from the BIT. As mentioned, Article 1(4) defines the term "territory" to mean the "territory of the Russian Federation or the territory of Ukraine as well as their respective exclusive economic zones and the continental shelf, defined in accordance with international law." Our colleague, Professor Stanivuković, takes the view that the reference to "in accordance with international law" is unnecessary in relation to "territory" because the limitation is already implicit and thus adding the limit would have been superfluous but in the majority view, the more persuasive fact is that the text is deliberately drafted to *exclude* the qualification that the permanent occupation be "in accordance with international law."

170. In the majority view, therefore, insertion of the phrase "in accordance with international law" in Article 1(4) relates to the definition of the two States' exclusive economic zones and continental shelf, not the definition of "territory" in general.

171. The majority and dissent are agreed that the proper interpretation of "territory" in the BIT does not rest in any way on the jurisprudence of the European Court of Human Rights which has a different mandate and subject matter than investment disputes.

172. Article 31(1) of the VCLT directs that the Treaty "be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in

light of its *object and purpose*."[219] In the majority view, the "ordinary meaning to be given to the terms" should not be cut down or diluted by importing the concept of "lawful" or "sovereignty" where the parties have chosen to use the word "territory" without any such limitation. On this point the Tribunal notes the submission of Ukraine that:

> Many of Ukraine's bilateral investment treaties do specifically define territory with reference to "sovereignty", but Ukraine deferred to Russia's preferred practice of leaving references to territory open-ended. A restrictive definition should not be imposed where the parties to an investment treaty could have chosen to adopt one, but did not.[220]

The Tribunal majority agrees. If the Contracting Parties had intended to specify "sovereign" territory they would have said so.

173. Our colleague, Professor Stanivuković reasons that:

> …if the Russian presence in Crimea was unlawful under international law in the relevant period, Crimea was not and could not be considered the territory of the Russian Federation at such time. (¶ 32)

174. On this view, the occupation of Crimea gave Russia everything except responsibility to compensate Ukrainian investors (which Russia itself has rendered "foreign") fair value for seized Crimean investments. In the majority view, this result is inconsistent with a good faith interpretation of the Treaty terms protecting foreign investment.

175. The Treaty is not without temporal limitations. Article 12 restricts protection to investments made "on or after January 1, 1992," being the date of the break-up of the Soviet Union. Other than 1 January 1992, the parties chose not to impose any further temporal limit on protected investments, leaving it to a claimant to establish that Crimea was Russian "territory" at the time of the alleged treaty breach by Russia and at the time of the initiation of the arbitration.

176. The object and purpose of the BIT, and of Articles 12 in particular, is to favour investment through granting protection to investments in the territory of each Contracting State in favour of

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219 AmSOC, ¶ 112; Claimants' Answers, ¶ 26.15.

220 Submission of Ukraine, ¶ 17.

investors of the other Contracting State. Future investment is promoted when existing investments are shown to be protected. There is no suggestion that Russian occupation of Crimea and Sevastopol in February and March 2014 was anticipated by the parties at the time they concluded the BIT in 1998. Invasion of one Contracting State by the other Contracting State was not on the agenda of either Contracting Party. Nevertheless the parties to the BIT remained the same before and after the invasion and the overall envelope of geographic space subject to the BIT did not change. Neither party took any action to terminate the BIT. There is no need for a "renewal" or further "adoption" of the BIT. Both Russia and Ukraine treated the BIT as subsisting after the occupation and subsequent annexation. Within the geographic space of Crimea, there was an internal shift in territorial power from one Contracting Party to the other but the Treaty terms remained the same. It was no more difficult to identify as a matter of geography Russian "territory" after the annexation as before. "Crimea" is a defined territory. The implications of this shift in terms of the BIT are initially tested on the facts existing at the date of the alleged breach, namely the seizure conjoined with the annexation on 21 March 2014, but deemed to have taken place on 18 March 2014. As to the date of initiation of the proceedings, there is no doubt Crimea and Sevastopol were part of Russia on 17 October 2016.

177. Our colleague, Professor Stanivuković points out that Russian declarations in respect of the BIT would be an "authentic" guide to interpretations only if accepted by the Ukraine (¶¶ 80-81). In the majority view, the BIT does not attach by reasons of Russian declarations but by reason of Russian conduct.

178. In essence, the Tribunal's conclusion is driven by the fundamental principle of ***pacta sunt servanda*** under Article 26 of the VCLT, pursuant to which all treaties must be performed in good faith. In *Belbek* the tribunal held that "[it] cannot presume that the Treaty does not apply to conduct occurring in the geographic space of the Crimean Peninsula in the period in question as that, without more, would **denude the Treaty of effect** and relieve the Contracting Parties of their obligation to perform the Treaty in good faith…and create a legal void, a bubble, in the application

of the Treaty in respect of the Crimean Peninsula that was never contemplated and should not be countenanced.'"[221] The majority of this Tribunal takes the same view.

179. Irrespective of the response of much of the international community to the occupation and annexation of Crimea, Russia as of 18 March 2014 exercised physical control and jurisdiction and asserted sovereignty over Crimea. A good faith interpretation of the BIT requires that Russia be held to its obligations to in respect of investments that were rendered permanently "foreign" by force of arms under Russia's dominion and authority.[222]

180. In summary, at the time the BIT was concluded, there was one geographic territory shared between two sovereign states, Ukraine and Russia. That is still the situation. Within the geographic space, effective control and *de facto* authority over both domestic and international relations of Crimea and Sevastopol was seized by the occupying forces of Russia and adopted by the Russian Parliament and endorsed by the Russian Supreme Court. While Ukraine has not surrendered sovereignty, it acknowledges that it is incapable of exercising it. *De facto* power was exercised by Russia from and after 27 February 2014 ("**Special Operations Forces Day**") although the constitutionality of the annexation under Russian law and the legality of the seizure under Russian law were not regularized until 21 March 2014 backdated to 18 March 2014.

181. The majority of this Tribunal rejects the Claimants' arguments that the BIT obligations attached as a matter of law on 27 February 2014, but concludes that the BIT obligations did attach as of 18 March 2014 anterior to or simultaneously with the seizure of the investments (a seizure which Russia has never denied).

182. Accordingly, the Claimants are entitled to invoke the protection of the BIT (jurisdiction *ratione personae*) as legally constituted corporate entities under Ukrainian law legally competent under Ukrainian law to invest both in Ukraine and Russia and at the time of the seizure effective 18 March 2014 they all held assets in the territory of Russia.

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[221] AmSOC, ¶ 119, *referring to Belbek,* ¶ 265 (**CLA-3**).
[222] AmSOC, ¶ 120.

PART 11 - WERE THE SEIZED ASSETS "INVESTMENTS" WITHIN THE PROTECTION OF THE BIT?

183. Article 1(1) of the Treaty defines the term "investments" and reads in relevant part:

> 1. The term "investments" means any kind of tangible and intangible **assets which are invested** by an investor of one Contracting Party **in the territory of the other Contracting Party** in accordance with its legislation, including:
>
> a) movable and immovable property, as well as any other related property rights;
>
> b) […]
>
> c) […]
>
> d) rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources. (emphasis added)

(a) Russia's Position

184. In its Letter of Objection dated 19 January 2017, Russia contends that an investment is protected under the BIT only if it qualified as a *foreign* investment at the time when it was made because protected assets must be invested by an investor of one Contracting Party "**in the territory of the other Contracting Party in accordance with its legislation**".

(b) The Claimants' Position

185. The Claimants repeat that the Treaty does not include a requirement that the investment be "foreign" from the outset. The imperfect tense of the verb "to invest" (*i.e.*, "are invested") signals that the provision does not impose any temporal limitations for covered investments.[223] Nor is there any support in the text of the BIT for the view that a tribunal's jurisdiction *ratione loci* must be considered only at the time an investment is originally made, particularly where the identity of the State controlling the territory within the original treaty area has changed.[224]

186. The Claimants reiterate that Article 12 extends the protection of the Treaty to "all investments made by investors of one Contracting Party in the territory of the other Contracting

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[223] Tr., 284:3-9.
[224] AmSOC, ¶ 153.

Party, *on or after January 1, 1992*," (italics added) and, citing *Belbek*, add that "the context of the Treaty as a whole discloses an overall intention to cover all qualifying investments, without regard to when or how such investments may have become qualifying investments under the Treaty."[225]

187. The Claimants also point out that the tribunal in *Everest Estate* ruled that Articles 1(1) and 12 of the Treaty do not require simultaneity between the transaction giving rise to an investment and the territory in which the investment is made for otherwise, "the protection of the [Treaty] would be denied to a category of investors of one Contracting Party purely as a result of the location of the investment and notwithstanding it meeting the requirement that the investment have been made after 1992."[226] The Claimants add that "it would seem illogical that…Ukrainian investments would then not be protected in Crimea, where Russia has occupied that territory and asserted its own jurisdiction and effective control."[227]

188. To support their argument, the Claimants also call the Tribunal's attention to the pronouncement in *Ukrnafta* that "a reading of Article 12 in combination with Articles 1(1) and 1(4) of the Treaty imposes no requirement that the investment be made in the territory of the other Contracting Party *ab initio*,"[228] because to do so would defeat the Treaty's object and purpose to create favourable conditions for mutual investments and to expand economic cooperation.

189. Moreover, the Claimants point out that Article 1(2) of the Treaty contains no temporal requirement at all on a protected investor.[229] Following the holding of the tribunals in *Belbek* and *Privatbank*, the Claimants assert that in the absence of such a requirement, it is "difficult to sustain a reason for reading such a requirement as regards the definition of the term investment under Article 1(1)."[230]

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[225] AmSOC, ¶ 154, *referring to Belbek,* ¶ 243 (**CLA-3**); Claimants' Answers, ¶ 35.3.
[226] AmSOC, ¶ 155, *referring to Everest - Jurisdiction*, ¶ 151 (**CLA-29**).
[227] Tr., 290:4-9.
[228] AmSOC, ¶ 156, *referring to Ukrnafta*, ¶ 196 (**CLA-50**).
[229] Claimants' Answers, ¶ 35.5.
[230] Claimants' Answers, ¶¶ 35.5, 35.9, *referring to Belbek,* ¶ 241 (**CLA-3**); *Privatbank*, ¶ 229 (**CLA-49**); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 3.33-3.34 (**CLA-132**).

(c) The Tribunal's Analysis

190. The critical date for investment is not when the investment is initially acquired but when a breach occurs. Prior to that date the BIT was not in play insofar as these investors were concerned. **There is no attempt at "retroactive" application of the Treaty**. Its terms apply directly and without retroactivity to the facts existing at the date of the breach.

191. In support of her position, our colleague Professor Stanivuković points to the words in Article 12:

> made by investors of one Contracting Party in the territory of the other Contracting Party

as indicative of a requirement for diversity of nationality at the time of the original investment (¶ 125), but in the majority view, the verb "made" is merely descriptive of an existing state of affairs on the critical dates of asset seizure and commencement of proceedings. Obviously the investment must have been "made". Otherwise there would be nothing to complain about. However, for reasons already discussed, the majority does not accept adding the "original date of investment" as an additional limitation on a BIT protection. The majority finds some reinforcement in Article 1(1) of the BIT which defines investments as assets that "are [present tense] invested by an investor", which is also merely descriptive of an existing state of affairs.

192. The uncontradicted evidence of Dr. Palishvili, the Claimants' expert on Ukrainian law, is that the investments were in accordance with Ukrainian legislation when they were originally made, and thereafter so long as Ukraine controlled Crimea;[231] and the investments were made in accordance with Russian legislation applicable to Crimea when Russia annexed Crimea effective 18 March 2014.[232]

193. Further, the evidence of the Claimants' expert on Russian law, Professor Paul B. Stephan, is that:

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[231] AmSOC, ¶ 145, *referring to* First Paliashvili Report, ¶ 88, First Stephan Report, ¶ 50; Claimants' Answers, ¶¶ 34.11, 34.17.

[232] AmSOC, ¶ 145, *referring to* First Paliashvili Report, ¶ 88; First Stephan Report, ¶ 50. *See also* Claimants' Answers, ¶¶ 34.11, 34.18.

> In summary, Russian legislation adopted subsequent to the annexation of Crimea did not require the liquidation of or bar operations by Ukrainian enterprises operating on the territory of Crimea, even if an enterprise was owned directly or indirectly by Ukrainian state organs. Indeed, this legislation confirmed that subsurface permits issued by Ukraine remained in effect in the Republic of Crimea once Russia had annexed that territory. **Russian legislation required Ukrainian firms eventually to reorganize themselves as Russian entities or to register as branches of foreign firms operating on Russian territory, but not before the end of 2014.** The subsurface permits remained in effect until later in 2015 or 2017, depending on the area they covered.[233]

194. Professor Stephan added in his Second Report:

> Law 124-FZ thus provided legal persons that had their corporate seats in the Republic of Crimea or the Federal City of Sevastopol with a path to bring their constituent documents in line with this requirement prior to the expiration of the transitional period on January 1, 2015 (later amended to March 1, 2015). In doing so, Law 124-FZ confirmed that, as a matter of Russian law, Chornomornaftogaz continued to exist as a legal person with rights under Russian civil law at the time of the annexation of the Republic of Crimea by the Russian Federation.[234]

195. The fact that Ukrainian investors in Crimea were considered "foreign" investors unless and until they "reorganized themselves as Russian entities" at some point in the transitional period ending 1 January 2015 demonstrates that the Claimants met the diversity of nationality requirement on the date of the seizure.

196. The Tribunal appreciates that it has not heard from legal experts on Russian law called by Russia but it was Russia's choice to decline to participate in this arbitration.

197. It is not a good faith interpretation of the Treaty to suggest that Russia, having taken over Crimea by force of arms, thereby depriving the Claimants and other Crimea investors of the legal protection of Ukrainian law and Ukrainian judicial institutions, to deny treaty protection to investors, which, by the unilateral act of one of the Contracting Parties, have become foreign investors. At the critical dates, the investments were made "in accordance with [Russian]

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[233] First Stephan Report, ¶ 110.

[234] Second Expert Report of Professor Paul B. Stephan, dated 22 February 2018 (hereinafter "**Second Stephan Report**"), ¶ 40.

legislation" because as a matter of Russian law the annexation was approved by the Supreme Court of the Russian Federation and implemented by laws duly enacted by the Russian Parliament.

198. If the Russian objection were correct, it would be necessary to add words to Article 1(1) of the BIT so as to read:

> any kind of tangible and intangible assets which [**from the date of acquisition**] were invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, including…(emphasis added)

199. Moreover, to hold that the circumstances of the original investment control the application of the BIT undermines one of the purposes of the Treaty which is not only to *attract* foreign investments but to *protect* existing investments which, at the time of the seizure, are "foreign investments" at the mercy of the state which effects the compulsory acquisition.

200. If the analysis of our colleague, Professor Stanivuković, were accepted, it would produce a gap (or "bubble") in treaty coverage because Russia would lack responsibility because the original investment was not made in Russia and Ukraine would not be responsible because the Claimants are Ukrainian not Russian.

201. Our colleague, Professor Stanivuković argues that attraction of fresh foreign investment to Crimea is scarcely a realistic objective in the present circumstances but it must be observed that if the attraction of new Ukrainian investment in Crimea was destroyed by Russia's military intervention, Russia should hardly be heard to rely on such lack of attraction to escape the responsibilities under the BIT.

202. The vulnerability of Ukrainian investments (and thus the need for Treaty protection) in Crimea is wholly the result of Russian military action. No good faith interpretation the terms of the Treaty could lead to a denial of protection, in the view of the majority.

PART 12 - ARE THE CLAIMANTS' CLAIMS FOUNDED ON TREATY OBLIGATIONS THAT WERE THEN BINDING ON RUSSIA?

203. Article 28 of the *Vienna Convention on the Law of Treaties* provides:

> Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entering into force of Treaty with respect to that party.

204. In order to establish jurisdiction, the Tribunal must find that Russia was obligated to Ukrainian investors under the BIT at the time the Claimants' Crimea assets were seized and at the time of commencement of this arbitration.

(a) The Claimants' Position

205. It is acknowledged that the necessary pre-conditions to jurisdiction must exist both at the date of the alleged breach and the date the arbitral proceedings were initiated.

206. The Claimants proffer two dates for Russia to have assumed Treaty obligations towards Crimean investors: (i) 27 February 2014, when Russia assumed effective control and jurisdiction over Crimea; or (ii) 18 March 2014, when Russia and Crimea entered into the **Annexation Treaty** to annex Crimea[235] confirmed by the **Law on Admission** enacted 21 March 2014, deemed in effect 18 March 2014. The Claimants maintain that this Tribunal has jurisdiction to hear this case under either alternative.

(1) In Support of 27 February 2014 as the Critical Date of Attachment

207. The Claimants contend that it was on 27 February 2014 ("**Special Operation Forces Day**") when Russia consolidated its control over Crimea[236] and inherited obligations under the BIT to all those investors who had thereby become "foreign" investors:

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[235] AmSOC, ¶¶ 121-127, 128-136. *See also* Claimants' Opening Presentation, slides 112-116.

[236] AmSOC, ¶ 121; Claimants' Answers, ¶¶ 26.4-26.12.

(a) armed men took control of the building of the Crimean Parliament in Simferopol and hoisted a Russian flag above that building; [237]

(b) Russian troops took control over the civilian airport in Simferopol and the military airport at Sevastopol;[238] and

(c) Mr. Aksyonov, a pro-Russian politician, was installed as the new Prime Minister of the Autonomous Republic of Crimea.[239]

208. The Claimants argue that Russia's effective control and jurisdiction over Crimea as of 27 February 2014 is reflected in both Ukrainian and Russian legislation.[240] Under Ukrainian legislation,[241] Russia's occupation of Crimea is declared to have commenced on 20 February 2014.[242] Under Russian legislation, the **Law on Admission** points to a late February 2014 date, when it provides for the application of Ukrainian legislation on or before 21 February 2014.[243]

209. Moreover, "Russia's control and jurisdiction over the territory are relevant, [regardless of whether] the international community continues to treat Crimea as an occupied territory."[244]

210. According to the Claimants, Russia's consolidation of effective control and jurisdiction over Crimea on 27 February 2014 rendered it responsible under the BIT[245] because "occupying powers are bound by international obligations in respect to territory that they physically control,

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[237] *See above* ¶ 87.
[238] *See above* ¶ 87.
[239] *See above* ¶ 88.
[240] AmSOC, ¶ 122.
[241] AmSOC, ¶ 122, *referring to* First Paliashvili Report, ¶¶ 61-65, *discussing* Law of Ukraine No. 1207-VII "On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine," 15 April 2014 (**CE-255**); Law of Ukraine No. 1636-VII "On Establishing Free Economic Zone 'Crimea' and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine," 12 August 2014 (**CE-280**).
[242] First Paliashvili Report, ¶ 62, *discussing* Law of Ukraine No. 1207-VII "On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine," 15 April 2014, Art. 1(2) (**CE-255**).
[243] Federal Constitutional Law of the Russian Federation No. 6-FKZ, Arts. 6, 23, 21 March 2014 (**CE-230**). Federal Constitution Law 6-FKZ provided for the application of, *inter alia*, the legal-normative acts of the so-called Republic of Crimea during the transitional period. This included Resolution 1745, which in turn provided for the application of Ukrainian legislation adopted before 21 February 2014. Autonomous Republic of Crimea, Resolution No. 1745-6/14, Art. 2, 17 March 2014 (**CE-199**).
[244] Tr., 93:10-94:18.
[245] AmSOC, ¶ 123; Claimants' Answers, ¶¶ 31.1, 31.5; Tr., 328:1-17.

even if such control is illegitimate or illegal."[246] In this regard, the Claimants rely on the decision of the International Court of Justice (the "**ICJ**") in the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, where the Court held:

> [South Africa] also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[247]

211. In addition, the Claimants rely on the jurisprudence of the European Court of Human Rights ("**ECtHR**")[248] to establish Russian responsibility:

(a) in *Loizidou v. Turkey*,[249] the Claimants assert that the ECtHR found that "[t]he concept of 'jurisdiction'…is not restricted to the national territory of the Contracting States [whose responsibility] could also arise when as a consequence of military action-whether lawful or unlawful-it exercises effective control of an area outside its national territory."[250] In that case the ECtHR held the State of Turkey responsible for the acts of the purported Turkish Republic of Northern Cyprus due to the effective control exercised by Turkey's army over Northern Cyprus;[251]

(b) in *Al-Skeini v. United Kingdom,*[252] the ECtHR held that occupying states are accountable for treaty violations within occupied territory so as not to deprive the

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[246] AmSOC, ¶ 123.

[247] AmSOC, ¶ 123, *referring to Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, 54 (**CLA-45**).

[248] AmSOC, ¶ 125.

[249] *Case of Loizidou v. Turkey*, ECtHR Application No. 15318/89, Judgment, 18 December 1996 (**CLA-41**) (hereinafter "***Loizidou***").

[250] AmSOC, ¶ 125, *referring to Loizidou*, ¶ 17 (**CLA-41**).

[251] AmSOC, ¶ 125, *referring to Loizidou*, ¶ 18 (**CLA-41**).

[252] *Case of Al-Skeini and Ors. v. United Kingdom*, ECtHR Application No. 55721/07, Judgment, 7 July 2011, ¶ 142 (**CLA-6**) (hereinafter "***Al-Skeini***").

population within that territory from the rights they are entitled to, and to prevent a "vacuum of protection within the [Treaty's] legal space";[253]

(c) in *Ilaşcu v. Moldova and Russia*,[254] the ECtHR held that "a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory…whether it be exercised directly, through its armed forces, or through a subordinate local administration."[255]

212. Taken together, the pronouncements of the ICJ and ECtHR, Russia's "physical control and jurisdiction over Crimea, although unlawful, engaged Russia's international responsibility under the Ukraine-Russia BIT with regard to rights and protections afforded to Ukrainian investors in Crimea" beginning on 27 February 2014.[256]

(2) In the Alternative, 18 March 2014 is the Critical Date of Attachment

213. If Russia did not assume obligations under the BIT as of 27 February 2014, the Claimants argue that Russia did so on 18 March 2014, when Russia and the Republic of Crimea executed the **Annexation Treaty**[257] that paved the way for Crimea to join the Russian Federation[258] as the "new Russian constituent entities of the Republic of Crimea and the Federal City of Sevastopol."[259]

214. In response to a question from the Tribunal regarding the effect of the **Annexation Treaty** executed on 18 March 2014, on the **Nationalization Resolution** issued the previous day on 17 March 2014, the Claimants contend that the **Nationalization Resolution** took effect, under Russian Law, on 18 March 2014, as Russia needed jurisdiction under Russian Law for such expropriation of the Claimants' assets to become valid.[260]

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[253] AmSOC, ¶ 125, *referring to Al-Skeini*, ¶ 142 (**CLA-6**).

[254] *Case of Ilaşcu and Others. v. Moldova and Russia*, ECtHR Application No. 48787/99, Judgment, 8 July 2004, ¶ 314 (**CLA-35**) (hereinafter "***Ilaşcu***").

[255] AmSOC, ¶ 126, *referring to Ilaşcu*, ¶ 314 (**CLA-35**).

[256] AmSOC, ¶ 124.

[257] Annexation Treaty (**CE-224-Am**).

[258] AmSOC, ¶ 131.

[259] AmSOC, ¶¶ 131, 132, *referring to* First Stephan Report, ¶ 43; Tr., 331:11-14.

[260] Tr., 57:15-59:21.

215. The Claimants rely on the *Everest Estate* decision for the proposition that "the transfer of Crimea to the Russian Federation occurred on that day [18 March] and that the 'claimants' investments are to be considered investments on Russian territory under the BIT after the annexation."[261] The Claimants maintain that the Respondent cannot claim otherwise to escape the consequences of its acts as it had declared Crimea part of its territory as of 18 March 2014 through a series of formal acts.[262]

216. The Claimants note, that after the execution of the **Annexation Treaty**, the Respondent's Constitutional Court upheld the validity of the **Annexation Treaty** in its Resolution No. 6-P, including the provisional effect of the Treaty as of 18 March 2014.[263] In addition, the Claimants assert that Russia, through the **Law on Admission**, considered Crimea admitted to its territory on the date of the signing of the Annexation Treaty, *i.e.*, 18 March 2014.[264]

217. In the Claimants' view, **good faith** demands that Russia act consistently with its formal declarations as unilateral acts giving rise to obligations on which third parties may rely on to exercise their rights,[265] citing *Joy Mining Machinery v. Arab Republic of Egypt*.[266]

(3) *In the Further Alternative, 21 March 2014 is the Critical Date*

218. The Claimants do not agree with *Belbek* that Crimea became part of the territory of the Respondent only on 21 March 2014, the day when Russia enacted the **Law on Admission** and ratified the **Annexation Treaty**.[267] Should the Tribunal find that Crimea became the territory of

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261 AmSOC, ¶ 132.

262 AmSOC, ¶ 132, *referring to Belbek*, ¶¶ 16, 197 (**CLA-3**); *Privatbank*, ¶¶ 12, 183 (**CLA-49**); *Everest - Jurisdiction*, ¶¶ 11, 83, 147 (**CLA-29**); *Ukrnafta*, ¶¶ 5, 135, 179 (**CLA-50**); *Stabil*, ¶¶ 5, 124 (**CLA-60**). The Claimants also state in the Respondent's letter to the PCA dated 19 January 2017 the Respondent did not make an equivalent assertion (referring to Letter No. 06-5928/17 of Ministry of Justice, Russian Federation, to Permanent Court of Arbitration, 19 January 2017 (**CE-383**).

263 First Stephan Report, ¶ 44, *discussing* Constitutional Court of the Russian Federation, Resolution No. 6-P (19 March 2014) (**CE-225**).

264 AmSOC, ¶ 133, *referring to* Russian Federation, Federal Constitutional Law No. 6-FKZ, Art. 1(3), 21 March 2014 (**CE-230**); First Stephan Report, ¶ 45.

265 AmSOC, ¶ 134, *referring to* Anthony Aust, *Handboook of International Law* (2nd ed. 2011) 8 (**CLA-83**); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 92 (**CLA-23**).

266 *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2008, § 96 (**CLA-40**).

267 AmSOC, ¶ 135 *referring to Belbek*, ¶¶ 176-209 (**CLA-3**); *Privatbank*, ¶ 162-195 (**CLA-49**).

Russia only on 21 March 2014, it should still uphold jurisdiction over the dispute in this case.[268] According to the Claimants, the Annexation Treaty: (i) caused Crimea to be annexed by Russia; and (ii) incorporated certain pre-annexation acts of the Republic of Crimea into Russian law, including those seizing the Claimants' assets.[269] On this view, the date of expropriatory acts is also shifted to 21 March 2014 because the day of the annexation and the expropriatory acts go hand-in-hand.[270]

219. The tribunal in *Ukrnafta* also concluded that the Treaty "became opposable to Russia 'no later than 21 March 2014.'"[271] In the Claimants' view, the important point is that "all tribunals to date that have considered claims brought by Ukrainian investors against Russia in connection with Ukrainian investments in Crimea have concluded that – as a result of Russia's assertion of sovereignty over Crimea – Crimea became territory of Russia under the [Treaty]."[272]

220. As to acts taken by the Crimean authorities before 21 March 2014, the Claimants assert that events occurring before a treaty has taken effect may be considered by a tribunal in determining whether there has been a breach of the treaty after it has entered into force.[273]

(b) The Tribunal's Analysis

222. The first point to make is that it was not necessary for Russia to take any affirmative action after annexation to "assume" its obligations to Ukrainian investors under the BIT. No "assumption" was necessary. Russia's occupation and annexation did not interrupt Russia's obligations to Ukrainian investors under the BIT. The issue is whether on the date of the breach and the date of initiation of these proceedings, the assets of Ukrainian investors were located in

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[268] AmSOC, ¶ 136.

[269] AmSOC, ¶ 136, *referring to* First Stephan Report, ¶¶ 14, 43, 80.

[270] AmSOC, ¶ 136.

[271] AmSOC, ¶ 135, *referring to Ukrnafta*, ¶ 179 (**CLA-50**); *Stabil*, ¶ 175 (**CLA-60**).

[272] AmSOC, ¶ 135, *referring to Belbek*, ¶¶ 208-209 (**CLA-3**); *Privatbank*, ¶¶ 194-195 (**CLA-49**); *Everest - Jurisdiction*, ¶ 163 (**CLA-29**); *Ukrnafta*, ¶ 179 (**CLA-50**); *Stabil*, ¶ 175 (**CLA-60**).

[273] Claimants' Answers, ¶¶ 37.2-37.3, *referring to M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 93 (**CLA-124**); *Bayandir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 132 (**CLA-109**); *Técnicas Medioambatientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 66, 68 (**CLA-139**).

"territory" for which Russia had assumed jurisdiction and to which Ukraine had, for all practical purposes, ceded jurisdiction.

223. Our colleague, Professor Stanivuković dismisses the argument that the BIT obligations attached as Russian troops invaded Crimea in February 2014 (¶ 98) but in the majority view, the assumption of BIT obligations did not commence on 27 February 2014, but came with Russia's incorporation of Crimea effective 18 March 2014. Professor Stanivuković takes the view that even at that date, the BIT did not apply to Russia because there was no Russian declaration "stating in clear and specific terms that the Russian Federation assumed responsibility for international relations of Crimea from 18 March 2014". (¶ 108) However, in the majority view, nothing screams louder than Russian conduct and assumption of comprehensive authority effective 18 March 2014 over all aspects of Crimean sovereignty including absorption of Crimea and Sevastopol into the Russian Federation. In some situations a verbal declaration is not necessary. *Res ipsa loquitur*. The jurisdictional facts speak for themselves. If a formal declaration were necessary, it would be found in the language of the comprehensive legislative takeover of Crimea effective 18 March 2014.

224. The date of Russian annexation of Crimea and Sevastopol is crucial because if the seizure of the Claimants' assets took place *before* that date then Russia inherited the seizure but did not itself seize the assets in question.

225. It is true as our colleague Professor Stanivuković argues at ¶ 226, that the Crimean Parliament had purported to seize the Claimants' assets prior to the annexation. On 17 March 2014, the Crimean Parliament issued Resolution No. 1758-6/14 (the "**Nationalization Resolution**")[274] and the **Independence Resolution** (Resolution No. 1745-6/14).[275] However, as earlier noted, two days earlier, on 15 March 2014, the Ukrainian Parliament had stripped the Crimean Parliament of its power. The purported seizure two days later by a rogue legislature, stripped of its powers by the national legislature that had created it, was therefore of no legal effect. The only source of legislative authority on 17 March 2014 was the Ukrainian constitution. The Russian Parliament had not proceeded prior to 21 March 2014 with the legal steps necessary to

[274] State Council of the Republic of Crimea, Resolution No. 1758-6/14, 17 March 2014 (**CE-202**).

[275] Autonomous Republic of Crimea, Resolution No. 1745-6/14, Art. 1, 17 March 2014 (**CE-199**).

cement the annexation and had not purported to make any grant of legislative authority to the Crimean Parliament.

226. The critical dates in this respect are as follows:

DATE	DESCRIPTION
23-24 February 2014	President Vladmir Putin instructs officials of the Russian Ministry of Defense and the Russian Special Forces to "begin the work to bring Crimea back into Russia."[276]
24 February 2014	Russian paratroopers land in Crimea[277] around the same time, Mr. Oleg Belaventsev, an envoy of President Vladimir Putin, arrived in Crimea to coordinate the secession and annexation process.[278]
27 February 2014	The *de facto* takeover of Crimea and Sevastopol is celebrated as "Special Operations Forces Day".[279]
15 March 2014	**The Ukrainian Parliament strips the Crimean Parliament of its powers.[280]**
16 March 2014	Referendum held in Crimea over future with Russia.
17 March 2014	The Crimean Parliament without constitutional authority adopts the "**Independence Resolution**" and the "**Nationalization Resolution**" purporting in tandem to seize the Claimants' assets in Crimea.
18 March 2014	Russia and Crimea conclude the **Annexation Treaty** in Moscow which provided that the Republic of Crimea "is deemed to have been admitted to the Russian Federation from the date of the signing of this Treaty" being 18 March 2014. The same day, armed men arrived at the offices of the Chornomornaftogaz in Simferopol.
21 March 2014	The Russian Parliament enacts: (i) the law ratifying the **Annexation Treaty** of 18 March 2014[281] and (ii) the "**Law on Admission**",[282]

[276] AmSOC, ¶ 42, *referring to* Radio Free Europe/Radio Liberty, 'News Analysis: The Plot To Seize Crimea Putin Reveals Secrets of Russia's Crimea Takeover Plot' 11 March 2015 (**CE-340**); Tr., 18:14-18.
[277] Nemtsov Report, 13 (**CE-345**).
[278] Claimants' Answers, ¶ 44.19, *referring to* Interview with Termirgaliev (**CE-342-Am**); Where the Motherland Orders (**CE-750**); Mikhail Zygar, All the Kremlin's Men: Inside the Court of Vladimir Putin (2016) 750 (**CE-719**).
[279] President of Russian Federation, Decree No. 103, 26 February 2015 (**CE-336**).
[280] First Paliashvili Report, ¶ 132.
[281] Russian Federation, Federal Law No. 36-FZ, 21 March 2014 (**CE-229**).
[282] Russian Federation, Federal Constitutional Law No. 6-FKZ, 21 March 2014 (**CE-230**).

DATE	DESCRIPTION
	admitting Crimea and Sevastopol into the Russian Federation, effective as of 18 March 2014 and providing for a transitional period during which entities in Crimea would continue to operate under their previous Ukrainian form until their legal status is determined under Russian law. The continuing validity of documents issued by Ukrainian bodies, **including records of property rights and rights of use**, was recognized.

227. In the view of the majority of the Tribunal, the only legislative authority in Crimea and Sevastopol, after the local Parliament was stripped of its authority on 15 March 2014, was the Parliament of Ukraine itself, which took no action against the Claimants' assets. There was no gap in sovereignty. Ukraine's constitutional order remained in place until Russia absorbed Crimea and Sevastopol into the Russian Federation.

228. Our colleague, Professor Stanivuković argues that "the *unauthorized* seizure that happened on 17 March 2014 was never reversed and had permanent effects" (emphasis added) (¶ 208). In the majority view, the "unauthorized seizure" had no more legal effect than if the Mayor of Sevastapol had, without authority, purported to nationalize all the grocery stores in the City. The "unauthorized seizure" was a scrap of paper. There was nothing to reverse.

229. Our colleague then argues that:

> [T]he Treaty on Admission and the Law on Admission retroactively confirmed the validity of those Resolutions, so their effective date remained the same. (¶ 213)

230. In the majority view, it is not possible to "confirm" a nullity. The expropriation was achieved only by force of the Russian legislation which enacted the previously unauthorized laws of the dis-empowered Crimean legislature. On the effective date of the Russian legislation, Crimea had been absorbed into the Russian Federation which, having authorized the seizure became responsible under the BIT for its financial consequences.

231. The **Law on Admission** created the necessary constitutional authority to adopt and ratify the seizure which Russia accomplished, incrementally, from and after 18 March 2014. Accordingly, the seizure occurred at a time when Russia had inherited the BIT obligation towards Ukrainian investors and investments.

PART 13 - DID THE CLAIMANTS COMPLY WITH THE NOTICE AND NEGOTIATION REQUIREMENTS OF THE TREATY?

232. Article 9(1) of the BIT requires a claimant, before commencing arbitral proceedings, to send to the Respondent state "written notice, accompanied by detailed comments," following which the parties to the dispute "shall endeavour to settle the dispute through negotiations if possible."[283] Arbitration may be only commenced if "the dispute cannot be resolved in this manner within six months from the date of the written notice."

(a) The Claimants' Position

233. The Claimants submit that they have complied with these requirements by their Notice of Dispute dated 15 February 2016 sent to the Respondent.[284] According to the Claimants, their written notice and offer of negotiation were sufficient to satisfy any obligations they had under Article 9 of the Treaty.[285] In support of this assertion, the Claimants refer to the pronouncements of the tribunal in *Belbek* that Article 9 of the Treaty only mandates that the parties shall "endeavour to settle the dispute through negotiations if possible."[286] Similarly, the tribunal in *Privatbank* observed that the "purpose of the six month period [under the Treaty] is to foster the conditions of

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[283] Article 9 of the BIT (Resolution of Disputes between a Contracting Party and an Investor of the Other Contracting Party) provides in relevant part:

> 1. Any dispute between one Contracting Party and **an investor of the other Contracting Party** arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.
> 2. If the dispute cannot be resolved in this manner within six months after the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to…

[284] AmSOC, ¶¶ 158-159, *referring to* Notice of Dispute (**CE-368**); Claimants' Answers, ¶¶ 12.6, 41.1.

[285] Claimants' Answers, ¶ 41.3.

[286] Claimants' Answers, ¶ 41.2, *referring to Belbek*, ¶ 259 (**CLA-3**).

amicable settlement…not to prevent an arbitration from proceeding where attempts at negotiation have been unsuccessful."[287]

234. The Claimants also mention the futile attempts of NJSC Naftogaz Chairman Mr. Kobolyev in discussing the return of the Claimants' assets or compensation for their seizure, when Mr. Kobolyev was "rebuffed at every turn." [288]

(b) The Tribunal's Ruling

235. The Tribunal is satisfied that the Notice of Dispute dated 15 February 2016 satisfied Article 9(1) of the BIT. There is no evidence that Russia expressed interest in any effort "to settle the dispute through negotiations."

PART 14 - DOES CONSENT TO ARBITRATION UNDER ARTICLE 9 OF THE TREATY EXTEND TO CLAIMS BEING MADE BY MULTIPLE CLAIMANTS IN A SINGLE ARBITRAL PROCEEDING?

236. The issue is whether Russia's consent to arbitration under Article 9 of the Treaty extends to multiple claimants in a single arbitral proceedings.

(a) The Claimants' Position

237. The Claimants note that while Article 9(1) of the Treaty refers to "investor" in the singular and "investments" in plural other provisions of the Treaty referred to the term "investors" in the plural.[289] *Everest Estate* dealt with claims by multiple claimants against Russia under the BIT. Following the holding in that case, the Claimants assert that "the definitions of 'investments' in plural and of 'investor' in singular do not preclude the possibility of a single investment made by multiple investors or *vice versa*…In this situation, which is the situation in this proceeding, silence in respect of multi-party proceedings is not silence in respect of consent. The State and each investor have given their consent."[290]

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[287] Claimants' Answers, ¶ 41.2, *referring to Privatbank*, ¶ 242 (**CLA-49**).
[288] AmSOC, ¶ 182, *referring to* WS Kobolyev, ¶¶ 22-37; Claimants' Answers, ¶ 12.4.
[289] Claimants' Answers, ¶ 40.3, *referring to Everest - Jurisdiction*, ¶ 176 (**CLA-29**).
[290] Claimants' Answers, ¶ 40.3, *referring to Everest - Jurisdiction*, ¶ 176 (**CLA-29**).

238. The Claimants submit that their claims are closely linked to each other, as they were "submitted jointly, are grounded on the same provisions under Articles 2, 3, and 5 of [the BIT]…arise from similar circumstances, *i.e.,* expropriation of their investments by the Russian Federation upon its unlawful annexation of Crimea" and plead substantially identical reliefs.[291]

(b) The Tribunal's Analysis

239. As the *Everest Estate* tribunal noted with respect to the silence of the BIT regarding the potential of multi-party proceedings, "silence in respect of multi-party proceedings is not silence in respect of consent."[292] Russia has consented to the arbitration with respect to each of the Claimants' "investors". In this case, the various Claimants are advancing claims arising out of the same series of events under the same provisions and seeking the same relief under the Russia-Ukraine BIT. For reasons of economy and avoidance of a multiplicity of virtually identical arbitrations leading possibly to inconsistent results, all of which is to be avoided, the cases should not be severed. The UNCITRAL Rules require the Tribunal to deal with all of the claims in an efficient and expeditious manner. There is no prejudice to the Respondent in dealing with the claims in this manner. There is no reason to think that Russia would object and in fact Russia has not objected to proceeding in this manner.

PART 15 - ATTRIBUTION OF LIABILITY UNDER THE TREATY

240. The Claimants allege that Russia breached several provisions of the Treaty, including (i) Article 5(1) on expropriation; (ii) Article 2(2) on full and unconditional protection; (iii) Article 3(1) on fair and equitable treatment; and (iv) Article 3(1) on full protection and security. The threshold issue is whether the seizure of the Claimants' assets can be attributed to the Russian Federation.

(a) The Claimants' Position

241. The Claimants submit that the Russian Federation is responsible for the seizure of its assets. With the assistance of the Crimean authorities, Russia orchestrated the takeover of their

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[291] Claimants' Answer, ¶ 40.4-40.5, *referring to Everest - Jurisdiction*, ¶ 177 (**CLA-29**).
[292] *Everest - Jurisdiction*, ¶ 176 (**CLA-29**).

investments by (a) taking control of Chornomornaftogaz's management;[293] (b) declaring on 6 March 2014 that the Claimants' assets will be nationalized and its ownership transferred to the Autonomous Republic of Crimea;[294] (c) announcing on 13 March 2014 that Chornomornaftogaz, the Odeske and Bizemennye gas fields, and Chornomornaftogaz drilling rigs will be transferred to the Autonomous Republic of Crimea;[295] (d) installing Mr. Aksyonov as the new Chairman of Chornomornaftogaz;[296] and (e) stating on 14 March 2014 that all of Chornomornaftogaz's assets will be nationalized; [297] (f) issuing the Nationalization Resolution on 17 March 2014 that declared the properties of Chornomornaftogaz and Ukrtransgaz as properties of the Republic of Crimea;[298] (g) providing for the creation of Chernomorneftegaz through the Nationalization Resolution, to which the properties of Chornomornaftogaz and Ukrtransgaz would be transferred;[299] (h) declaring in the Nationalization Resolution that Chernomorneftegaz would operate using Chornomornaftogaz's permits;[300] and (i) issuing Order No. 165-r directing the incorporation of Chernomorneftegaz.[301]

242. Despite the suspension by Ukraine of the legal authority of the Parliament of Crimea, Russia signed the Annexation Treaty which gave the acts of seizure legal effect effective as of 18 March 2014, the date Crimea entered the Russian Federation.

243. As outlined above, the Crimean authorities issued additional resolutions and orders that confiscated the Claimants' investments and placed these in the hands of Chernomorneftegaz. Acting under the authority of the Russian Constitution:

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[293] AmSOC, ¶ 165.

[294] AmSOC, ¶ 165, *referring to* Interfax-Ukraine, 'Ukrainian Property Will Be Nationalized- First Deputy Chairman of Council of Ministers' 6 March 2014 (**CE-178**).

[295] AmSOC, ¶ 165, *referring to* Ria Novosti, 'Interview with Sergey Aksyonov' 10 March 2014 (**CE-180**).

[296] AmSOC, ¶ 165, *referring to* Chairman of the Council of Ministers of the Autonomous Republic of Crimea, Order No. 110-rp, 13 March 2014 (**CE-189**).

[297] AmSOC, ¶ 165, *referring to* Comment.ua, 'Temirgaliev Intends to Attract Investments in the Stolen Chernomorneftegaz' 14 March 2014 (**CE-192**).

[298] AmSOC, ¶ 167, *referring to* State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 1, 17 March 2014 (**CE-202**).

[299] AmSOC, ¶ 167, *referring to* State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 4, 17 March 2014 (**CE-202**).

[300] AmSOC, ¶ 167.

[301] AmSOC, ¶ 167, *referring to* Council of Ministers of the Republic of Crimea, Order No. 165-r, 17 March 2014 (claiming to transfer assets to the Russian Chernomorneftegaz) (**CE-204**).

(a) the Ministry of Fuel and Energy issued Order No. 3, which allocated property owned by the Republic of Crimea to Chernomorneftegaz;

(b) the Ministry of Fuel and Energy, on 26 March 2014, executed with Chernomorneftegaz a certificate of transfer and acceptance for the operational management of the property owned by the Republic of Crimea;

(c) the State Council of Crimea issued Resolution 2032 that declared the gas supply system operated by Krymgaz under a lease agreement with and with the financial support of NJSC Naftogaz as property of the Republic of Crimea;

(d) the State Council of Crimea issued Resolution 2033 that clarified the nationalization of the gas pipeline system then operated by NJSC Naftogaz;

(e) the Ministry of Fuel and Energy issued Order No. 8 that ordered the gas pipeline system transferred to NJSC Naftogaz be allocated to Chernomorneftegaz; and

(f) the State Council of Crimea issued Resolution No. 2085-6/14 which declared that all property of the state of Ukraine and abandoned property to be the property of the Republic of Crimea.[302]

244. For the acts of the Crimean authorities *before* 18 March 2014, the Claimants assert two separate bases for attribution thereof to the Respondent, Articles 8 and 11 of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (the "**ILC Articles**"). The Claimants argue that the Respondent "acknowledged and adopted the pre-annexation resolutions and orders of the Crimean authorities, including those of the Crimean Parliament" when the Respondent gave effect to those acts by virtue of the *Annexation Treaty* and the *Law on Admission*, which, according to the Claimants, constitute the Respondent's "clear, unequivocal acknowledgement and adoption of the Crimean authorities' acts."[303] In *Ampal-American Israel Corporation and Others v. Arab Republic of Egypt*[304] and *William Ralph Clayton*

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[302] AmSOC, ¶ 172.

[303] Claimants' Answers, ¶¶ 44.5, 44.6, 44.8, 44.9.

[304] *Ampal-American Israel Corporation and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 146 (**CLA-106**).

and Others v. Government of Canada[305] conduct was attributed to the Respondent States under Article 11 when the States acknowledged and adopted the conduct and thereby made it their own, which is precisely the case here.[306]

(b) The Tribunal's Ruling

245. Article 8 of the ILC Articles states that conduct will be attributed to a State when that State "directed or controlled the specific operation and the conduct complained of was an integral part of that operation."[307] The evidence in this case firmly establishes beyond a doubt that Russia directed and controlled the step-by-step takeover of the Claimants' investments, that ultimately culminated in their expropriation by Russia acting under the authority of the Russian Constitution as interpreted and applied by the Russian Supreme Court.

246. As to the acts of the Crimean authorities *after* 21 March 2014 [backdated under Russian law to 18 March 2014], Article 4 of the ILC Articles applies to attribute international responsibility as the Crimean authorities were then already acting in their capacity as local organs of the Russian Federation.[308] The actions of governmental subdivisions including regional governments are properly attributable to the State.[309]

PART 16 - EXPROPRIATION

247. Article 5 of the BIT addresses the issue of expropriation in the following terms:

> Investments made by investors of one Contracting Party in the territory of the other Contracting Party **shall not be expropriated**, nationalized or subject to other measures equivalent in effect to expropriation (hereinafter referred to as "expropriation"), except in cases where such measures are taken in the public interest under due process of law, are not discriminatory

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305 *William Ralph Clayton and Others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction, 17 March 2015, ¶¶ 322-324 (**CLA-143**).

306 Claimants' Answers, ¶¶ 44.7 and 44.10.

307 Claimants' Answers, ¶ 44.12, *referring to* Article 8, ILC Articles Commentary (**CLA-73-Am**); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶ 173 (**CLA-122**).

308 Claimants' Answers, ¶ 44.34.

309 Claimants' Answers, ¶ 44.35, *referring to* Article 8, ILC Articles (**CLA-72-Am**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/37/3, Award, 21 November 2000, ¶ 49 (**CLA-112**). *See also* Claimants' Answers, ¶ 44.36, *referring to* Article 4, ILC Articles Commentary (**CLA-73-Am**).

> and are **accompanied by prompt, adequate and effective compensation**.
>
> The amount of such compensation shall correspond to the **market value** of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable.

(a) The Claimants' Position

248. According to the Claimants, their investments were seized through a "methodical combination of interference, physical control, and, ultimately, formal legislation" undertaken by Russia and the Republic of Crimea,[310] all of which fulfil the criteria of a "classic expropriation", constituting "a series of formal acts" that deprived the Claimants of their property rights. Such deprivations were permanent.[311]

249. The preparatory acts of the Crimean authorities were followed by acts purporting to nationalize the Claimants' investments albeit, the Claimants state, without legal effect under Ukrainian law.[312] The Claimants refer to:

(a) the 17 March 2014 Independence Resolution that stripped Ukraine and Ukrainian enterprises of their ownership of properties in Crimea;

(b) the Nationalization Resolution that decreed the transfer of the movable and immovable properties of Chornomornaftogaz and Ukrtransgaz to the Republic of Crimea, as well as called for the creation of the Russian Chernomorneftegaz, to which the properties of Chornomornaftogaz shall be transferred; and

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[310] AmSOC, ¶ 162.

[311] AmSOC, ¶ 163, *referring to* the definition of a direct expropriation in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 535 (**CLA-7**) and *Valerie Belokon v. Kyrgyz Republic,* Award, 24 October 2014, ¶ 206 (**CLA-103**).

[312] AmSOC, ¶¶ 167-168, *referring to* First Paliashvili Report, ¶ 141.

(c) Order No. 165-r of the Council of Ministers of the Republic of Crimea and Order No. 1 of the Ministry of Fuel and Energy of the Republic of Crimea that respectively directed the incorporation and approval of the charter of the Russian Chernomorneftegaz.[313]

250. These measures culminated in the expropriation of the Claimants' investments on 21 March 2014 (but effective 18 March 2014) under the *Annexation Treaty*, which gave provisional effect under Russian laws as of that date to the acts of the Crimean authorities, including the acts that purported to nationalize the Claimants' investments.[314] Accordingly, from 18 March 2014, the Respondent "had nationalized significant Naftogaz assets as a matter of Russian law."[315] Until the end of May 2014, Russia issued additional resolutions and orders in support of the expropriation of the Claimants' assets, placing them "in the hands of state-owned Russian Chernomorneftegaz", including:

(a) Order No. 3, dated 20 March 2014, of the Ministry of Fuel and Energy of the Republic of Crimea, which allocated to the Russian Chernomorneftegaz the property of the Republic of Crimea earlier specified in Resolution No. 1785;

(b) the certificate of transfer and acceptance, executed on 26 March 2014, between the Ministry of Fuel and Energy of the Republic of Crimea and the Russian Chernomorneftegaz, which confirmed that the latter "assumes responsibility for the operational management of the property owned by the Republic of Crimea";

(c) the 11 April 2014 Resolution 2032 of the State Council of the Republic of Crimea, which declared as property of the Republic of Crimea the facilities of the gas supply system operated by Krymgaz in accordance with its lease agreements with Naftogaz, including facilities of the gas supply system that were constructed with the financial

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[313] AmSOC, ¶ 167, *referring to* Autonomous Republic of Crimea, Resolution No. 1745-6/14, Art. 1, 17 March 2014 (**CE-199**); State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 1, 17 March 2014 (**CE-202**); Council of Ministers of the Republic of Crimea, Order No. 165-r, 17 March 2014 (**CE-204**); Ministry of Fuel and Energy of the Republic of Crimea, Order No. 1, ¶ 1, 7 March 2014 (**CE-203**).

[314] AmSOC, ¶ 170, *referring to* Annexation Treaty, Art. 9.2 (**CE-224-Am**).

[315] AmSOC, ¶ 171.

support of Naftogaz, as well as terminated Krymgaz's financial obligations to Naftogaz;

(d) the 11 April 2014 Resolution 2033 of the State Council of the Republic of Crimea, which clarified that the Nationalization Resolution nationalized the "facilities of the gas pipeline system, in state ownership or transferred for use to NJSC Naftogaz;"

(e) the 13 April 2014 Order No. 8 of the Ministry of Fuel and Energy of the Republic of Crimea, which ordered the property of the Republic of Crimea that was transferred to NJSC Naftogaz be allocated to the Russian Chernomorneftegaz;

(f) the 30 April 2014 Resolution No. 2085-6/14 of the State Council of the Republic of Crimea, which resolved that all property of the State of Ukraine and all abandoned property in Crimea shall be considered the property of the Republic of Crimea; and

(g) the 21 May 2014 Resolution 1830 of the State Council of the Republic of Crimea, which decreed that the natural gas of NJSC Naftogaz in the Hlibovske storage facility and the natural gas produced in the Chornomornaftogaz gas fields are properties of the Republic of Crimea.[316]

251. The Claimants conclude that in the result, "Naftogaz's rights to engage in commercial activity, its moveable and immovable property, the value of its equity interests, and other assets were all taken or their value was destroyed."[317]

252. **The Claimants contend that these acts of seizure were in contravention of Article 5 of the Treaty**,[318] under which expropriation, to be lawful, must be: (i) taken in the public interest;

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[316] AmSOC, ¶ 172, *referring to* Ministry of Fuel and Energy of the Republic of Crimea, Order No. 3, ¶ 1, 20 March 2014 (**CE-227**); Statement of Transfer and Acceptance of the Property Owned by the Republic of Crimea, 26 March 2014 (**CE-233**); State Council of the Republic of Crimea, Resolution No. 2032-6/14, ¶ 1, 11 April 2014 (**CE-250**); State Council of the Republic of Crimea, Resolution No. 2033-6/14, 11 April 2014 (**CE-251**); Ministry of Fuel and Energy of the Republic of Crimea, Order No. 8, 22 April 2014 (**CE-257**); State Council of the Republic of Crimea, Resolution No. 2085-6/14, ¶ 1, 30 April 2014 (**CE--259**); State Council of the Republic of Crimea, Resolution No. 1830-6/14, ¶ 3, as amended 21 May 2014 (**CE-235**).

[317] AmSOC, ¶ 174.

[318] AmSOC, ¶ 175. *See also* Claimants' Opening Presentation, slides 119-146.

(ii) conducted under due process of law; (iii) not discriminatory; and (iv) must be accompanied by prompt, adequate, and effective compensations.[319] In this case, the Claimants maintain that the Respondent failed to meet any and all of these requirements.

253. First, the Claimants argue that the Respondent's expropriation of its investments was not in the **public interest**.[320] The statements and threats made by the "Russian-controlled Crimean authorities," particularly Crimean Deputy Prime Minister Temirgaliev and Crimean Speaker Konstantinov, to seize "Ukrainian state-owned assets"[321] undermined any confidence in the rule of law.[322]

254. Second, the Claimants argue that Russia's expropriation was not carried out in accordance with due process of law.[323] In this regard, the Claimants refer to the rulings in *ADC Affiliate v. Hungary*[324] and *Enkev Beeher v. Poland*.[325] The *ADC* tribunal held that due process requires, at a minimum, notice and opportunity to present one's case.[326] In *Enkev*, the Claimants note that "due process requires that measures resulting in expropriation afford the investor a reasonable opportunity within a reasonable time to secure its rights.[327] In this case, Russia denied any sort of notice or opportunity to make submissions in response to the nationalization of their investments and there was no judicial hearing in advance of the expropriation.[328]

255. Third, the Claimants argue that Russia's expropriation of their assets was discriminatory and point to the statements of Crimean officials Mr. Aksyonov and Temirgaliev, and the acts of the Crimean authorities specifically targeting the Claimants.[329] Moreover, the Claimants highlight that the Respondent's treatment of the Claimants were in stark contrast compared to the "generally

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319 AmSOC, ¶ 175, *referring to* BIT, Art. 5(1) (**CLA-99/CLA-169**).
320 AmSOC, ¶ 176; Claimants' Answers, ¶ 45.2.
321 Claimants' Answers, ¶ 45.4
322 Claimants' Answers, ¶ 45.5.
323 AmSOC, ¶ 179.
324 *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 435 (**CLA-2**) (hereinafter "***ADC***").
325 *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, ¶ 350 (**CLA-27**) (hereinafter "***Enkev***").
326 AmSOC, ¶ 179, *referring to ADC*, ¶ 435.
327 AmSOC, ¶ 180, *referring to Enkev,* ¶ 350.
328 AmSOC, ¶ 181.
329 AmSOC, ¶ 185.

applicable regime that it established for other investors in connection with the integration of Crimea."[330]

256. Fourth, the Claimants emphasize that the Respondent has failed and has "outright refused" to provide prompt, adequate, and effective compensation to the Claimants.[331]

(b) ***The Tribunal's Analysis***

257. Russia challenges the jurisdiction of the Tribunal to hear this dispute but it did not go on to deny its alleged seizure of the Claimants' assets. In light of the legislative steps since 18 March 2014, it is difficult to imagine that Russia would take such an implausible position.

258. Article 1(1) of the BIT describes "investments" in the broadest terms ("any kind of tangible or intangible assets…including rights to the exploration, development and exploitation of natural resources"). As indicated earlier, the Claimants held a wide variety of such rights, all of which were seized after the occupation and annexation. Discrete legal rights – be they rights to money or otherwise – are independent "investments" capable of expropriation in cases, as here, where the BIT defines "investments" to include such rights.

259. Viewed from the perspective of 21 or 18 March 2014, the Claimants' investments had been "made" in what had become, by reason of Russian military intervention and legislative action, Russian territory. The use of the word "made" in Article 5 ("[i]nvestments made…") does not require that the initial investment be in Russian territory. The initial investment date is not relevant to the analysis. What is relevant is the state of affairs at the date of the expropriation and thereafter the date of commencement of the arbitration.

260. A measure is expropriatory when a State interferes with a protected investment in a way that significantly or substantially deprives the investor of the use, benefit, or value of the

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[330] AmSOC, ¶ 187.
[331] AmSOC, ¶ 188.

investment, to an extent that is more than ephemeral.[332] This was the purpose and effect of the complete denial of the rights of the Claimants to the assets.

261. International tribunals have held that the form of the measures is not decisive of whether an expropriation has occurred: the measures may vary from an immediate and comprehensive taking to a series of measures that gradually chips away at the value of investments by incremental steps, culminating in a substantial deprivation of the investment (often referred to as "creeping expropriation").[333] In short: Expropriation can be direct, indirect, regulatory, creeping, *de facto*. A government act may be tantamount to, equivalent to, or have similar effects as expropriation.

262. There is no doubt that Russia, both directly and through the legislative and executive authority granted by Russia to the government of Crimea for which Russia bears international responsibility, unlawfully expropriated the Claimants' investments without due process or any compensation.

263. Our colleague, Professor Stanivuković contends that "the legal acts of the Crimean authorities, *although unlawful under Ukrainian law*, had the character of expropriation under international law" (emphasis added) (¶ 206). The majority does not accept the theory of the dissent that while the unlawfulness of the Russian invasion deprives Russia's conduct of any consequences under the BIT, nevertheless conduct of the Crimean Parliament which our colleague also considers "unlawful" resulted in an expropriation effective under international law to deprive the Claimants of their assets.

264. In the majority view, the key to Russian liability lies not in the unlawful invasion but in the annexation of Crimea and the *subsequent* expropriation of the Claimants' assets by constituent emanations of Russian sovereignty.

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[332] *See, e.g.*, *Técnicas Medioambentales Tecmed S.A. v. United Mexican States,* Award, 29 May 2003, ¶ 114 (**CLA-139**); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt,* Award, 12 April 2002, ¶ 107 (**CLA-43**); *CME Czech Rep. B.V. v. Czech Republic*, Partial Award, 13 September 2001, ¶¶ 604-605 (**CLA-16**).

[333] *See Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶¶ 76-77 (**CLA-18**).

PART 17 - FULL AND UNCONDITIONAL LEGAL PROTECTION

265. Article 2(2) of the BIT guarantees the following protection to investors:

> 2. Each Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party.

(a) The Claimants' Position

266. The Claimants argue that the guarantee of full and unconditional legal protection "is violated where, for example, the host state's conduct is 'targeted to remove the security and *legal protection* of the [c]laimant's investment,' or where new legal measures contravene existing national laws."[334] During the transitional period for the integration of Crimea into the Russian Federation, the Claimants, but for the wrongful acts of Russia, would have "retained the legal rights, powers, and obligations established under Ukrainian law that existed at the moment of annexation."[335] In particular, Article 12 of Law No. 6-FKZ, allowed entities such as the Claimants to continue operation and to conduct business in Crimea, and "recognized the continuing validity in the Republic of Crimea of documents issued by state and official bodies of Ukraine" and the "permits and licenses held by the Claimants."[336]

267. Russia then proceeded to confiscate the Claimants' investments and properties for eventual transfer to Chernomorneftegaz, which was granted the right to operate Chornomornaftogaz's permits.[337] The Claimants assert that Russia failed to provide any forum to seek redress, the return of their assets, or compensation therefor, as none of the legislation adopted by the Respondent included a means for the Claimants to challenge or object to the nationalization of their investments[338] As result, the Claimants submit that they have been "denied ordinary legal protections with respect to their investments in Crimea, in violation of Article 2(2) of the Treaty.[339]

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334 AmSOC, ¶ 190, *referring to Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), Final Award, 30 March 2010, ¶¶ 30, 50 (**CLA-69**).

335 AmSOC, ¶ 191, *referring to* First Stephan Report, ¶ 58.

336 AmSOC, ¶ 191, *referring to* First Stephan Report, ¶ 59.

337 AmSOC, ¶ 192.

338 AmSOC, ¶ 192, *referring to* First Stephan Report, ¶¶ 84-110.

339 AmSOC, ¶ 192.

(b) ***The Tribunal's Analysis***

268. It is apparent that Russia's expropriation by legislation without compensation is the antithesis of fulfillment of Russia's obligation to extend "full and unconditional legal protection" to those investments. Russia does not claim that it extended "full and unconditional legal protection" to the Claimants' assets. Our colleague, Professor Stanivuković characterizes our brief statement on this head of liability as unduly cursory but in the majority view, given the fact that Russia has chosen not to contest the facts put forward by the Claimants, supported by independent document, nothing further is required.

PART 18 - MOST FAVORED NATION TREATMENT

(a) *The Claimants' Position*

269. The Claimants submit that under Article 3(1) of the Treaty,[340] they are entitled to the benefit of the more favourable substantive protections extended by Russia to investors under other BITs such as the guarantee of **fair and equitable treatment** ("**FET**")[341] under Article 3(1) of the *Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments*, dated 29 June 1999.[342] The guarantee is to be "not unjustly treated, with due regard to all surrounding circumstances [and] is a means to guarantee justice to foreign investors."[343] Citing *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*,[344] the Claimants assert that fair and equitable treatment requires a State to act in a transparent manner, to respect procedural propriety and due process, and not to act in an "arbitrary, grossly unfair,

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[340] Article 3 confers National Treatment and Most Favored Nation Treatment as follows:

> 1. Each Contracting Party shall ensure in its territory for the investments made by investors of the other Contracting Party, and activities in connection with such investments, **treatment no less favorable** than that which it accords to its own investors or to investors of any third state, which precludes the use of measures discriminatory in nature that could interfere with the management and disposal of the investments.

[341] AmSOC, ¶ 193, *referring to* Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd ed. 2012) 211 (**CLA-85**).

[342] Russia-Lithuania BIT, Art. 3(1) (**CLA-100**).

[343] AmSOC, ¶ 195, *referring to Swisslion DOO Skopje v. F.Y.R. Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶ 273 (**CLA-62**); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113 (**CLA-44**).

[344] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CLA-54**).

unjust, idiosyncratic" manner towards investors.[345] Russia's unequivocal acts targeting the Claimants that culminated in the eventual confiscation of their assets and investments, as well as the transfer thereof to Chernomorneftegaz, constitute discriminatory and bad faith conduct in violation of the FET guarantee.[346]

270. In addition, the Claimants note Russia's failure to provide notice and opportunity to contest the confiscation of their investments, all of which violates the standard of fair and equitable treatment.[347] Referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*,[348] the Claimants submit that the Respondent's failure to provide even "a pretense of due process" evinces the unfair and discriminatory nature of the confiscation of their investments, and a lack of procedural propriety, in violation of the FET guarantee.

271. The Claimants argue that the standard of **full protection and security**, again imported through Article 3(1), "requires due diligence and vigilance on the part of a host state, consistent with 'the reasonable measures of prevention which a well administered government could be expected to exercise under similar circumstances.'"[349] In the present case, on the contrary, Russia failed to provide the Claimants and their investments with the basic legal protections and basic physical security.[350] The Claimants cite the Russian Federation forces' acts of seizing the offices of Chornomornaftogaz, blocking the Ukrtransgaz employees from removing their assets in Crimea, intercepting the boats of Chornomornaftogaz employees, and occupying the Chornomornaftogaz drilling platforms—acts that are "antithetical to any sense of physical protection."[351]

(b) ***The Tribunal's Analysis***

272. The Claimants need not resort to guarantees and protections obtained under the Most Favoured Nation clause as their entitlement to compensation is complete under the Ukrainian-

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345 AmSOC, ¶ 196.

346 AmSOC, ¶¶ 197-198.

347 AmSOC, ¶ 199.

348 AmSOC, ¶¶ 199-200, *referring to Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (**CLA-43**).

349 AmSOC, ¶ 202, *quoting Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 2000, ¶ 77 (**CLA-10**).

350 AmSOC, ¶ 203.

351 AmSOC, ¶ 204.

Russia BIT in respect of unlawful expropriation and Russia's failure to extend full and unconditional legal protection to their investments. However, if it were necessary to do so, the Tribunal would find a breach of the Most Favoured Nation obligations as well by reason of Russia's confiscation of the Claimants' assets and investments without due process and without compensation, all of which was done in bad faith and constituted repudiation of the FET guarantee.

PART 19 - COSTS

273. The disposition of costs is reserved until the Final Award.

PART 20 - DISPOSITIF

274. For the reasons set out above, the Tribunal by majority rules:

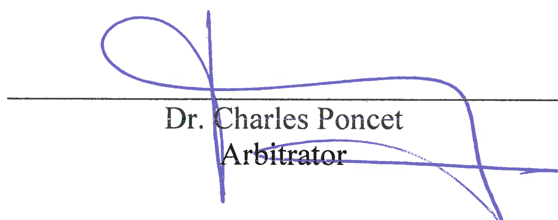
(a) that the Tribunal has jurisdiction over the claims;

(b) that the Claimants have established a violation of Article 5 (expropriation) and Article 2(1) (full and unconditional legal protection) and Article 3(1) (most favored nation treatment) of the BIT.

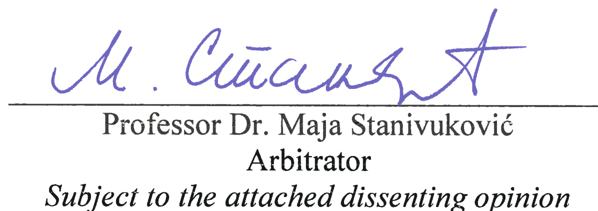
275. The Tribunal will therefore proceed to the quantum phase of the arbitration.

Place of arbitration: The Hague, the Netherlands

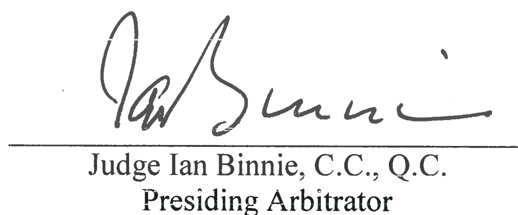
Signed, this 22 day of February 2019,



Dr. Charles Poncet
Arbitrator



Professor Dr. Maja Stanivuković
Arbitrator
Subject to the attached dissenting opinion



Judge Ian Binnie, C.C., Q.C.
Presiding Arbitrator