



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

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

- and -

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

PCA CASE NO. 2015-21

- between -

**(1) PJSC CB PRIVATBANK
(2) FINANCE COMPANY FINILON**

The Claimants

- and -

THE RUSSIAN FEDERATION

The Respondent

**INTERIM AWARD
(CORRECTED)**

The Arbitral Tribunal
Professor Pierre-Marie Dupuy (Presiding Arbitrator)
Sir Daniel Bethlehem QC
Dr. Václav Mikulka

Registry
Permanent Court of Arbitration

27 March 2017

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Belbek Arbitration	An arbitration before a tribunal constituted in accordance with the Treaty and the UNCITRAL Rules between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as claimants and the Russian Federation (<i>PCA Case No. 2015-07</i>)
Belbek LLC	Aeroport Belbek LLC
BIT	Bilateral investment treaty
Claimants	PrivatBank and Finilon
[REDACTED]	[REDACTED]
Corporate Register	Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations of Ukraine
Crimea	The region known as the “Autonomous Republic of Crimea” under the Ukrainian Constitution and the “Republic of Crimea” under the Russian Constitution
Crimean Peninsula	Crimea and the city of Sevastopol
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Finilon	Finance Company Finilon LLC, a claimant in this arbitration
ICJ	International Court of Justice
Incorporation Agreement	“Agreement between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation” dated 18 March 2015
Incorporation Law	Federal Constitutional Law of the Russian Federation No. 6-FKZ “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol” dated 21 March 2014
[REDACTED]	[REDACTED]

Parties The Claimants and the Respondent

PCA Permanent Court of Arbitration

[REDACTED]

PrivatBank PJSC CB PrivatBank, a claimant in this arbitration

Referendum Referendum held in the Crimean Peninsula on 16 March 2014

Respondent The Russian Federation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Sevastopol (or city of Sevastopol) The city known as the “city of special status Sevastopol” under the Ukrainian Constitution and the “city of federal significance Sevastopol” under the Russian Constitution

Skvortsov Report Expert Report of Professor Oleg Skvortsov dated 10 June 2016

[REDACTED]

Non-Disputing Party Submission Non-Disputing Party Submission of Ukraine dated 16 May 2016

Treaty *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* dated 27 November 1998

Tsirat Report Expert Report of Dr. Anna Tsirat dated 10 June 2016

UN The United Nations

UNCITRAL Rules UNCITRAL Arbitration Rules, 1976

VCLT *Vienna Convention on the Law of Treaties*, 1969

VCST

*Vienna Convention on the Succession of States in Respect of
Treaties, 1978*

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I. INTRODUCTION

1. The claimants in this arbitration are: (i) PJSC CB PrivatBank, a commercial banking institution registered at 50 Naberezhna Peremogy Street, Dnepropetrovsk, Ukraine 49094 (“**PrivatBank**”); and (ii) Finance Company Finilon LLC, a financial services company registered at 42 Naberezhna Peremogy Street, Dnepropetrovsk, Ukraine 49094 (“**Finilon**” and, together with PrivatBank, the “**Claimants**”). The Claimants are represented in these proceedings by Messrs. John M. Townsend, James H. Boykin and Vitaly Morozov of Hughes Hubbard & Reed LLP, 1775 I Street, NW, Washington, D.C. 20006, United States of America; Messrs. Marc-Olivier Langlois and Leon Ioannou of Hughes Hubbard & Reed LLP, 8 rue de Presbourg, Paris 75116, France; and Professor Dr. Kaj Hober of 3 Verulam Buildings, Gray’s Inn, London, WC1R 5NT, United Kingdom.
2. The respondent in this arbitration is the Russian Federation, a sovereign State (the “**Respondent**”, and, together with the Claimants, the “**Parties**”). As of the date of this Interim Award, the Respondent had not appointed any representatives in these proceedings.
3. The arbitration concerns measures allegedly taken by the Russian Federation in 2014-2015 that are said to have violated the Claimants’ rights under Articles 2, 3 and 5 of the *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* dated 27 November 1998 (the “**Treaty**”) in respect of their investment in a banking network in the Crimean Peninsula.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE *BELBEK* ARBITRATION AND THIS ARBITRATION

4. [REDACTED]
5. On 13 January 2015, two Ukrainian claimants represented by the same counsel as the Claimants in these proceedings, Aeroport Belbek LLC (“**Belbek LLC**”) and Mr. Igor Valerievich

¹ [REDACTED]

² [REDACTED]

Kolomoisky, commenced an arbitration against the Russian Federation under the Treaty (the “*Belbek Arbitration*”).³ Between January and April 2015, a tribunal was constituted in the *Belbek Arbitration*, comprising the same members as would later be appointed to this Tribunal.

6. On 13 April 2015, some three months after the commencement of the *Belbek Arbitration*, the Claimants initiated the present arbitration proceedings by serving [REDACTED] pursuant to Article 9(2)(c) of the Treaty and the UNCITRAL Arbitration Rules, 1976 (the “*UNCITRAL Rules*”).

B. CONSTITUTION OF THE TRIBUNAL; RECEIPT OF CORRESPONDENCE FROM THE RESPONDENT; FIXING OF THE TIMETABLE

7. [REDACTED] the Claimants notified the Respondent of their appointment of Sir Daniel Bethlehem QC as the first arbitrator in these proceedings. [REDACTED]

8. [REDACTED]

9. On 4 June 2015, the Secretary-General of the PCA appointed Mr. Michael Hwang as the appointing authority in this matter.

10. On 30 June 2015, Mr. Hwang appointed Dr. Václav Mikulka as the second arbitrator in these proceedings. [REDACTED]

11. [REDACTED]

³ PCA Case No. 2015-07, *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*.

[REDACTED]

[REDACTED]

12. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. On 6 July 2015, at the request of the co-arbitrators, the PCA wrote to the Parties informing them that, pursuant to Articles 7(1) and 7(3) of the UNCITRAL Rules, the co-arbitrators had selected Professor Pierre-Marie Dupuy as the Presiding Arbitrator in these proceedings.

[REDACTED]

14. By the same letter of 6 July 2015, the PCA informed the Parties that it had communicated the Respondent's Letters to the Tribunal. On behalf of the Tribunal, the PCA provided the Claimants with a copy of the Respondent's Letters, invited them to respond, and informed the Parties that the Tribunal considered the content of the Respondent's Letters to constitute an objection by the Respondent to the jurisdiction of the Tribunal and to the admissibility of the Claimants' claims

under Article 21 of the UNCITRAL Rules. Draft Terms of Appointment and draft Rules of Procedure were also circulated to the Parties for their comments.

15. [REDACTED]

16. On 18 August 2015, having considered the Claimants' comments and sought the Respondent's views but received no reply, the Tribunal issued the document previously circulated under the title "Terms of Appointment" as its **Procedural Order No. 1**, providing, *inter alia*, that the International Bureau of the PCA would act as registry in these proceedings. On the same date, the Tribunal also issued its **Rules of Procedure**, fixing The Hague, the Netherlands as the place of arbitration and establishing a timetable for the proceedings.

C. FILING OF THE STATEMENT OF CLAIM; THE RESPONDENT'S FAILURE TO SUBMIT A STATEMENT OF DEFENCE; BIFURCATION; TRIBUNAL QUESTIONS TO THE PARTIES; PUBLICATION OF INFORMATION

17. [REDACTED]

18. The Respondent did not submit a Statement of Defence within the time period granted in the Rules of Procedure (*i.e.*, by 29 February 2016).

19. [REDACTED]

20. On 19 March 2016, [REDACTED] the Tribunal issued **Procedural Order No. 2**, in which it: (i) ordered, pursuant to Article 28(1) of the UNCITRAL Rules, that the proceedings continue notwithstanding the Respondent's failure to submit a Statement of Defence; (ii) decided to proceed on the basis of a bifurcated proceeding in which issues of jurisdiction and admissibility would be addressed in a preliminary procedure; and (iii) directed that the hearing on jurisdiction

and admissibility would be held concurrently with the hearing on jurisdiction and admissibility in the *Belbek* Arbitration.

21. In addition, the Tribunal, adopting the procedure followed in the *Belbek* Arbitration, posed 25 questions to the Parties on issues of jurisdiction and admissibility—one question to the Claimants only and 24 questions to both Parties. The Parties were to respond to the Tribunal’s questions by 22 February 2016. Thereafter, each Party had until 29 March 2016 to indicate whether it wished to comment on the responses provided by the other Party.

22. Finally, the Tribunal informed the Parties that it was minded to instruct the PCA: (i) to post certain basic information about this arbitration on its website; and, (ii) from time to time, to issue press releases containing information on the procedural steps taken by the Tribunal, in which case, a copy of the press release would be provided to the Parties for their comments in advance of its being made publicly available. A copy of a first draft press release was provided to the Parties.

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

26. [REDACTED]

D. APPOINTMENT OF TRIBUNAL EXPERTS AND NON-DISPUTING PARTY SUBMISSION

27. By letter from the PCA dated 13 May 2016, the Tribunal informed the Parties that it had decided that it would be appropriate for it to appoint an expert in Ukrainian civil law and an expert in

Russian civil law. The Tribunal invited the Parties to comment on the proposed appointment of Dr. Anna Tsirat and Professor Oleg Skvortsov as such experts and their draft Terms of Reference.

28. [REDACTED]
29. Also on 18 May 2016, a representative from the Embassy of Ukraine to the Kingdom of the Netherlands delivered to the PCA: (i) a *Note Verbale* from the Embassy to the PCA; (ii) a letter from the Ministry of Foreign Affairs of Ukraine to the Tribunal, requesting the Tribunal's permission to make a non-disputing party submission in these proceedings; and (iii) a copy of the proposed non-disputing party submission (the "**Non-Disputing Party Submission**").
30. On 19 May 2016, the PCA forwarded to the Tribunal the *Note Verbale* from the Embassy and the letter from the Ministry of Foreign Affairs, but not the Non-Disputing Party Submission, pending the views of the Parties and the decision of the Tribunal on the question of whether Ukraine should be permitted to make a non-disputing party submission in this matter.
31. On 21 May 2016, the Tribunal forwarded to the Parties the *Note Verbale* from the Embassy and the letter from the Ministry of Foreign Affairs, with an invitation to submit their comments on Ukraine's request to make a non-disputing party submission by 27 May 2016.
32. On 24 May 2016, the PCA provided the Parties with copies of the signed Terms of Reference of Dr. Tsirat and Professor Skvortsov. Pursuant to their Terms of Reference, Dr. Tsirat and Professor Skvortsov were to report in writing to the Tribunal on certain issues of Ukrainian civil law and Russian civil law, respectively.
33. [REDACTED]
34. By letter from the PCA dated 3 June 2016, the Tribunal admitted the Non-Disputing Party Submission into the record of these proceedings, provided a copy of the submission to the Parties and invited their comments thereon by 17 June 2016. The Ambassador of Ukraine to the Kingdom of the Netherlands was notified of the decision to admit Non-Disputing Party Submission into the record.
35. On 10 June 2016, Dr. Tsirat submitted her expert report (the "**Tsirat Report**"), which the Tribunal communicated to the Parties on the same day.

36. Also on 10 June 2016, Professor Skvortsov submitted his expert report, in Russian, to the Tribunal (the “**Skvortsov Report**”). After having an English translation produced, the Tribunal communicated the Skvortsov Report and its translation to the Parties on 14 June 2016.

37. [REDACTED]

38. By letter dated 29 June 2016, Ukraine sought the permission of the Tribunal to attend and make oral submissions at the hearing scheduled for 12 to 14 July 2016. Having sought the Parties’ views, the Tribunal denied Ukraine’s request on 7 July 2016.

E. HEARING ON JURISDICTION AND ADMISSIBILITY AND POST-HEARING EVENTS

39. A hearing on jurisdiction and admissibility was held from 12 to 14 July 2016 in Geneva, Switzerland. It took place concurrently with the hearing in the *Belbek* Arbitration, although the two cases remained separate and were not consolidated.

40. The Claimants were represented at the hearing by party representatives and by counsel. The Russian Federation did not attend or otherwise participate in the hearing.

41. The following persons were present:

Tribunal:

Professor Pierre-Marie Dupuy (presiding)
Sir Daniel Bethlehem QC
Dr. Václav Mikulka

Tribunal-appointed Experts:

Professor Oleg Skvortsov
Dr. Anna Tsirat

PCA:

Mr. Martin Doe
Ms. Evgeniya Goriatcheva
Mr. Philipp Kotlaba

Claimants:

[REDACTED]

[REDACTED]
[REDACTED]

Mr. John M. Townsend
Mr. Marc-Olivier Langlois
Mr. James Boykin
Mr. Leon Ioannou
Mr. Vitaly Morozov
Mr. Samuel Cowin
Ms. Eleanor Erney
Ms. Ekaterina Botchkareva
Hughes Hubbard & Reed LLP

Professor Dr. Kaj Hobér
3 Verulam Buildings

Mr. Sergii Uvarov
Avellum Law Firm

Mr. Vladimir Yemtsev
Thesis Law Firm

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Court Reporter:
Ms. Dawn Larson

Interpreters:
Ms. Irina van Erkel
Mr. Sergei Mikheyev

42. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

43. The experts appointed by the Tribunal, Dr. Tsirat and Professor Skvortsov, also appeared at the hearing. Questions were put to them by counsel for the Claimants and the Tribunal.

44. Additionally, the Tribunal posed several questions to the Claimants' counsel.

45. A transcript of the hearing was delivered electronically to the Parties at the end of each hearing day. On 18 July 2016, hard and electronic copies of the complete transcript of the hearing were

circulated to the Parties, with an invitation to propose corrections. [REDACTED]
[REDACTED]
[REDACTED]

46. As stated by the Tribunal at the close of the hearing and confirmed by subsequent letter dated 18 July 2016, the Parties were invited to submit post-hearing briefs addressing the questions raised by the Tribunal in the hearing as well as other matters arising out of the hearing, by 14 October 2016.

47. [REDACTED]
[REDACTED]

48. The Respondent did not make any post-hearing submissions.

III. FACTUAL BACKGROUND

49. In this Section, the Tribunal sets out in outline the facts giving rise to this arbitration, insofar as they are material for purposes of this Interim Award on jurisdiction and admissibility. Where relevant to this Interim Award, the facts are discussed in greater detail in the Tribunal's analysis below.

50. As a preliminary matter, it is useful to give a brief explanation of terminology. In this Interim Award, "**Crimea**" refers to the region known as the "Autonomous Republic of Crimea" under the Ukrainian Constitution and the "Republic of Crimea" under the Russian Constitution. "**Sevastopol**" or the "**the city of Sevastopol**" refers to the city known as the "city of special status Sevastopol" under the Ukrainian Constitution and the "city of federal significance Sevastopol" under the Russian Constitution. Crimea and Sevastopol together are referred as the "**Crimean Peninsula**." Save where otherwise indicated, the Tribunal uses the translations of original Russian and Ukrainian documents provided by the Claimants. The Tribunal's use of the Claimants' translations should not be taken as an acceptance of the correctness of these translations, even if the Tribunal has raised a number of material issues arising from these translations in the course of the proceedings and addressed them as necessary in this Interim Award.

A. THE CLAIMANTS AND THEIR BUSINESS IN THE CRIMEAN PENINSULA

51. As noted in paragraph 1 above, the first claimant, PrivatBank, is a commercial banking institution registered in Dnepropetrovsk, Ukraine.⁴ It operates under a banking license from the National Bank of Ukraine.⁵ It was founded in 1992 and established its “Crimean Division” and “Sevastopol Division” in 1994.⁶ [REDACTED]

52. [REDACTED]

53. The second claimant, Finilon, was first registered as a company on 1 October 2013 and as a financial institution (other than a bank) on 24 October 2013.⁹ [REDACTED]

⁴ Extract of Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations of Ukraine, 1 April 2016 (CE-187).

⁵ National Bank of Ukraine Banking License No. 22 issued to Public Joint Stock Company Commercial Bank PrivatBank, 5 October 2011 (CE-16).

⁶ [REDACTED]
⁷ [REDACTED]
⁸ [REDACTED]

⁹ Extract of Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations of Ukraine, 1 April 2016 (CE-188); Finilon Extract from the Financial Institutions Register [REDACTED]

¹⁰ [REDACTED]
¹¹ [REDACTED]

54. Shortly before the issuance of this Interim Award, the Tribunal learned from public sources that PrivatBank was nationalized by Ukraine in December 2016.¹² This development was not brought to the attention of the Tribunal by the Claimants and the Parties have not briefed the Tribunal on any potential impact it may have on the Claimants' capacity to bring their claims. For this reason, insofar as this development may be relevant to any issues of jurisdiction and admissibility, its consideration is reserved for the next stage of these proceedings.¹³

B. THE CRIMEAN EVENTS OF FEBRUARY-MARCH 2014

55. These proceedings arise, in the first instance, out of the events in the Crimean Peninsula in February-March 2014. The Claimants submitted a detailed factual narrative of these events as part of their pleadings. The Tribunal has not, however, simply accepted the Claimants' account. The following summary of events, while drawing on the Claimants' submissions, as appropriate, also draws upon publicly available information of which the Tribunal considers that it can properly take judicial notice.
56. As widely reported in the media, in late November 2013, then President of Ukraine Mr. Viktor Yanukovich suspended negotiations of a political and economic association agreement with the European Union in favour of developing closer ties with the Russian Federation, sparking anti-government protests in Kiev¹⁴ that culminated in violent clashes on 18-21 February 2014.¹⁵ On 22 February 2014, President Yanukovich left Kiev and was removed from office by the

¹² Ukraine Government Press Release, "PJSC PrivatBank Transferred to 100% State Ownership," 18 December 2016 (in Ukrainian), http://www.kmu.gov.ua/control/uk/publish/article?art_id=249597705&cat_id=244276429, website last visited on 24 February 2017; World Bank Press Release, "Statement Regarding the Nationalization of PrivatBank," 19 December 2016, <http://www.worldbank.org/en/news/press-release/2016/12/19/regarding-the-nationalization-of-privatbank>, website last visited on 24 February 2017.

¹³ See also para. 199 below.

¹⁴ See e.g. New York Times, *Facing Russian Threat, Ukraine Halts Plans for Deals with E.U.*, 21 November 2013, <http://www.nytimes.com/2013/11/22/world/europe/ukraine-refuses-to-free-ex-leader-raising-concerns-over-eu-talks.html>, website last visited on 24 February 2017; New York Times, *Thousands protest Ukraine's rejection of trade pacts*, 24 November 2013, http://www.nytimes.com/2013/11/25/world/europe/thousands-of-ukrainians-protest-scrapping-of-trade-pact-with-eu.html?_r=0, website last visited on 24 February 2017; Reuters, *Ukraine pro-Europe protesters hold first big rally of 2014*, 12 January 2014, <http://uk.reuters.com/article/uk-ukraine-idUKBREA0B0KE20140112>, website last visited on 24 February 2017; TASS, *Ukrainian Government Put on Hold the Preparation for Signature of the Association Agreement with the EU*, 21 November 2013, <http://tass.ru/mezhdunarodnaya-panorama/778055> (in Russian), website last visited on 24 February 2017.

¹⁵ See e.g. TASS, *The Situation in Ukraine. Chronicle of Events. 18 February*, 18 February 2014, <http://tass.ru/mezhdunarodnaya-panorama/977889> (in Russian), website last visited on 24 February 2017; TASS, *The Situation in Ukraine. Chronicle of Events. 19 February*, 19 February 2014, <http://tass.ru/mezhdunarodnaya-panorama/982300> (in Russian), website last visited on 24 February 2017; TASS, *The Situation in Ukraine. Chronicle of Events. 20 February*, 20 February 2014, <http://tass.ru/mezhdunarodnaya-panorama/986247> (in Russian), website last visited on 24 February 2017; New York Times, *Ukraine's Forces Escalate Attacks Against Protesters*, 20 February 2014, <http://www.nytimes.com/2014/02/21/world/europe/ukraine.html>, website last visited on 24 February 2017; BBC, *EU imposes Ukraine sanctions after deadly Kiev clashes*, 21 February 2014, <http://www.bbc.com/news/world-europe-26280710>, website last visited on 24 February 2017.

Verkhovna Rada (the Ukrainian Parliament), replaced on 23 February by the speaker of the Rada, Mr. Oleksandr Turchinov, as interim President.¹⁶

57. It is reported that the President of the Russian Federation, Mr. Vladimir Putin, stated in a televised interview in March 2015 that “he had ordered work on ‘returning Crimea’ to begin at an all-night meeting on 22 February [2014].”¹⁷
58. In the following days, there were reports of pro-Russian rallies held in the Crimean Peninsula, *inter alia* installing a Russian citizen as the *de facto* mayor of Sevastopol, and of the formation of “people’s patrols” for the defence of “the interests of Crimeans and Russian Crimeans.”¹⁸
59. On 27 February 2014, armed men in fatigues but without identification were reported to have taken control of the building of the Supreme Council of Crimea in Simferopol, flying from it the Russian flag;¹⁹ established checkpoints between the Crimean Peninsula and the Ukrainian mainland;²⁰ and surrounded Ukrainian airports in the Crimean Peninsula.²¹ On the same day, the Supreme Council of Crimea held an emergency session in which it elected the leader of the pro-Russian Crimean parliamentary party, Mr. Sergei Aksyonov, as the new regional Prime Minister, and decided to hold a referendum on the status of Crimea (the “**Referendum**”).²²

¹⁶ New York Times, *Archrival is freed as Ukraine Leader Flees*, 22 February 2014, http://www.nytimes.com/2014/02/23/world/europe/ukraine.html?_r=0, website last visited on 24 February 2017; New York Times, *Ukraine Rushes to Shift Power and Mend Rifts*, 23 February 2014, https://www.nytimes.com/2014/02/24/world/europe/ukraine.html?_r=0, website last visited on 24 February 2017; TASS, *Speaker of the Rada: We Recognize the Importance of Ties with the Russian Federation and are ready for a Dialogue with its Leadership*, 23 February 2014, <http://tass.ru/mezhdunarodnaya-panorama/998011> (in Russian), website last visited on 24 February 2017; BBC, *Putin: Russia helped Yanukovich to flee Ukraine*, 24 October 2014 (CE-174).

¹⁷ BBC, *Putin reveals secrets of Russia's Crimea takeover plot*, 9 March 2015 (CE-100). See also “Crimea: The Path to the Motherland,” documentary film first aired on Russian television on 18 March 2015, available in Russian at https://russia.tv/brand/show/brand_id/59195/, website last visited on 24 February 2017.

¹⁸ Wall Street Journal, *In Crimea, Backlash to Uprising Lifts Pro-Russia Leader*, 25 February 2014 (CE-141); Center for Journalistic Investigations, *Aksyonov: Rally of volunteer patrols in Simferopol is a celebration of February 23*, 23 February 2014 (CE-140).

¹⁹ The Guardian, *Crimean parliament seized by unknown pro-Russian gunmen*, 27 February 2014 (CE-19).

²⁰ Europe News, *Crimea Checkpoints Raise Secession Fears*, 28 February 2014 (CE-22).

²¹ UPI, *Ukrainian Interior Minister: Russian troops patrolling Ukrainian airport constitutes “armed invasion”*, 18 February 2014 (reporting on patrolling of unidentified armed men outside Simferopol airport) (CE-23).

²² Supreme Council of Crimea, Resolution No. 1630-6/14 “Regarding Organization and Holding of a Republican/Local Referendum on Matters of Enhancing the Status and Powers of the Autonomous Republic of Crimea,” 27 February 2014 (CE-203), in Russian at <http://crimea.gov.ru/act/11610>; TASS, *Crimean parliament elects Aksyonov new premier*, 27 February 2014 (CE-20); RT, *Crimean parliament sacks regional government, approves referendum*, 27 February 2014, <https://www.rt.com/news/ukraine-crimea-parliament-government-056/>, website last visited on 24 February 2017; The Guardian, *Crimean parliament seizure inflames Russian-Ukrainian tensions—live*, 27 February 2014, <https://www.theguardian.com/world/2014/feb/27/ukraine-pro-russian-gunmen-seize-crimea-parliament-live-updates>, website last visited on 24 February 2017.

60. On 1 March 2014, the Federation Council of the Russian Federation, the upper house of its federal legislature, approved President Putin’s request to “use the armed forces of the Russian Federation in the territory of Ukraine until the sociopolitical situation in that country normalizes.”²³
61. On 6 March 2014, the Supreme Council of Crimea resolved “to join the Russian Federation as a member territory of the Russian Federation” and scheduled the Referendum to be held in the entire Crimean Peninsula, including Sevastopol, on 16 March 2014.²⁴
62. On 11 March 2014, the Supreme Council of Crimea and the city of Sevastopol issued a “Declaration of Independence”, in which they announced their intent to declare independence if required by the result of the Referendum.²⁵
63. On 16 March 2014, voters in Crimea and Sevastopol were asked to choose between supporting (i) “Crimea’s reunification with Russia as its constituent member” or (ii) “the restoration of the Constitution of the Republic of Crimea of 1992 and the status of Crimea as a part of Ukraine.”²⁶ According to the organisers, 83.1 percent of the registered Crimean population voted (89.4 percent in Sevastopol), with about 96 percent of the votes cast in favour of “Crimea’s reunification with Russia as its constituent member.”²⁷
64. On 17 March 2014, the Supreme Council of Crimea adopted the following resolution:

The Verkhovnyaya Rada [Supreme Council] of the Autonomous Republic of Crimea, pursuant to the direct will of the peoples of Crimea in the referendum of March 16, 2014, which demonstrated that the peoples of Crimea have spoken out in favor of becoming part of Russia and, consequently, in favor of withdrawing from Ukraine and in favor of creating an independent state, being guided by the Declaration of Independence of the Republic of Crimea, which was adopted at the extraordinary plenary session of the Supreme Council of

²³ Federal Council of the Russian Federation, Resolution No. 28-CF “On the Use of the Russian Federation’s Armed Forces in the territory of Ukraine,” 1 March 2014 (CE-204), in Russian at <http://www.council.gov.ru/activity/documents/39979/>, website last visited on 24 February 2017.

²⁴ Supreme Council of the Autonomous Republic of Crimea, Resolution No. 1702-6/14 “On Holding a Crimea-Wide Referendum,” 6 March 2014 (CE-205), in Russian at: <http://crimea.gov.ru/act/11689/>, website last visited on 24 February 2017; New York Times, *Crimea Vote Deepens Crisis and Draws Denunciations*, 6 March 2014 (CE-153).

²⁵ Supreme Council of the Autonomous Republic of Crimea and the Sevastopol City Council, “Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol,” 11 March 2014 (CE-156).

²⁶ TASS, *Mikhail Malyshev: Crimea’s prosperity in unity turns into prosperity in unity with Russia*, 17 March 2014, <http://tass.ru/en/world/724023>, website last visited on 24 February 2017; New York Times, *2 Choices in Crimea Referendum, but Neither is ‘No’*, 14 March 2014 (CE-34); BBC, *Crimea referendum: What does the ballot paper say?*, 10 March 2014, <http://www.bbc.com/news/world-europe-26514797>, website last visited on 24 February 2017.

²⁷ Commission of the Autonomous Republic of Crimea for Holding the Crimea-Wide Referendum, “Public Declaration of the Results of the Crimea-Wide Referendum, Held in the Autonomous Republic of Crimea on 16 March 2014” (CE-206); Media Relations Section of the Sevastopol City Council, “City Council Session Approves Results of Crimea-Wide Referendum Held on 16 March 2014,” 17 March 2014 (CE-207).

the Autonomous Republic of Crimea on March 11, 2014 and the extraordinary plenary session of the Sevastopol City Council on March 11, 2014, hereby resolves:

1. To proclaim Crimea an independent sovereign state—the Republic of Crimea, in which the city of Sevastopol has special status.

The Republic of Crimea intends to arrange its relations with other states on the principles of equality, peace, neighborliness, and other generally accepted principles of political, economic, and cultural partnership among nations.

The Republic of Crimea appeals to the United Nations and to all states of the world with a call to recognize the independent state created by the peoples of Crimea.

2. From the date that this Resolution enters into force, within the territory of the Republic of Crimea the laws of Ukraine shall no longer apply and the resolutions of the Verkhovna Rada of Ukraine and of other state bodies of Ukraine, adopted after February 21, 2014, shall no longer be implemented.

The laws of Ukraine, except where indicated in the first paragraph of this clause, shall be applied within the territory of the Republic of Crimea until corresponding regulatory acts of the Republic of Crimea.

3. The activities of the state bodies of Ukraine within the territory of Crimea shall cease; their authority, property, and monetary resources shall be transferred to the state bodies of the Republic of Crimea specified by the Government of the Republic of Crimea.

4. For the purposes of protecting the rights and freedoms of citizens and economic entities, the courts of Ukraine within the territory of the Republic of Crimea shall continue to function. However, their decisions pertaining to the application of the laws of Ukraine within the territory of the Republic of Crimea shall not contradict this Resolution.

The highest judicial bodies within the Republic of Crimea are the corresponding appellate courts located within the Republic of Crimea and the city of Sevastopol, which has special status.

5. All institutions, enterprises, and other organizations founded by Ukraine or with its involvement within the Republic of Crimea shall become institutions, enterprises, and other organizations founded by the Republic of Crimea.

6. State property of Ukraine located within the territory of the Republic of Crimea on the date of the adoption of this Resolution is the state property of the Republic of Crimea.

7. The property of the labor unions and other public organizations of Ukraine located within the territory of the Republic of Crimea on the date of the adoption of this Resolution is the property of the subdivisions of the corresponding organizations located within the Republic of Crimea; and if there are no such subdivisions, then it is the state property of the Republic of Crimea.

8. The Republic of Crimea, as represented by the Verkhovna Rada of the Republic of Crimea appeals to the Russian Federation with a proposal to accept the Republic of Crimea into the Russian Federation as a new constituent entity of the Russian Federation with the status of a republic.

9. This Resolution shall enter force from the date of its adoption.²⁸

²⁸ State Council of the Republic of Crimea, Resolution No. 1745-6/14 “On the Independence of Crimea,” 17 March 2014 (CE-162).

65. Also on 17 March 2014, the Sevastopol City Council issued a resolution in which it decided:

To support: the passage of a resolution by the Supreme Rada [Council] of the Autonomous Republic of Crimea declaring Crimea an independent sovereign state, the Republic of Crimea, in which the Hero-City Sevastopol has a special status.²⁹

66. By presidential edict of the same date (17 March 2014), the Russian Federation recognized the “Republic of Crimea, in which the city of Sevastopol has special status, as a sovereign and independent state.”³⁰

67. On 18 March 2014, the “Agreement between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation” (the “**Incorporation Agreement**”) was signed in Moscow.³¹ The Incorporation Agreement provided as follows:

The Russian Federation and the Republic of Crimea,

based on the historical affinity of their peoples and taking into account the existing ties between them,

recognizing and confirming the principle of equal rights and self-determination of peoples codified in the United Nations Charter, according to which all peoples have an inalienable right to freely determine their political status and pursue their economic, social, and cultural development without external interference, while each state must respect that right,

being firmly resolved to ensure respect for and observance of human dignity, rights, and freedoms, including the right to life, free thought, conscience, religion, and conviction, for everyone within the boundaries of their territories, without discrimination, in accordance with the universally recognized principles and norms of international law, and being aware of the close interaction of other basic principles of international law—particularly those codified in the United Nations Charter and the Helsinki Final Act of the Conference on Security and Cooperation in Europe—with the principle of respect for and observance of human rights and freedoms,

expressing the shared will of their peoples, who are inextricably connected by their common historic fate, to live together as part of a democratic, federative, law-based state, seeking to ensure the welfare and prosperity of their people,

based on the free and voluntary expression of will of the peoples of Crimea in the republic-wide referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 2014, during which the peoples of Crimea resolved to join with Russia as a constituent part of the Russian Federation,

taking into account the proposal of the Republic of Crimea and the special-status city of Sevastopol regarding the acceptance of the Republic of Crimea, including the special-status city of Sevastopol, into the Russian Federation,

²⁹ Sevastopol City Council Resolution No. 7156 “On the Status of Hero-City Sevastopol,” 17 March 2014
[REDACTED]

³⁰ President of the Russian Federation, Edict No. 147 “On Recognizing the Republic of Crimea,” 17 March 2014
[REDACTED]

³¹ CE-43.

have entered into this Treaty as follows:

Article 1

1. The Republic of Crimea shall be considered accepted into the Russian Federation from the date of signing of this Treaty.
2. The Republic or Crimea shall be accepted into the Russian Federation in accordance with the Russian Federation Constitution, this Treaty, the Federal Constitutional Law “On the Procedures for Accepting into the Russian Federation and Forming within the Russian Federation a New Constituent Part of the Russian Federation,” and a federal constitutional law on accepting the Republic of Crimea into the Russian Federation.

Article 2

From the date of acceptance of the Republic of Crimea into the Russian Federation, new constituent parts shall be formed within the Russian Federation: the Republic of Crimea and the federal city of Sevastopol.

[...]

Article 10

This Treaty shall temporarily apply from the date of its signing and shall enter into force from the date of its ratification.

68. On 19 March 2014, having examined the Incorporation Agreement at the request of the President, the Constitutional Court of the Russian Federation decided:

To recognize the international treaty between the Russian Federation and the Republic of Crimea that has not yet entered into effect regarding the acceptance of the Republic of Crimea into the Russian Federation and the formation of new constituent parts within the Russian Federation as consistent with the Russian Federation Constitution.³²

69. On 21 March 2014, the Federal Assembly of the Russian Federation (that is, the Russian Parliament) enacted a constitutional law ratifying the Incorporation Agreement,³³ as well as a constitutional law “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol” (the “**Incorporation Law**”).³⁴ The Incorporation Law provided, in relevant part:

Article 1. Grounds and time period for admitting the Republic of Crimea into the Russian Federation

1. The Republic of Crimea shall be admitted to the Russian Federation under the Russian Federation Constitution and Article 4 of Federal Constitutional Law No. 6-FKZ dated December 17, 2001 “On the procedure for admission to the Russian Federation and for creating within it a new constituent entity of the Russian Federation.”
2. The grounds for admitting the Republic of Crimea into the Russian Federation are:

³² Constitutional Court of the Russian Federation, Resolution No. 6-P, 19 March 2014 (CE-45), pp. 13-14.

³³ Federal Law of the Russian Federation No. 36-FZ “On Ratification of the [Incorporation Agreement],” 21 March 2014 (CE-49).

³⁴ Federal Constitutional Law of the Russian Federation No. 6-FKZ, 21 March 2014, as amended 31 December 2014 (CE-47).

- 1) The results of a Crimea-wide referendum held March 16, 2014 in the Autonomous Republic of Crimea and the city Sevastopol, at which the issue of reunifying Crimea with Russia with the rights of a constituent entity of the Russian Federation was passed;
- 2) The declaration of independence of the Autonomous Republic of Crimea and the city Sevastopol, as well as the Agreement between the Russian Federation and the Republic of Crimea on admitting the Republic of Crimea into the Russian Federation and creating new constituent entities within the Russian Federation;
- 3) Proposals by the Republic of Crimea and the special status city Sevastopol on admitting the Republic of Crimea, including the special status city Sevastopol, into the Russian Federation;
- 4) This Federal Constitutional law.

3. The Republic of Crimea shall be deemed admitted to the Russian Federation as of the signing date of the Agreement between the Russian Federation and the Republic of Crimea on admitting the Republic of Crimea into the Russian Federation and creating new constituent entities within the Russian Federation.

Article 2. Creating new constituent entities in the Russian Federation, their naming and status

1. As of the date the Republic of Crimea is admitted to the Russian Federation, new constituent entities shall be created: the Republic of Crimea and the federal city Sevastopol.
 2. The names of the new constituent entities of the Russian Federation—the Republic of Crimea and the federal city Sevastopol—shall be included in Section 1, Article 65 of the Russian Federation Constitution.
 3. The new constituent entities of the Russian Federation have status of a republic and of a federal city.
 4. The state languages of the Republic of Crimea are Russian, Ukrainian and Crimean Tatar.
- [. . .]

Article 24. Entry into force of this Federal Constitutional Law

This Federal Constitutional Law shall enter into force on the date of the entry into force of the Agreement between the Russian Federation and the Republic of Crimea on admitting the Republic of Crimea into the Russian Federation and creating new constituent entities within it.

70. Both laws of 21 March 2014 were signed by President Putin and came into effect on the same day.³⁵ However, as quoted above, pursuant to Article 1(3) of the Incorporation Law, “the Republic of Crimea [including Sevastopol] shall be deemed admitted to the Russian Federation as of the signing date of the Agreement between the Russian Federation and the Republic of Crimea on admitting the Republic of Crimea into the Russian Federation and creating new constituent entities within the Russian Federation.” That is, under Russian law, the incorporation of the Crimean Peninsula into the Russian Federation was made retroactive to 18 March 2014.

³⁵ Official Website of the President of the Russian Federation, *Ceremony signing the laws on admitting Crimea and Sevastopol to the Russian Federation*, 21 March 2014 (CE-48).

71. In public statements made after these events, President Putin acknowledged the involvement of the Russian military in the Crimean Peninsula. In an interview on 17 April 2014, he stated:

Russia did not annex Crimea by force. Russia created conditions with the help of special armed groups and the Armed Forces. I will say it straight but only for the free expression of the will of the people living in Crimea and Sevastopol. It was the people themselves who made this decision. Russia answered their call and welcomed the decision of Crimea and Sevastopol.³⁶

72. In the televised interview mentioned at paragraph 57 above, President Putin explained as follows:

In order to blockade and disarm 20,000 people who are well armed, you need a certain kind of force, not just in quantity but in quality. Specialists were needed who knew how to do this. Therefore, I gave the orders and instructions to the Ministry of Defense, why hide it, under the guise of protection of our military facilities in Crimea, to deploy a special division of the Main Intelligence [Directorate] (the GRU) together with naval infantry forces and paratroopers.³⁷

C. THE MEASURES ALLEGEDLY TAKEN BY THE RESPONDENT AGAINST PRIVATBANK

73. [REDACTED]

74. [REDACTED]

³⁶ Official Website of the President of the Russian Federation, *Direct line with Vladimir Putin*, 17 April 2014 (CE-58) (emphasis added).

³⁷ “Crimea: The Path to the Motherland,” documentary first aired on Russian television on 18 March 2015, available in Russian at https://russia.tv/brand/show/brand_id/59195/, website last visited on 24 February 2017. English translation of this quote from *Putin. War Based on materials from Boris Nemtsov*, 12 May 2015, p. 15 (CE-115). See also Official Website of the President of the Russian Federation, *Interview to German TV channel ARD* (CE-183), p. 2 (“Yes, I make no secret of it. It is a fact and we never concealed that our Armed Forces, let us be clear, blocked Ukrainian armed forces stationed in Crimea, not to force anybody to vote, which is impossible, but to avoid bloodshed, to give people an opportunity to express their own opinion . . .”).

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ [REDACTED]

[REDACTED]

75. [REDACTED]

76. [REDACTED]

IV. KEY LEGAL PROVISIONS

77. It is useful to set out in full the text of provisions of the Treaty relevant to this jurisdictional phase, as well as text of certain other key international instruments.

41 [REDACTED]

42 [REDACTED]

43 [REDACTED]

44 [REDACTED]

45 [REDACTED]

46 [REDACTED]

[REDACTED]

48 [REDACTED]

49 [REDACTED]

78. The Treaty was concluded on 27 November 1998 in Russian and Ukrainian, both texts having equal force.⁵⁰ It entered into force on 27 January 2000.
79. Article 9 of the Treaty sets out the Contracting Parties' offer to arbitrate with investors. It provides:

ARTICLE 9
RESOLUTION OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE
OTHER CONTRACTING PARTY

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

80. Article 12 of the Treaty describes the scope of the Treaty's application:

ARTICLE 12
APPLICATION OF THE AGREEMENT

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

⁵⁰ See Treaty, last sentence. The Claimants have submitted to the Tribunal two translations from the Russian original (exhibits CE-1-R and CA-137) and one translation from the Ukrainian original (CE-1-U). The Claimants explain that the second translation from Russian (CA-137) was produced by using the controlling English translations of other BITs entered into by the Russian Federation (Letter from the Claimants dated 9 March 2016). This is the translation referred to in this Interim Award unless indicated otherwise. Other translations are referred to when discussing specific questions of interpretation of the Treaty.

81. Article 14 provides for the effective date and term of the Treaty:

ARTICLE 14
EFFECTIVE DATE AND TERM

1. This Agreement shall take effect as of the date of the last written notice of completion by the Contracting Parties of the national procedures necessary for this Agreement to take effect.
2. This Agreement shall be valid for ten years and shall be automatically renewed each time for another five-year period until such time as either Contracting Party notifies the other Contracting Party no later than twelve months prior to the expiration of the Agreement, of its intention to terminate this Agreement.
3. With respect to investments made before the date of termination of this Agreement and covered by it, the provisions of all other Articles of this Agreement shall remain in force for the next ten years after that date.

82. Article 1(1) of the Treaty defines the term “investments”:

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

- a) movable and immovable property, as well as any other related property rights;
- b) monetary funds, as well as securities, commitments, stock and other forms of participation;
- c) intellectual property rights, including copyrights and related rights, trademarks, rights to inventions, industrial designs, models, as well as technical processes and know-how;
- d) rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources.

Any alteration of the type of investments in which the assets are invested shall not affect their nature as investments, provided that such alteration is not contrary to legislation of a Contracting Party in the territory of which the investments were made.

83. Article 1(2) defines the term “investor of a Contracting Party”:

The term “investor of a Contracting Party” means:

- (a) any natural person having the citizenship of the state of that Contracting Party and who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party;
- (b) any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party, to make investments in the territory of the other Contracting Party.

84. Article 1(4) defines the term “territory”:

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

85. Key provisions of the 1969 *Vienna Convention on the Law of Treaties* (the “VCLT”)⁵¹ relevant to this jurisdictional phase include the following:

ARTICLE 26
“PACTA SUNT SERVANDA”

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

ARTICLE 29
TERRITORIAL SCOPE OF TREATIES

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

ARTICLE 31
GENERAL RULES OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32
SUPPLEMENTARY MEANS OF INTERPRETATION

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

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

ARTICLE 33
INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

⁵¹ UN Doc. A/Conf.39/27; 1155 UNTS 331. Both the Russian Federation and Ukraine are parties to the VCLT.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

ARTICLE 73

CASES OF STATE SUCCESSION, STATE RESPONSIBILITY AND OUTBREAK OF HOSTILITIES

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

86. For purposes of the discussion that follows, it is also useful to note certain provisions of the 1978 *Vienna Convention on the Succession of States in respect of Treaties* (the “VCST”):⁵²

ARTICLE 1

SCOPE OF THE PRESENT CONVENTION

The present Convention applies to the effects of a succession of States in respect of treaties between States.

ARTICLE 2

USE OF TERMS

1. For the purposes of the present Convention:

- (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;
- (b) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (c) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (d) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (e) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

[. . .]

⁵² 1946 UNTS 3.

ARTICLE 6
CASES OF SUCCESSION OF STATES COVERED BY THE PRESENT CONVENTION

The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations

ARTICLE 15
SUCCESSION IN RESPECT OF PART OF TERRITORY

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

- (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
- (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

V. THE PARTIES' POSITIONS

A. THE CLAIMANTS' POSITION

83. [REDACTED]

84. [REDACTED]

53 [REDACTED]

54 [REDACTED]

[REDACTED]

85. [REDACTED]

86. [REDACTED]

87. [REDACTED]

[REDACTED]

88. [REDACTED]

55 [REDACTED]

56 [REDACTED]

[REDACTED]

58 [REDACTED]

59 [REDACTED]

60 [REDACTED]

61 [REDACTED]

1. Existence of a dispute between a Contracting Party and an investor of the other Contracting Party to the Treaty

89. [Redacted]

90. [Redacted]

91. [Redacted]

92. [Redacted]

93. [Redacted]

62. [Redacted]

63. [Redacted]

64. [Redacted]

65. [Redacted]

66. [Redacted]

67. [Redacted]

68. [Redacted]

69. [Redacted]

[REDACTED]

94. [REDACTED]

95. [REDACTED]

2. Whether the dispute arose in connection with “investments”

96. [REDACTED]

97. [REDACTED]

70 [REDACTED]

71 [REDACTED]

72 [REDACTED]

73 [REDACTED]

74 [REDACTED]

75 [REDACTED]

(a) Nature of the investments

98. [REDACTED]

99. [REDACTED]

(b) “on the territory of the other Contracting Party”

100. [REDACTED]

76. [REDACTED]

77. [REDACTED]

78. [REDACTED]

79. [REDACTED]

80. [REDACTED]

81. [REDACTED]

101. [REDACTED]

102. [REDACTED]

103. [REDACTED]

82 [REDACTED]
83 [REDACTED]
[REDACTED]

84 [REDACTED]
85 [REDACTED]
86 [REDACTED]
87 [REDACTED]
[REDACTED]

88 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[Redacted]

104. [Redacted]

105. [Redacted]

106. [Redacted]

107. [Redacted]

89 [Redacted]

90 [Redacted]

91 [Redacted]

92 [Redacted]

93 [Redacted]

94 [Redacted]

95 [Redacted]

[REDACTED]

108. [REDACTED]

109. [REDACTED]

[REDACTED]

96 [REDACTED]

97 [REDACTED]

98 [REDACTED]

99 [REDACTED]

100 [REDACTED]

101 [REDACTED]

102 [REDACTED]

103 [REDACTED]

[REDACTED]

110. [REDACTED]

111. [REDACTED]

112. [REDACTED]

104 [REDACTED]

105 [REDACTED]

106 [REDACTED]

107 [REDACTED]

108 [REDACTED]

109 [REDACTED]

110 [REDACTED]

111 [REDACTED]

112 [REDACTED]

[Redacted text block]

113. [Redacted text block]

114. [Redacted text block]

115. [Redacted text block]

113 [Redacted text block]

114 [Redacted text block]

115 [Redacted text block]

116 [Redacted text block]

117 [Redacted text block]

118 [Redacted text block]

116. [REDACTED]

(c) “invested . . . in accordance with . . . legislation [of the other Contracting Party]”

117. [REDACTED]

118. [REDACTED]

119. [REDACTED]

119 [REDACTED]

120 [REDACTED]

121 [REDACTED]

122 [REDACTED]

123 [REDACTED]

[REDACTED]

120. [REDACTED]

[REDACTED]

124 [REDACTED]

125 [REDACTED]

126 [REDACTED]

127 [REDACTED]

128 [REDACTED]

129 [REDACTED]

130 [REDACTED]

[REDACTED]

121. [REDACTED]

[REDACTED]

(d) Timing of the investments

122. [REDACTED]

123. [REDACTED]

124. [REDACTED]

131 [REDACTED]

132 [REDACTED]

133 [REDACTED]

134 [REDACTED]

135 [REDACTED]

136 [REDACTED]

137 [REDACTED]

138 [REDACTED]

[REDACTED]

[REDACTED]

125. [REDACTED]

3. Notice requirement

126. [REDACTED]

127. [REDACTED]

139. [REDACTED]

140. [REDACTED]

141. [REDACTED]

142. [REDACTED]

143. [REDACTED]

B. THE RESPONDENT’S POSITION

128. As noted above, the Tribunal has interpreted the Respondent’s Letters, its sole communication in the context of these proceedings, as an objection to its jurisdiction and to the admissibility of the Claimants’ claims. The Respondent’s Letters are reproduced in full at paragraphs 11-12 above.

VI. THE NON-DISPUTING PARTY SUBMISSION OF UKRAINE

129. In its Non-Disputing Party Submission, Ukraine states that the Autonomous Republic of Crimea and the City of Sevastopol continue to form “an inseparable part” of Ukraine.¹⁴⁴ In consequence, “any treaty right or obligation pertaining to sovereignty” over the Crimean Peninsula, bilateral or multilateral, remains in effect.¹⁴⁵ At the same time, Ukraine acknowledges the “practical reality of the Russian occupation and, accordingly, its current exercise of jurisdiction and effective control” over Crimea.¹⁴⁶ Accordingly, Ukraine notes, it “is presently unable to fulfill its obligations in respect of Crimea.” In its stead, the Russian Federation has “assumed international obligations in its administration of Crimea,” including obligations pertaining to Crimea-based investments under the Treaty.¹⁴⁷

130. Ukraine therefore argues in its Non-Disputing Party Submission that the Treaty is applicable to investments made by Ukrainian nationals in Crimea. In particular, Ukraine takes the position that neither the Treaty’s use of the term “territory”, nor any temporal nexus derived from the treaty text operate to exclude the Treaty’s application to Ukrainian investors and investments in the Crimean Peninsula. These arguments are detailed below in turn.

A. TERRITORIAL APPLICATION OF THE TREATY

131. According to Ukraine, the territorial scope of the Treaty’s application extends to all “territory” over which the Respondent exercises effective control, consistent with: (i) the ordinary meaning of “territory” interpreted in the light of the Treaty’s context, object and purpose; (ii) other “relevant rules of international law,” including Article 29 of the VCLT; and (iii) the general principle of good faith.

132. Ukraine first cites a number of dictionary references in which the term “territory” is used broadly; it notes, for instance, definitions “refer[ring] to all lands ‘under the jurisdiction of a ruler or

¹⁴⁴ Non-Disputing Party Submission, para. 2.

¹⁴⁵ Non-Disputing Party Submission, para. 43.

¹⁴⁶ Non-Disputing Party Submission, para. 45.

¹⁴⁷ Non-Disputing Party Submission, para. 45.

state,” including those under the effective jurisdiction or control of an occupying power.¹⁴⁸ Ukraine then suggests that “the ‘common[] use[]’ of the term in international law” also supports a broad interpretation,¹⁴⁹ which is further bolstered by, and “specifically recognized” in, Article 29 of the VCLT, the latter establishing a “default rule that a treaty applies to the ‘entire territory’ of the signatory.”¹⁵⁰

133. Ukraine submits, in this connection, that the term “territory” is worded broadly in the Treaty itself. In Ukraine’s view, the word “territory” in the Treaty neither “entail[s] the concept of a State’s sovereignty, [n]or even lawful rule.”¹⁵¹ Despite “available models for defining ‘territory’ in a more restrictive way,” *i.e.*, so as to confine the application of a treaty to areas over which the Contracting States exercise sovereignty, the Contracting States agreed to a “non-restrictive approach” in the Treaty.¹⁵² Ukraine adds:

Many of Ukraine’s bilateral investment treaties do specifically define territory with reference to “sovereignty,” but Ukraine deferred to Russia’s preferred practice of leaving references to territory open-ended. A restrictive definition should not be imposed where the parties to an investment treaty could have chosen to adopt one, but did not.¹⁵³

134. Ukraine, moreover, considers that this interpretation is supported by the context of the Treaty, particularly by other provisions incorporating references to “territory”. In this regard, Ukraine notes that the term “territory” in the Treaty is “not limited to sovereign territory,” but is used throughout the Treaty in ways that demonstrate “a practical focus on effective control,” rather than on sovereignty as the appropriate interpretive framework.¹⁵⁴ Examples of such usage are found in Articles 2(1), 3(1) and 4 of the Treaty, relating to the encouragement, favorable treatment of, and guarantee of “openness and availability” of legislation with respect to, investments on the Contracting States’ territories.¹⁵⁵ Because these provisions require “affirmative measures” on the territory of the Contracting States, the term “territory” must be understood to “bind[] the party that is in a position effectively to carry out those obligations.”¹⁵⁶

¹⁴⁸ Non-Disputing Party Submission, para. 7.

¹⁴⁹ Non-Disputing Party Submission, para. 8.

¹⁵⁰ Non-Disputing Party Submission, para. 9, referring to Karl Doehring, “The Scope of the Territorial Application of Treaties: Comments on Art. 25 of the ILC’s 1966 Draft Articles on the Law of Treaties,” 27 *Heidelberg J. Int’l L.* 483, 488-489 (1967) (CA-101).

¹⁵¹ Non-Disputing Party Submission, para. 7.

¹⁵² Non-Disputing Party Submission, paras. 13-14.

¹⁵³ Non-Disputing Party Submission, para. 14.

¹⁵⁴ Non-Disputing Party Submission, paras. 16-17.

¹⁵⁵ Non-Disputing Party Submission, para. 16.

¹⁵⁶ Non-Disputing Party Submission, para. 17.

An alternative reading, Ukraine suggests, would “leave gaps in the Treaty’s coverage” in a manner “not contemplated” by the Contracting States.¹⁵⁷

135. Similarly, Ukraine submits that the object and purpose of the Treaty supports the broad interpretation of “territory” which it advocates. Specifically, Ukraine suggests that the objective of the Treaty, to “enhanc[e] the legal framework under which foreign investment operates,” is furthered by construing the Treaty to apply to “protect Ukrainian investors in Crimea under the Russian occupation.”¹⁵⁸ In its view, the Tribunal’s “task . . . is to construe the Treaty’s geographic application” in a manner that “furthers the Treaty’s investment protection and rule of law objectives.”¹⁵⁹ Any other interpretation would create “a legal black hole for investment protection.”¹⁶⁰
136. In addition to undermining the Treaty’s object and purpose, Ukraine adds, the consequent “vacuum” would also stand in tension with “relevant rules of international law applicable between Ukraine” and the Respondent, including: (i) the Russian Federation’s obligations under the customary law on belligerent occupation, including obligations to “respect property rights in Crimea, a territory it occupies”;¹⁶¹ and (ii) human rights treaties including the European Convention on Human Rights.¹⁶² With respect to the latter, Ukraine invokes arguments similar to those advanced by the Claimants in respect of “the application of rights-protective treaties to occupied territories,” with particular reference to the ICJ’s *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*.¹⁶³
137. Judicial and State practice confirms this understanding, Ukraine suggests.¹⁶⁴ It points to State practice recognizing the application of treaties to territories considered to be unlawfully occupied, citing practice relating to the Baltic States,¹⁶⁵ including the decision, under the 1990 Conventional

¹⁵⁷ Non-Disputing Party Submission, para. 17.

¹⁵⁸ Non-Disputing Party Submission, para. 22.

¹⁵⁹ Non-Disputing Party Submission, para. 23.

¹⁶⁰ Non-Disputing Party Submission, para. 24.

¹⁶¹ Non-Disputing Party Submission, para. 26.

¹⁶² Non-Disputing Party Submission, para. 27.

¹⁶³ Non-Disputing Party Submission, paras. 28-29.

¹⁶⁴ Non-Disputing Party Submission, para. 10.

¹⁶⁵ Non-Disputing Party Submission, paras. 11-12.

Forces in Europe Treaty, to “specifically define[] the USSR’s ‘territory’ to include” the Baltic States despite those territories having been viewed as unlawfully occupied.¹⁶⁶

138. Finally, in Ukraine’s view, a “good faith reading” of the Treaty requires “territory” to be interpreted so as to include “occupied territory that the Russian Federation administers,” including the Crimean Peninsula.¹⁶⁷ Ukraine explains:

[T]he Russian Federation cannot invade, occupy, and claim sovereignty over Crimea, yet refuse to be bound by its treaty obligations within that territory. The Russian Federation has unlawfully occupied Crimea by force . . . [and] has informed the Tribunal of its view that Crimea “forms an integral part of the territory of the Russian Federation.” Yet it simultaneously maintains that its actions in Crimea “cannot be regulated by the [Treaty].” A restrictive interpretation of the term “territory” in the Treaty that would allow Russia to profit from this inconsistency is fundamentally inconsistent with the principle of good faith interpretation.¹⁶⁸

In Ukraine’s view, while “illegitimate and invalid”, the Respondent’s claims to have lawfully integrated the Crimean Peninsula into the territory of the Russian Federation “nonetheless carry legal consequences.”¹⁶⁹ In other words, by “claiming the benefits of sovereignty” over Crimea, the Russian Federation must also “accept the obligations that follow,” including respect for treaty rights of Ukrainian investors in Crimea.¹⁷⁰ Ukraine accordingly submits that well-established principles of good faith or “consistency” legally bind the Russian Federation to guarantee Treaty protection to investors in the Claimants’ position, even as the annexation itself remains unlawful.¹⁷¹

B. TEMPORAL APPLICATION OF THE TREATY

139. Ukraine submits that Ukrainian investors may avail themselves of the Treaty’s protections “regardless of when such investors initially commenced their investment.”¹⁷²
140. Ukraine first observes that Article 1(1) of the Treaty “uses the present tense” to define investments covered under the Treaty¹⁷³—implying, in effect, that the Contracting States did not contemplate requiring a particular temporal nexus as of the moment when the investment was first “made”. Ukraine additionally argues that Article 12, which confirms that the Treaty applies

¹⁶⁶ Non-Disputing Party Submission, para. 9.

¹⁶⁷ Non-Disputing Party Submission, para. 18.

¹⁶⁸ Non-Disputing Party Submission, para. 20.

¹⁶⁹ Non-Disputing Party Submission, para. 34.

¹⁷⁰ Non-Disputing Party Submission, para. 34.

¹⁷¹ Non-Disputing Party Submission, paras. 37-41.

¹⁷² Non-Disputing Party Submission, para. 30. *See also* paras. 34-41.

¹⁷³ Non-Disputing Party Submission, para. 31.

to any qualifying investments made after 1 January 1992, evinces a “clear intent” on the part of the Contracting States to “maximize the temporal application of the Treaty” and to “cover investments that were not protected by the Treaty at the time they were initiated.”¹⁷⁴ It explains:

Like most bilateral investment treaties of its era . . . [the Treaty] protect[s] “both ‘old’ and ‘new’ investments” as part of a general commitment . . . even when the investment was initiated without any expectation of treaty protection. It is a widely-held view that application of an investment treaty to pre-existing investments is generally presumed even where the agreement is silent on the question of temporal application. Under the Treaty, so long as the investment was made after January 1, 1992, it is irrelevant whether the Treaty applied at that time.¹⁷⁵

VII. THE TRIBUNAL’S CONSIDERATIONS

A. PRELIMINARY CONSIDERATIONS

1. Introduction

141. This Interim Award addresses the threshold jurisdictional issue of the application of the Treaty between the Russian Federation and Ukraine in respect of the Crimean Peninsula in the period from February 2014. It also addresses the issues of: (i) the existence of a “dispute” between the Parties arising in connection with the Claimants’ claimed investments; (ii) whether the Claimants’ claimed investments are protected under the Treaty notwithstanding the fact that PrivatBank made its investments before the events of February-March 2014; and (iii) whether any notice or negotiation requirements of Article 9 of the Treaty have been satisfied.
142. Any and all other issues of jurisdiction and admissibility that may warrant consideration and decision are joined to the merits of the proceedings. In particular, the Tribunal defers to the next phase of the proceedings consideration of the issues of whether: (i) the Claimants are “investors” within the meaning of Article 1(1) of the Treaty, including in the light of PrivatBank’s nationalization by Ukraine; (ii) the Claimants’ “investments” fall within the definition of that term in Article 1(1) of the Treaty; and (iii) the dispute between the Parties arose “in connection with” those investments.
143. The Tribunal observes that its jurisdiction derives from the Treaty alone. It is not an inter-State tribunal of general jurisdiction. While the Tribunal has an incidental jurisdiction under the Treaty to address ancillary issues that are properly engaged by the proceedings of which it is seised and which are necessary for its decisions, its jurisdiction does not in principle go beyond that

¹⁷⁴ Non-Disputing Party Submission, para. 32.

¹⁷⁵ Non-Disputing Party Submission, para. 32, referring to Rudolf Dolzer & Margrete Stevens, *BILATERAL INVESTMENT TREATIES* (Martinus Nijhoff, 1995) (CA-187), pp. 45-46.

conferred upon it by the Contracting Parties under Article 9 of the Treaty. Given the circumstances of this case, the Tribunal emphasises these limits on its jurisdiction, which it considers to be axiomatic.

144. In this regard, the Tribunal notes that this Interim Award does not reach any view on the legality or illegality under international law of the incorporation of the Crimean Peninsula by the Russian Federation or on the sovereignty claims of Ukraine and the Russian Federation in respect of the Crimean Peninsula. None of the findings contained in this Interim Award are intended to take any position on such matters.

2. Applicable law and burden of proof

145. As just noted, the Tribunal's competence derives from the Treaty. The Treaty defines the jurisdiction of the Tribunal, as well as the rights and obligations of the Contracting Parties to the Treaty and of investors of a Contracting Party. The Treaty is thus the primary source of law and of legal obligation that the Tribunal is called upon to apply.
146. The Treaty does not, however, address issues of applicable law more widely or set out any rules concerning its interpretation and application. As regards interpretation, the Tribunal will be guided by the rules on interpretation of treaties set out in Articles 31-33 of the VCLT, to which both the Russian Federation and Ukraine are party and have been, respectively, since April and May 1986. Insofar as may be material, the Tribunal observes that it is commonly accepted that Articles 31 and 32 of the VCLT reflect customary international law. Although the same attention has not been given to the issue of the customary international law status of the principles expressed in Article 33 of the VCLT, the Tribunal considers that these principles can also safely be said to reflect customary international law.
147. Article 9(1) of the Treaty defines the scope of the disputes that may be submitted to an arbitral tribunal constituted under its terms, namely those "arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof." This language will be controlling of the question of the jurisdiction of the Tribunal as regards the application of the Treaty. The interpretation and application of this provision is addressed further below.
148. Without prejudice to, and reaffirming, the preceding, it nonetheless bears emphasis that the Treaty does not stand in isolation. The Treaty and the rights and obligations that it creates exist within the framework of general international law. The Tribunal will therefore have regard as appropriate to other relevant rules of international law applicable in the relations between the

Parties, either because they are incorporated into the Treaty by reference or as may be necessary to address incidental questions regarding the interpretation and application of the Treaty.

149. The Tribunal also observes that it may equally be necessary and appropriate for it to have regard to relevant and applicable national law insofar as the provisions of the Treaty direct the Tribunal to do so or where questions regarding the interpretation and application of the Treaty can only be addressed by reference to national law.
150. As regards the burden of proof, Article 24(1) of the UNCITRAL Rules provides that each party shall have the burden of proving the facts relied upon to support its claim or defence. Article 25(6) of the UNCITRAL Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. Without prejudice to any given issue, the Tribunal observes that it is uncontroversial in international proceedings such as this, at least at a level of generality, that the burden of proof rests in the first instance with the party advancing a proposition. A claimant cannot prevail without meeting a minimum standard of proof, even if the burden shifts to the respondent at some point to establish that its conduct was permitted under the treaty or under international law more generally. The issues of the burden of proof in jurisdictional proceedings, as well as the consequences that flow from the non-participation of the Respondent in these proceedings, are addressed further below.
151. Finally, the Tribunal notes that the present proceedings are jurisdictional proceedings. As a result, a prior question that needs to be considered, before looking to the particular circumstances of the present case, is the date on which the Tribunal's jurisdiction is to be assessed. It is settled law that the critical date for such evaluation is the date on which the proceedings were commenced.¹⁷⁶ This does not, however, preclude a tribunal properly seised of a case from taking account of situations and facts arising prior to the date of the institution of the proceedings in its evaluation of the merits of the claims before it.¹⁷⁷

¹⁷⁶ See e.g. *Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998, ICJ Reports 1998, paras. 36-37, 42-43; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, para. 26. See also *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, para. 42 (regarding the date for determining the existence of a dispute).

¹⁷⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, Interim Award of 1 December 2008.

3. The Respondent's non-participation

152. [REDACTED]

[REDACTED] Since this correspondence, the Russian Federation has not participated in these proceedings in any way.

153. Article 28 of the UNCITRAL Rules addresses some of the consequences of default by a party. Article 28(1) provides that “[i]f, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.” Article 28(2) provides that, “[i]f one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.” Pursuant to these provisions, after affording the Parties an opportunity to present their views, the Tribunal ordered that these proceedings continue notwithstanding the Respondent’s failure to file a statement of defence within the relevant time period, and proceeded with the arbitration despite the Respondent’s failure to participate in the hearing.

154. At the same time, the Tribunal has taken every measure to safeguard the Russian Federation’s procedural rights. The Tribunal has, *inter alia*: (i) ensured that all communications and materials submitted in the proceedings have been promptly delivered, both electronically and physically, to the Ambassador of the Russian Federation to the Netherlands in The Hague; (ii) afforded the Russian Federation, as with the Claimants, an opportunity to express its views on each proposed procedural step throughout the proceedings; (iii) granted the Russian Federation equal and sufficient time to submit responses to the written pleadings and other communications from the Claimants; (iv) invited the Russian Federation, as with the Claimants, to comment on the proposed candidates and terms of reference for the independent experts on Russian and Ukrainian law subsequently appointed by the Tribunal; (v) provided the Russian Federation adequate notice of the hearing in the case; (vi) provided the Russian Federation, in a timely manner, with the transcripts and all other documents submitted in the course of the hearing; and (vii) provided an opportunity for, and invited, the Russian Federation to comment on anything said during the

¹⁷⁸ The full text of this correspondence is reproduced at paragraphs 11-12 above.

hearing. Thus, at every stage, the Tribunal has given the Russian Federation the opportunity to participate in these proceedings. Moreover, as will be seen from what follows, this Interim Award neither disposes of all issues of jurisdiction and admissibility nor addresses any issue of the merits. It therefore remains open to the Russian Federation to participate in these proceedings going forward.

155. Article 28(3) of the UNCITRAL Rules provides that, “[i]f one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.” In the Tribunal’s view, in a case such as this with a non-participating party, the Tribunal must decide the claim of the participating party in the light of all the available information, rather than accepting the participating party’s case by default. Further, the Tribunal must, as a preliminary step, also satisfy itself of its own jurisdiction to decide the claim put before it. The *compétence-compétence* doctrine, the power of a tribunal to determine its own jurisdiction, has a necessary corollary, namely, that a tribunal must satisfy itself that it has jurisdiction in respect of the matter of which it would be seised by a claimant.

156. [REDACTED]

157. The Tribunal does not accept this proposed approach. As it informed the Parties by letter from the PCA dated 19 March 2016, the Tribunal considers that it is required to determine its jurisdiction and the admissibility of the claims whether or not objections have been raised by the Respondent.¹⁸⁰ The Tribunal does not accept [REDACTED] that its power to do so is

¹⁷⁹ [REDACTED]

¹⁸⁰ See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 ICJ Reports 3, para. 33 (“... in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case.”); *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, UNCLOS, Award on Jurisdiction of 29 October 2015, para. 123 (“... the Tribunal also stated that it would not confine itself to addressing only those issues raised in China’s Position Paper and that, in line with its duty to satisfy itself of its jurisdiction, the Tribunal would consider other issues that might potentially pose an obstacle to the continuation of these proceedings.”); *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of 25 October 2016, para. 225 (“... the Tribunal notes that an assessment of whether jurisdiction exists in respect of a given dispute is required of all tribunals, whether a party raises the issue or not. It is not in the systemic interests of the effective administration of international justice for a tribunal to adjudicate on matters over which it does

limited by Article 21 of the UNCITRAL Rules.¹⁸¹ While this provision addresses the treatment of pleas as to the jurisdiction of a tribunal, it is silent regarding the tribunal's power to consider its jurisdiction *proprio motu*.

158. Such an argument also ignores the burden of proof. Burden of proof requirements and the Tribunal's responsibilities as regards the admissibility, relevance, materiality and weight of evidence are not altered by the absence of one of the Parties to the dispute or a failure to raise jurisdictional objections.¹⁸² In respect of arbitral jurisdiction, this means that a State's consent to arbitration, and the jurisdiction of a tribunal, cannot simply be presumed.¹⁸³ It is for the claimant in any given case to establish the respondent's consent to arbitration. Where a claimant fails to meet this burden to the satisfaction of the tribunal, jurisdiction will be justifiably declined, whether or not a jurisdictional objection is expressly raised by the respondent.¹⁸⁴ It is also for the Tribunal to determine, *proprio motu*, if necessary, whether the conditions necessary to found it jurisdiction, and the admissibility of the claims under the Treaty, are met.
159. This said, the Tribunal must also take care to avoid prejudice to the Claimants from the non-participation of the Respondent. While the non-participation of the Respondent unavoidably gives rise to evidential and related issues for the proceedings, the Tribunal must in the first instance proceed on the basis that, absent a reason to doubt this, the Claimants' evidence is presented in good faith and that, subject to enquiry and scrutiny by the Tribunal going to admissibility, relevance and materiality, it can properly be accorded appropriate weight.
160. In this regard, the Tribunal notes that it has not simply accepted without more the allegations, arguments and evidence of the Claimants. On the contrary, it has taken every available opportunity and measure to test the Claimants' case and to ensure that it has the information necessary to reach the findings contained in this Interim Award. These measures include:

not have jurisdiction, whether the parties would wish this to be the case or not. This appreciation does not turn only on issues of consent, although this may be important. It also turns importantly on *ratione materiae*, *ratione temporis* and *ratione personae* considerations, and is a feature of most courts and tribunals, including in the domestic sphere.”)

¹⁸¹ [REDACTED]

¹⁸² See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1984 ICJ Reports 14, para. 29.

¹⁸³ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, paras. 69-71.

¹⁸⁴ *ICS Inspection and Control Services v. Argentine Republic*, PCA Case No. 2010-09, UNCITRAL, Award on Jurisdiction of 10 February 2012, para. 280; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 175. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, 2006 ICJ Reports 6, paras. 91-93; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, 2008 ICJ Reports 177, para. 62.

(i) putting a detailed series of 25 written questions to the Parties in advance of the hearing on matters of both fact and law that the Tribunal considered not to have been sufficiently canvassed in the Claimants' submissions, and (ii) the appointment of independent experts to report on issues of Ukrainian and Russian law, which had previously been addressed only by experts appointed by the Claimants. Additionally, during the hearing, the Tribunal put questions both to the Claimants' and the Tribunal-appointed experts. The Tribunal also put detailed questions to the Claimants' counsel in the course of the hearing and invited both Parties to address these questions in post-hearing briefs—the Respondent having the opportunity to do so on the basis of the transcripts of the hearing. Having tested the evidence presented by the Claimants, the Tribunal is in a position to decide to what extent such evidence may be relied upon and the weight to be accorded to it.

161. By way of example, while, as will be seen below, the Tribunal has had regard to the expert opinion of the Claimants' Ukrainian law expert, [REDACTED] it has done so only after careful consideration and only on the basis that [REDACTED] evidence was fully supported by the Tribunal-appointed independent expert on Ukrainian law, Dr. Tsirat, who, having reviewed both [REDACTED] expert opinion and the underlying documents on which it was based, indicated her agreement with [REDACTED] evidence.¹⁸⁵

B. APPLICATION OF THE TREATY TO THE CRIMEAN PENINSULA

162. The Tribunal now turns to the principal issue of concern in this phase of the proceedings, namely, the application of the Treaty between the Russian Federation and Ukraine in respect of the Crimean Peninsula in the period from February 2014 and, more specifically, whether (as a general matter) the Treaty can be invoked by Ukrainian investors in the Crimean Peninsula against the Russian Federation.
163. As an initial matter, having regard to the factual developments described in paragraphs 55-72 above, the Tribunal considers that the reality which it is required to address is that of the change in the character of the Crimean Peninsula from part of Ukraine to a territory for the international relations of which the Russian Federation has become responsible. The Tribunal does not consider that the brief interregnum from 17 March 2014 to 18 or 21 March 2014, as may be relevant, in which it might be said that an independent Republic of Crimea came into existence, is relevant or controlling for the purposes of the analysis that follows. It is evident from the developments described above that the 17 March 2014 proclamation of independence by the Supreme Council of Crimea was simply a stepping stone to the incorporation of the Crimean

¹⁸⁵ [REDACTED]

Peninsula into the Russian Federation that followed swiftly thereafter. Indeed, this is readily apparent from the 6 March 2014 resolution of the Supreme Council of Crimea, in which it resolved “to join the Russian Federation as a member territory of the Russian Federation.”¹⁸⁶

164. [REDACTED]

165. The Tribunal first observes that this case is *sui generis*, the factual circumstances presented by it not fitting readily into any settled matrix of legal analysis. The geographic scope of application of the Treaty has not changed as a result of the events of February-March 2014 in the Crimean Peninsula. Save that the view might be taken—which the Tribunal emphasises it does not adopt—that the events of February-March 2014 led to a legal vacuum as regards the Crimean Peninsula in respect of the application of the Treaty, the Treaty continues to apply to investments in the territories of the Russian Federation and of Ukraine. The issue that arises, consequent upon the events in question, is to which Contracting Party is the Treaty opposable in respect of claims as regards claimed investments in the Crimean Peninsula. In other words, the issue is which Contracting Party is responsible under the Treaty to address claims of investors of the other Contracting Party in respect of investments in the Crimean Peninsula.

166. In the Tribunal’s view, this appreciation is material, as the starting point of any analysis must properly be that the juridical space of the Treaty has not changed. The Treaty applied to investments in the Crimean Peninsula before the events of February-March 2014. There is no suggestion in the submissions of either Party, or of Ukraine in its Non-Disputing Party Submission, that the Treaty ceased to apply to the Crimean Peninsula consequent upon the events in question. [REDACTED]

¹⁸⁶ See paragraph 61 above.

¹⁸⁷ [REDACTED]

¹⁸⁸ [REDACTED]

[REDACTED]

170. The Tribunal disagrees with the Claimants' contentions on these points. As an initial matter, while the Tribunal accepts that the rule expressed in Article 15 of the VCST is properly characterised as the "moving treaty frontiers rule", and that the rule as so expressed reflects customary international law, the Tribunal does not consider that this rule is properly described by reference to Article 29 of the VCLT. While the rules expressed in Article 29 of the VCLT and Article 15 of the VCST are related, they are distinct. Article 29 states a rule of general application concerning the territorial scope of treaties. In contrast, the rule expressed in Article 15 of the VCST addresses a narrow subset of circumstances, arising on a succession in respect of part of territory, engaging questions of the change of the territorial scope of application of treaties. Notwithstanding their connection, the two rules ought not, in the Tribunal's view, to be conflated.
171. More importantly, the Tribunal does not accept [REDACTED] that the appropriate analysis in this case turns on questions of State succession and the application of the moving treaty frontiers rule. The circumstances engaged by this case do not fall within the scope of the rule expressed in Article 15 of the VCST, as a careful reading of this provision discloses. Leaving aside any issue as might be engaged by the limitation expressed in Article 6 of the VCST, the rule expressed in Article 15 of the VCST does not contemplate a situation in which the treaty in question is a bilateral treaty that applies between the "predecessor State" and the "successor State" as regards, *inter alia*, the territory in respect of which international responsibility is said to have changed.¹⁹¹ Rather, Article 15 addresses circumstances in which treaties of the predecessor State cease to apply in respect of a given territory and, simultaneously, the territorial scope of treaties of the successor State expands to that same territory. The treaty partners of the predecessor State are not necessarily identical with the treaty partners of the successor State. The same goes for the subject-matters of the treaties of the predecessor State and the successor

189 [REDACTED]

190 [REDACTED]

¹⁹¹ "Draft Articles on Succession of States in Respect of Treaties with commentaries" in Yearbook of the International Law Commission 1974, vol. 2, part I (New York: UN, 1975)(A/CN.4/SER.A/1974/Add.1 (Part 1)), p. 177 ("... the question of succession concerns the triangular position of the predecessor State, the successor State and the other State which concluded the treaty with the predecessor State.").

State.¹⁹² In the present case, however, the issue is not the replacement, in the territory of the Crimean Peninsula, of Ukrainian treaties with third States by treaties of the Russian Federation with third States, but rather the continued application, after the events of February-March 2014, of the Treaty between Ukraine and the Russian Federation to the territory of the Crimean Peninsula. Especially given that neither Contracting Party to the Treaty has expressed any views about the non-application of the Treaty to the Crimean Peninsula, the Treaty will, and must, continue to apply to the territory of the Crimean Peninsula from the perspective of *both* Contracting Parties.

172. The Tribunal also does not agree with ██████████ that the iteration of the moving treaty frontiers rule under customary international law is in some manner broader than the iteration of the rule in Article 15 of the VCST and in terms that avail the Claimants. The Tribunal can find nothing in the commentary of the International Law Commission, in judicial or scholarly comments, or elsewhere, to sustain such a contention.
173. The Tribunal accordingly does not consider that an analysis of the circumstances presented by this case predicated on the moving treaty frontiers rule is either correct or useful. As already noted, the circumstances presented by this case are *sui generis*. The juridical space of the Treaty has not changed with the events in question. The question, for purposes of determining the jurisdiction of a tribunal established pursuant to Article 9 of the Treaty, is which investors may avail themselves of the protections of the Treaty and against which Contracting Party.
174. Without prejudice to the preceding, the Tribunal takes some guidance from the law on State succession for purposes of its analysis, namely, that the appropriate test for purposes of ascertaining which State will have obligations under the Treaty in respect of investors of the other Contracting Party will be which State is responsible for the international relations of the territory in question.¹⁹³ This approach also comports with the general, and uncontroversial, rule on the territorial scope of treaties expressed in Article 29 of the VCLT, namely, that “[u]nless a different

¹⁹² See “Draft Articles on Succession of States in Respect of Treaties with commentaries” in Yearbook of the International Law Commission 1974, vol. 2, part I (New York: UN, 1975)(A/CN.4/SER.A/1974/Add.1 (Part 1)), p. 208: “[In Article 15] the moving treaty-frontiers rule appears in pure form. . . . Shortly stated, the moving treaty-frontiers rule means that, on a territory undergoing a change of sovereignty, it [the territory] passes automatically out of the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign.” The reference to “regimes” clearly shows that Article 15 concerns situations other than that of two States directly involved in the transfer of territory between them.

¹⁹³ In its commentary to Article 2(b) of the VCST, the International Law Commission explained that the formula “the replacement of one State by another in the responsibility for the international relations of territory” is “commonly used in State practice . . . to cover in a neutral manner any specific case independently of the particular status of the territory.” “Draft Articles on Succession of States in Respect of Treaties with commentaries” in Yearbook of the International Law Commission 1974, vol. 2, part I (New York: UN, 1975) (A/CN.4/SER.A/1974/Add.1 (Part 1)), p. 175.

intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” It is to this issue that the Tribunal now turns.

175. Two questions arise for consideration in the circumstances of this case. The first question is whether the Russian Federation can be said to have obligations under the Treaty toward Ukrainian investors in respect of their investments in the Crimean Peninsula in the period from or following February-March 2014, as a general matter. If the answer to the first question is in the affirmative, a second question arises regarding the date from which the Russian Federation came to have obligations under the Treaty toward Ukrainian investors in respect of their investments in the Crimean Peninsula.
176. Turning to the first question, it is helpful to begin the analysis with an enquiry as to whether the Russian Federation can be said to be bound by the Treaty in respect of the Crimean Peninsula today or, for purposes more closely analytically related to the present case, at the point at which these proceedings were instituted on 13 April 2015.¹⁹⁴ The utility of this enquiry is that it enables an assessment to be made as a matter of general proposition whether the Treaty is opposable to the Russian Federation in respect of the Crimean Peninsula detached from the particular circumstances of the case.
177. As will be evident from the factual recitation given above, the governmental institutions of the Russian Federation took various steps in March 2014 with respect to the incorporation of the Crimean Peninsula into the Russian Federation as a matter of Russian law. On 19 March 2014, following various developments in the Crimean Peninsula in the preceding weeks outlined in paragraphs 55-67 above, culminating with the signing, on 18 March 2014, of the “Agreement between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation” (the Incorporation Agreement), the Constitutional Court of the Russian Federation held that the Incorporation Agreement was consistent with the Russian constitution and therefore that the incorporation of the Crimean Peninsula into the Russian Federation was constitutional.
178. Two days later, on 21 March 2014, the Federal Assembly of the Russian Federation (*i.e.*, the Russian Parliament) enacted a law ratifying the Incorporation Agreement¹⁹⁵ and a constitutional law “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constitutional Entities in the Russian Federation: the Republic of Crimea and the Federal City of

¹⁹⁴ See paragraph 151 above.

¹⁹⁵ Federal Law of the Russian Federation No. 36-FZ “On Ratification of the [Incorporation Agreement],” 21 March 2014 (CE-49).

Sevastopol” (the Incorporation Law).¹⁹⁶ Both laws were signed by President Putin on the same date, *i.e.*, 21 March 2014, and came into force on that date, President Putin’s signature completing the formal constitutional requirements for the entry into force of the laws.

179. Article 1(3) of the Incorporation Law provided that “[t]he Republic of Crimea [including Sevastopol] shall be deemed admitted to the Russian Federation as of the signing date of the [Incorporation Agreement].”¹⁹⁷ That is, under Russian law, the incorporation of the Crimean Peninsula into the Russian Federation was made retroactive to 18 March 2014.
180. The unavoidable appreciation that follows from the preceding is that, by 21 March 2014, the Russian Federation had taken various constitutional steps, as a matter of Russian law, to incorporate the Crimean Peninsula into the Russian Federation. This incorporation of the Crimean Peninsula into the Russian Federation as a matter of Russian law was, in parallel, complemented by settled Russian physical control over the Crimean Peninsula.
181. Ukraine, while contesting the claims of the Russian Federation to the Crimean Peninsula, and the legal effect, as a matter of international law, of the Incorporation Agreement and the Incorporation Law, has, in its Non-Disputing Party Submission in these proceedings, expressly acknowledged the practical reality of the Russian exercise of jurisdiction and effective control over the Crimean Peninsula, and that the Russian Federation has “assumed international obligations in its administration of Crimea.”¹⁹⁸ In April and August 2014, Ukraine enacted legislation establishing a special regime for the Crimean Peninsula precisely to account for the fact of the Russian exercise of jurisdiction and effective control.¹⁹⁹ Although this legislation refers to a “temporary occupation”, an extensive period appears to be contemplated, as the law establishing the special economic regime for the Crimean Peninsula does so for ten years.²⁰⁰ According to Ukraine, the “occupation” of the Crimean Peninsula began on 20 February 2014.²⁰¹

¹⁹⁶ 21 March 2014, as amended 31 December 2014 (CE-47).

¹⁹⁷ 21 March 2014, as amended 31 December 2014 (CE-47).

¹⁹⁸ Non-Disputing Party Submission, para. 45. *See also* paras. 2, 46.

¹⁹⁹ Law of Ukraine No. 1207-VII “On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine,” 15 April 2014 (██████); Law of Ukraine No. 1636-VII “On Establishing Free Economic Zone ‘Crimea’ and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine,” 12 August 2014 (██████).

²⁰⁰ Law of Ukraine No. 1636-VII “On Establishing Free Economic Zone ‘Crimea’ and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine,” 12 August 2014 (██████), art. 2.1.

²⁰¹ Law of Ukraine No. 1207-VII “On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine,” 15 April 2014 (██████), art. 1(2).

182. What emerges from the preceding is that, while there is no concordance of views between the Contracting Parties to the Treaty about the status of the Crimean Peninsula as a matter of international law, there is an intersection of the positions of the Russian Federation and of Ukraine as regards Russian Federation jurisdiction and settled, long-term control over the Crimean Peninsula, translating into the assumption by the Russian Federation of the responsibility for the international relations of the Crimean Peninsula.
183. Assessing these circumstances from the vantage point of the 13 April 2015 institution of these proceedings, or today, the Tribunal considers that it is beyond peradventure that the Treaty must be said to apply vis-à-vis the Russian Federation in respect of Ukrainian investors in the Crimean Peninsula at these points. Analytically, the test that the Tribunal considers emerges from the concept of State succession, namely which State must be said to be responsible for the international relations of the Crimean Peninsula, admits of only one answer, *i.e.*, the Russian Federation. Indeed, the point is not and could not sensibly be denied by the Russian Federation. Its correspondence to the Tribunal of 16 June 2015 states in clear terms that the Crimean Peninsula “at the present time pursuant to the will of people forms an integral part of the territory of the Russian Federation.”
184. This analysis and conclusion draws additional support from the rule stated in Article 29 of the VCLT. Without prejudice to any issue concerning the application of Article 73 of the VCLT in the circumstances of this case, it is axiomatic that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”
185. Although Article 1(4) of the Treaty contains a definition of the term “territory”, it does not establish a different intention as to the territorial application of the Treaty. The term “territory” is first defined simply as “the territory of the Russian Federation or the territory of Ukraine,” thus without indicating any intention to define territory in a different manner to the ordinary meaning of that term in Article 29 of the VCLT. As for the phrase “in accordance with international law” in Article 1(4), the Tribunal considers that it only concerns the definition of the two States’ exclusive economic zones and continental shelf, not the definition of “territory” as a whole. This reading is consistent with the ordinary meaning of this provision and is supported by the investment treaty practice of the Russian Federation.²⁰²

202

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

186. The Tribunal therefore considers that the term “territory” in the Treaty is used in accordance with the meaning of that term in Article 29 of the VCLT, and that the latter term has a wider meaning capable of encompassing territory for which a State has assumed the responsibility for international relations.²⁰³ [REDACTED] [REDACTED] the Tribunal construes the term “territory” for purposes of the Treaty to include territory over which a State exercises settled jurisdiction or control and on behalf of which it has assumed responsibility for international relations.
187. Assessed at some remove from the hothouse of the events in issue in this case, the Tribunal cannot identify any reason to conclude that the Russian Federation cannot and should not be held to be bound by its formal conduct, as a matter of Russian law, incorporating the Crimean Peninsula into the Russian Federation, together with its settled, long-term control over the Crimean Peninsula. Any different a view would ride roughshod over two settled, cornerstone provisions of the international law on the observance and application of treaties, namely, the principle of *pacta sunt servanda*, addressed in Article 26 of the VCLT, and the entire territory application rule, addressed in Article 29 of the VCLT. In circumstances in which neither the Russian Federation nor Ukraine has taken any step to disavow, denounce, suspend or terminate the Treaty, or to otherwise assert the view that the Treaty no longer applies to investments in the Crimean Peninsula, there is no basis to conclude that the Treaty does not today, or did not on 13 April 2015, bind the Russian Federation as regards conduct in the Crimean Peninsula.
188. Given this assessment, the second question that arises is from what date must the Russian Federation be said to be bound by the Treaty as regards Ukrainian investors in the Crimean Peninsula.

²⁰³ See Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff, 2009) (CA-135), p. 392 (“Recognition under international law of the State and its territory is not required.”); Oliver Dörr and Kirsten Schmalenbach, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Springer, 2012) (CA-103), p. 497 (“According to [Special Rapporteur, Sir Humphrey Waldock’s] Commentary, States practice showed that in the absence of a territorial clause, treaties were applied to all metropolitan and non-metropolitan territories of a State. Therefore, he proposed to use the formula that ‘a treaty applies with respect to all the territory or territories for which the parties are internationally responsible’. The ILC preferred the expression ‘its entire territory’. However, this new wording was only chosen to avoid the association of the first term with the colonial clauses. The contents of both expressions were considered equivalent.”). See also “Draft Articles on the Law of Treaties with commentaries” in Yearbook of the International Law Commission 1966, vol. 2 (New York: UN, 1967)(A/CN.4/SER. A/1966/Add. 1), p. 213. The Tribunal notes the judgment of the European Court of Justice of 21 December 2016 in *Council of the European Union v. Front Polisario* (Case No. C-104/16 P). The Tribunal considers, in the light of the commentary of the International Law Commission and the observations of the commentators just noted, that the analysis of the European Court of Justice that places emphasis on “the fullness of the powers granted to sovereign entities by international law” (para. 95) is too narrow insofar as it appears to proceed on the basis that an appreciation of the sovereign status of the territory in question is necessary, contrary to the analysis of positive international law undertaken by the International Law Commission.

189. [REDACTED]

190. The Tribunal is unable to accept either date proposed by the Claimants.

191. As regards the 27 February 2014, the Tribunal does not consider that the application of a BIT can be said to have been triggered by the presence of troops of one State on the territory of another, even if those troops are exercising effective *de facto* control over the territory in question. Soldiers do not carry BIT obligations in their backpacks. The application of a treaty such as that in issue in the present proceedings requires something more.²⁰⁴

192. In the Tribunal's view, while physical control and political expressions of intent as regards the status of a territory may be relevant for purposes of this assessment, and will need to be weighed in the mix, the critical consideration is likely to be an appreciation of settled, long-term control over the territory in question by the State whose responsibility is invoked under the Treaty. Evidence of such settled, long-term control may come, *inter alia*, as in this case, both from legal steps taken by the State whose responsibility is invoked to formalise, and constitutionalise, its control, and by settled, long-term physical manifestations of control. The Tribunal observes that it is the very essence of BITs that they are intended to create and maintain a settled investment framework. Once established, that settled investment framework cannot be presumed to have been displaced in the absence of compelling evidence to the contrary pointing to a new dispensation of a sustained character. The Tribunal draws on this appreciation for purposes of arriving at the test here expressed of settled, long-term control, the notion of "settled" control signalling a dispensation concerning which there is evidence of sustained character.

193. Having regard to these considerations, and to the evidence presented and available to it, the Tribunal considers that it cannot be said that the indicia of Russian Federation control over the

²⁰⁴ The Tribunal is cognisant of the approach adopted by international human rights courts and human rights treaty monitoring bodies regarding the application, or extra-territorial application, of international human rights instruments, including in circumstances of armed conflict and military occupation. Even if there may be elements of coincidence between them, the Tribunal considers that BITs are not normative, standard-setting instruments analogous to multilateral human rights treaties that afford broad protections to an only lightly constrained class of right holders. The Tribunal does not, accordingly, consider that the human rights jurisprudence in question can be relied upon by a claimant under a BIT to found the application of that BIT in circumstances of military engagement that do not rise to the level of settled, effective control (*see* paragraph 192 below). In this regard, the Tribunal reaffirms its observation at paragraph 143 above that its jurisdiction is derived from the Treaty between the Russian Federation and Ukraine alone. It is not a tribunal of general jurisdiction.

Crimean Peninsula were such on 27 February 2014 as to give rise to obligations for the Russian Federation under the Treaty.

194. The question is then whether the 18 March 2014 effective incorporation date, as a matter of Russian law, is the critical date for purposes of the application of the Treaty vis-à-vis the Russian Federation as regards the Crimean Peninsula. While the Tribunal notes the retroactive application, as a matter of Russian law, of the incorporation of the Crimean Peninsula in the Russian Federation, it considers that the relevant date, for purposes of the crystallisation of settled, long-term Russian Federation control over the Crimean Peninsula is properly 21 March 2014, the date on which the Incorporation Law was in fact enacted by the Parliament of the Russian Federation, was signed by President Putin, and entered into force. That the Incorporation Law applied, by its terms, retroactively, may be material as a matter of Russian law. As regards the crystallisation of Russian Federation settled, long-term control over the Crimean Peninsula, however, this, in the Tribunal's assessment, took place on 21 March 2014. As noted at paragraph 129 above, Ukraine also accepts that, by 21 March 2014 (and in fact from 20 February 2014) the Russian Federation had begun its exercise of "jurisdiction and effective control" over the Crimean Peninsula.
195. The Tribunal accordingly concludes and so finds that, on 21 March 2014, the Treaty became opposable to the Russian Federation as regards Ukrainian investors in the Crimean Peninsula. The Tribunal finds that, as of this date, the Crimean Peninsula is to be treated for purposes of the application of the provisions of the Treaty as part of "the territory of the Russian Federation."

C. APPLICATION OF THE TREATY'S JURISDICTIONAL REQUIREMENTS

196. Having concluded that since 21 March 2014 the Russian Federation's Treaty obligations toward Ukrainian investors extend to the territory of the Crimean Peninsula, the Tribunal now turns to consider whether the Treaty's requirements for jurisdiction and admissibility have been met in the present case, such as to allow the Claimants to avail themselves of the Treaty's protection.
197. Article 9 of the Treaty, which contains the Contracting Parties' offer to arbitrate with investors (and is reproduced at paragraph 79 above), raises the issues of whether: (i) the Claimants are "investors of a Contracting Party" within the meaning of the Treaty (jurisdiction *ratione personae*); (ii) there exists a dispute between the Parties "arising in connection with investments" within the meaning of the Treaty (jurisdiction *ratione materiae*); and (iii) the Claimants have complied with any notice or negotiation requirements of the Treaty. The Tribunal addresses each of these issues in turn below.

1. Whether the Claimants are “investors of a Contracting Party”

198. Article 1(2) of the Treaty, reproduced in full at paragraph 83 above, sets out the Treaty’s definition of the terms “investor of a Contracting Party.” Pursuant to this provision, the questions for the Tribunal are whether Privatbank and Finilon are: (i) “legal entit[ies] constituted in accordance with the legislation in force in the territory of Ukraine”; and (ii) “competent in accordance with the legislation of [their] Contracting Party, to make investments in the territory of the other Contracting Party.”
199. As noted at paragraph 54 above, the Tribunal became aware shortly before the issuance of this Interim Award that PrivatBank was nationalized by Ukraine in December 2016. As it was not briefed by the Parties on the impact that this development may have on PrivatBank’s status as an “investor of a Contracting Party”, the Tribunal joins consideration of this question to the merits phase of these proceedings.
200. As to Finilon, having reviewed the documents submitted by the Claimants and the opinions of the experts on Ukrainian law, [REDACTED] and Dr. Tsirat, the Tribunal is satisfied that it is a legal entity constituted in accordance with Ukrainian law. The Claimants have shown that it has been duly registered in the Ukrainian Corporate Register since 1 October 2013 and in the Ukrainian State Register of Financial Institutions (other than banks) since 24 October 2013.²⁰⁵
201. As for the requirement under Article 1(2) of the Treaty that Finilon be “competent in accordance with the legislation of its Contracting Party, to make investments in the territory of the other Contracting Party,” the Tribunal understands this to be a requirement of capacity to enter into certain legal relations. The Tribunal accepts the expert evidence that Finilon had legal capacity under Ukrainian law to make investments in the Crimean Peninsula at all times from its acquisition of PrivatBank’s Crimean business to the commencement of this arbitration.²⁰⁶
202. The Tribunal notes that its understanding of the “competency” requirement is based on the second translation of the Treaty provided by the Claimants²⁰⁷ and, in their description, produced by using the controlling English translations of other BITs entered into by the Russian Federation.²⁰⁸ The Tribunal is conscious that the first translation provided by the Claimants stated not that investors had to be “competent”, but rather that they had to be “legally authorized” to make investments.

²⁰⁵ Extract of Corporate Register, 1 April 2016 (CE-188); Extract of the Financial Institutions Register (available at: <http://nfp.gov.ua/files/reestry/DRFU/38062828-drfu.xlsx>) ([REDACTED]).

²⁰⁶ [REDACTED] Hearing Tr., 13 July 2016 at 318-320 (examination of Dr. Tsirat).

²⁰⁷ CA-137.

²⁰⁸ [REDACTED]

If accepted, the latter translation might suggest that, beyond the question of capacity, the Tribunal should also investigate whether any restrictions applied under Ukrainian law to the making of investments by Finilon in the Crimean Peninsula. As will be seen, the Tribunal is not in a position at this stage to carry out this investigation in full.

203. [REDACTED]

the Resolution of the National Bank of Ukraine No. 699 dated 3 November 2014, which states that it “is prohibited for a resident [of Ukraine] to invest in an investment object located (registered) within the territory of Crimea.”²¹⁰ While the plain text of Resolution No. 699 could suggest a prohibition on all investments in the Crimean Peninsula, the Tribunal accepts [REDACTED], given the scope of the powers of the National Bank of Ukraine, this Resolution should be understood as prohibiting only monetary transfers to the Crimean Peninsula and only those made after the Resolution came into force.²¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

209 [REDACTED]

210 [REDACTED]

211 [REDACTED]

212 [REDACTED]

204. [REDACTED]

205. [REDACTED] the Resolution of the National Bank of Ukraine No. 260 dated 6 May 2014.²¹³ *Inter alia*, the Resolution mandated Ukrainian banks to terminate the operations of their Crimean branches within a month of the Resolution.²¹⁴ [REDACTED]

206. As noted above, in this Interim Award the Tribunal has considered it appropriate to decide questions of jurisdiction and admissibility on a narrow basis. In order not to prejudge any issue in the absence of complete information, the Tribunal therefore defers to the merits stage of the proceedings the consideration of any jurisdictional questions that might require findings of fact likely also to be relevant to merits issues. Whether the Claimants complied with Resolution No. 260 and whether this Resolution is relevant given the timing of alleged Treaty breaches, are two such questions.

2. Whether there exists a dispute between the Parties “arising in connection with investments”

207. A second jurisdictional requirement set out in Article 9 of the Treaty is the existence of a dispute between the “investor of a Contracting Party” and the other Contracting Party “arising in connection with investments.” This requirement gives rises to a number of questions:

²¹³ [REDACTED]

²¹⁴ National Bank of Ukraine Regulation No. 260 “On withdrawal and cancellation of banking licenses and general licenses to carry out currency transactions of some banks and closure by the banks of their separate departments located on the territory of the Autonomous Republic of Crimea and city of Sevastopol,” 6 May 2014 [REDACTED] para. 5. The Tribunal notes that the Resolution entered into force on 6 May 2014.

²¹⁵ [REDACTED]

- (i) Did the Claimants hold “investments” falling within the definition of that term in Article 1(1)?
- (ii) Is there a dispute between the Parties?
- (iii) Did this dispute arise “in connection with investments” protected under the Treaty?
- (iv) Does the Treaty, and Article 1(1) in particular, require that the Claimants’ investments have been initiated in the territory of the Russian Federation, or does the Treaty also protect investments that were made in the Crimean Peninsula before the Russian Federation assumed responsibility for its international relations?

208. As noted above, in this Interim Award the Tribunal has considered it appropriate to decide questions of jurisdiction and admissibility on a narrow basis and therefore to defer to the merits stage of these proceedings the consideration of any jurisdictional questions that might require findings of fact likely also to be relevant to merits issues. Whether Finilon complied with Resolution No. 260, and whether this Resolution is relevant given the timing of alleged Treaty breaches, are two such questions. For the same reason, the Tribunal defers to the merits stage the consideration of the first and third questions noted in the above paragraph, proceeding to answer only the second and fourth questions, which can be addressed in this Interim Award without encroaching on the merits.

209. With respect to the second question—whether there is a dispute between the Parties—the Tribunal has no doubt that this is the case. According to the jurisprudence, “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”²¹⁷ While “[i]t must be shown that the claim of one party is positively opposed by the other” in order for a dispute to exist,²¹⁸ “the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.”²¹⁹

210. In the present case, the Claimants are of the view that the Respondent took measures in breach of the Treaty that deprived them of the entire benefit of their investment in PrivatBank’s banking business in the Crimean Peninsula, and therefore owes them compensation. Despite the Claimants’ requests, the Respondent has shown no intention to provide such compensation or

²¹⁷ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, PCIJ, Series A, No. 2, p. 11.

²¹⁸ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Reports 319, p. 328; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, 2006 ICJ Reports 6, para. 90.

²¹⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, 2011 ICJ Reports 70, para. 30.

otherwise satisfy the Claimants' claims. The Tribunal finds that, at the latest, the dispute between the Parties crystallized when the Respondent provided no answer (beyond an acknowledgment of receipt) to the letter [REDACTED]

[REDACTED]

[REDACTED] The Tribunal concludes on this basis that there exists a dispute between the Parties within the meaning of Article 9 of the Treaty, arising in connection with what the Claimants consider to be their protected investments under the Treaty.

211. The fourth question set out in paragraph 207 above—whether the Treaty protects investments that were made in the Crimean Peninsula before the Russian Federation assumed responsibility for its international relations—is raised by the Respondent's correspondence to the Tribunal. [REDACTED]

[REDACTED]

[REDACTED]

212. [REDACTED]

213. This is a serious objection that, if accepted, would dispose of PrivatBank's claims comprehensively as all of its claimed investments were made before the Treaty became opposable to the Russian Federation in respect of the Crimean Peninsula on 21 March 2014. It is also material to ask whether what were "domestic" investments of the Claimants at the point at which they were initially made, *i.e.*, investments by Ukrainian investors in Ukraine, can properly be considered to have been internationalised and to have acquired the protection of the Treaty

220 [REDACTED]

221 [REDACTED]

through no action of the investors but only in consequence of the conduct of the Russian Federation in the Crimean Peninsula.

214. In essence, the Tribunal is faced here with a straightforward question of treaty interpretation: does the use of the phrase “invested . . . in the territory of the other Contracting Party” in Article 1(1) of the Treaty imply that the Claimants’ investments must have been made initially in the territory of the Russian Federation in order to be covered by the Treaty, or does the Treaty also cover investments that were made in territory in respect of which the Russian Federation has subsequently assumed responsibility for international relations? The former interpretation implies an additional temporal limitation, and thus a narrower scope of application of the Treaty, as compared to the latter, broader interpretation of the definition of “investment” under the Treaty.
215. The point of departure for the Tribunal’s analysis of this question is Article 31(1) of the VCLT, which requires the Treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose. It is according to this rule of interpretation that the Tribunal must determine which of the two possible interpretations is to be preferred.
216. In the Tribunal’s assessment, while acknowledging the weight of the Respondent’s objection (as here construed), the objection fails in the light of the construction of the relevant terms of the Treaty, in their context and in the light of the Treaty’s object and purpose. There are four essential reasons for this conclusion: (i) the proper reading of the text of Article 1(1) of the Treaty; (ii) a reading of Article 1(1) in the context of the Treaty as a whole; (iii) a reading of Article 1(1) in the light of the Treaty’s object and purpose; and (iv) the absence of any evidence of an intention to temporally constrain the Treaty’s definition of covered investments.
217. [REDACTED]
218. The Treaty was concluded in Russian and Ukrainian, both texts having equal force. Accordingly, the Tribunal must first consider the ordinary meaning of this phrase in those languages. [REDACTED]

[REDACTED]

219. On the basis of its own informed reading of the text, the Tribunal agrees with the explanation of Russian and Ukrainian grammar given by the Claimants. The Tribunal concludes that the Claimants' proposed addition of the bracketed "which are" in its English translation of Article 1(1) accurately reflects the fact that the imperfective aspect of the verb is used in the Russian and Ukrainian texts. However, the Tribunal is not convinced that this grammatical point fully resolves the question of the interpretation of Article 1(1). Read as stating that investments are ". . . assets [which are] invested . . . in the territory of the other Contracting Party," it is apparent that the provision does not obviously and expressly create any temporal limitation, but it appears also not to exclude this possible interpretation. An analysis of the context and the object and purpose of the Treaty remains necessary.

220. Turning to the wider context of the Treaty, an examination of the terms of the Treaty discloses a number of provisions that either have or do not have (actual or implicit) temporal dimensions that may shed light on the question of whether a temporal limitation ought properly to be read into Article 1(1) such that a nexus must be shown between the initial investment and the Contracting Party whose responsibility is invoked under the Treaty.

221. As a preliminary matter, the Tribunal observes that the finding of any such nexus would require the Tribunal to read language creating a nexus into the Treaty, given that the Treaty contains no

223 [REDACTED]

224 [REDACTED]

225 [REDACTED]

²²⁶ See *Lesson Six: Perfective and Imperfective Verbs*, National University of "Kyiv-Mohyla Academy" (CE-244); *Learn Russian: Aspects of Russian Verbs – Imperfective and Perfective*, RT (2012) (CE-213).

227 [REDACTED]

explicit language to this effect. The Tribunal considers that it should be cautious about reading words into the Treaty where none exist.

222. Beyond this, the Tribunal notes that four provisions of the Treaty have a bearing on the present analysis, including: (i) the concluding sentence of Article 1(1); (ii) the definition of the term “investor” in Article 1(2); (iii) Article 12 of the Treaty addressing its application; and (iv) Article 14(3) of the Treaty addressing the consequences of termination of the Treaty.
223. It is convenient to start with Article 12, which provides that “[t]his Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party on or after January 1, 1992.”
224. The material consideration here, from the Tribunal’s perspective, is that Article 12 contemplates expressly that the protections of the Treaty will apply to investments made not simply before the Treaty entered into force but some seven years before the Treaty was concluded. There is no necessary nexus, therefore, flowing from this provision, between the initial making of an investment and the Treaty’s signature or entry into force. It follows, in the Tribunal’s view, that the Contracting Parties were concerned to ensure that investments made in either Contracting Party in the immediate aftermath of the breakup of the Soviet Union were afforded the protections provided by the Treaty without regard to considerations of whether the Treaty was yet in force as between the Contracting Parties.
225. Importantly for the consideration of the Respondent’s objection, the terms of Article 12 suggest that the Contracting Parties contemplated that the protection of the Treaty would be given not only to those investors of a Contracting Party who initiated their investments in the territory of the other Contracting Party in the knowledge that they would be protected by the Treaty, and for whom this knowledge may have been a key factor in their decision to invest, but also—automatically and by operation of law—to those investors who had initiated their investment without such knowledge and whose investments were therefore clearly made irrespective of the availability of any protections at the international level. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

226. The Tribunal notes that, contrary to the terms of Article 1(1), and the formulation “invested by”, the verb “made” in Article 12 is used in the perfective aspect and in the past tense in the Russian and Ukrainian texts. This usage is essential to give Article 12 its temporal dimension. Given the reference in Article 12 to the making of investments “on or after January 1, 1992,” this provision would make neither grammatical nor logical sense if the imperfective form of the verb were used. The contrast between the verb usage in Article 12 and in Article 1(1) reinforces the conclusion that the latter provision does not expressly or impliedly require a temporal nexus between the time of making of the investment and its making in a particular territory. Where a temporal meaning is intended, the perfective aspect of the verb is used (Article 12). Where no such temporal meaning is intended, the imperfective aspect is used (Article 1(1)). Accordingly, the Tribunal would expect that if a temporal meaning were intended in Article 1(1) the perfective aspect would have been used, in application of the normal rules of Russian and Ukrainian grammar.
227. The Treaty’s coverage of pre-existing investments is mirrored by the terms, common to investment treaties, of Article 14(3), which provides that “[w]ith respect to investments made before the termination of this Agreement and covered by it, the provisions of all other Articles of this Agreement shall remain in force for the next ten years after that date.” As with Article 12, the evident intention behind Article 14(3) is to ensure to investors the protections of the Treaty for a settled period notwithstanding the termination of the Treaty. Once again, in the Tribunal’s view, this provision eschews formalism in the temporal application of the Treaty in favour of affording investors the protection of the Treaty.
228. More telling is the definition of the term “investor of a Contracting Party” in Article 1(2) of the Treaty which, both as regards natural persons having the citizenship of the state of a Contracting Party and as regards legal entities constituted in accordance with the legislation in force in the territory of a Contracting Party, contains no temporal requirement at all, such as would require an investor to be a citizen of a given Contracting Party, or an entity constituted in accordance with the laws of a given Contracting Party, at the point at which the initial investment was made. If there is no such requirement as regards an “investor of a Contracting Party”, it is difficult to see a sustainable rationale for reading such a requirement as regards the definition of the term “investment” in Article 1(1).
229. Finally, this assessment draws further support, in the Tribunal’s estimation, from the concluding sentence of Article 1(1) of the Treaty, which expressly contemplates the possibility of an “alteration of the type of investments” over time, providing that this “shall not affect their nature as investments.” In the Tribunal’s view, insofar as the Treaty provides for the continuing protections of the Treaty notwithstanding an alteration of the type of investment, this supports

the conclusion that the protections of the Treaty cannot be taken to lapse in consequence of some other alteration in the character of the investment, as long as the investment in question is in the territory of the Contracting Party whose responsibility under the Treaty is invoked, at the point at which that responsibility is said to have arisen, and provided that the claimant can satisfy the other requirements of the Treaty for a claim to be brought.²²⁹

230. In sum, the context of the Treaty as a whole discloses an overall intention to cover all qualifying investments, without regard to when or how such investments may have become qualifying investments under the Treaty. Simply put, given that the Treaty explicitly provides for the coverage of investments, notwithstanding that they (i) pre-date the conclusion or entry into force of the Treaty, (ii) have changed in their basic characteristics and form over time, and (iii) are held by investors whose nationality or capacity to invest has changed over time, the Tribunal does not consider that there could properly be read in to Article 1(1) language that would create an exception to such coverage on the basis of where an investment was initially made.
231. This observation takes the Tribunal to a consideration of the object and purpose of the Treaty. The object and purpose of a BIT will typically be two-fold: to provide protections to foreign investors and to attract foreign investment into the host State. This dual object and purpose is reflected in the title of the Treaty, which gives equal emphasis to the “protection” and “encouragement” of investments. It is also reflected in the Treaty’s preamble, which states that the Contracting Parties sought, on the one hand, to “create and maintain favorable conditions for mutual investments” and, on the other hand, to “create favorable conditions for the expansion of economic cooperation between the Parties.”²³⁰
232. In the case at hand, a finding by the Tribunal that Ukrainian investments made in the Crimean Peninsula before 21 March 2014 benefit from the protections of the Treaty is consistent with the investor protection objective of the Treaty. While care must be taken to avoid unduly elevating the objective of investor protection when construing the terms of an investment treaty,²³¹ the Tribunal considers that a finding that Ukrainian investments made in the Crimean Peninsula

²²⁹ The Tribunal notes that a similarly-worded provision in the US-Ecuador BIT has also been taken as evidence of those States’ intention to provide broad coverage in time to investments, and thus as reason not to read further temporal limitations into the definition of investments under that treaty. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2007-2, UNCITRAL, Interim Award of 1 December 2008, paras. 181-183.

²³⁰ Emphasis added.

²³¹ *European American Investment Bank AG (EURAM) v. Slovak Republic*, PCA Case No. 2010-17, UNCITRAL, Award on Jurisdiction of 22 October 2012, para. 326 (“... the object and purpose of the BIT is not such that it requires provisions which confer protection upon investors to be given the broadest possible interpretation in order to further the goal of investment protection. In particular, the Tribunal considers that it would not be justified in departing from the ordinary meaning of the terms of a definition provision on the basis that a more expansive definition of ‘investment’ would further what is only one of the objects of the BIT.”).

before 21 March 2014 are covered by the Treaty would be in keeping with the Treaty's dual object and purpose. As noted above, Article 12 clearly demonstrates that the Contracting Parties intended that investments that were made prior to the entry into force of the Treaty would nonetheless benefit from its protections.

233. Additionally, the Tribunal finds nothing in the context or object and purpose of the Treaty that would militate in favour of a narrower interpretation of Article 1(1). In fact, the Tribunal considers that if a temporal limitation—the requirement of a nexus between the investment and the Contracting Party whose responsibility is invoked under the Treaty at the time the investment was originally made—were read into Article 1(1), it would serve to exclude only investments in cases such as the present one involving territorial changes. The Tribunal can find no evidence in the Treaty or otherwise to suggest that the Contracting Parties intended to exclude such investments. Rather, as already detailed above, the context and object and purpose of the Treaty contain numerous indicia which contradict such an intention.
234. The preceding analysis turns on questions of treaty interpretation, *i.e.*, is focused on the interpretation of the terms of the particular treaty here in issue. The conclusion reached above is that there is nothing in either Article 1(1) or Article 9(1) of the Treaty that imposes a requirement that the investments that are the subject of the claims must, at the point of their initial investment, have been made in the Russian Federation. The same analysis leads the Tribunal to conclude that nothing in the Treaty suggests that investments which began as domestic investments and later became international investments should be denied coverage for this reason alone.
235. Although the present case is *sui generis*, the Tribunal draws support for the preceding analysis and conclusions from a wider review of investment treaty jurisprudence. In *OKO Pankki Oyj and others v. Estonia*,²³² for example, a threshold jurisdictional issue was whether investments made by Finnish and German investors between 1988 and 1990 in the Estonian Soviet Socialist Republic, *i.e.*, in Estonian territory then comprising part of the USSR, qualified as investments in Estonia following its independence in 1991 for purposes of the 1992 Estonia-Finland BIT and the 1997 Estonia-German BIT. The tribunal in that case concluded that there was an investment in Estonia for purposes of the BITs in question.²³³ While the circumstances of the present case are different from those of *OKO Pankki Oyj*, the latter award lends support to the conclusion that the character or sovereign status of the territory in which an investment was initially made will

²³² *OKO Pankki Oyj and Others v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007.

²³³ *OKO Pankki Oyj and Others v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007, paras. 182-183; also paras. 184-187.

not be controlling for purposes of deciding whether the investment is a qualifying investment under a BIT that subsequently affords investor protection rights to investors in that territory.²³⁴

236. Also affording some analogy, even if only indirect, is the case of *Pac Rim Cayman LLC v. El Salvador*, in which one of the preliminary issues was whether a claimant had to have the requisite nationality under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) at the point at which the investment was made or if such nationality could be acquired thereafter.²³⁵ The tribunal concluded that it “does not find in the text, object or purpose of CAFTA any indication that, in order to qualify for protection under the treaty, CAFTA requires an investor to have a Party’s nationality prior to making its investment.”²³⁶ In other words, the treaty “does not require any precise chronological order in the fulfillment of its requirements to quali[f]y an ‘investor of a Party.’”²³⁷ Unless otherwise established, the earliest date for purposes of the *ratione temporis* application of the treaty is the date at which the alleged violation occurred.²³⁸
237. While the analogy is imperfect, the Tribunal takes this decision as support for the proposition that, absent indication to the contrary, the relevant dates for purposes of assessing whether the factual predicates of a claim qualify for purposes of a BIT are the date of the alleged breach and the date on which the claim is brought. The date of the initial investment, assuming the investment to have been made within the temporal ambit of the treaty, will not be controlling. Ultimately,

²³⁴ For completeness, the Tribunal notes here the award in the case of *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, in which the tribunal drew a distinction between the question of the legality of an investment at the point of the initiation of the investment and legality during the performance of the investment. While this distinction was clearly material to the issue to be assessed in that case, *i.e.*, the question of whether the claimed investment was in compliance with the host State’s legislation in the face of an allegation of fraud in the making of the investment, the present Tribunal does not find this distinction, or the tribunal’s analysis in the *Hamester* case, to be germane for present purposes. The principal issue with which this Tribunal is faced is not the point in time at which an allegation of fraud is to be assessed but rather the question of whether the claimed investment can be a qualifying investment in circumstances in which it was initially made in the Crimean Peninsula prior to the date on which the Russian Federation assumed responsibility for the Crimean Peninsula’s international relations. In addition, the Tribunal notes that the decision in *Hamester* turned on the interpretation of specific English-language wording in the BIT in question.

²³⁵ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, para. 3.31.

²³⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 3.32.

²³⁷ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 3.33.

²³⁸ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 3.34.

this case is an illustration of the principle governing the critical date for the assessment of a tribunal's jurisdiction already set forth above.²³⁹

238. The Tribunal notes further that when arbitral tribunals have interpreted provisions of investment treaties defining the notion of “investment” to include temporal limitations, they have generally relied on the specific wording of those investment treaties.²⁴⁰ In that sense, the Tribunal adheres to the proposition—often repeated in respect of other controversial issues regarding the interpretation of investment treaties—that the interpretation of a treaty is specific to the treaty being interpreted, and that attention must be paid to the particular terms used and the meaning given by the Contracting States to that specific treaty's provisions.²⁴¹ This is the approach that the Tribunal has adopted with respect to the present Treaty. In the Tribunal's view, an analysis of the terms of the Treaty in its two authentic languages reveals no intention to imply a temporal constraint into the definition of “investment” under Article 1(1) that is not expressed in that provision. The Treaty does not require that, to qualify as an investment under the Treaty, the investment have been originally made as a Ukrainian investment in the territory of the Russian Federation. It suffices that a Ukrainian investment remain in the Crimean Peninsula after 21 March 2014 for it to be protected by the Treaty vis-à-vis the Russian Federation.
239. In summary, the Tribunal considers that its jurisdiction falls to be assessed on the date on which proceedings were instituted, having regard, as appropriate, to the circumstances in place on the date on which the violation is alleged to have occurred. The Tribunal does not see any explicit temporal limitation in Article 1(1) of the Treaty, and finds neither reason nor basis to read into that provision any such limitation by reference to the text, context or object and purpose of the Treaty. Nor does the Tribunal find support for such a limitation in investment-treaty

²³⁹ See paragraph 151 above.

²⁴⁰ See e.g. *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, paras. 126-127 (where the tribunal considered Article 10 of the Germany-Ghana BIT: “This Treaty shall also apply to investments made prior to [the treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.”).

²⁴¹ See for example in relation to whether most-favoured-nation provisions apply to the dispute settlement provisions of investment treaties, *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections of 20 March 2009, para. 90 (“It is undoubtedly fair to compare BITs for the purpose of assessing compliance with promises of MFN treatment given their congruent objective: the promotion and protection of investments. Yet such a general statement is insufficient to decide any particular case. It is a matter of the wording of the relevant instruments. This is one of the reasons awards under BITs are of variable relevance and value in subsequent cases.”); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, paras. 161-167; Study Group on the Most-Favoured-Nation Clause, Final Report, Annex to the Report of the International Law Commission, 70 UNGAOR Supp. No. 10, UN Doc. A/70/10 (14 August 2015), p. 182, paras. 162-163 (“The point is essentially one of party autonomy; the parties to a BIT can, if they wish, include the conditions for access to dispute settlement within the scope of coverage of an MFN provision. The question in each case is whether they have done so. In this sense, the question is truly one of treaty interpretation that can be answered only in respect of each particular case.”).

jurisprudence or practice. Accordingly, the Tribunal finds that the Treaty does not exclude from its protections investments that were made by Ukrainian investors in the Crimean Peninsula before the Russian Federation assumed responsibility for the international relations of the Crimean Peninsula and, thus, that PrivatBank's investments are not excluded from the scope of the Treaty's protections on the basis that there were initially made before 21 March 2014.

3. Whether the Claimants have complied with any notice or negotiation requirement of the Treaty

240. Pursuant to Article 9(1) of the Treaty, investor-State disputes are "subject to a written notice, accompanied by detailed comment," which the investor "shall send" to the host State, after which the parties to the dispute "shall endeavor to settle the dispute through negotiations if possible." Article 9(2) further provides that, "[i]f the dispute cannot be resolved in this manner within six months after the date of the written notice," it may be referred to arbitration.

241. The Treaty thus envisages that the dispute resolution process will begin with a formal written notification of the dispute by the investor to the host State followed by a period of six months dedicated to the attempt of reaching a negotiated solution, before arbitral proceedings can be commenced.

242. The purpose of the six-month period is to foster the conditions for amicable settlement.²⁴² It is not, however, to prevent an arbitration from proceeding where attempts at negotiation have been unsuccessful.

243. [REDACTED]

[REDACTED] That letter, which is summarized at paragraph 210 above, contained all the necessary elements to inform the Respondent of the existence of the dispute, its subject-matter and

²⁴² See e.g. *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award of 3 September 2001, paras. 185, 187 ("... the purpose of the waiting period, ... is to allow the parties to enter into good-faith negotiations before initiating arbitration."); *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, para. 315 ("... by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration.").

²⁴³ [REDACTED]

PrivatBank's intention to pursue the claims in arbitration if a negotiated solution could not be achieved.

244. [REDACTED]
[REDACTED]
[REDACTED] the Tribunal finds that the Claimants respected the six-month period provided by the Treaty for negotiations.

245. Additionally, the Tribunal finds that the Claimants made a good faith attempt to enter into negotiations with the Respondent. [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

246. However, having received this invitation to negotiate from the Claimants, the Respondent did not take any step to engage with them. [REDACTED]
[REDACTED] the Tribunal sees no reason to doubt that this was the case, as this attitude of the Respondent was borne out by its non-participation in the present proceedings.

247. On this basis, the Tribunal finds that the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty.

D. CONCLUSION

248. The threshold issue presented by this case is whether the Treaty between the Russian Federation and Ukraine affords rights opposable to the Russian Federation as regards Ukrainian investors in the Crimean Peninsula and, if so, from what date. Following on from the analysis above, it is the conclusion of the Tribunal that the Treaty is indeed opposable to the Russian Federation as regards Ukrainian investors in the Crimean Peninsula as of 21 March 2014.

244 [REDACTED]
[REDACTED]
[REDACTED]

245 [REDACTED]

249. Neither the geographic scope of application of the Treaty nor its juridical space changed with the events of February-March 2014 in the Crimean Peninsula. Neither Contracting Party to the Treaty took or has since taken any step to disavow, denounce, suspend or terminate the Treaty as a whole or as regards the Crimean Peninsula. The Treaty remains in force and continues to apply to investments in the Crimean Peninsula. Given these considerations, a conclusion that the Treaty no longer applies to conduct occurring in the Crimean Peninsula would be to denude the Treaty of effect and relieve the Contracting Parties of their obligation to perform the Treaty in good faith, contrary to the cardinal principle of *pacta sunt servanda*. It would be to create a legal void, a bubble, in the application of the Treaty in respect of the Crimean Peninsula that was never contemplated and should not be countenanced.
250. While there is no concordance of views between the Contracting Parties about the status of the Crimean Peninsula as a matter of international law, there is an intersection of the positions of the Contracting Parties as regards the Russian Federation's jurisdiction and settled, long-term control over the Crimean Peninsula. This translates into the responsibility of the Russian Federation for the international relations of the Crimean Peninsula. This intersection of positions emerges, on the side of the Russian Federation, from the constitutional steps it took, as a matter of Russian law, to incorporate the Crimean Peninsula into the Russian Federation and, on the side of Ukraine, from its legislation and its Non-Disputing Party Submission in these proceedings. The critical consideration is the emergence of settled, long-term control by the Russian Federation over the Crimean Peninsula which crystallised on 21 March 2014 when the Russian law incorporating the Crimean Peninsula into the Russian Federation was enacted.
251. After concluding that since 21 March 2014 the Russian Federation's Treaty obligations toward Ukrainian investors extend to the territory of the Crimean Peninsula, the Tribunal also considered in this Interim Award whether the Treaty's requirements for jurisdiction and admissibility have been met in the present case, such as to allow the Claimants to avail themselves of the Treaty's protection. The Tribunal found that: (i) there exists a dispute between the Parties arising in connection with the Claimants' claimed investments; (ii) PrivatBank's investments are not excluded from the scope of the Treaty's protections on the basis that they were initially made before 21 March 2014; and (iii) the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty.
252. Any and all other issues of jurisdiction and admissibility that may warrant consideration and decision are joined to the merits of the proceedings. In particular, the Tribunal defers to the next phase consideration of the issues of whether: (i) the Claimants are "investors" for the purposes of Article 1 of the Treaty, including in the light of PrivatBank's nationalization by Ukraine; (ii) the Claimants' "investments" fall within the definition of that term in Article 1(1); and (iii) the dispute between the Parties arose "in connection with" those investments.

VIII. DECISION

For the foregoing reasons, the Tribunal finds that:

1. the Russian Federation has assumed obligations under the Treaty in respect of Ukrainian investors and their investments in the Crimean Peninsula as of 21 March 2014;
2. there is a dispute between the Parties arising in connection with what the Claimants allege to constitute “investments” under the Treaty; and
3. the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty.

The Tribunal joins the consideration of all other issues of jurisdiction or admissibility to the merits of the proceedings and defers any decision on the costs of arbitration to the next phase of the arbitration.

Place of arbitration: The Hague, the Netherlands

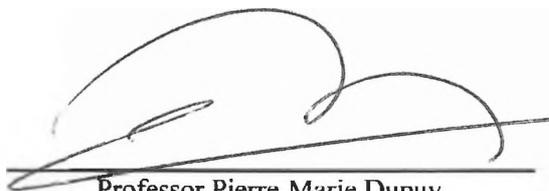
Date: 27 March 2017



Sir Daniel Bethlehem QC



Dr. Václav Mikulka



Professor Pierre-Marie Dupuy
(Presiding Arbitrator)