



**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. 2015-07

- between -

**(1) AEROPORT BELBEK LLC
(2) MR. IGOR VALERIEVICH KOLOMOISKY**

The Claimants

- and -

THE RUSSIAN FEDERATION

The Respondent

PROCEDURAL ORDER NO. 11

The Arbitral Tribunal

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

Registry

Permanent Court of Arbitration

21 December 2020

1. Procedural Background

- 1.1 On 24 February 2017, the Tribunal issued an Interim Award (the “**Interim Award**”) finding that: (i) the Respondent has assumed obligations under 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 the Claimants and their claimed investments in the Crimean Peninsula as of 21 March 2014; (ii) the Claimants are “investors” for the purposes of Article 1 of the Treaty; (iii) there is a dispute between the Parties arising in connection with what the Claimants alleged to constitute “investments” under the Treaty; and (iv) the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty. The Tribunal joined the consideration of all other issues of jurisdiction or admissibility to the merits of the proceedings.
- 1.2 On 4 February 2019, the Tribunal issued a Partial Award (the “**Partial Award**”) finding that: (i) the Tribunal has jurisdiction over the Claimants’ claims under the Treaty; (ii) the Claimants’ claims are admissible; and (iii) the Respondent has breached Article 5 of the Treaty in respect of the Claimants’ investment. The issue of compensation due in light of this finding of liability was deferred to a subsequent phase of the arbitration. Until the issuance of the Partial Award, the Respondent did not participate in these proceedings.
- 1.3 In correspondence dated 7 June, 3 July and 9 July 2019, the Respondent for the first time expressed its intention to participate in this arbitration. It requested that the Tribunal allow it to make written and oral submissions on jurisdiction, and, if the Tribunal’s jurisdiction is confirmed, give the Respondent an opportunity to raise objections in relation to the claim on the merits and quantum, including by way of an evidentiary hearing. By letters dated 21 June and 8 July 2020, the Claimants objected to all of the Respondent’s requests, save for its request to submit a written defense on issues of quantum.
- 1.4 In this respect, in its Procedural Order No. 8 dated 21 August 2019, the Tribunal denied the Respondent’s request for permission to make written and oral submissions on jurisdiction and the Respondent’s request to raise objections in relation to the Claimants’ claim “on the merits and quantum insofar as it seeks a reconsideration of the Tribunal’s finding in its Partial Award that the Respondent has breached Article 5 of the Treaty.” The Tribunal granted the Respondent’s request insofar as it “seeks an opportunity to make written submissions on the issues of compensation due in the light of the Tribunal’s finding of liability.” The Tribunal indicated that it would consider whether any further procedural steps were warranted after receiving the Parties’ written submissions on compensation.
- 1.5 In its Procedural Order No. 10 dated 12 September 2019, the Tribunal established a calendar for the filing of a Submission on Compensation by the Respondent, a Reply on Compensation by the Claimants and a Rejoinder on Compensation by the Respondent.
- 1.6 On 21 February 2020, the Respondent filed its Submission on Compensation (the “**Submission on Compensation**”), together with expert reports on quantum by Mr. Nikolay Nikolaevich Pichuev of AKG and Mr. Erik van Duijvenvoorde of Accuracy SAS. *Inter alia*, in Chapters 2 through 7 of its Submission on Compensation, the Respondent argued that it has no obligation to compensate the Claimants under the Treaty due to (i) the principle of reciprocity in the application of the Treaty; (ii) the exceptional circumstances of this case; and (iii) the fact that the assets for which the Claimants demand compensation are tainted by illegality.
- 1.7 On 21 May 2020, the Claimants submitted their Reply on Compensation (the “**Reply on Compensation**”), together with the fourth expert opinion on Ukrainian law of Mr. Glib Bondar and the third expert report on quantum of Mr. Brent C. Kaczmarek. In their Reply on

Compensation, the Claimants objected to the arguments set out in Chapters 2 through 7 of the Respondent's Submission on Compensation on the ground that they are "thinly disguised attempts to reargue decisions that the Tribunal has already made and that fall outside the scope of what is permitted by Procedural Order No. 8."¹ The Claimants asked the Tribunal to disregard Chapters 2 through 7 of the Submission on Compensation in their entirety.²

- 1.8 On 21 August 2020, the Respondent submitted its Rejoinder on Compensation (the "**Rejoinder on Compensation**"), together with expert reports on quantum by Mr. Pichuev, Mr. van Duijvenvoorde, and Mr. Mikhail Andriyanov of Andriyanov & Partner, and an expert report on Ukrainian law by Ms. Tetiana Lysovets. In response to the Claimants' objections, the Respondent argued that the Tribunal should fully consider the arguments set out in Chapters 2 through 7 of its Submission on Compensation, and "revisit any contrary findings and considerations in the Interim Award and/or Partial Award to the extent necessary."³
- 1.9 By letter dated 7 September 2020, the Tribunal invited the Parties to comment on whether any further procedural steps should be taken in these proceedings.
- 1.10 By letter dated 17 September 2020, the Claimants submitted that while possible further steps in these proceedings would be to update the Claimants' valuation report and to hold a hearing on compensation, neither of these two steps was necessary.
- 1.11 By letter dated 21 September 2020, the Respondent objected to the filing of an updated valuation report by the Claimants and requested an in-person hearing in order to elaborate orally on its written submissions, present its evidence through expert witnesses and cross-examine the Claimants' expert witnesses on issues including "(i) Claimants' radically changed positions on the applicability of a DCF method and Belbek Airport's going concern status, (ii) many material errors in Claimants' valuation that were not addressed by either Claimants or Mr. Kaczmarek, and (iii) various illegalities including that the Exchange Agreement concealed that the Adjoining Parcels were purchased in violation of the land moratorium."
- 1.12 By letter dated 2 October 2020, the Claimants reiterated their position that there is no need for an updated valuation or a further hearing. The Claimants also argued that if a hearing were held, it should not address item (iii) of the Respondent's letter of 21 September 2020, as the latter appears to be an attempt to reopen findings made in the Partial Award.
- 1.13 By letter to the Parties dated 23 October 2020, the Tribunal confirmed that there was no need for the Claimants to update their valuation of 30 September 2017, but that a further hearing on the matter would be of assistance, such hearing to be held at the earliest possible opportunity. In respect of the Parties' disagreement regarding the proper scope of this phase of the proceedings and of the hearing to be held, the Tribunal recalled its findings in Procedural Order No. 8 (set out at paragraph 1.4 above) and, for the avoidance of doubt, confirmed that it remained of the view "that the circumstances do not warrant reopening the proceedings in respect of issues of jurisdiction and liability ... [and that] [a]ccordingly, the only issues that will properly fall within the scope of the hearing are issues of compensation due in light of the Tribunal's finding of liability." Having regard to this decision, the Tribunal requested that (i) each Party submit a comprehensive list of the issues it wishes to address at the hearing; and (ii) the Parties confer in order to reduce the scope of any disagreements and, in case of a persisting disagreement, make brief submissions explaining why given issues do, or do not, properly fall within the scope of the hearing.

¹ Reply on Compensation, para. 3.

² Reply on Compensation, para. 4.

³ Rejoinder on Compensation, para. 49.

- 1.14 On 2 November 2020, the Parties submitted their respective replies to the Tribunal’s request for comprehensive lists of issues to be addressed at the hearing.
- 1.15 By separate letters dated 12 November 2020, the Parties reported on the areas of agreement and disagreement between them regarding the issues that properly fall within the scope of the hearing.

2. **The Tribunal’s Considerations and Ruling Regarding the Proper Scope of this Phase of the Proceedings and the Hearing**

- 2.1. The Tribunal defined the scope of the present phase of the proceedings in its Procedural Order No. 8, in the terms set out at paragraph 1.4 above. Notably, the Tribunal found that the circumstances did not warrant reopening the proceedings in respect of issues of jurisdiction and liability, which had already been decided in its Interim and Partial Awards. The Tribunal therefore allowed further written submissions only “in respect of the issues of compensation due in the light of the Tribunal’s finding of liability.” It left the question of whether to hold an oral hearing in respect of these issues to be decided at a later date.
- 2.2. In its letter of 23 October 2020, the Tribunal confirmed that, over a year after the issuance of Procedural Order No. 8, it remained of the view that the circumstances did not warrant reopening these proceedings in respect of issues of jurisdiction and liability. Having found that it would be of assistance to hold a further hearing in this matter, the Tribunal accordingly indicated that “the only issues that will properly fall within the scope of the hearing are issues of compensation due in light of the Tribunal’s finding of liability.”
- 2.3. The Tribunal reiterates and affirms its earlier findings, decisions and determinations, as just noted. In the light of these prior findings, decisions and determinations, the only remaining question for the Tribunal in respect of the scope of the present phase of the proceedings and the pending hearing is whether the subject-matters over which the Parties disagree are “issues of compensation due in light of the Tribunal’s finding of liability.”
- 2.4. In their respective letters of 12 November 2020, the Parties report their agreement that the amount of compensation owed to the Claimants by the Respondent as a result of the violation of Article 5 of the Treaty found by the Tribunal in its Partial Award properly falls within the scope of the hearing. The Parties also agreed that the hearing should encompass the cross-examination of the Parties’ quantum experts—Messrs. Kaczmarek, Van Duijvenvoorde, Pichuev and Andriyanov. The Tribunal agrees with the Parties’ assessment and confirms that the amount of compensation due to the Claimants properly falls within the scope of the present phase of the proceedings as defined in Procedural Order No. 8 and may accordingly form the subject of oral argument and witness examination at the upcoming hearing.
- 2.5. The Parties disagree, however, as to whether the following arguments raised by the Respondent properly fall within the scope of the hearing: (i) “[t]he exceptional circumstances of this case which result in a full or significant reduction in the amount of any compensation to be paid” (the “**Exceptional Circumstances Argument**”); (ii) “[t]he illegality of Claimants’ investments with the consequence that no compensation is payable in respect of such illegal investments, which fall to be excluded from the pool of compensable assets” (the “**Illegality Argument**”); (iii) “the consequences on the level of any compensation to be paid for the Claimants’ contributory fault or failure to mitigate their losses” (the “**Failure to Mitigate and Contributory Fault Argument**”); and (iv) “consequences on the level of any compensation to be paid to the Claimants as a result of Ukraine’s non-observance of the principle of reciprocity” (the “**Reciprocity Argument**”) (together, the “**Four Arguments**”).⁴

⁴ The Four Arguments are formulated as quoted here in the Respondent’s letter dated 12 November 2020.

- 2.6. In its letter of 12 November 2020, the Respondent asserts that, while “it is not asking the Tribunal to disturb its findings as to jurisdiction or liability,” each of its Four Arguments goes “to the amount of quantum payable, and therefore fall[s] naturally and entirely within the scope of a hearing on quantum.” This contention may be contrasted with the Respondent’s earlier submissions that the Tribunal’s jurisdictional findings were “preliminary” and ought to be revisited.⁵
- 2.7. The Claimants, for their part, in their letter of 12 November 2020, submit that all Four Arguments constitute an attempt by the Respondent to reopen matters of jurisdiction and liability decided in the Interim and Partial Awards.⁶ As some of the Four Arguments touch upon issues of Ukrainian law, the Parties also disagree as to whether their experts on Ukrainian law (Mr. Bondar and Ms. Lysovet) should be heard at the hearing.
- 2.8. The Tribunal addresses each of the Four Arguments below and its findings and determinations for the organization of the hearing.
- (i) *Preliminary Observations*
- 2.9. In its letter of 12 November 2020, the Respondent observes that, “[w]hile many of the [Four Arguments] *can be* of relevance to matters of jurisdiction and/or liability, they *also* are of direct relevance to matters of quantum alone. In other words, just because an issue can also go to jurisdiction and/or liability does not mean that it cannot equally go to quantum without first being presented at the jurisdiction and/or liability phases. [...] [P]re-existing findings of jurisdiction and liability (as the Tribunal has already made in the present case) do not necessarily preclude a consequent finding that no compensation is payable (an issue to which the Tribunal is yet to turn its mind).”⁷ The Respondent, further, refers to Article 15(1) of the UNCITRAL Arbitration Rules 1976 (the “**UNCITRAL Rules**”) and observes that it “has already been denied the opportunity to make arguments on threshold matters of jurisdiction and liability on the basis of substantive new factual evidence which has come to its attention [...] [a matter that] already forms the basis of a challenge to the existing Award at the seat of arbitration. Should Respondent also be denied the opportunity to raise argument relating to the remaining issues of quantum, especially when those arguments do not disturb the Awards, that too would render any subsequent award of damages susceptible to challenge.”
- 2.10. As will be evident from what follows below, the Tribunal has concluded that the Respondent should have the latitude to advance certain of the arguments that it contends go to the issue of the quantum of compensation due. This said, the Tribunal is also mindful, as the Respondent has noted and the Claimants have objected, that the issues that it seeks to raise under the guise of quantum arguments may also go to issues of jurisdiction and liability. In this regard, and having regard also to the Respondent’s allusion to Article 15(1) of the UNCITRAL Rules and its implied challenge to the Tribunal’s decision to reject its earlier application to re-open questions of jurisdiction and liability, the Tribunal recalls and reaffirms the careful analysis, findings and decisions set out not only in Procedural Order No. 8 but also in its Interim and Partial Awards (and other orders and decisions), going *inter alia* to the finality and binding nature of those Awards and to the absence of any sustainable reason in favour of the re-opening of those Awards. The Tribunal also rejects any suggestion that the Respondent has been disadvantaged procedurally, treated unequally, or denied a full opportunity of presenting its case at any stage of the proceedings. The careful reasoning of the Tribunal’s Interim and Partial Awards, and of

⁵ Rejoinder on Compensation, paras. 28-37, 42, 46, 48-49.

⁶ Claimants’ letter dated 12 November 2020, pp. 2-5.

⁷ Emphasis in the original.

Procedural Order No. 8, and the opportunity given to both Parties to make submissions about the scope of the quantum phase of the proceedings, attest to this. The Respondent's set aside application before the Dutch courts will be a matter to be addressed in those proceedings on which the Tribunal forbears from any comment.

- 2.11. This said, having in mind the potentially fine line between the Respondent's proposed arguments on the issue of quantum and off-limits questions of jurisdiction and liability, and the boundaries of the permissions that are granted below, the Tribunal underlines that the scope of the present phase of the proceedings, and of the forthcoming hearing, is strictly limited to the issue of quantum.

(ii) *The Exceptional Circumstances Argument*

- 2.12. The Respondent submits that the exceptional circumstances of the present case mandate that, notwithstanding the Tribunal's finding on liability, no or significantly reduced compensation should be paid to the Claimants.⁸ According to the Respondent, these exceptional circumstances are that (i) one of the Claimants has created a severe financial crisis in Crimea by freezing the bank accounts of hundreds of thousands of Crimean customers of the largest bank of Ukraine; (ii) one of the Claimants has had a clear anti-Russian agenda and financed a private military in other regions of Ukraine; and (iii) the regulatory and business environment where the Claimants operated has changed dramatically since 2014, calling into question the viability of Belbek Airport's business in the region.⁹
- 2.13. The Respondent relies on the case law of the European Court of Human Rights (the "ECtHR") to submit that "a total lack of compensation can be considered justifiable [...] in exceptional circumstances."¹⁰ According to the Respondent, the ECtHR has previously found that "major political transitions", such as nationalizations of distressed financial institutions and the reunification of a state, constitute exceptional circumstances justifying the absence of compensation.¹¹
- 2.14. The Claimants object that the Exceptional Circumstances Argument is "a thinly-veiled attempt to reopen the Tribunal's decision on liability," as the Respondent is essentially claiming that exceptional circumstances justify the measures it took against Belbek Airport, while the Tribunal has already found those measures to be unlawful.¹² The Claimants further argue that, in the ECtHR cases cited by the Respondent, the ECtHR discussed exceptional circumstances "in the context of its analysis of whether the respondent state had breached Article 1 of Protocol 1 to the [European Convention on Human Rights] (specifically, whether the interference with the applicants' property was 'proportional' to the legitimate aim allegedly pursued by the state), and not in its assessment of the reparation due after a finding of liability."¹³

⁸ Respondent's letter dated 12 November 2020, p. 6 (Annex 1).

⁹ Respondent's letter dated 12 November 2020, p. 6 (Annex 1).

¹⁰ Submission on Compensation, para. 57, referring to *The Holy Monasteries v. Greece*, ECtHR Cases Nos. 12092/87 and 13984/88, Judgment of 9 December 1994, para. 71 (RA-11); *Pressos Compania Naviera S.A. and others v. Belgium*, ECtHR Case No. 17849/91, Judgment of 20 November 1995, para. 38 (RA-12); *Zvolský and Zvolská v. Czech Republic*, ECtHR Case No. 46129/99, Judgment of 12 November 2002, para. 70 (RA-13); *Broniowski v. Poland*, ECtHR Case No. 31443/96, Judgment of 22 June 2004, para. 176 (RA-14).

¹¹ Submission on Compensation, paras. 58, 59, referring to *Jahn and others v. Germany*, ECtHR Cases Nos. 46720/99, 72203/01 and 72552/01, Judgment of 30 June 2005, paras. 117, 125 (RA-15); *Dennis Grainger and others v. United Kingdom*, ECtHR Case No. 34940/10, Decision of 10 July 2012, paras. 39, 42 (RA-16).

¹² Claimants' letter dated 12 November 2020, p. 2.

¹³ Claimants' letter dated 12 November 2020, p. 2.

- 2.15. The Tribunal notes that, according to the Respondent, it does not put forward its Exceptional Circumstances Argument as a means to reopening the Tribunal's decision on liability, but as an argument that can justify the denial or reduction of any compensation due to the Claimants. The Tribunal notes in particular the Respondent's assertion that a change in regulatory and business environment may have called into question the viability of Belbek Airport's business (presumably affecting its value). *Insofar as it is so circumscribed*, the Tribunal finds that the Exceptional Circumstances Argument *may* go to "issues of compensation due in the light of the Tribunal's finding of liability" and thus fall within the scope of the present phase of the proceedings as defined in Procedural Order No. 8 and, accordingly, of the upcoming hearing. The Respondent accordingly is granted permission to advance its Exceptional Circumstances Argument at the forthcoming hearing in terms that are carefully circumscribed to issues of quantum.
- 2.16. As regards the case law of the ECtHR cited by the Respondent, the Tribunal notes that, on a preliminary reading of these cases, exceptional circumstances were treated by the ECtHR as relevant to the question of State liability under Article 1 to Protocol 1 of the European Convention on Human Rights (which guarantees in substance the right of property),¹⁴ rather than to the question of compensation to be granted by the ECtHR if such liability were established. At the upcoming hearing, the Respondent will therefore be expected to address this question as well as how each of the specific arguments it puts forward as part of its Exceptional Circumstances Argument remain within the proper scope of the present phase.

(iii) *The Illegality Argument*

- 2.17. In its Illegality Argument, the Respondent submits that the Claimants are not entitled to compensation for the assets for which they claim compensation as these assets were acquired and operated in violation of Ukrainian law.¹⁵ The Respondent argues that the Illegality Argument is relevant to quantum as the "violation of domestic law within the acquisition of investments creating flaws in the legal title to investment has pecuniary consequences on the value of such investments and increases the risk of the lawful seizure which must be taken into account [in the valuation of those investments]."¹⁶ The Respondent also argues that it is the standard approach of investor-State tribunals to reduce compensation payable to investors based on their misconduct or lack of diligence.¹⁷
- 2.18. The Claimants object that the Illegality Argument is an issue of jurisdiction, which has already been addressed in the Partial Award, and therefore falls outside the proper scope of the hearing.¹⁸
- 2.19. The Tribunal notes that, in its Partial Award, it already considered and decided the question of the legality of the Claimants' investments insofar as this was relevant to determining that the Claimants held investments within the meaning of Article 1(1) of the Treaty.¹⁹ This determination may not be reopened at this stage.²⁰

¹⁴ Specifically, in considering the "fair balance" between the protection of private property and the public interest, the ECtHR has found that in exceptional circumstances a taking of property by the State without compensation will be lawful under Article 1 of Protocol 1 of the Convention.

¹⁵ Respondent's letter dated 12 November 2020, p. 7 (Annex 1).

¹⁶ Respondent's letter dated 12 November 2020, p. 7 (Annex 1).

¹⁷ Respondent's letter dated 12 November 2020, pp. 7, 8 (Annex 1), referring to *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, paras. 242, 243.

¹⁸ Claimants' letter dated 12 November 2020, p. 3.

¹⁹ See Partial Award, paras. 219-240.

²⁰ In this respect, the Tribunal notes that, in its Submission on Compensation, the Respondent contended that the Claimants' assets "do not qualify as protected investments under the Treaty" (para. 159), and that, in its Rejoinder on Jurisdiction, the Respondent argued that the Tribunal's jurisdictional reasoning on legality was "preliminary" (para. 48).

2.20. This said, the Tribunal considers that issues of legality of the investment may be relevant to issues of the quantum of compensation due, following its finding of liability, *insofar as they may go to an assessment of the value of the Claimants' investment (as already found by the Tribunal) or, possibly, as part of a contributory fault argument*. Subject to the firm direction that any submissions by the Respondent on this head of argument are directed *only* to the issue of the quantum of compensation due, the Tribunal gives permission for the Respondent to pursue its Illegality Argument in the course of the forthcoming hearing.

(iv) *The Failure to Mitigate and Contributory Fault Argument*

2.21. The Respondent argues that the Claimants' contributory fault, consisting of Mr. Kolomoisky's support and funding of unlawful paramilitary activities in Eastern Ukraine, PrivatBank's freezing of depositors' assets as well as illegalities in the acquisition and operation of the Claimants' investments, must be taken into account when determining the amount of compensation due.²¹ It also argues that the Claimants' failure to mitigate their damages by asserting their rights "through domestic legal remedies" is relevant to the question of compensation.²²

2.22. The Claimants submit that the Respondent's contributory fault argument is "simply a repackaging of [the Respondent's] allegation of wrongful conduct/exceptional circumstances and illegality," while its mitigation argument is precluded by the Tribunal's finding in its Partial Award that "the Respondent rejected the Claimants' attempts to resume operation of the airport or to sell it and failed to provide any meaningful avenue through which the Claimants could be heard or pursue a claim in respect of their dispossessed interest in the Belbek Airport."²³

2.23. The Tribunal considers that arguments regarding contributory fault and an alleged failure to mitigate loss go, potentially, both to the question of the *causation* of loss and damage *and* to the question of the quantum of any such loss or damage. Given this, the Tribunal finds that the Respondent's Failure to Mitigate and Contributory Fault Argument properly falls within the scope of the present phase of the proceedings as defined in Procedural Order No. 8 and, accordingly, of the upcoming hearing, *insofar as it goes to issues of the quantum of compensation due in the light of the Tribunal's finding of liability*. The Respondent is once again directed to ensure that its submissions on this issue remain clearly directed to the issue of quantum.

(v) *The Reciprocity Argument*

2.24. The Respondent's Reciprocity Argument consists of its contention that, given the reciprocal and interdependent nature of the Contracting Parties' obligations under the Treaty, it "is not bound by the obligation to compensate under the [Treaty] in respect of alleged Ukrainian investments in Crimea in circumstances where Ukraine denies, in effect, that the Treaty applies in Crimea."²⁴ The Respondent also submits that, under public international law, a "breach by one contracting party entitles the corresponding party to refuse performance"²⁵ and that the principle of *exceptio non adimpleti contractus* applies "even at the stage of determining or enforcing reparation."²⁶ In contrast, the Claimants object that the Reciprocity Argument is "squarely one of jurisdiction,

²¹ Submission on Compensation, paras. 271-274; Respondent's letter dated 12 November 2020, p. 8 (Annex 1).

²² Respondent's letter dated 12 November 2020, pp. 8, 9 (Annex 1), referring to *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages of 10 January 2019, para. 204; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, para. 80.

²³ Claimants' letter dated 12 November 2020, p. 3, referring to Partial Award, para. 284.

²⁴ Respondent's letter dated 12 November 2020, p. 9 (Annex 1).

²⁵ Submission on Compensation, para. 19.

²⁶ Respondent's letter dated 12 November 2020, p. 9 (Annex 1).

which the Respondent has made a centerpiece of its pending application to The Hague Court of Appeals to set aside the Tribunal's awards."²⁷

- 2.25. The Tribunal considers that the Reciprocity Argument is properly characterized as a question of either jurisdiction or liability, but not of compensation. It concerns the question of whether or not in the current circumstances the Respondent has obligations under the Treaty toward Ukrainian investors in the Crimean Peninsula, rather than of any issue of compensation due in the light of the Tribunal's finding of liability. This argument, therefore, cannot be considered at this stage of the proceedings without reopening the Tribunal's findings in its Interim and Partial Awards, in particular its finding in the Interim Award that the Respondent has assumed obligations under the Treaty in respect of the Claimants and their claimed investments in the Crimean Peninsula as of 21 March 2014, and its finding in the Partial Award that the Respondent has breached those obligations.
- 2.26. The Tribunal understands that the Reciprocity Argument is currently being put forward by the Respondent in the set aside proceedings before the Dutch courts under the jurisdictional heading "Absence of a valid arbitration agreement."²⁸ This further attests to its jurisdictional character.
- 2.27. Accordingly, the Tribunal finds that the Reciprocity Argument falls outside the scope of the present phase of the proceedings as defined in Procedural Order No. 8 and, accordingly, of the upcoming hearing.

(vi) *Conclusion*

- 2.28. As noted at paragraph 2.4 above, the Tribunal confirms that the amount of compensation owed to the Claimants by the Respondent as a result of the violation of Article 5 of the Treaty found by the Tribunal in its Partial Award properly falls within the scope of the present phase of the proceedings as defined in Procedural Order No. 8, and may accordingly form the subject of oral argument and witness examination at the upcoming hearing.
- 2.29. Subject to directions given above defining and restricting the scope of the arguments that may be advanced under each head in terms that are carefully circumscribed to issues of quantum, the Tribunal finds that (i) the Exceptional Circumstances Argument, (ii) the Illegality Argument, and (iii) the Failure to Mitigate and Contributory Fault Argument fall within the scope of the present phase of the proceedings, and that the Respondent is therefore given permission to advance those arguments within the indicated parameters. The Tribunal will pay particular attention to compliance by both sides with settled issues of jurisdiction and liability. Any endeavor by either side to revisit issues of jurisdiction or liability via their arguments on the quantum of compensation due will not be permitted.
- 2.30. The Tribunal finds that the Reciprocity Argument falls outside the scope of the present phase of the proceedings as defined in Procedural Order No. 8 and, accordingly, of the upcoming hearing.
- 2.31. Given that the Illegality Argument and the Failure to Mitigate and Contributory Fault Argument give rise to questions of Ukrainian law, each Party, should it wish to do so, may call the other Party's expert on Ukrainian law for cross-examination at the hearing.
- 2.32. Each Party is requested to notify the other Party and the Tribunal of the witnesses it wishes to call for cross-examination at the hearing by **Monday, 4 January 2021**. The Parties are then requested

²⁷ Claimants' letter dated 12 November 2020, p. 4.

²⁸ See Annex 2 to the Respondent's letter dated 7 June 2019.

to confer and, by **Monday, 18 January 2021**, either jointly submit an agreed schedule to the Tribunal, or make brief separate submissions regarding any remaining areas of disagreement.

Date: 21 December 2020

Place of Arbitration: The Hague, the Netherlands



On behalf of the Tribunal
Professor Pierre-Marie Dupuy
Presiding Arbitrator