

DISSENTING OPINION OF PROFESSOR DR. MAJA STANIVUKOVIĆ

1. INTRODUCTION

1. In the Final Award, the Tribunal addresses the quantum of compensation that the Respondent must pay for the expropriation of the Claimants' investments, pursuant to a finding of liability in the Partial Award of 22 February 2019. However, the main question seems to be the Tribunal's jurisdiction *ratione temporis*. By a judgment of 19 July 2022, as corrected on 18 October 2022, ("Judgment of The Hague Court of Appeal"), the Court of Appeal in The Hague annulled the Partial Award of 22 February 2019 insofar as the Tribunal found that it had jurisdiction to adjudicate all claims. The Hague Court of Appeal held that the Tribunal had jurisdiction to adjudicate only investments made on or after 1 January 1992. In the Final Award, the Tribunal implicitly holds that all investments were made by the Claimants after 1 January 1992 and awards the Claimants the total value of the expropriated oil and gas assets amounting to USD 4,222,875,858.81. While I do not doubt that the value of the oil and gas assets concerned was above USD 4 billion, I am convinced by evidence presented by both Parties in this arbitration that a fair part of that value was created by Soviet investments made before 1992, which fall outside the scope of the Tribunal's jurisdiction. Neither National Joint Stock Company Naftogaz ("NJSC Naftogaz") nor other Claimants had proven the quantum of their investments made after 1992 to acquire those assets and/or the right to explore and exploit them. The Claimants were incorporated by the State to develop those assets that existed before 1992, but neither the investments made into such development nor the value created thereby were shown to the Tribunal. For those reasons and others that will be further elaborated on, I regret that am unable to join the majority's decisions.

2. JURISDICTION *RATIONE TEMPORIS*

2. As a preliminary remark, it should be underlined that temporal limitations that exclude past events contained in the instrument expressing consent to arbitration must be respected.¹

3. Article 12 of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of

¹ Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd ed. 2022), p. 53.

Investments (the “BIT”) limits the applicability of the BIT to all investments that were made by the Claimants after 1 January 1992. Investments that were made prior to 1 January 1992 do not fall within the *ratione temporis* scope of the BIT and are therefore beyond *ratione temporis* jurisdiction of the Tribunal.² This is why, contrary to the majority’s view,³ the history of investments in the underlying assets is relevant in this case and must be considered.

4. In the Partial Award, the majority of the Tribunal determined the investments (assets) that were expropriated⁴ and accepted jurisdiction for all claims, implying, although not expressly stating, that all the assets that were claimed to be expropriated were the Claimants’ investments and fell within the Tribunal’s *ratione temporis* jurisdiction. Hence, the majority did not verify at that point whether all the assets claimed to be expropriated investments were indeed made by the Claimants after 1 January 1992.⁵

5. This implicit decision is now confirmed in the Final Award. In their Memorial on Quantum, the Claimants claim compensation for their interests in the special permits (“Special Permits”) and their investments in the underlying oil and gas fields and prospects (collectively “Upstream Assets”); the Claimants’ rights to operate gas pipelines and a gas storage facility, including volumes of fill gas and cushion gas in the storage facility (“Midstream Assets”); four jack-up drilling rigs, 22 marine vessels and three helicopters (“Service Assets”) belonging to National Joint Stock Company Chornomornaftogaz (“CNG”), and the Claimants’ shareholdings in two distribution companies (“Interests in the Distribution Companies”).⁶ The majority takes the position that the Claimants acquired the Upstream, Service and Midstream Assets, and Interests in the Distribution Companies from the State in the period from 1998 until 2014,⁷ and that they could not have made investments before that date “since none of them existed before 1998”.⁸ However, the majority omits to establish the dates and amounts of investments the Claimants made to acquire those assets or to develop them after they acquired them. My colleagues also refuse to exclude from the quantification of value of the assets the

² Rejoinder on Quantum, dated 3 June 2020 (hereinafter “**Rejoinder on Quantum**”), ¶¶ 259, 328.

³ Final Award, ¶¶ 303, 330-336, 354-355, 361-362.

⁴ Partial Award, ¶¶ 108, 123, 125.

⁵ Before assuming jurisdiction, the other tribunals constituted on the basis of the BIT almost systematically verified whether the claimants’ investments had been made after 1 January 1992 in compliance with Article 12 of the BIT. *See* Rejoinder on Quantum, ¶ 405.

⁶ Memorial on Quantum, dated 27 June 2019 (hereinafter “**Memorial on Quantum**”), ¶ 53.

⁷ Final Award, ¶ 318.

⁸ Final Award, ¶¶ 309-317.

value that results from investments that were made before the critical date by the Claimants' Soviet predecessors and by other Soviet entities.⁹

6. The majority's decision on jurisdiction *ratione temporis* is implicit in the decision on the quantification of the Claimants' loss. Although not addressing the issue explicitly, the majority of the Tribunal does consider it has jurisdiction *ratione temporis* for all of the claims. This is the main point of our disagreement. In my view, part of the claims concern investments made before 1 January 1992, and the Tribunal should have held that it lacked jurisdiction to rule on them. Due to my disagreement with the decision on jurisdiction *ratione temporis*, I am also unable to join my colleagues in the decision on the quantification of the Claimants' loss.

2.1. Asset-Based Definition of Investments

7. The BIT defines the term "investments" in Article 1 as tangible and intangible *assets*:

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...¹⁰ (emphasis added).

8. This type of definition is known as an "asset-based" definition of investments. The ordinary meaning of this provision is that investments are (1) assets, that are (2) invested, (3) by an investor of a Contracting Party, (4) in the territory of the other Contracting Party, and (5) in accordance with the legislation of the other Contracting Party.

9. Article 12 of the BIT, which governs the *ratione temporis* jurisdiction of the Tribunal,¹¹ adds another condition to be included in the definition of protected investments. It determines that the BIT applies only to "investments made" after 1 January 1992. Upon adding this condition, protected investments under the BIT are determined in the following way: (1) assets, (2) that are invested/made (3) by an investor of a Contracting Party, (4) in the territory of the other Contracting Party, (5) in accordance with the legislation of the other Contracting Party, (6) after 1 January 1992.

10. The term "investments" as used in the BIT is narrower than the term "assets". It comprises only those assets that meet the aforementioned specified conditions. There can of

⁹ Final Award, ¶¶ 356-358.

¹⁰ Russia-Ukraine BIT, Art. 1(1) (CLA-99/CLA-169).

¹¹ See *PJSC Ukrnafta v. the Russian Federation*, Award on Jurisdiction, 26 June 2017, ¶¶ 181-197 (CLA-50); *Stabil et al. v. the Russian Federation*, Award on Jurisdiction, 26 June 2017, ¶¶ 175-193 (CLA-60).

course exist assets that do not meet the conditions. Those assets will not be considered as protected investments and will not be within the scope of jurisdiction of the Tribunal.

11. Article 5 of the BIT, which regulates the prohibition of unlawful expropriation, employs the term “investments”, rather than “assets”. Thus, paragraph one states that “[i]nvestments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated...”, and paragraph two provides that “[t]he amount of ... compensation shall correspond to the market value of the expropriated *investments*” (emphasis added).¹² The ordinary meaning of the term “investments” in Article 5 should correspond to the meaning of this term in Articles 1 and 12 of the BIT. Therefore, expropriated investments are expropriated assets that meet the above conditions. To be protected from expropriation assets must be qualified as “investments made after 1 January 1992”.

12. In the quantum proceedings, the Claimants submitted an asset-based valuation of the expropriated investments.¹³ The Claimants classified the expropriated investments into several categories of assets. In terms of value, the most important are the following three: the “Upstream *Assets*”, the “Service *Assets*” and the “Midstream *Assets*”.¹⁴ It was the Tribunal’s task to decide which of these pipeline and gas-related assets can be qualified as investments made by the Claimants after 1 January 1992, so that they are within the scope of the Tribunal’s jurisdiction. To the extent that the pipeline and gas-related investments were made before that date, during the time when Ukraine and the Russian Federation were part of the USSR, they are not protected investments under Article 12 of the BIT and are not covered by the protection against expropriation afforded by Article 5 of the BIT.

2.2. Ownership of the Underlying Assets

13. The Claimants argue that they made all the expropriated investments and that this was after 1992. In fact, the Claimants argue that they made all the expropriated investments even later - after 1998, when they were established:

229. ... To the extent that any of the assets underlying Naftogaz’s expropriated investments existed before the Claimants’ formation, they were *owned by different legal entities*. As a result, such assets

¹² Russia-Ukraine BIT, Art. 1(1) (CLA-99/CLA-169).

¹³ “Naftogaz’s investments in Crimea (the “**Seized Assets**”) are summarized in Annex A to this Memorial...” (emphasis added). See Memorial on Quantum, ¶¶ 2, 9.

¹⁴ First Expert Report of Gaffney, Cline & Associates, dated 15 September 2017 (hereinafter “**First GCA Report**”), ¶ 10; Memorial on Quantum, ¶ 53.

could not be regarded as the Claimants' "investments," since before 1998, the Claimants simply did not exist.¹⁵ (emphasis added)¹⁶

14. The argument in this passage ties the attribution of investments to the ownership of assets. The Claimants argue that, although the underlying assets on which they base their claims existed before 1992, they were owned by different legal entities; as a consequence, those underlying assets cannot be regarded as *their* investments before 1998, that is, before they were established. Such an argument implies that after they were established, the Claimants became the owners of the underlying assets. However, this is not the case. Most of the underlying assets which were expropriated had never been owned by the Claimants.

15. In particular, this applies to the Upstream and Midstream Assets. As aforementioned, and as argued by the Claimants, the Upstream Assets comprise "investments in the underlying oil and gas fields and prospects".¹⁷ The underlying oil and gas fields and prospects are owned by the State of Ukraine as provided in the Constitution of Ukraine,¹⁸ the Law of Ukraine No. 1636 VII,¹⁹ and the Special Permits for the use of the Upstream Assets.²⁰

16. The Midstream Assets consist of the main gas pipelines and respective facilities, distribution oil pipelines and respective facilities, and underground storage facility ("UGSF") Hlibovske. As stated by the Claimants' expert, the main pipeline transport system as well as UGSFs for oil and gas are in the State ownership of Ukraine.²¹ NJSC Naftogaz has the right of use of these assets pursuant to a contract with the State Property Fund of Ukraine.²²

81. At the material time, the main gas pipelines and the respective facilities, as well as the oil and gas storage facilities, were in state

¹⁵ Reply Memorial on Quantum, dated 14 February 2020 ("**Reply on Quantum**"), ¶ 229.

¹⁶ This argument is apparently accepted by the majority in ¶¶ 312-317 of the Final Award.

¹⁷ Memorial on Quantum, ¶ 53.

¹⁸ Under the Ukrainian Constitution, the land, its subsoil, and other natural resources within the territory of Ukraine, as well as its continental shelf and the exclusive maritime economic zone, are owned by the people of Ukraine. See First Expert Report of Dr. Irina Paliashvili, dated 14 September 2017 (hereinafter "**First Paliashvili Report**"), ¶ 67.

¹⁹ Law of Ukraine No. 1636 VII, "On Establishing Free Economic Zone 'Crimea' and on Specifics of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine", Art. 13.1, 12 August 2014 (**CE-280**). Pursuant to this Law, the soil, subsoil, and other resources located within the territory of Ukraine and its continental shelf and exclusive (maritime) economic zone, which are in the ownership of Ukrainian People, as well as the property of state enterprises, institutions and organizations, are in the ownership of the State of Ukraine. See First Paliashvili Report, ¶ 65.

²⁰ Final Award, ¶ 340, citing as an example Special Permit No. 3907 (Palasa area), Article 6 (**CE-83**).

²¹ First Paliashvili Report, ¶ 76.

²² Agreement No. 76 on the Use of the State Property which Cannot be Privatized (**CE-32-Am**); Amended Counter-Memorial on Quantum, dated 24 January 2020 (hereinafter "**AmCM**"), ¶ 59; First Paliashvili Report, ¶¶ 83-85.

ownership, but were transferred to NJSC Naftogaz for its use and operational management.²³

17. In sum, the Claimants never acquired the Upstream and Midstream Assets in the sense of acquiring ownership. They were entitled to explore, develop, and exploit the Upstream Assets on the basis of Special Permits issued to them by the State of Ukraine²⁴ and to use the Midstream Assets on the basis of contract.²⁵ The State of Ukraine was the owner of those assets both before and after the Claimants' formation and remained so until the assets were expropriated.²⁶

18. But the main issue in this case is when the investments in the underlying oil and gas fields, the gas pipelines and respective facilities were made. Admittedly, the Claimants could not have made any such investments before they were incorporated. However, this does not necessarily exclude the possibility that other entities could have made such investments before 1998, and before 1992, for that matter. Furthermore, while the Claimants could logically make such investments only after they were incorporated, the underlying assets themselves could not be regarded as their investments.

19. Consequently, the ownership of the underlying assets does not assist in determining the dates of the relevant investments in the Upstream and Midstream Assets.

3. UPSTREAM ASSETS

20. Importantly, and as noted in paragraph 339 of the Final Award, the Claimants define the Upstream Assets as (1) "interests in special permits" and (2) "*investments in the underlying oil and gas fields and prospects*" (emphasis added).²⁷ This means that the Claimants request the value of all investments that were made into the underlying oil and gas fields and prospects, no matter when they were made. The Claimants' expert, Gaffney, Cline & Associates ("GCA") calculates the fair market value of the Upstream Assets to be USD 3.54 billion.²⁸ This value is placed on the Upstream Assets as a whole, without specifying the value of the interests in Special Permits on the one hand, and the value of the investments that were made in the

²³ First Paliashvili Report, ¶ 81.

²⁴ First GCA Report, ¶¶ 8-10.

²⁵ Cabinet of Ministers of Ukraine, Resolution No. 747 "On Establishing the National Joint Stock Company "Naftogaz of Ukraine", 25 May 1998, Clause 3 (CE-28).

²⁶ Rejoinder on Quantum, ¶ 464.

²⁷ Memorial on Quantum, ¶ 66.

²⁸ Memorial on Quantum, ¶ 66.

underlying oil and gas fields and prospects, on the other hand. GCA's valuation fails to distinguish between the value of these two categories. It also fails to distinguish between the value of investments made before and after 1 January 1992.²⁹ As a matter of fact, GCA's valuation does not value the Claimants' investments in the underlying oil and gas fields and prospects at all, but rather the value of the Upstream Assets as a package, *i.e.*, the estimate of the future net income to be derived from the estimated production and sale of hydrocarbons produced in those oil and gas fields and prospects, based on a discounted cash flow ("DCF") analysis.³⁰ There is no indication of the value of the investments made to enable such production or of the amount invested or paid by the Claimants to acquire the right to such production. Indeed, this case is unique in the sense that the Claimants consistently refrain from specifying the amount of contributions that they made to acquire the Special Permits or to further develop the underlying oil and gas fields which, as they concede, existed before 1 January 1992.³¹

21. The majority denies the relevance of the "investments in the underlying oil and gas fields and prospects", the second category mentioned by the Claimants in their own definition of the Upstream Assets.³² Acknowledging that such investments were made (or, in the words of the majority: "development costs [were] incurred") by the Claimants *and their predecessors in title* to develop the value of the Special Permits, the majority considers that (a) no quantification of such investments, and (b) no differentiation between investments made by the Claimants and by their predecessors are needed. Taking that standpoint, the majority considers it unnecessary to establish the quantum of investments the Claimants made in the underlying oil and gas fields after 1992 and to distinguish them from the investments made before 1992 which are not protected.

3.1. The Meaning of "Making an Investment" in the Oil and Gas Industry: Upstream Assets

22. Deciding on the date when the investments called the "Upstream Assets" were made requires determining the meaning of "investments [made] in the underlying oil and gas fields

²⁹ Rejoinder on Quantum, ¶ 353; Sur-Rebuttal on Quantum, dated 16 November 2020 (hereinafter "**Sur-Rebuttal on Quantum**"), ¶¶ 7, 143.

³⁰ First GCA Report, ¶ 14.

³¹ This can be contrasted to other similar cases such as *Gold Reserve*, mentioned by the majority in ¶ 359 of the Final Award, where it was established that GRI (the Canadian company that appeared as claimant in that case) contributed USD 300 million to the Brisas Project in Venezuela.

³² Final Award, ¶ 339.

and prospects”. The specific meaning of this term in the context of oil and gas industry can be discerned from the expert reports that were filed by the Parties.³³

23. Perusal of these reports reveals that the following economic activities can be considered as “making an investment” in an oil and gas field:

- Regional geological exploration works (involving basin analysis, play analysis and prospect analysis),
- Drilling wells (prospecting or exploration drilling and appraisal drilling),
- Development (drilling additional wells, constructing platforms, laying of intra-field pipelines, pipelines to shore, constructing compressor stations, onshore and offshore gas processing facilities, etc.),³⁴ and
- Production (management and control).³⁵

24. As explained in the First Expert Report of Vygon Consulting (“First Vygon Report”), the process of oil and gas exploration is implemented in sequential phases. No subsequent phase can be implemented without obtaining successful results in the previous phase.³⁶ Thus, the development and production phases are impossible without discovering reserves during the prior appraisal phase. Also, there can be no reserves absent a discovery during the exploration phase.³⁷

25. Investments in this sector are long-term. Although there is some disagreement on the minimum duration of various phases for development of oil and gas fields in Crimea, the experts generally agree that it takes years if not decades of work to reach the production phase.³⁸ The actual data confirms that the investments in the disputed oil and gas fields located in Crimea took a long time. The First Vygon Report provides an overview of the duration of

³³ Valuation report by the GCA submitted by the Claimants and expert report by Vygon Consulting submitted by the Respondent.

³⁴ Presentation of Dr. Grigory Vygon, Hearing on Quantum, slide 8; First GCA Report, ¶¶ 160, 200, Appendix 7, ¶¶ 6, 65, 73, 134, 151, 152, 325.

³⁵ First Expert Report of Vygon Consulting, dated 29 May 2020 (hereinafter “**First Vygon Report**”), 14.

³⁶ First Vygon Report, 12-15.

³⁷ Rejoinder on Quantum, ¶ 315.

³⁸ For example, the period between the start of the regional works in Upstream Assets and the evaluation of each field reserves took on average 26.2 years for the Northwestern shelf of the Black Sea. For the most remote fields (*i.e.*, Odeske and Shtormove), these stages took 31 and 27 years respectively and were completed prior to 1 January 1992. *See* Rejoinder on Quantum, ¶ 148.

various phases for each of the oil and gas fields concerned and concludes that the longest phase of exploration works and the preparation of structures for prospecting drilling was carried out for all the fields under consideration before 1 January 1992.³⁹

26. The experts also agree that the exploration phase as well as the prospective and appraisal drilling are also the riskiest phases of investments because capital investments are made with no guarantee that there will be a discovery of oil or gas.⁴⁰ Although the costs of the exploration phase (the so-called sunk costs) can be relatively low, they can create significant value.⁴¹

27. The contribution of investments in oil and gas exploration to the creation of value in oil and gas industry is explained in the following manner:

“43. It is possible for very large sums of money to be spent on oil and gas exploration, in particular on drilling, without any resulting income. An often-quoted example of this is the Mukluk exploration well drilled in Alaska by BP. BP spent in the order of USD 1 billion (in 1982), with high expectations of making a discovery, only to find that the Mukluk structure was dry. Plainly companies do not make such large investments with negative results too often or else they would not stay in business, but these experiences are possible in the petroleum industry.

44. On the other hand, a company may spend a very limited amount of money and make a very large discovery with substantial value. A field that contains 30 [billion cubic meters] of gas may be discovered by a well costing as little as several million dollars. Even adding on the cost of development and producing the gas, the total cost may be some USD 500 million to USD 1 billion, compared to a sales value of the gas over the field’s life of perhaps USD 10 billion. While the cost of capital and the time value of money must also be taken into account, the value of the asset far exceeds its cost, and is related to the size and nature of the discovery, not the cost to find, develop, and produce it.”⁴² (references omitted)

³⁹ First Vygon Report, 61-62.

⁴⁰ First Vygon Report, 13-14. For example, capital costs per well in the Schmidta field were estimated at UAH 16 million for each vertical well and from UAH 42 million to UAH 92 million for each horizontal well. The facility cost for platforms and pipeline add up in this field was estimated at UAH 1,060 million. *See* First GCA Report, Appendix VII, ¶¶ 101-102.

⁴¹ Presentation of Dr. Grigory Vygon, Hearing on Quantum, slide 14 (“Despite the relatively low costs that are typical for the initial stages of E&P projects, significant value is created due to the achieved formation of the resource base.”). *See also* First GCA Report, ¶ 140 (“Contingent and Prospective Resources have significant value over and above the sunk cost of investment and are routinely sold and bought by international oil and gas companies.”).

⁴² First GCA Report, ¶¶ 43-44.

28. As explained, exploration and drilling costs are not always proportional to the value that is created by an eventual discovery. Nevertheless, exploration and drilling costs are an indispensable investment in creating an income yielding oil and gas field. In this case, the contribution of any exploration, drilling or development, if it took place prior to the critical date, must be established and distinguished from the value of any other investments that were made subsequently to create an income yielding oil and gas field, because that is how the protection of investments is regulated by the BIT.

3.2. The Underlying Oil and Gas Fields and Prospects defined as Upstream Assets

29. The Claimants request compensation for expropriation of their investments in seven producing gas fields: Shtormove, Odeske, Arkhanhelske, Holitsynske, East Kazantypske, Dzhankoy, and Zadornenske, and for their investments in the oil field Semenievsk (as the only producing oil field).

30. The Claimants further request compensation for expropriation of their investments in five gas fields that are not producing yet, but have been discovered and are planned for development: North Kerchenske, Schmidta, Bezimenne, South Holitsynske, North Bulhanatske, and, as the only oil field planned for development, Subbotina.

31. Finally, the Claimants request compensation for expropriation of their investments in two contingent resources (“CRs”),⁴³ namely the Arkhanhelske CR and the Schmidta CR, as well as their investments in the following prospective resources (prospects)⁴⁴: Hubkina structure, Palasa structure, Shtormove Deep structure, Luchytskoh exploration block, and Albatros and Pryvybiina structure.⁴⁵

⁴³ Contingent resources represent volumes of hydrocarbons that have been discovered but have not reached a commercial producing status due to a number of contingencies (e.g., the volumes found may be too small, or too costly, to develop commercially). There is therefore a risk that they will never be developed. *See* First GCA Report, ¶¶ 54, 76.

⁴⁴ GCA uses the term “prospective resources” to describe “suspected volumes of hydrocarbons that have yet to be proven or disproven, to exist by drilling”, “that have not yet [been] drilled, and that may never be drilled”. According to GCA, “[e]ven if prospective resources are drilled, there is a risk that there will be no discovery. If a discovery is made, there is a risk that it may not be developed for a number of reasons”. *See* First GCA Report, ¶¶ 54, 76.

⁴⁵ Additionally, CNG requests compensation for offshore and onshore exploration and production equipment it owned. *See* Response to Matters Raised in the Rejoinder, dated 7 September 2020 (hereinafter “**Response to Matters Raised in the Rejoinder**”), Annex A, 10.

32. Curiously, neither the Claimants nor the majority refer to any amount of fresh investments that the Claimants made into those fields and prospects after 1 January 1992, or upon their establishment in 1998.

3.3. The Date of Investments Made in the Upstream Assets

33. The Respondent claims that most of the Upstream Assets for which the Claimants seek compensation were prospected, explored, discovered, appraised and/or developed long before 1992.⁴⁶

34. In accordance with the Parties' experts' explanation of the meaning of the term "investments in the underlying oil and gas fields and prospects", it can be considered that those investments were made for the purposes of Article 12 of the BIT at the time when the geological exploration works were undertaken, when the fields were detected, when the drilling of wells took place, when the reserves were discovered and evaluated, and when the development and production if any started.

35. The First Vygon Report provides a systematic overview of investments of this kind made before 1 January 1992. The First GCA Report also sporadically mentions the dates of such activities. These reports therefore allow for the investments in the underlying oil and gas fields and prospects to be distinguished based on the date when they were made.

36. The First Vygon Report and the First GCA Report testify to the fact that some of the investments in the Upstream Assets were carried out before 1 January 1992 while others were made after that date. For instance, most exploration activities and major discoveries took place before 1992.⁴⁷ Ten of fourteen oil and gas fields discovered as of the 17/18 March 2014 (the "Valuation Date") were discovered before 1992, while four were discovered after 1992.⁴⁸ Out of nine fields that were producing oil and gas on the Valuation Date, eight were discovered before 1 January 1992 and one (East Kazantypske) was discovered thereafter.⁴⁹ Out of 143 exploratory wells in the Upstream Assets, 125 were drilled before 1992 and 18 thereafter.⁵⁰ Production started before 1992 in five fields and after 1992 in four fields, and so on.

⁴⁶ AmCM, ¶ 115.

⁴⁷ First Export Report of Vygon Consulting, dated 29 May 2020 (hereinafter "**First Vygon Report**"), 56.

⁴⁸ Presentation of Dr. Grigory Vygon, Hearing on Quantum, slide 9.

⁴⁹ First Vygon Report, 8.

⁵⁰ Presentation of Dr. Grigory Vygon, Hearing on Quantum, slide 8.

37. The BIT does not apply to investments in oil and gas fields in question that were made before 1 January 1992. As a result, the Tribunal lacks jurisdiction to decide on the expropriation of those pre-1992 investments. If it were not for those pre-1992 investments, the value of Upstream Assets, including the value of the Claimants' Special Permits, would have been lower at the Valuation Date. Without the exploration, prospecting, appraisal and development activities carried out prior to 1 January 1992, the oil and gas fields in question would not have reached the same stage of development and production that they reached on the Valuation Date.⁵¹ Therefore, the participation of pre-1992 investments in the value of the Upstream Assets for which the Tribunal lacks jurisdiction must be excluded.

38. Furthermore, if a particular investment was made in different stages (*e.g.*, a gas field was explored and developed before this date, but the production started after that date),⁵² the initial date of the investment counts.⁵³ The appropriate date to determine the application of the BIT to that investment is the initial date of the investment.⁵⁴ According to Article 12, the BIT protects only a new, "fresh" investment in that gas field, such as a purchase, or an expansion made in that field after 1 January 1992 that is proven to be made by the investor.⁵⁵

3.4. Subsequent Acquisition

39. The Claimants argue that although the Upstream Assets existed prior to 1 January 1992, and investments were made in them prior to that date, they acquired all of the expropriated assets afterwards, and that the date of such acquisition should be considered as the date when they made their investment:

Naftogaz's investments meet Article 12's requirements for an additional reason: as a factual matter, Naftogaz *acquired all of the expropriated assets* that qualify as investments under the Treaty on or after 1 January 1992.⁵⁶ (references omitted, emphasis added)

This argument is accepted by the majority in the Final Award.⁵⁷

⁵¹ Sur-Rebuttal on Quantum, ¶ 129.

⁵² *E.g.*, The Special Permit for Subsoil Use No. 3293, which applied to the Shtormove gas condensate field, states: "the Shtormove gas condensate field was discovered in 1983 and put into pilot commercial development in 1993." See Special Permit No. 3293, 9 December 2003, T-0009 (CE-61).

⁵³ *Ruby Roz Agricol and Kaseem Omar v. Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013, ¶¶ 157-168 (RLA-113); *9REN Holding S.à.r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶¶ 287-291 (RLA-86).

⁵⁴ Rejoinder on Quantum, ¶ 306.

⁵⁵ Judgment of The Hague Court of Appeal, ¶ 5.7.5.8.

⁵⁶ Reply on Quantum, ¶ 226.

⁵⁷ Final Award, ¶¶ 351-353.

40. It should be pointed out first that there is no occurrence of “acquired investments” in the wording of the relevant provisions of the BIT but rather “assets which are invested” (Article 1) and “investments made” (Articles 1, 5 and 12). Investors must be competent “to make investments” rather than to “acquire investments” (Article 1, paragraph 2). The wording of Article 12 does not refer to all investments that were *acquired*, but to all investments that were made at a particular time. The BIT provides no basis to conclude that the terms “made” and “acquire” are synonymous.

41. The verb “make” is an active verb which implies an activity by the investor in relation to the assets enumerated in the BIT definition of investments. So, even if acquiring of an asset could be considered as a subcategory of making an investment, it would be so only if the asset was acquired through an activity of the investor, such as creating, buying or improving (expanding) the asset, and not if it was acquired without activity, passively, by actions of others.⁵⁸ In other words, it matters how the asset was acquired.

42. The State Parties are in agreement on this interpretation.⁵⁹ In *Tatneft v. Ukraine*, the State of Ukraine argued that mere passive ownership of an asset is insufficient. The investor must do something, he must actively invest.⁶⁰

43. In the majority’s view, the Claimants did not passively receive the property and rights from the State within the framework of restructuring, as argued by the Russian Federation.⁶¹ Instead, the majority holds that the Claimants bought the property and rights by issuing their own shares to the State.⁶² However, the monetary value of such “purchase” has not been demonstrated, nor does it seem convincing that NJSC Naftogaz and the other Claimants acted as investors in their own incorporation. Therefore, the issuing of their own shares by NJSC Naftogaz and the other Claimants to their founder cannot be considered as their investment.

⁵⁸ This interpretation of the verb “make” was recently confirmed in the Award in *Sun Reserve v. Italy*, based on the Energy Charter Treaty: “The ECT envisions the making of an investment as an active mode of doing as opposed to a passive method of being granted acquisition over assets. In other words, making an investment refers to the active conduct of establishing or acquiring investments.” *Sun Reserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. 2016/32, Final Award, 25 March 2020, ¶ 752 (RLA-164).

⁵⁹ Sur-Rebuttal on Quantum, ¶¶ 56-59.

⁶⁰ *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), Judgment, 13 July 2018, ¶¶ 58, 67 (RLA-109). This meaning of the verb “made” in Article 12 is also endorsed by Ukraine in its non-disputing party submission. See 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, ¶ 37.

⁶¹ Rejoinder on Quantum, ¶ 434; Sur-Rebuttal on Quantum, ¶ 104.

⁶² Final Award, ¶¶ 330, 332.

3.5. Acquisition of Permits as Investment

44. It follows from the description of the Claimants' investments, termed the Upstream Assets, that they fall into the category mentioned under Article 1, paragraph 1(d) of the BIT.

45. This was confirmed by the Claimants in the jurisdictional phase of the proceedings:

Claimants most valuable investments in Crimea consisted of the right to engage in commercial activity, including, in particular: Chornomornaftogaz's 15 special permits for subsoil use.... and NJSC Naftogaz's three special permits for offshore exploration.⁶³ (references omitted)

46. At the hearing, the Claimants confirmed that their claim for compensation for expropriated Upstream Assets is related to the rights arising under the Special Permits:

So to summarise, the property rights for which the Claimants seek compensation in connection with their upstream assets are rights arising under special permits issued to the Claimants from 1999 to 2013.⁶⁴

47. Therefore, the dates of making the investments that enabled the Claimants to acquire those rights should have been specified by the Claimants. However, as the Claimants acknowledge in their last submission, their Response to the Rejoinder on Quantum ("Response to Matters Raised in the Rejoinder"):

the Claimants have not systematically presented, with reference to each piece of relevant documentary evidence, the specific date and circumstances of the acquisition of the assets underlying their investments.

48. In their Response to Matter Raised in the Rejoinder, the Claimants referred only to the dates of acquisition of Special Permits while they again did not specify any dates of "investments in the underlying oil and gas fields and prospects" that they made before or after acquiring the Special Permits. The Claimants present that they have acquired the right to engage in commercial activity by applying for Special Permits as indicated in the table in Annex A to the Response to the Rejoinder on Quantum,⁶⁵ and that, therefore, they made their investments on those dates.

⁶³ Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018 (hereinafter "**Claimants' Answers**"), ¶ 10.3.

⁶⁴ Transcript of the Hearing (hereinafter "**Tr.**"), Hearing on Quantum, Day 1, 24:19-22.

⁶⁵ Response to Matters Raised in the Rejoinder, Annex A, 2-3, 6-7. These pages have been reproduced in footnote 87 of the Final Award.

49. However, other than applying for the Special Permits, the Claimants do not explain what they did to acquire rights to engage in commercial activity. It is not convincing that the mere application by the investor qualifies as an investment made by the investor. Also, the date of issue of the document called a Special Permit by the sovereign owner of the natural resources can hardly be accepted as the date of making the investment under the BIT. The Special Permits were issued by “state entities [which] reviewed and approved” CNG’s and NJSC Naftogaz’s applications.⁶⁶ Issuing of a permit by a state authority can hardly be described as an action of making an investment “by the investor”.

50. The Claimants do not offer documentary evidence to prove the value they invested in order to obtain the relevant Special Permits or any auction or competitive bidding procedure they had to engage in with other potential investors in order to obtain them. There is no valuation in the Claimants’ submissions of what the Claimants had invested to obtain those Special Permits or to develop the assets as opposed to investments that had been previously made by other investors in the same assets. The Claimants do not offer any evidence to rebut the Respondent’s contention that the Special Permits were extended gratuitously by the State granting the use of “natural monopolies”⁶⁷ to its own arms:⁶⁸

In essence, it is the state authorizing a state-owned entity (i.e., itself) to conduct a licensed activity that its legal predecessors already conducted on the very same fields. It would make no sense for the state entity to deny the issuance of special permits to state-owned companies that perform public functions using state property.⁶⁹

51. In fact, some of the Special Permits expressly provide that the source of financing of the works to be performed on the oil and gas fields will be “State funds”.⁷⁰

⁶⁶ Response to Matters Raised in the Rejoinder, Annex A, 2-3, 6-7.

⁶⁷ First Paliashvili Report, ¶ 77.

⁶⁸ The Government of Ukraine is the only shareholder of NJSC Naftogaz: “The Government of Ukraine as represented by the Cabinet of Ministers of Ukraine, controls the Company through participation in the shareholders’ meeting and the Supervisory Board meetings, as well as through the appointment of the Chairman of the Board and the Board Members.” 2014 Annual Report (CE-145). NJSC Naftogaz and its subsidiaries are included into the List of Objects of State Ownership Which Have Strategic Importance for Economy and Security of the State of Ukraine approved by the Resolution of the Cabinet of Ministers of Ukraine No. 83, dated 4 March 2015 (AV-57). See Second Expert Report of Dr. Oleksandr Vygovskyy, dated 16 November 2020 (hereinafter “Second Vygovskyy Report”), ¶ 22.

⁶⁹ Sur-Rebuttal on Quantum, ¶ 129.

⁷⁰ Special Permit No. 2377, 12 August 2003 (CE-59); Special Permit No. 3481, 21 January 2009 (CE-72); Informational Certificate on the Special Permit and Its Validity for the East Kazantypske gas field (extract from Geoinform of Ukraine), 19 August 1998 (RE-78); Informational Certificate on the Special Permit and Its Validity for the North Kerchenske and North Buhlahatske gas fields (extract from Geoinform of Ukraine), 14 December

52. The majority's finding that the Claimants "bought" the Special Permits is not convincing. It rests on the vague statement made at the oral hearing that the Claimants acquired the Permits by "an array of payments"⁷¹ and that they made "mandatory payments" to the State budget.⁷² Although such payments, even if they had existed, would be minor compared to investments that had to be made in exploration and development of the oil and gas fields and prospects, it should be noted that the total amount of fees and royalties that the Claimants had paid for the issuance of the Permits and for their maintenance (if any) has not been revealed to the Tribunal. Nor did Claimants argue that any such payments were their investments. It was not the Claimants' case that they bought the Special Permits or that they made investments in the form of mandatory payments to the State budget, and no such payments were mentioned in the description of the circumstance of acquiring the investments.⁷³ For those reasons, one can justifiably hold that the conclusions of the majority that the Special Permits were paid and this is how the Upstream Assets were "made"⁷⁴ are simply unfounded.

3.6. Legal Succession: Upstream Assets

53. It is also doubtful whether the right to engage in the commercial activity of exploration, development and exploitation of oil and gas in Crimea was first acquired by the Claimants on the date of issue of the Special Permits that are at stake in these proceedings or earlier. That is to say that, even if the moment of acquisition of the relevant right to explore, develop and exploit was considered the date when the investment was made under the BIT, the Tribunal would be obliged to examine whether that right, granted under the Special Permit, was existent and was acquired by the Claimants or their legal predecessors before 1 January 1992.

54. The process of acquiring the Special Permits was described in the following manner:

... As an initial matter, an operator acquired a Special Permit for geological study, including pilot production (an "Exploration Permit"). This permit type would allow an operator to conduct exploration activities, drill appraisal wells, and develop fields for commercial production.

... Subsequently, once a field was producing oil, gas, or condensate, the Exploration Permit would be converted into a "Production Permit".

1999 (RE-80); Informational Certificate on the Special Permit and Its Validity for the Subbotina gas field (extract from Geoinform of Ukraine), 9 August 2004 (RE-85).

⁷¹ Final Award, ¶¶ 351-352.

⁷² Final Award, ¶¶ 310, 351, *quoting* Tr., Hearing on Quantum, Day 2, 13:6-20.

⁷³ Response to Matters Raised in the Rejoinder, Annex A

⁷⁴ Final Award, ¶ 353.

Production Permits allowed the operator to continue commercial development and production.⁷⁵ (references omitted)

55. Inasmuch as Special Permits are issued for a limited term and must be periodically extended, it is plausible that the Special Permit at issue was not the first one that allowed the holder to engage in the same commercial activity.⁷⁶ The Ukrainian law provides that a Subsoil Permit shall be granted without an auction where the holder of an exploration permit seeks a production permit for the same area in which it was previously entitled to conduct the exploration and production activity.⁷⁷

56. In that respect it is crucial to note that NJSC Naftogaz and CNG are universal legal successors to companies founded in the Soviet Union prior to 1 January 1992 that engaged in the same type of commercial activities.⁷⁸ Their legal predecessors are Soviet enterprises Ukgazprom and Chernomorneftegazprom. As the universal legal successors of those enterprises, the Claimants succeeded into all their rights and obligations. Any rights to engage in the commercial activity related to the Upstream Assets held by the Claimants' legal predecessors can therefore be regarded as the Claimants' rights.⁷⁹

57. The Claimants argue that NJSC Naftogaz and CNG are new legal entities. They state that CNG was created as a result of "transformation" of State Production Company "Chernomorneftegaz". According to the Claimants, under Ukrainian law, a transformation such as CNG's is one of the ways in which a legal entity's existence can be terminated and a new legal entity created.⁸⁰ This might imply that CNG has nothing to do with the rights vested in its predecessors. The majority accepts this argument.⁸¹

58. However, no Ukrainian legislation is cited in support of this claim. On the contrary, it has been established that Ukrainian law provides:

In case of *transformation* of an enterprise into another enterprise, all rights and obligations of a predecessor entity are transferred to a successor enterprise.

⁷⁵ First GCA Report, ¶ 50.

⁷⁶ First Paliashvili Report, ¶¶ 73-75.

⁷⁷ Cabinet of Ministers of Ukraine, Resolution No. 615 "On Approval of the Procedure for Issuing Special Permits for Subsoil Use", Cl. 8 (CE-94).

⁷⁸ AmCM, ¶¶ 36-37.

⁷⁹ Rejoinder on Quantum, ¶ 471.

⁸⁰ Reply on Quantum, ¶ 228.

⁸¹ Final Award, ¶ 317.

In case of *reorganization* of an enterprise, its rights and obligations are transferred to its successors.⁸²

59. The argument that NJSC Naftogaz and CNG are new entities ignores the key fact that they are legal successors of Soviet enterprises by universal legal succession.⁸³ The rights and obligations of these enterprises, including their right to engage in commercial activity were transferred to their universal legal successors, NJSC Naftogaz and CNG on the date of their transformation.⁸⁴

60. Through their legal predecessors, both NJSC Naftogaz and CNG were engaged in commercial activity of oil and gas exploration, development, and production long before 1 January 1992. On its website, CNG, describes that it was created in 1978 and reorganized into a joint stock company in 1998.⁸⁵ Among the “main events in the history of ‘Chornomornaftogaz’ and oil and gas production in Crimea”, CNG includes the discovery and development of several gas fields and the construction of pipelines in the period 1960-1991.

61. Under the laws of the Soviet Union, a mining allotment certificate was a document similar to a Special Permit, confirming the limits of a land plot for subsoil use as well as the right of the relevant State entity to exploit subsoil resources.⁸⁶ In the Soviet period, the Claimants’ legal predecessors had received mining allotment certificates for several gas fields at issue. For instance, mining allotment certificates were issued in 1968 to Ukrgezprom, the legal predecessor of NJSC Naftogaz for the Dzankoy and Zadornenske gas fields and to Chernomorneftegazprom, the legal predecessor of CNG for Holitsynske gas field in 1986 and for Semenivske oil field in 1991.⁸⁷ All of mentioned fields are still producing and the Claimants’ quantum calculation includes them.

⁸² Law of Ukraine No. 887-XII, “On Enterprises in Ukraine”, 27 March 1991, as in force in 1998, Arts. 34(7), 36(7) (**RE-12**).

⁸³ Rejoinder on Quantum, ¶¶ 40, 46; First Expert Report of Dr. Oleg Vygovskyy, dated 1 June 2020, ¶¶ 67-68. *See also* Final Award, ¶ 334, *citing* CNG’s 18 August 1998 Corporate Charter, ¶ 4.2 (**CE-1229**).

⁸⁴ NJSC Naftogaz was designated as a universal legal successor of JSC Ukrgezprom on 31 May 1999 by Resolution No. 931 of the Cabinet of Ministers of Ukraine. *See* Cabinet of Ministers of Ukraine, Resolution No. 931, 31 May 1999 (**RE-144**). JSC Ukrgezprom was established in 1994 by means of corporatization of the Soviet Production Association Ukrgezprom. *See* Sur-Rebuttal on Quantum, ¶¶ 52, 56-57.

⁸⁵ Rejoinder on Quantum, ¶ 66; Joint-Stock Company Chornomornaftogaz, “Our Story” (**RE-146**).

⁸⁶ AmCM, ¶ 222.

⁸⁷ AmCM, ¶ 223.

62. Holitsynske gas field was developed and started production in 1983. The Claimants' expert GCA states for the Holitsynske gas field: "It was *the first offshore gas field that CNG developed*."⁸⁸

63. For Semenievskye oil field, GCA states: "*CNG discovered the Semenievskye field in 1980 [...] CNG immediately developed* and production started in 1983."⁸⁹

64. Special Permits 2112 and 2113 issued to CNG for the last two fields state that the purpose of subsoil use is "continuation of hydrocarbon production", and for the extent of development of the field the Special Permits state: "Exploitation from 1983".⁹⁰ Clearly, there is continuity between the CNG's right to exploit the Holitsynske and Semenievskye fields in 1983 and the same right existing under Special Permits 2112 and 2113 issued on 6 January 2000 for which CNG seeks compensation.⁹¹

65. Before the expropriation, Naftogaz's operating company in Crimea, CNG, held most of the Special Permits that are at issue in this arbitration.⁹² In 1983, geological prospecting works were conducted at Shtormove gas field for CNG's legal predecessor, Chernomorneftegazprom.⁹³ Accordingly, CNG's predecessor at that time already had rights to engage in exploration activities in that field and started developing the field in the 1990s.⁹⁴ The right to explore and exploit the Shtormove field which CNG's legal predecessor acquired back in 1983 was legally transferred to CNG by operation of Ukrainian law.

66. Likewise, in 1987, following extensive geological exploration works carried out in the seventies, exploration drilling was conducted for CNG's legal predecessor, Chernomorneftegaz which lead to discovery of the Odeske gas field in 1988.⁹⁵ In 1988 a first

⁸⁸ First GCA Report, Annex VII, ¶ 214 (emphasis added).

⁸⁹ First GCA Report, Annex VII, ¶ 271 (emphasis added).

⁹⁰ Special Permit for Subsoil Use No. 2113 (Holitsynske) (**CE-38**); Special Permit for Subsoil Use No. 2112 (Semenievskye) (**CE-39**).

⁹¹ Final Award, ¶ 352, footnote 87.

⁹² Tr., Hearing on Quantum, Day 1, 24:11-15.

⁹³ Report on Calculation and Recounting of Gas and Condensate Resources according to Materials of Geological Prospecting Works of 1983 – Composition of resources balance for PA 'Chernomorneftegazprom', 1983 (**RE-15**).

⁹⁴ The Claimants' expert, GCA, states that: "The Shtormove field was discovered in 1981 with a successful well test across the Lower Paleocene age P-XI formation in well Shtormove -1. The field has three separate culminations [...] two of which *CNG started developing in the 1990s*. Production started in 1993...". See First GCA Report, ¶ 156 (emphasis added).

⁹⁵ Report on research work "Developing main directions of geological exploration work to ensure planned increments of gas reserves for Chernomorneftegaz group of production companies – Current appraisal of oil and gas reserves", 1988, 2 (**RE-23**).

appraisal of the gas reserves was performed based on the results of the exploration drilling and these reserves were made available to CNG's legal predecessor Chernomorneftegaz.⁹⁶ The right to exploit the Odeske gas field, which CNG's legal predecessor acquired in 1988, was legally transferred to CNG by operation of Ukrainian law.

67. The latest version of the CNG's charter currently applicable, published in 2018, provides that the company was

established as a result of the reorganization of State Production Enterprise specialized in gas production and gas storage 'Chernomorneftegaz' through *transformation* into a joint stock company [...] and *is a legal successor to all its property and non-property rights and obligations.*⁹⁷ (emphasis added)

68. State Production Enterprise Chernomorneftegaz, mentioned in the CNG's Charter, was a universal legal successor of the state-owned Production Association Chernomorneftegazprom which had been established in the Soviet Union on 20 October 1978.⁹⁸ Therefore, pursuant to its own charter, CNG is a universal legal successor to rights of Chernomorneftegazprom and Chernomorneftegaz to engage in exploration activities at the Shtormove and Odeske gas fields. In other words, CNG did not acquire the rights to engage in commercial activities in those fields only in 2003 as indicated in Annex A to the Response to the Rejoinder on Quantum and in paragraph 352 of the Final Award,⁹⁹ but apparently held those rights continuously since 1983 and 1987 respectively.

69. In short, in the case at issue, the Upstream Assets for which CNG requests protection under the BIT consist in the rights to engage in commercial activity of exploration, development and exploitation of oil and gas that CNG performed in Crimea, of which it states it was expropriated after the accession of the Republic of Crimea to the Russian Federation. In order to determine the date on which this investment was made, which must be viewed globally as all oil and gas exploration, development and exploitation activities performed by CNG in

⁹⁶ Report on "Current estimation of oil, gas and condensate reserves available to Chernomorneftegaz for 1988-1989", 1989, 2 (RE-24).

⁹⁷ Charter of National Joint Stock Company "Chornomornaftogaz", Art. 1.1, 12 March 2018 (CE-805). The same provision was found in Art. 4.2 of CNG's 1998 Charter. See Final Award, ¶ 334.

⁹⁸ The history of CNG all the way back to its foundation in 1978 has been backtracked in AmCM, ¶¶ 65-72. See also Historical Note on "Chernomorneftegaz", 22 March 2016 (RE-7), which was not contradicted by the Claimants.

⁹⁹ Final Award, ¶ 352, footnote 87.

Crimea, the Tribunal must determine the date on which this oil and gas exploration, development and exploitation activities began.

70. Regarding this point, according to the exhibits produced (which were not contested by CNG), these activities were initiated by the CNG's legal predecessor, the Production Association Chernemorneftegazprom, in the seventies and eighties, during the times of the Soviet Union. These gas exploration and development activities were Soviet investments initiated and made before 1 January 1992.¹⁰⁰

71. It can hardly be considered that CNG's right to engage in gas exploration and development activities in Crimea was established only in 1998, after it was corporatized, *i.e.*, transformed from a state owned enterprise into a state-owned joint-stock company. Adjudicating JSC Oschadbank's claims that its banking activities began only on the date of registration of its branch in Crimea, the Paris Court of Appeal came to the following conclusion:

If JSC Oschadbank claims that the date of the registration of the branch present in Crimea with the Ukrainian authorities was January 2, 1992, this date cannot constitute the date on which the investment was made according to the Treaty given that, as is attested by the abovementioned exhibits, JSC Oschadbank's banking activity had already begun, which necessarily implies that the investment had already been made.¹⁰¹

72. Likewise, although CNG relies on the fact that the dates of issuing of the latest Special Permits were in 2003 (and so after 1 January 1992), in my opinion, and contrary to the view held by majority, these dates cannot constitute the dates on which the investments were made according to the BIT given that, as is attested by the abovementioned exhibits and expert reports, CNG's exploration, development and exploitation activities had already begun long before that date. This necessarily implies that some investments had already been made before that date.

73. The same reasoning applies to NJSC Naftogaz as the universal legal successor of the Soviet enterprise Ukrgezprom, which also held rights to engage in oil and gas exploration and exploitation activities in Crimea. However, an additional remark needs to be made with regard to NJSC Naftogaz's Special Permits. Three Special Permits for exploration of oil and gas fields

¹⁰⁰ Rejoinder on Quantum, ¶¶ 352, 356.

¹⁰¹ *Oschadbank v. Russian Federation*, PCA Case No. 2016-14, Set-Aside Decision, Paris Court of Appeal, 30 March 2021, ¶ 100 (RLA-166).

issued to NJSC Naftogaz were allegedly indirectly expropriated, according to the Claimants, on 11 April 2014 through Resolutions Nos. 2032¹⁰² and 2033¹⁰³ of the State Council of the Republic of Crimea. These measures, according to the Claimants, although not expressly mentioning Naftogaz's Special Permits, fundamentally deprived NJSC Naftogaz of the possibility of utilizing them. The majority awards the Claimants USD 151 million on this account. However, it should be noted that in the Partial Award the majority did not include these three Special Permits issued to NJSC Naftogaz among the property expropriated under the Resolutions Nos. 2032 and 2033.¹⁰⁴

74. The third Claimant that claims under Special Permits is Joint Stock Company Ukrigasvydobuvannya ("UGV"), a company which acquired its right to engage in development activities in Crimea from CNG, by entering into a contract (the "JAA") with CNG in October 2000.¹⁰⁵ This JAA, which initially covered only the Sea of Azov area, was subsequently amended several times. UGV claims compensation for interest it had in joint development of three gas fields: Odeske, East Kazantypske and Bezimenne. Interests in developing these fields, two of which (Odeske and Bezimenne) are located on the Black Sea shelf, were acquired by UGV in 2008 pursuant to the Addendum No. 5 to the JAA.¹⁰⁶

75. UGV did not specify which investments it made in 2008 or thereafter in order to acquire the rights to develop these fields. In their last submission the Claimants only state that:

... The field development plans and investment reports evidence that NJSC Naftogaz, Chornomornaftogaz, and Ukrigasvydobuvannya (by virtue of its interest under its Joint Activity Agreement with Chornomornaftogaz) each undertook activities in relation to the Special Permits they acquired, including but not limited to new seismic studies, exploration drilling, and the development of the fields.¹⁰⁷ (references omitted)

76. The Claimants do not lead any evidence to demonstrate the date and circumstances of specific UGV's activities in relation to the Special Permits. Their experts value UGV's share

¹⁰² State Council of the Republic of Crimea, Resolution No. 2032-6/14, 11 April 2014 (CE-250).

¹⁰³ State Council of the Republic of Crimea, Resolution No. 2033-6/14, 11 April 2014 (CE-251).

¹⁰⁴ Partial Award, ¶ 123.

¹⁰⁵ Agreement on the Joint Activity in the Sea of Azov for the Development of Gas Fields in the Southern Part of the Sea of Azov, 24 October 2000 (hereinafter the "JAA") (CE-43-Am).

¹⁰⁶ First GCA Report, ¶¶ 205-206; JAA, Addendum 5, 55 of PDF (CE-43-Am).

¹⁰⁷ Response to Matters Raised in the Rejoinder, ¶ 52.

in the net present value (“NPV”) / expected monetary value (“EMV”)¹⁰⁸ of the Upstream Assets (Odeske, East Kazantypske, and Bezimenne) at USD 1,090 million, without specifying which investments that postdated 1 January 1992 UGV made in the underlying gas fields. The majority awards USD 940 million to UGV without any evidence of investments made by this company.¹⁰⁹

77. The assets (the gas fields) that were the subject matter of the JAA existed and were operated by CNG before 1 January 1992,¹¹⁰ and major investments had been made into them before that date.¹¹¹ Since only fresh investments made after 1 January 1992 are entitled to the BIT protection, they must be distinguished from any pre-1992 investments in the same assets, duly proven and valued independently of the pre-1992 investments made in the same assets.¹¹²

78. In view of this, it was upon the Claimants to demonstrate any fresh investments UGV made to contribute to the creation of NPV and/or to the creation of EMV of the three respective gas fields for which it claims compensation. Given that UGV failed to demonstrate any fresh investments, it must be concluded that the value that UGV claims as compensation for the loss of the right to engage in commercial activity was created by investments made into the three gas fields concerned before 1 January 1992 and should therefore be excluded from the quantum valuation, being outside of the Tribunal’s jurisdiction.

¹⁰⁸ Due to its probabilistic nature, the EMV concept is preferable to assess the fair market value of fields where the exploration phase has not yet been completed, rather than the deterministic NPV approach, which is commonly used for already discovered oil and gas fields. First Vygon Report, 14.

¹⁰⁹ Final Award, ¶¶ 490-491.

¹¹⁰ According to the Claimants’ experts, the Upstream Assets were held by CNG, UGV and NJSC Naftogaz, but CNG was the sole operator of producing assets on the Valuation Date. First GCA Report, ¶ 48.

¹¹¹ The Odeske gas field was discovered in 1988, and the reserves were made available to CNG’s legal predecessor, Chernomorneftegaz, in the same year. CNG developed the field mainly from 2006 to 2012. None of UGV’s activities are mentioned in the Claimants’ expert evidence. *See* Report on “Current estimation of oil, gas and condensate reserves available to Chernomorneftegaz for 1988-1989”, 1989, 2 (RE-24); AmCM, ¶ 131; First GCA Report, ¶ 208. The East Kazantypske discovery was part of larger-scale regional searches in the Sea of Azov. In 1987, CNG and other authorities and entities involved presented their findings regarding the project of prospecting and the deep drilling of structures involved in the seismic exploration of the Sea of Azov, which included the East Kazantypske field. In 1977, the East Kazantypske gas structure was prepared for prospecting drilling. Gas was discovered by CNG in 1999 and the field was developed in 2002-2003, also by CNG. UGV’s activities are not mentioned in the Claimants’ expert evidence. *See* Geological Project of prospecting and exploration drilling on the structures of seismic exploration, North Bulhanatske, North Kazantypske and East Kazantypske (Azov Sea), 1987 (RE-44). *See also* AmCM, ¶¶ 151, 153; First Vygon Report, 30; First GCA Report, Appendix VII, ¶ 156. The Bezimenne structure was detected by reflection method exploration in 1966 and was prepared for drilling in 1973, following which contour maps and profile cut records were established. Prospecting drilling started in 1997 and gas was discovered in the same year. No further development was made. *See* AmCM, ¶ 186; First GCA Report, Appendix VII, ¶ 5; First Vygon Report, 46.

¹¹² Rejoinder on Quantum, ¶ 320.

3.7. Valuation of the Contribution of Pre-1992 Investments to the Value of Upstream Assets

79. The Special Permits would have had no value if there were no underlying assets in which investments were made which constitute the value and/or contribute to the value of those Special Permits. This is confirmed by the Claimants' experts estimate the value of interests in Special Permits based on the estimated yield (discounted cash flow) from the underlying assets. There is no value to the Claimants' Special Permits outside the value that results from the investments that have been made in the underlying assets. Or, if there is such additional value to the Special Permits, the Claimants' valuation fails to quantify it.

80. The Respondent's expert, Vygon Consulting, valued the NPV of nine fields that were discovered before 1 January 1992¹¹³ applying the DCF approach. Vygon Consulting's estimation of the NVP of the fields under consideration was based on the condition they were in as of 1 January 1992 and assumed that they would operate in a Russian economic and legal framework, rendering a valuation as of the Valuation Date in the amount of USD 2,268 million.¹¹⁴

81. The Claimants, on the other hand, having consistently maintained their position that *all* of the Upstream Assets were the result of their investments made after 1 January 1992, failed to identify and prove, as an alternative position, specific dates of their own investments after 1 January 1992 and the amounts invested at each phase of development of the Upstream Assets.¹¹⁵

82. The majority considers that the entire historical cost argument is misconceived and rejects Vygon Consulting's calculations, relying on the theory that the Claimants' investments were the fees paid for the Special Permits.¹¹⁶

83. As generally noted, a claimant bears the legal burden of showing that the tribunal has jurisdiction to consider its claim. This principle has been affirmed by many investment tribunals.¹¹⁷ In Procedural Order No. 13 the Tribunal noted that "in the quantum phase, the

¹¹³ Namely: Odeske, Shtormove, Arkhanhelske, Holitsynske, Dzhankoy, Semenivske, Zadornenske, North Kerchenske and Schmidta.

¹¹⁴ First Vygon Report, 111.

¹¹⁵ Rejoinder on Quantum, ¶ 451.

¹¹⁶ Final Award, ¶¶ 349-350.

¹¹⁷ See *Sergei Viktorovich Pugachev v. Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020, ¶ 248 (RLA-159), referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 190, 192; *Tulip Real Estate and*

Claimants will have to establish that the investments were made within the meaning of the BIT after 1 January 1992”.¹¹⁸

84. The Respondent has substantiated, and the evidence submitted by the Claimants themselves has corroborated that the exploration works were conducted on the Upstream Fields, that prospecting and appraisal wells were drilled, and that discoveries and developments were made prior to 1992. It cannot be denied that these works were valuable and, if finished by discovery, that their value was multiplied by the DCF that the discovered resources could produce.

85. This necessarily implies that the onus of proving post-1992 investments was on the Claimants. International arbitration is not a system where it is sufficient to make a *prima facie* case relying on the opponent to rebut that case.¹¹⁹ Rather, it was for the Claimants to justify the *ratione temporis* jurisdiction of the Tribunal.¹²⁰ They should have submitted evidence that would attest to the fact that they made investments after 1992 for which they claim compensation. They should have submitted a valuation which would have enabled the Tribunal to exclude the investments made before 1 January 1992 from the value of investments for which compensation should be awarded. The fact that the Tribunal “lacks the evidence to make such an apportionment” of the investments made before and after 1 January 1992 in accurate terms¹²¹ is precisely due to the Claimants’ failure to discharge their burden of proof.

3.8. The Assumption of Transferability

86. The valuation of the Upstream Assets envisions a hypothetical sale of the expropriated assets to the willing buyer before the expropriation.¹²² Regarding this valuation, two more remarks need to be made. On the one hand, not being the owners of the Upstream Assets, the

Development Netherlands B.V. v Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48; *National Gas S.A.E. v Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 118; *Emmis International Holding, B.V. v Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 171.

¹¹⁸ This sentence was quoted by the Claimants in their Response to Matters Raised in the Rejoinder, ¶ 4.

¹¹⁹ *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 148 (RLA-90).

¹²⁰ *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 785 (RLA-32-Am).

¹²¹ Final Award, ¶ 350.

¹²² First GCA Report, ¶ 6. The Claimants’ argument is based on the “purchase of upstream oil and gas assets.” Memorial on Quantum ¶ 64. “[T]he basis of the valuation is that the willing buyer is buying all of Naftogaz’s assets...” Reply on Quantum, ¶ 115.

Claimants were not entitled to sell them. On the other hand, the disposal of rights under the Special Permits was not legally possible.

87. It has been brought to light during the proceedings that the Special Permits are non-transferrable, which prevents the valuation of the Upstream Assets envisioning a sale thereof. At the hearing, the Claimants' expert, when asked whether a Special Permit can be freely transferred to another company under Ukrainian law, replied:

“There is the Subsoil Code, there is Law on Oil and Gas. Under these two laws, the permit has to be issued anew for the first time to the specific applicant. The permits cannot be inherited or transferred; they have to belong to the applicant who applied for this permit.¹²³

And I just want to point out that under Ukrainian law, the permits are issued only specifically to the applicant, and only the holder of the permits can operate this permit; they cannot be operated by any third parties. So the legal rights in the permits are in the name of the joint stock company.¹²⁴

88. Similarly, the Claimants' expert on Russian law confirmed:

Russian laws and regulations do not permit the assignment of licenses to nonaffiliated third parties.¹²⁵

Thus the “lease” of the Upstream Assets by the Claimants, as the majority had described the nature of the Claimants' rights (although never stating how much they had paid to obtain this lease)¹²⁶ is non-assignable.

89. Additionally, the Special Permits have a limited term. This term varies from ten to fifty years. Some of them expired already in 2014,¹²⁷ others were due to expire in 2017,¹²⁸ 2018,¹²⁹

¹²³ Tr., Hearing on Quantum, Day 2, 66:18-22.

¹²⁴ Tr., Hearing on Quantum, Day 2, 13:11-20.

¹²⁵ First Expert Report of Evgeny Zhilin, dated 14 February 2020 (hereinafter “**First Zhilin Report**”), ¶ 74.

¹²⁶ Final Award, ¶ 352.

¹²⁷ See, e.g., Special Permit for Subsoil Use No. 2692, 29 December 2004 (CE-66).

¹²⁸ See, e.g., Special Permit for Subsoil Use No. 2113, 6 January 2000 (CE-38); Special Permit for Subsoil Use No. 2112, 6 January 2000 (CE-39).

¹²⁹ See, e.g., Special Permit for Subsoil Use No. 2379, 12 August 2003 (CE-57); Special Permit for Subsoil Use No. 2378, 12 August 2003 (CE-58); Special Permit for Subsoil Use No. 2377 (CE-59).

2019¹³⁰ or 2020,¹³¹ whereas some have a longer period of validity, going all the way to 2039,¹³² 2041,¹³³ and in one case even to 2063.¹³⁴

90. Nevertheless, the Claimants' experts calculated the value of expropriated rights to the Upstream Assets basing their DCF analysis on the estimate that CNG and Naftogaz would have continued to hold the rights under all Special Permits for 35 years, *i.e.*, until 2050:

Our analysis of the upstream assets has them still producing way past 2050.¹³⁵

91. Accordingly, the valuation of the Claimants' rights under the Special Permits takes into account cash flow in the period after the Special Permits would have expired. Such valuation is entirely speculative since it is not certain that the Russian authorities would have extended the Claimants' Permits after they had expired. The majority's assumption that the Permits would have had to be extended because the Willing Buyer would possess the infrastructure¹³⁶ seems to overlook its own finding that the Willing Buyer was only renting the use of this infrastructure (for an unknown price),¹³⁷ so that after the expiry of the Permits it would be the State who would possess the infrastructure and would thus be in the position to refuse reissuance of the Permits. Even if the DCF from the production of the Upstream Assets was to be used as a measure of compensation, the only period of production that could properly have been considered to put the Claimants into the same position they would have been in but for the expropriation, was the period of validity of each and every Special Permit they held. This is another reason why the valuation of the Upstream Assets offered by the Claimants is of no utility to the Tribunal. The valuation should have been based on the value of investments made by the Claimants after 1 January 1992 to explore, develop and exploit the assets at issue, rather than on the sale of the Special Permits.

¹³⁰ See, *e.g.*, Special Permit for Subsoil Use No. 2092, 24 December 1999 (CE-37); Special Permit for Subsoil Use No. 3481, 21 January 2009 (CE-72).

¹³¹ See, *e.g.*, Special Permit for Subsoil Use No. 2188, 24 March 2000 (CE-40).

¹³² See, *e.g.*, Special Permit for Subsoil Use No. 4991, 21 July 2009 (CE-74).

¹³³ See, *e.g.*, Special Permit for Subsoil Use No. 5280, 13 January 2011 (CE-84).

¹³⁴ See, *e.g.*, Special Permit for Subsoil Use No. 4478, 27 December 2013 (CE-141-Am).

¹³⁵ Tr., Hearing on Quantum, Day 5, 29:23-24.

¹³⁶ Final Award, ¶ 414.

¹³⁷ Final Award, ¶ 358.

4. MIDSTREAM ASSETS

92. Under Midstream Assets, the Claimants seek compensation for
- the Crimean main high-pressure pipeline systems operated by CNG and Joint Stock Company Ukrtransgaz (“UTG”),
 - the UGSF,
 - natural gas inventories in the pipelines and injected cushion gas within the UGSF, and
 - Smaller distribution pipelines and associated vehicles and equipment (“Miscellaneous Midstream Assets”).¹³⁸

4.1. The Meaning of “Making an Investment” in the Oil and Gas Industry: Midstream Assets

93. The Claimants’ experts have valued the high-pressure pipeline systems and the underground storage facility on the basis of the depreciated replacement cost.¹³⁹ Their calculation can serve as guidance to the meaning of “making an investment” in the Midstream Assets in the oil and gas industry.

94. The first step in applying the replacement cost methodology is to assess the cost of construction of the pipeline system, taking into account different sections of the pipeline system, *i.e.*, “segments” running from one junction to another, that were build and put into operation at different periods of time.¹⁴⁰ This industry-specific framework for estimating costs of hydrocarbons pipelines, developed by John S. Page, an award-winning member of the American Association of Cost Estimators, is based on a recognized industry standard.¹⁴¹ The framework breaks down the process of onshore pipeline construction into a number of activities, estimating prices for construction crews and equipment under a variety of operating conditions.¹⁴² In this case, the cost was estimated in USD on the basis of material and labor required for pipeline construction in Ukraine as of first quarter of 2014.¹⁴³

¹³⁸ First GCA Report, ¶ 418.

¹³⁹ First GCA Report, ¶¶ 431 *et seq.*

¹⁴⁰ First GCA Report, ¶ 432.

¹⁴¹ First GCA Report, ¶ 434.

¹⁴² First GCA Report, ¶ 435.

¹⁴³ First GCA Report, ¶ 433.

95. GCA reviewed information on the length, diameter, wall thickness, material used, burial depth, and year of commissioning for each pipeline segment operated by CNG and UTG in Crimea, consisting of 51 and 4 segments respectively.¹⁴⁴ GCA determined the replacement cost for each pipeline segment, by estimating the cost of materials (steel pipe grade), coating, cabling and controls, pressure reduction valves and isolation stations, as well as overhead and contingency. Overhead costs include engineering, management, certification, and insurance.¹⁴⁵ The GCA estimate of construction cost also includes labor costs and all equipment necessary to install, inspect, test and commission the pipeline to standards of construction conforming to the GOST Russian Standards.¹⁴⁶

96. After taking into account the depreciation of pipelines, and adding the value of the rights of way, GCA valued their replacement cost at USD 213 million for the pipeline system operated by CNG and USD 243 million for the Pipeline System operated by UTG.¹⁴⁷

97. Considering that a detailed description of costs of construction of the UGSF was unavailable, GCA valued the replacement cost of this facility on the basis of depreciated costs of construction of twelve similar storage facilities that NJSC Naftogaz operates in the rest of Ukraine.¹⁴⁸ GCA stated that the depreciated cost of UGSF in dollars should be based on the exchange rate at the time the facility was commissioned.¹⁴⁹ In its First Report, GCA calculated the value of UGSF to be USD 63 million, but revised its valuation to USD 26 million in its second report.¹⁵⁰

98. In addition to the costs of commissioning described above, the operation of pipeline systems and the underground storage facility requires injection of cushion gas and pipeline fill.¹⁵¹ The value assigned by GCA to cushion gas injected into the UGSF Hlibovske and pipeline fill required to operate the main high-pressure pipelines was USD 142 million and USD 4 million respectively. All of the described costs necessary to commission and operate the pipelines are investments in the creation of those assets.

¹⁴⁴ First GCA Report, ¶ 436.

¹⁴⁵ First GCA Report, ¶ 437.

¹⁴⁶ First GCA Report, ¶ 441.

¹⁴⁷ First GCA Report, ¶ 457.

¹⁴⁸ First GCA Report, ¶ 462.

¹⁴⁹ First GCA Report, ¶ 466.

¹⁵⁰ First GCA Report, ¶ 467; Second Expert Report of Gaffney, Cline & Associates, dated 14 February 2020 (hereinafter “**Second GCA Report**”), ¶ 29.

¹⁵¹ AmCM, ¶ 247.

4.2. The Date of Investments Made in the Midstream Assets

99. Before examining the date of investments made in the Midstream Assets, it is worth reiterating that the investments for which compensation is claimed under the heading of Midstream Assets, which had been made before 1 January 1992, fall outside the scope of the BIT and of the Tribunal's jurisdiction.

100. Evidently, for many of the Midstream Assets for which the Claimants seek compensation in this arbitration, significant economic activity, described by the Claimants' experts as costs needed to replace them, had taken place before 1 January 1992. This concerns many of the gas pipelines, the UGSF, part of the gas inventories and some of the Miscellaneous Midstream Assets.¹⁵²

101. The maps of the gas distribution system on the Crimean Peninsula in 1992 and 2014 respectively, submitted by the Respondent,¹⁵³ demonstrate that the entire western part of the gas distribution system was constructed prior to 1992 whereas the eastern part was constructed after 1992.¹⁵⁴

102. There is no doubt that the same costs described in the previous section had been associated with the construction and commissioning of these pre-1992 pipelines. It follows that investments involved in their construction and commissioning were made prior to 1992.¹⁵⁵

103. More precisely, as far as CNG's gas pipelines are concerned, the list of Main Gas Pipelines (**CE-933**) filed by the Claimants includes CNG's main gas pipelines ("MGP") and gas pipeline branches to gas distribution stations ("GDS") with their respective year of commissioning.¹⁵⁶ This document shows that the most of the CNG's pipelines were commissioned before 1 January 1992.¹⁵⁷ Out of the 51 pipelines listed in this document, 38 pipelines were commissioned before and 13 pipelines after 1992.¹⁵⁸ For two among those 13

¹⁵² AmCM, ¶ 233.

¹⁵³ Map of the Gas Distribution System in Crimea in 1992 (**RE-140**); Map of the Gas Distribution System in Crimea in 2014 (**RE-141**).

¹⁵⁴ AmCM, ¶ 235.

¹⁵⁵ AmCM, ¶ 233.

¹⁵⁶ List of Main Gas Pipelines of Public Joint Stock Company "State Joint Stock Company 'Chornomornaftogaz'" (**CE-933**).

¹⁵⁷ AmCM, ¶ 236.

¹⁵⁸ AmCM, ¶ 238.

pipelines, the document mentions different commissioning dates which are both pre- and post-1992.¹⁵⁹

- For the pipeline branch to the GDS-2 Simferopol (item n°15 in **CE-933**),¹⁶⁰ 6 km were commissioned in 1966, while 12 km were commissioned in 2009;
- For the MGP Glibovka–Simferopol (item n°1 in **CE-933**, 151 km long),¹⁶¹ the commissioning dates mentioned are “1966-2005”. However, 102.4 km of those pipelines were commissioned in 1966, 39.5 km were commissioned in 1985, while the remaining 9,5 km were commissioned in 2005.¹⁶²

104. Furthermore, as the Respondent rightly argues, the date of commissioning a pipeline does not necessarily reflect the date on which the pipeline was built, or when the corresponding investment was made. The fact that a pipeline was commissioned in or after 1992 does not prove, in and of itself, that the respective investment was made after 1 January 1992. Commissioning may well have taken place in 1992, or after 1992, although the pipeline had been built prior to 1992 and thus the investment had been made before that date.¹⁶³

105. The investments into pipelines which were made prior to 1 January 1992, including the fill gas that was injected in the pipelines prior to that date as a necessary condition for their operation, are excluded from the Tribunal’s jurisdiction as the BIT does not apply to them.

106. The Hlibovske UGSF falls outside the Tribunal’s jurisdiction as well. Special Permit 2187 reissued to CNG indicates that the creation of UGSF started in 1983 and that the facility has been operated by CNG since 1991:

The Hlibovske Gas Condensate Field was discovered in 1960 and put into development in 1966. The development of the field was completed in 1983. Creation of the underground gas storage facility was driven by the need for regulation of the seasonal irregularity of gas supply to industrial consumers in the south of Ukraine. Creation of the UGSF was started in 1983 [...] Until 1989, gas injection was performed (primarily from the Holitsynske GCF) using the airless

¹⁵⁹ AmCM, ¶ 239.

¹⁶⁰ List of Main Gas Pipelines of Public Joint Stock Company “State Joint Stock Company ‘Chornomornaftogaz’” (**CE-933**).

¹⁶¹ List of Main Gas Pipelines of Public Joint Stock Company “State Joint Stock Company ‘Chornomornaftogaz’” (**CE-933**).

¹⁶² Order of the Ministry of Gas Industry No. 640, “On the approval of the act of acceptance for commissioning of the Pipeline Hlibovske – Simferopol”, 7 October 1966 (**RE-104**); Technical passport for the Hlibovka-Simferopol main gas pipeline (**RE-105**).

¹⁶³ Rejoinder on Quantum, ¶ 158.

injection method to the UGSF reservoirs in order to restore the gas saturated porous volume and reduce the gas-water contact. At the same time, field facilities construction was underway for the UGSF, as well as drilling of wells. Since 1991, the storage facility has been operating in a cyclic mode: in summer – injection of gas, in winter – gas withdrawal. Initial gas reserves of the Hlibovske Field amounted to 4.57 billion cu m, with the remaining reserves after completion of the development being 388.6 mln cum. which were transferred to the buffer volume.¹⁶⁴

107. Special Permit 2187 certifies that the Hlibovske UGSF was made before 1 January 1992 and the investments made to create it (retention of the remaining reserves as buffer or cushion gas, injection of additional gas, and construction of field facilities) were made by CNG's predecessor before that date.

4.3. Legal Succession: Midstream Assets

108. The Claimants argue that it does not matter when the pipelines were constructed and who made the relevant investments, because their investments consisted in the right to use the Midstream Assets which was transferred to them by the owner, the State of Ukraine.¹⁶⁵

109. The Claimants specified the dates and circumstances of acquisition of the rights related to Midstream Assets in Annex A to the Response to the Matters raised in the Rejoinder on Quantum. The table is reproduced in paragraph 504 of the Final Award.

110. The dates of acquiring the right to use and operate the main gas pipelines and the UGSF supplied by the Claimants do not seem convincing. In that respect, it is important to recall that NJSC Naftogaz and CNG are universal legal successors to companies founded in the Soviet Union prior to 1 January 1992 that engaged in the same type of commercial activities. All rights and obligations of their predecessors were transferred to them, including the right to operate gas transportation and storage facilities. This means that they had rights to operate the gas transportation system before 1 January 1992.

111. It is indicative that Claimants themselves describe the acquisition of those rights as follows:

Before NJSC Naftogaz was formed in 1998, Chornomornaftogaz was a state-owned company *that operated all the main gas pipelines (87) and the underground-gas-storage facility in Crimea.*

¹⁶⁴ Special Permit No. 2187, 20 November 2014, T-0008 (CE-326).

¹⁶⁵ Tr., Hearing on Jurisdiction and Liability, Day 3, 300:20-301:16.

(87) *See* Order No. 209 of the Ministry of Gas Industry, T-0001 (27 Oct. 1978) (establishing Production Association Chernomorneftegazprom, the predecessor company to Chornomornaftogaz, for the purpose of hastening the development on the continental shelf of the USSR) (**CE-608**); Order No. 158 of the Ministry of Oil Production, Cl. 2 (19 Mar. 1988) (referring to the creation of Chornomornaftogaz’s Trunk Pipelines Management Division, which, by virtue of its name, would have managed the main gas pipelines in Crimea).

...

Chornomornaftogaz—which had operated all main gas pipelines in Crimea and the Hlibovske underground-gas-storage facility since the collapse of the Soviet Union—thereafter continued operation of this state-owned property, with Ukrtransgaz, as discussed below, later obtaining the right to operate certain other pipelines (including main gas pipelines) in Crimea.

Chornomornaftogaz’s *continued operation of state-owned pipelines in Crimea* (save for those operated by Ukrtransgaz) is reflected in form 2b(k), a report that Chornomornaftogaz filed annually with the Ministry of Fuel and Energy of Ukraine as a record of the state-owned pipelines and pipeline facilities that Chornomornaftogaz operated (“**Form 2b(k)**”). Chornomornaftogaz’s last available Form 2b(k), which is for the period ending on 31 December 2012, shows that it operated 57 pipeline segments owned by the State of Ukraine in Crimea, together with related equipment and facilities.

...

Ukrtransgaz, *unlike Chornomornaftogaz*, did not exist and therefore did not operate any pipeline before NJSC Naftogaz was created. In 1999, NJSC Naftogaz entered into an agreement with Ukrtransgaz and *transferred to Ukrtransgaz most of the rights to operate state-owned pipelines and gas-storage facilities in Ukraine that NJSC Naftogaz had received from the State Property Fund under Agreement No. 76.*

Specifically, the agreement provided that NJSC Naftogaz would transfer to Ukrtransgaz for its “operative management and use” state property that was held by all of the companies listed in Schedule 1 to Agreement No. 76, save for four, with one of those four being Chornomornaftogaz. This state property *included most of Ukraine’s then-existing main gas pipelines...*¹⁶⁶ (references omitted, emphasis added)

112. Considering the quoted statements, it is evident that CNG, *i.e.*, the universal legal predecessors of this company operated the pipelines and pipeline facilities, including the accessory natural gas inventories in Crimea before 1 January 1992. Also, NJSC Naftogaz as universal legal successor of companies that operated the remaining pipelines in Crimea, transferred the right to operate them to UTG in 1998. It has not been stated that UTG made any investment to acquire the right to operate the pipelines and the accessory natural gas

¹⁶⁶ Claimants’ Answers, ¶¶ 8.3-8.13.

inventories. These pipelines are an exemplary type of investments that were made in Soviet times (prior to 1992), for the likes of which the cutoff date in the BIT was included.

4.4. Valuation of the Midstream Assets

113. One more remark is due with respect to valuation of the Midstream Assets. The valuation envisions a hypothetical sale of the pipelines, UGS and Miscellaneous Midstream Assets to a Willing Buyer.¹⁶⁷ However, most of the assets classified under the term Midstream Assets are not owned by the Claimants and their sale is expressly prohibited under Agreement 76, which transferred the right of use to NJSC Naftogaz:

“Save to the extent permitted by the applicable laws, the Property transferred hereunder may not be sold.”¹⁶⁸

114. The sale is prohibited because the relevant property could not be privatized pursuant to Ukrainian law.

115. The Claimants are also not allowed to transfer the right of use of the assets in question to a third party (the willing buyer):

The Company shall:

Not transfer the Property described in Clause 1.1. above for third party use without the authorization of the [State Property] Fund, with the exception of transfers to enterprises that belong to the Company.¹⁶⁹

116. The valuation of pipelines owned by NJSC Naftogaz is also based on their sale,¹⁷⁰ while these assets cannot be sold to a third party.¹⁷¹ The same is true of the CNG’s right to operate the UGSF based on the Special Permit, as this Special Permit for subsoil use was non-transferrable and expired in 2020.¹⁷²

117. Therefore, the valuation of the rights that were expropriated from the Claimants should have been based on the value of investments made by the Claimants to operate the Midstream

¹⁶⁷ First GCA Report, ¶ 6: “We have been instructed to assume that the assets would be sold...”.

¹⁶⁸ Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, Art. 4.1, 4 February 1999. (**CE-32-Am**).

¹⁶⁹ Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, Art. 2.3, 4 February 1999. (**CE-32-Am**).

¹⁷⁰ First GCA Report, ¶ 6: “We have been instructed to assume that the assets would be sold.”

¹⁷¹ Pursuant to the Charter of NJSC Naftogaz, Clause 12, fixed assets of the company and its subsidiaries are not subject to disposal and encumbrance, except in the cases established by law. Privatization of NJSC Naftogaz and its subsidiary companies engaged in transportation by trunk pipelines is prohibited. *See* Current Charter of NJSC Naftogaz (**AV-42**); AmCM, ¶ 403.

¹⁷² Claimants’ Answers, ¶ 8.11.

Assets after 1 January 1992, rather than on the sale of the Midstream Assets or the sale of the right to their use. Since the Claimants did not value their post-1992 investments, the Tribunal could not establish the value of any investments made by the Claimants in the construction and operation of the pipelines and the UGSF after the critical date. The income to be derived from the Midstream Assets that was awarded to the Claimants by the majority as compensation,¹⁷³ is based on both pre-1992 and post-1992 investments, without distinguishing between them.

5. SERVICE ASSETS

5.1. The Meaning of “Making an Investment” in the Oil and Gas Industry: Service Assets

118. Among the investments termed the Service Assets, the Claimants include the drilling rigs Sivash and Tavrida and fifteen marine vessels that were made (built) prior to 1 January 1992. These investments would fall within the scope of the Tribunal’s jurisdiction if they were constructed, bought, or upgraded by the Claimants after 1 January 1992.

5.2. The Date of Investments Made in the Service Assets

119. The evidence shows that the drilling rig Sivash was built in 1979 in the Astrakhan Shipyard in the USSR. The drilling rig Tavrida was built in 1991 in the Astrakhan Shipyard in the Soviet Union,¹⁷⁴ and some unspecified additions were made to it in the Mikolayiv or Kherson shipyard in Ukraine in 1995.¹⁷⁵ The marine vessels that were built before 1992 are: Briz, Don, FS-645, Kalkan, Centaur, Delfin, Gousan-5, Inya, Alaid, Naftogaz-68, Yarylgach, Neptune, Chornomorets-15, Shkval and Krepkii-1.¹⁷⁶

120. The Claimants argue that CNG acquired Sivash and Tavrida from its founder by transfer into ownership upon its transformation into a joint-stock company.¹⁷⁷ The same argument is made about acquisition of the pre-1992 marine vessels.¹⁷⁸

¹⁷³ Final Award, ¶¶ 492 *et seq.*

¹⁷⁴ AmCM, ¶ 228; Certificate of Ownership No. 001069 for Tavrida, 8 April 2015 (RE-87); First GCA Report, ¶¶ 382, 396.

¹⁷⁵ Certificate of Ownership No. 001069 for Tavrida, 8 April 2015 (RE-87); First GCA Report, ¶¶ 382, 396; 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).

¹⁷⁶ AmCM, ¶¶ 230-231.

¹⁷⁷ Response to Matters Raised in the Rejoinder, ¶¶ 20-24.

¹⁷⁸ Response to Matters Raised in the Rejoinder, ¶¶ 22-29.

121. According to the Respondent, the old drilling rigs were acquired by CNG at the time when they were built, and fifteen marine vessels were put on CNG's balance sheet before 1992.¹⁷⁹ The Respondent submits evidence that Sivash was used by CNG's predecessor in 1986.¹⁸⁰

122. In my opinion, the Claimants have not substantiated the investments CNG made to acquire the two drilling rigs and the marine vessels in 1998, at the time when CNG was transformed from a State enterprise into a joint-stock company. It appears that CNG received this property by legal succession, not by making an investment. The transfer of assets was formalized by way of a balance sheet transfer between the predecessor state enterprise and the successor – the state-owned joint-stock company, without any payment.¹⁸¹ There was no new investment, so the date of the original investments remains and the investments at issue are not protected.¹⁸²

123. In paragraph 330 of the Final Award, the majority holds that (a) the Claimants made an investment by issuing their own shares to their founder in exchange for the Soviet-era assets, (b) that the Claimants bought the Soviet-era assets with their shares, and (c) that “at that stage, and not before, the assets became protected investments within the scope of Article 1 of the BIT”. In my view, this is a fundamental misconception. When a company issues shares to its founder, the company does not itself make an investment.¹⁸³ The fact that the state has transferred state-owned assets from one state-owned entity to another on a given date, does not mean that the latter has bought the assets or that itself made an investment on the same date.¹⁸⁴ Finally, the assets did not become protected investments at the time of the Claimants' transformation, but only on 18 March 2014 as held in the Partial Award.

124. In contrast to treaties which apply broader terms, the BIT does not refer to investments that are held or acquired (e.g. by succession), but to investments that were made by the investor at a particular time. The investment may count as having been made after 1 January 1992 if after that date CNG bought the relevant Service Assets from a third party or upgraded the

¹⁷⁹ AmCM, ¶¶ 228 and 230-231. The Respondent refers to documents certifying that the aforementioned marine vessels were put on balance sheet of the CNG's legal predecessors.

¹⁸⁰ Order No. 289 of Chernomorneftegazprom “On drilling of well No. 1 at the Arkhanhelske field”, 21 July 1986 (RE-29).

¹⁸¹ First Vygovskyy Report, ¶¶ 66, 75.

¹⁸² Sur-Rebuttal on Quantum, ¶ 109.

¹⁸³ Sur-Rebuttal on Quantum, ¶ 35.

¹⁸⁴ Sur-Rebuttal on Quantum, ¶ 110.

relevant Service Assets inherited from its predecessors. Considering that CNG simply received the relevant Service Assets that were previously held by its predecessors, it cannot be accepted that it thereby made an investment.

125. Given that Article 12 of the BIT limits the temporal scope of application of the BIT to investments made after 1 January 1992, the date when the investment was made is critical and in case of universal legal succession to property rights it can only be the date of the original investment.¹⁸⁵ The aforementioned Service Assets were made (constructed or bought) by CNG's predecessor prior to 1992 in the USSR, they were transferred to CNG as the universal legal successor of the Soviet company through a balance sheet transfer, and therefore fall outside the scope of the Tribunal's jurisdiction.

6. THE LOCAL DISTRIBUTION COMPANIES

126. The Claimants seek and the majority awards them compensation in an amount of USD 8.5 million for NJSC Naftogaz and CNG's interest in Public Joint Stock Company Krymgaz ("Krymgaz") and for NJSC Naftogaz's interest in Public Joint Stock Company Sevastopolgaz ("Sevastopolgaz" and together with Krymgaz, the "Local Distribution Companies").¹⁸⁶

127. The Respondent argues that Krymgaz and Sevastopolgaz are universal legal successors to companies founded in the Soviet Union prior to 1 January 1992. For the Respondent, the Claimants' interests in these companies were not investments made after that date.¹⁸⁷ Rather, the interests concern companies that existed prior to 1 January 1992¹⁸⁸, and in which the Claimants' founder had stakes before that date.¹⁸⁹

128. The shares of the state in the Krymgaz and Sevastopolgaz were transferred to NJSC Naftogaz by the Council of Ministers of Ukraine Resolution No. 747 dated 25 May 1998. NJSC Naftogaz failed to prove that it made itself any post-1 January 1992 investment in the Local Distribution Companies. Its interests in these companies were received by NJSC Naftogaz from its founder, the State of Ukraine which had those interests before 1 January

¹⁸⁵ Rejoinder on Quantum, ¶¶ 5, 397.

¹⁸⁶ Final Award, ¶¶ 601-623.

¹⁸⁷ AmCM, ¶¶ 255-261.

¹⁸⁸ The legal predecessor of Krymgaz was "Krymgaz Crimean Gas Production Association" which was created in 1975. The legal predecessor of Sevastopolgaz was "Sevastopolgaz Gas Production Association" established in 1975. Production Association Krymgaz and Production Association Sevastopolgaz were reorganized as state-owned OSJs in 1996. AmCM, ¶¶ 256-258.

¹⁸⁹ Rejoinder on Quantum, ¶ 138.

1992. The same applies to lack of any evidence of CNG's investments in Krymgaz. CNG's reference to 8 May 2003 as the date of acquiring the shares is not corroborated by the submitted evidence. It is not clear how CNG acquired the shares in Krymgaz and what investments it made for that purpose. The Claimants' interests in the Local Distribution Companies are therefore not investments covered by the BIT and the Tribunal has no jurisdiction under the BIT to decide on the compensation for expropriation of those interests.

7. CONCLUSION

129. The Claimants have failed to state their case under Article 12 of the BIT. Instead of directly addressing pre-1992 investments and carving them out from the investments they made after that date, the Claimants maintained their position that all the assets for which they claim compensation were their investments and were all made after the relevant cut-off date. Regrettably, the majority of the Tribunal followed the Claimants' approach and did not exclude the considerable investments that were evidently carried out before 1 January 1992. The Tribunal lacks jurisdiction for those investments and had to exclude them from the valuation of the expropriated assets.¹⁹⁰

130. As a consequence of disagreeing with the decisions on jurisdiction and quantum, I also have a different view on the allocation of costs. Article 40(2) of the 1976 UNCITRAL Arbitration Rules allows the costs of legal representation and assistance to be determined and apportioned between the parties in a reasonable manner, taking into account the circumstances of the case. The Claimants' failure to discharge their burden of proof regarding investments made after 1 January 1992,¹⁹¹ as well as their admission that they postponed presenting the circumstances of acquisition of the assets for which they seek compensation up to their last submission¹⁹² reasonably leads to the conclusion that they should not be awarded the costs of legal representation.


¹⁹⁰ Sur-Rebuttal on Quantum, ¶ 2.

¹⁹¹ See ¶ 85 above.

¹⁹² See ¶ 47 above.

Place of Arbitration: The Hague, the Netherlands

Signed, this 8th day of February 2023



Professor Dr. Maja Stanivuković
Arbitrator