DISSENTING OPINION OF PROFESSOR DR. MAJA STANIVUKOVIĆ

1. PRELIMINARY CONSIDERATIONS

1.1. Introduction

1. The Partial Award addresses two principal issues: jurisdiction of the Tribunal 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 (the "BIT"), as well as the Respondent's liability for breaches of the BIT by actions undertaken against the Claimants' investments in the period from 27 February to 30 April 2014. The majority has found that it has jurisdiction and that the Respondent bears liability for breaches of the BIT. I regret that I am unable to join my colleagues in their decisions for the reasons that will be explained below.

1.2. The nationalization

2. The facts of the case have been outlined in ¶¶ 1-12 and ¶¶ 81-97 of the Partial Award. What follows is a brief recount of the relevant acts of nationalization as described by the Claimants.[1]

3. In early March 2014, within a week of assuming control of Crimea, the Russian Federation, according to the Claimants, launched a methodical scheme to expropriate Ukrainian-owned property in Crimea, including Naftogaz's property.[2]

4. The Crimean authorities, under the direction of the Russian Federation,[3] began with an attempt to change Chornomornaftogaz's management. Specifically, on 3 March 2014, Crimean Prime Minister Aksyonov issued Order No. 66-rp naming Andrey Ilyin as Chornomornaftogaz's new Chairman, in place of Sergiy Holovin.[4]

5. On 6 March 2014, the Crimean authorities began making public statements about their intention to seize Ukrainian state-owned assets, including Naftogaz's assets.[5] These statements are quoted in ¶¶ 101 and 102 of the Partial Award.

---

1 *See also* ¶¶ 98-125 of the Partial Award.
2 AmSOC, ¶ 35.
3 AmSOC, ¶¶ 5 and 58.
4 AmSOC, ¶ 48.
5 AmSOC, ¶ 52.

6. On 13 March 2014, Crimean Prime Minister Aksyonov issued Order No. 110-rp, which appointed a new Chairman of Chornomornaftogaz, Nikolay Kharitonov, who was to replace Andrey Ilyin. Crimean Deputy Prime Minister Temirgaliev appeared that day with Nikolay Kharitonov at Chornomornaftogaz's headquarters building in Simferopol to implement the order, accompanied by men armed with submachine guns.[6]

7. On 15 March 2014, the Ukrainian Parliament stripped the Crimean Parliament of its powers.[7]

8. On 16 March 2014, the Crimean Parliament held a referendum on Crimea's independence.

9. On 17 March 2014, the Parliament of the Republic of Crimea issued Resolution No. 1745-6/14 (the "Independence Resolution") declaring that a Republic of Crimea was an independent sovereign state.[8] The Resolution nationalized the state property of Ukraine, located in the territory of the Republic of Crimea on the date the resolution was adopted.

10. The Independence Resolution transformed all enterprises and other organizations established by Ukraine, or with its participation in the territory of Crimea into enterprises and organizations established by the Republic of Crimea.[9] The Resolution stated that it was effective from the date of adoption.[10]

11. Paragraph 2 of the Independence Resolution provided, among other things, that Ukrainian legislation adopted on or before 21 February 2014 would apply in the territory of the Republic of Crimea, except to the extent it was superseded by enactments of organs of the Republic of Crimea.

12. In Resolution No. 1758-6/14 (the "Nationalization Resolution"), issued on 17 March 2014, the Parliament of the Republic of Crimea nationalized "the movable and immovable property" of both Chornomornaftogaz and Ukrtransgaz "that is located in the territory of the Republic of Crimea, its continental shelf and exclusive (maritime) economic zone," declaring

---

6 AmSOC, ¶ 60.
7 First Paliashvili Report, ¶ 132.
8 AmSOC, ¶ 65.
9 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 6, 17 March 2014 (**CE-199**).
10 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 9, 17 March 2014 (**CE-199**).

it now "the property of the Republic of Crimea."[11] The Resolution stated that it was effective from the date of adoption.[12]

13. The Nationalization Resolution authorized the Council of Ministers of the Republic of Crimea to form a new Republic of Crimea-owned enterprise, called the "Crimean Republican Enterprise 'Chernomorneftegaz'" (the "Russian Chernomorneftegaz"), to which Chornomornaftogaz's and Ukrtransgaz's nationalized property was to be transferred. This property included Chornomornaftogaz's permits for subsoil use.[13]

14. The authorization was implemented on the same day, when the Ministry of Fuel and Energy of the Republic of Crimea issued Order 1, which approved the charter of the Russian Chernomorneftegaz and appointed Nikolay Kharitonov as its General Manager.[14]

15. On 17 March 2014, by Decree No. 147, the President of the Russian Federation recognized the Republic of Crimea as an independent state.[15]

16. On 18 March 2014, the Russian Federation and the Republic of Crimea executed a treaty on the admission of the Republic of Crimea into the Russian Federation (the "Treaty on Admission").[16] The Treaty on Admission stated that it was provisionally applicable from the date of its execution, 18 March 2014. It also set forth that the Republic of Crimea "is deemed to have been admitted to the Russian Federation from the date of the signing of this treaty [*i.e.*, 18 March 2014]."[17]

17. The Treaty on Admission established a transitional period until 1 January 2015, during which legal rights and duties in the Republic of Crimea would be integrated into the Russian legal system.[18] It further provided that the legislative and other normative legal acts of the

---

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

[12] State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 6, 17 March 2014, (**CE-202**). *See* ¶¶ 108 and 109 of the Partial Award for a brief description of the content of the Resolution.

[13] AmSOC, ¶ 68.

[14] AmSOC, ¶ 69.

[15] President of the Russian Federation, Edict No. 147, 17 March 2014 (**CE-205**).

[16] Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, 18 March 2014 (**CE-224-Am**), referred to as the *Annexation Treaty* in the Glossary of Defined Terms and Abbreviations.

[17] Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 1.1, 18 March 2014, (**CE-224-Am**).

[18] Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 6, 18 March 2014 (**CE-224-Am**).

Russian Federation shall be in effect from the date of the Republic of Crimea's admission to the Russian Federation.[19] Article 9(2) of the Treaty on Admission confirmed that the normative legal acts of the Republic of Crimea remained in effect until the end of the transitional period.

18. On 21 March 2014, the Federal Assembly of the Russian Federation ratified the Treaty on Admission. Then, on 21 March 2014, it adopted the Federal Constitutional Law 6-FKZ (the "Law on Admission") to admit both the Republic of Crimea and the Federal City of Sevastopol into the Russian Federation, effective from the date of signing of the Treaty on Admission, being 18 March 2014.[20]

19. Like the Treaty on Admission, the Law on Admission provided for a transitional period that was to run until 1 January 2015, during which "issues of integration of the new constituent entities of the Russian Federation into the economic, financial, credit and legal systems of the Russian Federation, and into the system of state bodies of the Russian Federation, shall be resolved." Finally, like the Treaty on Admission, the Law on Admission confirmed the validity of normative legal acts of the Republic of Crimea.[21] This included the Resolutions adopted on 17 March 2014 by the Republic of Crimea.

20. Other decrees of the State Council of the Republic of Crimea further implemented the taking of state property seized by Resolution 1745 (the Independence Resolution). For example, Resolution No. 2032-6/14 of the State Council of the Republic of Crimea of 11 April 2014 clarified that the gas-supply system of the Republic of Crimea operated by Krymgaz, the lease agreements between Krymgaz and NJSC Naftogaz for gas pipelines and other structures, and all other facilities of the gas-supply system in Crimea, including facilities constructed with the financial participation of NJSC Naftogaz, were the property of the Republic of Crimea, and assigned economic management of such property to the Crimean Republic Enterprise for the Operation of Pipelines and Networks.

21. Resolution No. 2032/6-14 cancelled all of Krymgaz's financial obligations to NJSC Naftogaz, including lease payment and loan payment obligations owed by Krymgaz.[22] It also

---

19 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 9.1, 18 March 2014 (**CE-224-Am**).

20 AmSOC, ¶ 75.

21 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 9, 18 March 2014 (**CE-224-Am**).

22 AmSOC, ¶¶ 90 and 174. First Stephan Report, ¶ 90.

prevented payment for gas deliveries and payment of dividends by Krymgaz and Sevastopolgaz to their shareholder, Naftogaz.[23]

22. On the same day, Resolution No. 2033-6 amended Resolution 1758 (the Nationalization Resolution) to clarify that the facilities of the Crimean gas pipeline system in state ownership or transferred for use by NJSC Naftogaz were the property of the Republic of Crimea. By nationalization of the gas pipeline system, of which the Hlibovske underground gas storage facility was part, NJSC Naftogaz was also deprived of the value of the gas it had stored in that facility.[24]

23. Another resolution, Resolution No. 2045-6/14 of the State Council of the Republic of Crimea of 11 April 2014, specifically nationalized the "Pivdennyi" resort complex "maintained"[25] in Crimea by Ukrgasvydobuvannya.[26]

24. Resolution No. 2085-6/14 of the State Council of the Republic of Crimea of 30 April 2014 provided that, during the period of legal transition established by Article 6 of the Treaty on Admission and the Law on Admission, Ukrainian state property and property abandoned by other owners would become the property of the Republic of Crimea. It further authorized the Crimean Council of Ministers *to identify and perfect* the Republic of Crimea's rights in this property, and authorized the Crimean Council of Ministers to reorganize and liquidate state enterprises and other legal entities that managed state property or property under the control of state organizations.[27]

1.3. Scope of jurisdiction

25. Article 9(1) of the BIT defines the scope of the disputes that may be submitted to an arbitral tribunal constituted under its terms, namely "[a]ny 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."[28]

---

23 AmSOC, ¶ 174.
24 Tr., 108:17-20.
25 This resort seems to have been in state ownership *see* AmSOC, ¶ 92.
26 First Stephan Report, ¶ 92.
27 First Stephan Report, ¶ 94.
28 Russia-Ukraine BIT (**CLA-99/CLA-169**).

1.4. Limits to jurisdiction

26. The clause defining the scope of disputes contained in Article 9(1) is broad. However, the terms "investments" and "investor of a Contracting Party" are defined in Article 1 of the BIT, and place limits on the jurisdiction of the Tribunal.

27. Article 1(1) of the BIT defines "investments" as "any kind of tangible and intangible assets [which are][29] invested *by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation*." (emphasis added).

28. Article 1(2) of the BIT defines "investor of a Contracting Party" as "…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."

29. Article 12 also limits the jurisdiction of the Tribunal, because the BIT, including Article 9, applies "to all investments made *by investors of one Contracting Party in the territory of the other* Contracting *Party*, on or after January 1, 1992." (emphasis added).

1.5. The issue of the lawfulness of the incorporation of Crimea into the territory of the Russian Federation

30. The majority accepts the Claimants' argument that, in order to resolve the question of jurisdiction, the Tribunal does not have to assess the legality of the incorporation of Crimea into the territory of the Russian Federation.[30] However, the applicability of various rules of international law to issues relevant to jurisdiction depends entirely on the nature of these events; *i.e.*, whether they were occupation/annexation or the lawful separation of a territory from one State and accession to another State. The lawfulness or unlawfulness in international law of the events taking place in Crimea in February-March 2014 and afterwards is part of the context and provides the necessary background for interpretation of the BIT:

> Subpara. 3(c) [of Article 31 of the VCLT] envisages treaty interpretation against the whole background of international law. Thus, the meaning of a treaty term will correspond with **any relevant rules**

[29] Although the words that appear in the brackets are not so marked in the translation of the BIT provided by the Claimants, other Tribunals have established on the basis of expert evidence, that the words "which are" are actually not to be found in the original Ukrainian and Russian text. *See Belbek*, ¶ 232 (**CLA-3**); *Everest - Jurisdiction*, ¶ 143 (**CLA-29**); *Ukrnafta*, ¶ 211 (**CLA-50**).

[30] Partial Award, ¶ 1, footnote 5 and ¶ 161. AmSOC, ¶ 137; Claimants' Answers, ¶ 42.1.

> **of international law applicable in the relations between the parties.**[31] (emphasis in the original)

31. The principle of "systemic integration" reflected in Article 31(3)(c) VCLT means that the interpretation of the terms used in the BIT requires that the other rules of international law applicable in the relations between the parties to the BIT be taken into account. For that reason, when interpreting the BIT, it is not possible to avoid the question of the lawfulness of Russia's actions with regard to Crimea under international law – the Tribunal must take a position on this issue either expressly or tacitly.

32. The use of the words "occupation" and "annexation" by the Claimants for events that happened in Crimea in February-March 2014[32] suggests the unlawful nature of Russian acts in international law. The majority of the Tribunal has accepted those terms in the Partial Award, thereby tacitly defining the character of the Russian presence in Crimea.[33] Yet, if the Russian presence in Crimea was unlawful under international law in the relevant period, Crimea was not and could not be considered the territory of the Russian Federation at such time.

1.6. The relevant moment for establishing jurisdiction

33. In international dispute resolution, the general rule is that jurisdiction must exist on the date when the proceedings are instituted. In UNCITRAL arbitration too, the date when the investor commenced arbitration is decisive for the tribunal's determination of whether it has jurisdiction. In this case, the arbitration was commenced on 17 October 2016, which is therefore the date on which jurisdiction needs to exist. Since the Tribunal's jurisdiction is based on the BIT, the BIT must: (i) be in force between Ukraine and the Russian Federation on that date; and (ii) be applicable to Crimea as the Russian territory on that date, or, if it was terminated, be applicable pursuant to a sunset provision.

34. There is a further limitation on temporal jurisdiction in general international law which is the existence of the substantive obligation on which the claim is based. This intertemporal

---

31 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 432.

32 *See, e.g.*, First Paliashvili Report, ¶ 4: "I have been instructed to express an opinion about the above issues from the beginning of the Russian Federation's occupation of the Autonomous Republic of Crimea on 20 February 2014 until the Russian Federation's purported annexation of the Autonomous Republic of Crimea on 18 March 2014."

33 The majority of the Tribunal uses terms that imply the unlawfulness of the incorporation, such as "Annexation Treaty" for the Treaty on the Admission of the Republic of Crimea to the Russian Federation of 18 March 2014 (**CE-224-Am**), "the annexation process" in ¶¶ 86 and 226, "annexation" (in various paragraphs including ¶¶ 176-180, 197, 222, 224, 225, 258, 264, and "annexed" in ¶ 192, as well as "occupation" (in various paragraphs, including ¶¶ 168-179, 208, 222 and 258 "occupying forces" in ¶ 180, and "invasion" in ¶¶ 85, 176, 263 and 264.

rule holds that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[34] It is a general principle of international law that "[u]nless otherwise indicated…any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it."[35]

35. Consequently, the Tribunal needs to assess the factual predicates of the claim in light of contemporaneous law binding on the Respondent at the time of the alleged breach.[36]

36. In the present dispute, the Claimants argued that the breach of the BIT took place in the period between 3 March and 30 April 2014. In order to establish jurisdiction, the Tribunal had to find that the Respondent had international obligations towards the Claimants under the BIT in that period.[37] This is acknowledged by the Claimants:

> The Tribunal assesses its jurisdiction as of the date the proceedings are commenced, having regard for the facts and circumstances on the ground at the time of the alleged breach. So, for example, […] the Tribunal is assessing its jurisdiction as of the date the proceedings were commenced. The Tribunal would still need to look back to February and March 2014 to assess whether the bilateral investment treaty between the Russian Federation and Ukraine applied in respect of Ukrainian investments in Crimea at the time that the breach occurred.[38]

2. THE APPLICABILITY OF THE BIT

2.1. Whether the BIT is in force as of the date of commencement of the arbitration

37. The BIT was signed on 27 November 1998 and entered into force on 27 January 2000 for a period of ten years. It was automatically renewed for a period of five years, *i.e.*, until 27 January 2015. Considering the events that have taken place in March 2014, which defined by the Claimants as the occupation and annexation of Crimea, it is proper to examine the question of whether the BIT was still in force between the parties on 17 October 2016 when the arbitration commenced.

---

34 Judge Huber in the *Island of Palmas* arbitration. Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4 April 1928, Permanent Court of Arbitration.

35 Institut de Droit International: Resolution on the Intertemporal Problem in International Law, Session of Wiesbaden, 1975, Rapporteur Mr. Max Sorensen, ¶ 1. *See also Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 85.

36 *Belbek*, ¶ 250 (**CLA-3**).

37 Tr., 276:23-25 (Claimants: "Well, we think the Russian Federation needs to have obligations under the treaty on the date that it breached those obligations").

38 Tr., 277:18 et seq.

38. The general principle of international law is that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between the parties to the conflict.[39] A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other State Party or States Parties to the treaty of such intention.[40]

39. In this case, neither the Russian Federation nor Ukraine has taken any step to suspend or terminate the BIT either as a whole or for the territory of Crimea.[41] Therefore, the BIT is still in force, including its provisions on dispute resolution.

2.2. Whether Crimea can be considered to be "the territory of the Russian Federation" at the date of commencement of the arbitration and at the time of the alleged breach

40. Since the Claimants are Ukrainian companies that invested in the territory of Crimea, to establish jurisdiction they need to prove that Russa had international obligations towards the Claimants under the BIT. To do this, they must show that Crimea was the territory of the Russian Federation both at the date of the commencement of the arbitration (17 October 2016) and at the time of the alleged breach, *i.e.*, in the period between 3 March and 30 April 2014.

41. At the time of of the BIT's entry into force, the territory of Ukraine included the territory of Crimea. Ukraine had international obligations towards Russian investors in Crimea pursuant to the BIT, whereas the Russian Federation had no obligations towards Ukrainian investors in Crimea. In March 2014, the Republic of Crimea and the city of Sevastopol declared independence from Ukraine and were admitted to the Russian Federation. The question is whether, with that admission, the territory of Crimea has become the territory of "the other Contracting Party" within the meaning of the BIT, such that the Russian Federation acquired international obligations towards Ukrainian investors in Crimea pursuant to the same BIT in March 2014 while Ukrainian obligations towards Russians investors in this territory ceased.

42. The answer to this question depends on interpretation of the meaning of the terms "territory of the Russian Federation" and "territory of Ukraine" in Article 1(4) of the BIT.

---

[39] International Law Commission, *Draft Articles on the Effects of Armed Conflict on Treaties, with Commentaries*, Art. 3.

[40] International Law Commission, *Draft Articles on the Effects of Armed Conflict on Treaties, with Commentaries*, Art. 9(1).

[41] *Belbek*, ¶ 201 (**CLA-3**); *Ukrnafta*, ¶ 133 (**CLA-50**).

43. The term "territory" appears seventeen times in the BIT.[42] It is defined in Article 1(4) of the BIT in the following manner:

> 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.[43]

44. The Claimants' position on the interpretation of "territory" is outlined in ¶¶ 149-158 of the Partial Award. The essence of that argument is that the definition of "territory of the Russian Federation" under the BIT is broad and encompasses "all territory over which the Russian Federation exercises effective control and jurisdiction, regardless of whether such territory is the sovereign territory of the Russian Federation."[44]

45. The Claimants' argument was addressed by the majority in ¶¶ 161-182 of the Partial Award. The majority has stated that "the plain terms of the BIT can be applied in their ordinary meaning to the situation in Crimea and Sevastopol".[45] With regard to the term "territory", the majority cites from the International Law Commission Commentary on the VCLT, Article 29, stating that "Article 29 does not reference either 'sovereignty' or the 'lawfulness' of occupation and control as relevant considerations."[46] Thus, the majority of the Tribunal concludes that the term "territory" in the BIT should be interpreted as *de facto* rather than *de jure* territory.[47] It is enough, according to the majority, that the Russian Federation "exercised physical control and jurisdiction and asserted sovereignty over Crimea" for this territory to be considered the territory of the Russian Federation under the BIT, even if such effective control and jurisdiction was unlawful under international law.[48] I find this reading of the term "territory" to be incompatible with international law.

2.2.1. Ordinary meaning

46. A term used in a treaty may have a number of meanings, which may change over time.[49] Thus, the term territory can certainly have different meanings and may be interpreted in

---

42 The term "territory" appears eight times in Art. 1, and once in each of Arts. 2-9 and 12 of the BIT.
43 Russia-Ukraine BIT (**CLA-99/CLA-169**).
44 Notice of Arbitration, ¶ 56; AmSOC, ¶ 111 (preceding title).
45 Partial Award, ¶ 161.
46 Partial Award, ¶ 168.
47 Partial Award, ¶ 180.
48 Partial Award, ¶ 179.
49 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 426.

different ways. It may mean land, but also airspace, the territorial sea, and internal waters. It may refer to title of sovereignty but also to title of administration.[50]

47. Nevertheless, in the ordinary sense of the word in international law, territory means a territory over which a State exercises sovereignty:

> The territory covers the area over which a party to the treaty exercises *sovereignty* and thus embraces all that State's land, territorial waters and air space, whether or not these areas are part of the metropolitan area (though not the continental shelf, the exclusive economic zone and the fishery zones).[51] (emphasis added, references omitted)

48. Authors are generally in agreement that this meaning is *the ordinary meaning*:

> Territory is a portion of land subject to the sovereign authority of a State.[52]
>
> Today there consequently exists an absolute nexus between territory and sovereignty.[53]
>
> State territory, one of the essential elements of statehood, is a definite portion of the earth which is subject to the sovereignty of a state.[54] (references omitted)

49. The Ian Brownlie text quoted by the Claimants in support of different interpretation[55] refers to the practice of certain national "when presented with questions of narrow aspect which invite a pragmatic approach," but does not refer to the ordinary meaning of the term "territory" as used in international treaties. In the same extract, however, Brownlie makes a clear statement about the meaning of the term "territory" in situations more akin to the present one:

> It may happen that the process of government over an area, with the concomitant privileges and duties, falls into the hands of another state…The important features of "sovereignty" in such cases are the continued existence of a legal personality and the attribution of territory to that legal person and not to holders for the time being.[56]

50. Sovereignty is ordinarily implied by the term "territory" as used in international treaties, and so in the context of BITs as well. Consequently, "sovereignty" does not have to be expressly

---

[50] Max Planck Encyclopaedia of Public International Law, Territory, Acquisition, ¶ 5.
[51] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 392 (**CLA-82-Am**).
[52] Antonio Cassese, International Law, (2nd ed. 2005), p. 82.
[53] Antonio Cassese, International Law, (2nd ed. 2005), p. 83.
[54] Boleslaw A. Boczek, International Law: A Dictionary, (2005), p. 251.
[55] AmSOC, ¶ 113, *referring to* Ian Brownlie, Principles of Public International Law, (7th ed. 2008), p. 112 (**CLA-79**), *cited in* ¶ 152 of the Partial Award.
[56] Ian Brownlie, Principles of Public International Law, (7th ed. 2008), pp. 106-107 (**CLA-79**).

mentioned to be part of the notion that defines the geographical scope of application of a treaty.[57]

51. For example, Ukraine and the Russian Federation, when entering into two agreements regulating the "Stay of the Black Sea Fleet of the Russian Federation *in the Territory* of Ukraine",[58] did not define the term "territory", but have understood it to mean the sovereign territory of Ukraine. The absence of an express reference to sovereignty in those two agreements does not mean that the Parties had a broader term in mind. In those agreements, "territory of Ukraine" meant the territory over which Ukraine exercised its sovereign rights.[59] Likewise, "sovereignty" was not mentioned in the BIT because it is implied in the ordinary meaning of the term territory.

52. States rarely define the term "territory" by reference to sovereign rights or sovereignty, because that meaning is self-evident. In contrast, when States wish to indicate that the term "territory" has a broader meaning, including territories over which they exercise jurisdiction and effective control, parties to a treaty tend to include those specific terms. Thus, in two BITs it has concluded with Egypt and Denmark respectively, Ukraine has defined the term "territory" in a broader way, by making a specific reference to jurisdiction:

> The term "territory" shall mean in respect of each Contracting Party the territory under its sovereignty and the sea and submarine areas over which the Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights *or jurisdiction*.[60] (emphasis added)

> The term "territory" shall mean in respect of each contracting Party the territory under its sovereignty and the sea and submarine areas over which the Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights *or jurisdiction*…[61] (emphasis added)

53. In contrast to those treaties which expressly provide that the term "territory" comprises the territory over which the Contracting Parties exercise jurisdiction, the present BIT mentions

---

57 *See* ¶ 172 of the Partial Award for the opposite view.

58 Agreement Between Ukraine and the Russian Federation on the Status and Terms of Stay of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine, 28 May 1997 (**CE-23**); Agreement Between the Government of Ukraine and the Government of the Russian Federation on Mutual Settlements Related to the Division of the Black Sea Fleet and the Stay of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine, 28 May 1997 (**CE-24**).

59 First Stephan Report, ¶ 29: "Ukraine and the Russian Federation also entered into three accords that recognized Ukrainian sovereignty over Sevastopol and its surrounding waters while granting to Russia a lease over its existing Black Sea naval base."

60 Agreement Between the Government of the Arab Republic of Egypt and the Government of Ukraine Concerning the Promotion and Reciprocal Protection of Investments, Art. 1(4), 22 December 1992 (**CLA-95**).

61 Agreement Between the Government of Ukraine and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, Art. 1(4), 23 October 1992 (**CLA-97**).

neither "jurisdiction" nor "effective control". In the absence of express reference to those terms in Article 1(4) of the BIT, one should interpret "territory" in light of its ordinary meaning which refers only to the sovereign territory of the Russian Federation or the sovereign territory of Ukraine, and not to territory over which one of these Contracting Parties solely exercises jurisdiction and effective control.

54. The definition of "territory" in the BIT includes the words "in accordance with international law". The Claimants argue that this qualification does not relate to territory, but relates only to the second part of the provision covering the exclusive economic zone and the continental shelf.[62] If that argument is accepted as correct, it seems to further support the interpretation of the term "territory" as "sovereign territory". The special reference to "exclusive economic zone and the continental shelf, defined in accordance with international law" is necessary precisely because those areas otherwise do not form part of the sovereign territory, and are therefore not included in the reference to "territory".

> "Territory" – though not defined in the [VCLT] – embraces all the land, internal waters and territorial sea, and the airspace above them, *over which a party has sovereignty*. Unless it appears otherwise from the treaty, *references to territory do not include the continental shelf or exclusive economic zone* or fishery zones, over which a state has certain sovereign rights.[63] (emphasis added)

55. If the phrase "in accordance with international law" in Article 1(4) does not apply to the definition of "territory", the meaning of "territory" must be understood in accordance with international law in any event, *i.e.*, as "sovereign territory", the interpretation which the Claimants wish to exclude. Otherwise, if the term "territory" is not to be interpreted in accordance with international law, what would be the law applicable to its interpretation?[64]

56. Further, if the meaning of "exclusive economic zone and the continental shelf" should be interpreted "in accordance with international law", it means they should be interpreted as zones in which the Contracting Parties, while not exercising sovereignty, exercise certain sovereign rights in accordance with international law. So, the meaning of territory is, again, restricted to zones where that State *lawfully* exercises jurisdiction.

---

62 Claimants' Answers, ¶ 38.1.

63 Anthony Aust, *Modern Treaty Law and Practice* (2nd ed. 2007), pp. 200-201.

64 The majority of the Arbitral Tribunal explains in ¶ 170 that the phrase "in accordance with international law" in Art. 1(4) relates to the definition of the two States' exclusive economic zones and continental shelf, not the definition of territory in general, but fails to determine the applicable law for interpretation of the term "territory" if not international law.

57. There is no doubt that the ordinary meaning of "territory" includes sovereignty. In contrast, the interpretation of "territory" as referring to jurisdiction or effective control in cases of unlawful annexation is an exceptional meaning that requires conclusive evidence of the Parties' intentions in order to be accepted.

2.2.2. The Contracting Parties' intentions

58. "The primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion" is recognized by the ICJ.[65] The intentions of the parties are often emphasized when interpreting bilateral, "contractual" treaties,[66] and BITs in particular.[67]

59. In that respect, I agree with the majority that the Contracting Parties, when drafting the BIT, had hardly contemplated such situation as the present, where one Contracting Party exercises effective control over territory that used to be or still forms part of the other Contracting Party.[68] The Claimants also recognize that "the circumstances surrounding the Russian Federation's invasion of Crimea are unique."[69]

60. Consequently, no evidence was submitted to the effect that Ukraine and the Russian Federation had in mind territory over which one of the parties exercises jurisdiction and effective control when they negotiated and drafted Article 1(4) of the BIT.

2.2.3. Object and purpose of the BIT

61. The ordinary meaning of a term of a treaty is to be determined in the light of its object and purpose.[70] "Consideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms".[71]

---

65 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, ¶ 31.
66 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 74 et seq., ¶ 18.
67 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, ¶ 432.
68 Partial Award, ¶ 176. *See also Everest - Jurisdiction*, ¶ 152 (**CLA-29**).
69 AmSOC, ¶ 109.
70 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 427.
71 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 428.

62. The object and purpose of a treaty is traditionally found in its preamble.[72] The preamble of the BIT states that its purpose is to:

> ...develop the basic provisions of the Agreement on Cooperation in the Sphere of Investment Activity of December 24, 1993…;
>
> ...create and maintain favorable conditions for mutual investments; [and]
>
> ...create favorable conditions for the expansion of economic cooperation between the Contracting Parties.[73]

63. The Claimants have requested that the Tribunal take into account the object and purpose of the BIT.[74] However, it is not clear how the object and purpose of the BIT as interpreted in accordance with Article 31(1) of the VCLT – being to create and maintain conditions for mutual investments and for the expansion of economic cooperation betwen the Contracting Parties – support the Claimants' position on the interpretation of the term "territory". The majority reads an additional purpose into the preamble: "Under the preamble to the Treaty, Russia and Ukraine intended to...protect existing investments."[75] No such purpose is stated in the preamble of the BIT.[76]

64. The majority of the Tribunal explains that the object and purpose of the BIT is to "favor investments through the protection of investments in the territory of each contracting State in favour of investors of the other contracting State", and that "future investment is promoted when existing investments are shown to be protected."[77] For that reason, the majority is willing to accept the Claimants interpretation that Crimea was the territory of the Russian Federation at the time of the alleged breach. The majority goes even a step further and states that "there is no doubt Crimea and Sevastopol were part of the Russia on 17 October 2016",[78] the date of initiation of these proceedings. However, I do not believe that the object and purpose of the BIT justify such interpretation.

65. The aim of the BIT is to attract investments from one State to the other and to develop economic cooperation between Ukraine and the Russian Federation. It is unlikely that this aim

---

72 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 428.
73 Russia-Ukraine BIT (**CLA-99/CLA-169**).
74 AmSOC, ¶¶ 112-115.
75 Partial Award, ¶ 154. *See also* ¶ 199 of the Partial Award.
76 The majority cites AmSOC ¶ 114 as reference, but there is no mention of protection of existing investments in that paragraph, either.
77 Partial Award, ¶ 176.
78 Partial Award, ¶ 176.

can be achieved in the present circumstances. The events that occurred in 2014, in whichever way they are qualified in international law, have frustrated or at least suspended the attainment of the BIT's object and purpose for a long time. Efforts to attain them by extensive intepretation of the terms of the BIT will only make matters worse between the Contracting Parties.

2.2.4. The principle of good faith

66. Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty.[79] As the tribunal noted in *Poštová Banka v. Greece*, interpreting a treaty in good faith "means that the interpretation requires elements of reasonableness that go beyond the mere verbal or purely literal analysis."[80]

67. The Tribunal is dealing here with a Ukrainian investment in Ukraine that was not protected by the BIT when the investment was made. On a literal interpretation, this is now an investment found in Russian territory because the Russian Federation exercises control over the territory. But if one looks at the underlying purpose of the BIT – to attract investments from one State to another – that was not the original nature of the investments in question. Is it then reasonable to interpret the text of the BIT beyond what it says, so as to protect an investment that was not made from one state to another?

68. The problem with the interpretation requested by the Claimants originates in the unique or unusual situation in which the application of the BIT is invoked.[81] The uniqueness of the situation is acknowledged by the Claimants.[82] The BIT is a treaty of friendship that was intended to apply in normal situations where a private investor from one country (Ukraine) invests assets in the other country (Russia), and hopes to earn some profits on it. It was not intended to apply in situations arising from annexation of state territory and the resulting claims to ownership of state property by the occupying state.

69. The purpose of the BIT is not to hold the Respondent responsible for disregard of the principles of international law, such as the respect of the territorial integrity of another State.[83]

---

[79] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 426.

[80] *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 284 (**CLA-51**).

[81] *Belbek*, ¶ 179 (**CLA-3**): "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."

[82] AmSOC, ¶ 109.

[83] This seems to be the reading of good faith espoused by the majority in ¶ 179 of the Partial Award.

A good faith reading of Article 9 of the BIT does not give the Tribunal the power of general jurisdiction under international law.

2.2.5. The Vienna Convention on the Law of Treaties and customary international law of treaty interpretation

70. Article 29 of the VCLT states that a treaty is binding upon each party in respect of its entire territory. On its own, that rule does not resolve the problem of interpretation of the word "territory" in Article 1(4) of the BIT.

71. The ordinary meaning of the term "territory" found in a multilateral treaty of such fundamental importance and wide membership should not be understood to include a territory which has been unlawfully annexed.[84] Without evidence to the contrary, Article 29 applies solely to situations that are in conformity with international law. It should be understood as a reference to a State's *de jure* territory:

> "Territory" – though not defined in the [VCLT] – embraces all the land, internal waters and territorial sea, and the airspace above them, *over which a party has sovereignty*.[85] (emphasis added)

72. The International Law Commission's commentary on Article 29 (formerly draft article 25) strongly suggests that the applicability of Article 29 is limited to sovereign territory and does not automatically include territories for which the parties are internationally responsible, nor does it concern extra-territorial competence of States.[86]

73. Neither Article 29 nor the International Law Commission's commentary mentions territory over which a State exercises jurisdiction or effective control, yet which is not legally part of that State's territory. While it is presumed that if there are territorial changes the treaty will apply to the entire territory of the party,[87] the term territorial change, again, implies establishment of sovereignty over a territory.[88]

74. Article 73 of the VCLT states that the provisions of the Convention, including Article 29, shall not prejudge any question with regard to a trety that may arise from a succession of States, the international responsibility of a State, or from the outbreak of hostilities between

[84] The majority takes the opposite view – *see* ¶ 168 of the Partial Award.
[85] Anthony Aust, *Modern Treaty Law and Practice* (2nd ed. 2007), pp. 200-201.
[86] ILC Yearbook 1966, Vol. II, p. 213 (commentary on draft Art. 25, in particular ¶¶ 3 and 5).
[87] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 393 (**CLA-82-Am**).
[88] Max Planck Encyclopaedia of Public International Law, Territory, Acquisition, ¶ 55.

States. One of the questions that shall not be prejudged by Article 29 is the question of the status of the territory of Crimea. Simply, the Claimants' depiction of Russia taking control of Crimea,[89] including the deployment of 20,000 Russian soldiers in Crimea, pictures an outbreak of hostilities. The Claimants state that the Russian Federation's unlawful invasion and occupation of Crimea appear to satisfy the definition of an "armed conflict".[90] Article 73 of the VCLT leaves open the question of the legal effect these situations may have on a treaty between State parties, including their effects upon the applicability of Article 29.[91]

75. I agree with the majority that the European Court of Human Rights jurisprudence that the Claimants invoke is not dispositive for interpretation of the term "territory".[92] In particular, it should be borne in mind that this jurisprudence interprets the term "jurisdiction" that is found in Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention on Human Rights"), which is broader than the term "territory". As Anthony Aust explains:

> The European Convention on Human Rights 1950 protects the rights of everyone within the territory of a party or 'subject to its jurisdiction', thus including persons who are not nationals of the party but are within its jurisdiction, including under the control of its armed forces abroad, in one of its embassies or consulates, ships flying its flag or aircraft registered with it.[93]

76. In contrast to the European Convention on Human Rights, the term used in the BIT is "territory", not "jurisdiction". The premise that the concept of jurisdiction is not restricted to the national territory of the Contracting States does not lead to the conclusion that the reverse is also true, *i.e.*, that the concept of national territory extends to those areas over which a Contracting Party to the BIT exercises jurisdiction.

77. While it is accepted that the European Convention on Human Rights can apply to protect the rights of persons within the jurisdiction of a country operating a military intervention in the territory of another State, it would be incorrect to suppose, by analogy, that the companies whose investments are located in the territory of the invaded State could initiate an arbitration against the invading State on the basis of a BIT in force between the two States. One does not

---

89 Claimant's Answers, ¶¶ 26.4-26.8.
90 Claimant's Answers, ¶ 43.2.
91 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 903 (**CLA-82-Am**).
92 Partial Award, ¶ 171.
93 Anthony Aust, *Modern Treaty Law and Practice* (2nd ed. 2007), p. 200.

necessarily lead to the other. Although their investments are found within the *de facto* jurisdiction of the invading State in the sense of the European Convention on Human Rights, they are not found in the territory of the invading State within the meaning of the BIT.[94] Such a broad reading of "territory" in BITs could lead to unexpected results in the field of investment arbitration law.

2.2.6. Declarations of the Russian Federation and Ukraine

78. The Russian Federation admited the Crimean Republic as a new constituent entity on 21 March 2014 with effect from 18 March 2014.[95]

79. Here, according to the Claimants, "the critical fact relevant to the Tribunal's analysis of whether the Russian Federation is responsible for protecting Ukrainian investments in Crimea is Russia's own actions".[96] Having declared Crimea as part of the Russian Federation as of 18 March 2014 through a series of formal acts, the Russian Federation cannot escape the consequences of that declaration.[97] The Russian Federation assumes obligations under the BIT in respect of that territory[98] and is bound by its unilateral declaration incorporating Crimea into the Russian Federation as a matter of Russian law.[99]

80. However, even if the declaration that Crimea is part of the Russian Federation would be automatically considered as an interpretative declaration in respect of the meaning of the term "territory" in the BIT, it would still have to be accepted by Ukraine in order to be binding. An interpretative declaration made in respect of a bilateral treaty by a State constitutes an authentic interpretation of that treaty only if accepted by the other party.[100] Ukraine has not accepted Russia's declaration. On the contrary, Ukraine has equally formally declared that it considers

---

94 *See* for the opposite view, ¶ 180 of the Partial Award.

95 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 1(1) and Art. 4, 18 March 2014 (**CE-224-Am**); Russian Federation, Federal Constitutional Law No. 6-FKZ, Art. 1(1) and Art. 3, 21 March 2014 (**CE-230**).

96 Claimants'Answers, ¶ 15.2.

97 AmSOC, ¶ 132.

98 Claimants' Answers, ¶ 15.2.

99 AmSOC, ¶ 132.

100 International Law Commission, Guide to Practice on Reservations to Treaties (2011), ¶ 1.6.3.

Crimea to be its territory,[101] that the Crimean Peninsula is its occupied territory and that it was its occupied territory in the relevant period.[102]

81. In the face of opposing declarations by the Contracting States, no authentic interpretation of the term "territory" in the BIT has been constituted. The majority gives more weight to what the Russian Federation considers its territory than to what Ukraine considers its territory when interpreting the term in Article 1(4) of the BIT.[103] The Tribunal's task is to interpret the BIT as it was written and understood by both Contracting Parties.

82. Returning to the ordinary meaning of the terms used in the BIT, Article 31(1) of the VCLT envisages the ordinary meaning to be given to the terms of the treaty in their context. Articles 1(4) defines the term "territory" as "the territory of the Russian Federation *or* the territory of Ukraine" (emphasis added). A territory, such as Crimea, cannot be the territory of the Russian Federation *and* the territory of Ukraine under the BIT, as would follow from the acceptance of the formal declarations by both Contracting States as a basis for interpretation of this term.

2.2.7. Conclusion

83. In light of the ordinary meaning of "territory" in international law, and also after considering the Contracting Parties' intentions and the object and purpose of the BIT, Crimea does not form part of the territory of the Russian Federation in the sense of Article 1(4) of the BIT. Under international law, it was not "the territory of the Russian Federation" at the date of commencement of the arbitration and it was not "the territory of the Russian Federation" at the time of the alleged breach, being the period between 27 February and 30 April 2014.

---

[101] 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, Preamble: "The sovereignty of Ukraine extends throughout its entire territory, which is indivisible and inviolable within its present border." Art. 1(1) "The temporarily occupied territory of Ukraine (the 'temporarily occupied territory') is an integral part of the territory of Ukraine, which is subject to the Constitution and the laws of Ukraine." **(CE-255)** As Naftogaz informs, Ukraine's UNCLOS claims are based on Ukraine's sovereign rights in waters in the Black Sea and Sea of Azov. Claimants' Answers, ¶ 47.1.

[102] 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, Preamble and Art. 1(1) (**CE-255**); Exhibit C-280, Law of Ukraine No. 1636-VII, "On Establishing Free Economic Zone Crimea and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine," 12 August 2014 (**CE-280**). Tr., 216:20-22: "Two points: the first is that ARC is still part of Ukraine; and second, it's a territory under temporary occupation".

[103] Partial Award, ¶¶ 163 and 223.

2.3. Whether the Russian Federation assumed obligations under the BIT in respect of the territory of Crimea in the period between 27 February and 30 April 2014

84. According to the Claimants, the Russian Federation's obligations under the BIT in respect of the territory of Crimea attached immediately upon the assumption of physical jurisdiction and control over that territory. It should be observed here, that "the specific date upon which the Russian Federation's BIT obligations attached",[104] or the date on which "the Russian Federation assumed obligations under the [BIT] in respect of Ukrainian investments in Crimea",[105] is the same thing as the date of entry into force of the BIT for the Russian Federation in the territory of Crimea. In other words, although the BIT was in force in the Russian Federation since 27 January 2000, the Claimants argue that the application of the Russian Federation's obligations towards Ukrainian investors in the territory of Crimea begins on a later date, the so-called "attachment date",[106] which is 27 February 2014.[107]

85. Alternatively, the Claimants propose 18 March 2014, which is the date upon which, as matter of Russian law, Russia's purported annexation of Crimea took effect.[108] It needs to be noted that the Claimants have marked 18 March 2014 as the date of the key expropriatory acts taking a significant part of the Claimants' assets.

86. Finally, the Claimants' alternative case, if the Tribunal finds that the Russian Federation assumed obligations under the BIT on 21 March 2014, is that the date of these key expropriatory acts is also shifted to 21 March 2014. According to the Claimants, the date of the annexation and the date of the expropriatory acts targeting the Claimants' Crimea-based assets go hand-in-hand.[109] Thus, the Claimants mark the date of assumption of the obligations under the BIT as the date of expropriation.

87. Examining the question of whether obligations under the BIT were binding on the Russian Federation in Crimea at the time of the alleged breaches, the majority concludes that "it was not necessary for Russia to take any affirmative action after annexation to 'assume' its

---

104 AmSOC, ¶ 110.
105 Tr., 7:14-16.
106 Tr., 322:13.
107 Notice of Arbitration, ¶¶ 14-15: "The Russian invasion began on 20 February 2014, when Russian military forces crossed from the Russian Federation into Crimea… In line with President Putin's instruction, on 27 February 2014, armed men took over the building of the Crimean Parliament and other government offices in Simferopol, the regional capital, and hoisted the Russian flag over the buildings." *See also* Tr., 7:14-17.
108 AmSOC, ¶ 110; Tr., 7:20-23.
109 AmSOC, ¶ 136.

obligations to Ukrainian investors [in Crimea] under the BIT."[110] It was enough for the transfer of obligations under the BIT that "Russia had assumed jurisdiction" for this territory under the Russian Constitution and that "Ukraine had, for all practical purposes, ceded jurisdiction."[111] The majority takes the date of the "Russian annexation of Crimea and Sevastopol" as crucial for Russia's assumption of obligations under the BIT.[112] The "attachment date" on this reading is 18 March 2014.[113] On that date, the majority concludes that "Russia had inherited the BIT obligation towards foreign (Ukrainian) investors and investments"[114] in the territory of Crimea. I respectfully disagree with these conclusions.

88. Crimea was admitted into the Russian Federation on 18 March 2014. However, the BIT did not become automatically and instantaneously applicable to the Russian Federation in that territory on that date for several reasons. The Claimants outline two of those reasons: (i) this was not a case of lawful succession; and (ii) the moving treaty-frontiers rule is not applicable. However, there are also other reasons: (iii) the automatic application of a BIT does not arise from the assumption of jurisdiction and control; (iv) there was no declaration by the Russian Federation that its treaties will apply to the "newly incorporated territory" of Crimea from that date; [115] and (v) unilateral declarations of one Contracting Party are insufficient to change the the territorial scope of application of the BIT.

89. Before further explanations are given, it needs to be clarified that, contrary to the views expressed by the majority,[116] attributing obligations to the Russian Federation in Crimea as of February-March 2014 does change the geographic scope of application of the BIT. Each State under the BIT had certain obligations within a defined territory. These obligations were reciprocal. It could be said that there were actually two sides to this BIT: the Ukrainian side and the Russian side. If the February-March events are taken as a trigger for a switch in responsibilities in the territory of Crimea, the geographical scope of Ukraine's BIT obligations diminishes whereas the geographical scope of Russia's BIT obligations enlarges as a result. Therefore, although the BIT as a whole still covers the same geographical territory as it did before these events, the geographical scope of its application with regard to each Contracting

[110] Partial Award, ¶ 222.
[111] Partial Award, ¶ 222.
[112] Partial Award, ¶ 224.
[113] Partial Award, ¶ 231.
[114] Partial Award, ¶ 231.
[115] The term "newly incorporated territory" has been used by the Expert Witness for Russian law: First Stephan Report, ¶ 47.
[116] Partial Award, ¶ 176.

Party has changed. After all, it is undisputed that the Russian Federation had no obligations towards Ukrainian investors in Crimea under the BIT before February 2014.

2.3.1. The Claimants' case: The Russian Federation's admission of Crimea was not a case of lawful succession of States

90. The Claimants argue that the events that led to Russia gaining effective control and jurisdiction over Crimea in 2014 do not constitute a succession of States under customary international law.[117] Since there was no consent of Ukraine to the separation of Crimea and its admission into the Russian Federation, there is no lawful succession.[118] Thus, there is no assumption of obligations on the basis of succession.

2.3.2. The Claimants' case: The moving treaty-frontiers rule is not applicable

91. Further, as the Claimants point out, the "moving treaty-frontiers" rule as reflected in Article 15 of the VCST is not applicable, because the Russian Federation is not a contracting party to the VCST.[119]

92. The International Law Commission defined the "moving treaty-frontiers" rule in the following terms:

> Shortly stated, the moving treaty-frontiers rule means that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory in question as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of such territory as from that date.
>
> …The rule, since it envisages a simple substitution of one treaty regime for another, may appear *prima facie* not to involve any succession of States in respect of treaties. Nevertheless the cases covered by the rule do involve a 'succession of States' in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is

---

117 Claimants' Answers, ¶ 16.1. Tr., 70:20-23.

118 AmSOC, ¶ 65. The Claimants cite United Nations General Assembly Resolution UN Doc A/RES/68/262 68/262, 27 March 2014, adopted by 100 votes to 11; 58 abstentions, ¶ 6 which "[c]alls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status".

119 Claimants' Answers, ¶ 22.1; Tr., 71:3 et seq.

> commonly included by writers among the cases of succession of States.[120]

93. The Claimants add that the customary international law rules on succession of States including the moving treaty-frontiers rule, are also not applicable to this case since Russia's purported annexation of Crimea was not "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".[121]

94. Nevertheless, the Claimants plead that the BIT automatically continued to apply in Crimea but with the roles reversed, *i.e.*, with the Russian Federation assuming obligations towards Ukrainian companies that it did not have before the attachment date. [122] According to the Claimants, the treaty regime where Ukraine was responsible to Russian investors was substituted with the treaty regime where the Russian Federation became responsible to pre-existing Ukrainian companies, but all this without succession and without application of the moving treaty-frontiers rule.

95. If the arguments of the Claimants are accepted, and if the moving treaty-frontiers rule is not relevant because of the unlawful nature of the events, the question must be asked regarding what the legal basis is for *automatic* application of the BIT in the territory of Crimea as of February-March 2014. What is the legal basis for the assumption of obligations towards investments that, when they were made, "had nothing to do with the bilateral investment treaty"?[123]

2.3.3. Automatic assumption of obligations under the BIT does not arise from assumption of jurisdiction and effective control

96. The Claimants find such basis in the assumption of jurisdiction and effective control by the Russian Federation over the territory of Crimea in February 2014. Such assumption of jurisdiction, according to the Claimants, leads automatically to the assumption of obligations by Russia under the BIT for this territory.

---

120 ILC Yearbook 1974, Vol. II (Part Two), p. 208 (commentary on draft Art. 14).
121 Claimants' Answers, ¶¶ 17.1. and 22.2, *citing* Art. 6 of the VCST. *See also* Claimants' Answers, ¶¶ 22.5.-22.7.
122 Tr., 73:18-19.
123 Tr., 73:20 et seq. (Question of the President of the Tribunal).

97. A similar argument by another claimant under the same BIT was persuasively rejected by the *Belbek* tribunal:

> 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.[124]

98. This passage confirms the view that bilateral treaties are not automatically applicable upon the assumption of jurisdiction and control over a territory. If occupation is just a "temporary change",[125] there is no reason to apply to it the consequences of a permanent displacement of sovereign power.

99. The Claimants mostly rely on the jurisprudence of the European Court of Human Rights to prove the assumption of obligations. However, the fact that the European Convention on Human Rights is applicable in Crimea-like situations does not make BITs automatically applicable to those situations, given the different nature, purpose, conditions for application and territorial provisions of those treaties.

100. Human rights jurisprudence cannot be relied on by the Claimants in support of the application of the BIT, because BITs are not normative, standard-setting instruments like human rights treaties.[126] Human rights treaties aim at protecting human rights from sovereign power, which sometimes can be performed outside State territory. So, jurisdiction is naturally a wider concept than territory. Human rights treaties are multilateral legislative treaties with no *quid pro quo* rationale. On the other hand, bilateral investment treaties are all about *quid pro quo* and reciprocity, as they are aimed at receiving benefits in exchange for an obligation to protect only those rights that bring these benefits. In sum, these two kinds of treaties are not comparable when it comes to assessing international treaty obligations.

101. The Claimants also refer to the *Namibia Advisory Opinion* of the ICJ and quote a passage from this Opinion to prove that international tribunals have found occupying powers

---

124 *Belbek*, ¶ 205 (**CLA-3**).

125 Claimants' Answers, ¶ 22.2, *quoting* Ian Brownlie, Brownlie's Principles of Public International Law, (James R. Crawford, Ed.) (8th ed. 2012), p. 423 (**CLA-155**).

126 *Belbek*, footnote 205 (**CLA-3**).

to be bound by international obligations in other contexts with respect to territory that they physically control, even if such control is illegitimate or illegal.[127]

102. In the *Namibia Advisory Opinion* the ICJ gives particular advice to member States of the United Nations on dealings with the Government of South Africa. The Court considered that, under the Charter of the United Nations and general international law, dealings with the Government of South Africa should be considered as inconsistent with the declaration of illegality and invalidity of its presence in Namibia, because they could be interpreted as a recognition that South Africa's presence in Namibia was lawful.

103. The duty of non-recognition, as formulated in ¶¶ 122-124 of the Advisory Opinion, is subject to an exception as formulated in ¶ 125:

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

104. The scope of the exception to the duty of non-recognition that the ICJ established in the *Namibia Advisory Opinion* is very narrow. It does not seem to include an obligation or even an option to automatically extend the application of a bilateral treaty to occupied territory.

105. It should be borne in mind that, unlike South Africa, which administered the territory of Namibia for many years, the Russian Federation did not have settled long-term control in the territory of Crimea between 27 February and 30 April 2014 when the alleged breach of the BIT occurred.[128]

106. Prior to that period the Russian Federation had no obligations towards Ukrainian investors in the territory of Crimea. Did it acquire them automatically on the basis of acquisition of physical control of the territory?[129] This seems to be too wide a reading of the *Namibia*

---

127 AmSOC, ¶ 123.

128 The premise that the Respondent exercised effective jurisdiction and control in Crimea in the relevant period was accepted by the majority. Partial Award, ¶ 180.

129 Partial Award, ¶ 222.

Advisory Opinion. That Opinion can hardly serve as a legal basis for the automatic extension of Russia's BIT obligations to the territory of Crimea.

2.3.4. There was no declaration by the Russian Federation that the BIT would apply to the newly incorporated territory of Crimea from 18 March 2014

107. As the *Belbek* tribunal stated, something more is required for the automatic application of the BIT to Russian obligations in the territory of Crimea. The Claimants' alternative argument is that the BIT became applicable to the Russian Federation as regards Ukrainian investors in Crimea on the date when Crimea was incorporated into the Russian Federation as a matter of Russian law, *i.e.*, on 18 March 2014. This alternative argument was accepted by the majority at ¶¶ 222-231 of the Partial Award. The majority of the Tribunal concludes that the Russian Federation had inherited the obligations towards Ukrainian investors from 18 March 2014.[130] There are several reasons why this conclusion cannot be correct.

108. First, the Russian Federation's assertion of constitutional authority over Crimea and Sevastopol cannot be intrepreted as a unilateral declaration on the applicability of the BIT.[131] The International Law Commission's 2006 Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations specify that a unilateral declaration "binds the State internationally only provided it is 'stated in clear and specific terms'."[132] One cannot find in the Treaty on Admission or the Law on Admission a declaration stating in clear and specific terms that the Russian Federation assumed responsibility for international relations of Crimea from 18 March 2014, nor any declaration that BIT or any other bilateral treaty would apply in the territory of Crimea from that date.

109. The Claimants' Expert Witness described the relevant content of the Annexation Treaty as follows:

> Article 6 of the Annexation Treaty provided for a transitional period until January 1, 2015 to complete the integration of *preexisting legal rights and duties* in the Republic of Crimea into Russian law. Article 9 stipulated the legal regime that would apply in the Republic of Crimea and the Federal City of Sevastopol as constituent entities of the Russian Federation during that period. First, Article 9(1) provided that, as a general principle, and *consistent with Article 4(2) of the Russian Constitution*, Russian *legislation and other normative legal acts* would have effect in the Republic of Crimea (including Sevastopol) from the

130 Partial Award, ¶ 231.

131 *See* ¶ 223 of the Partial Award for the contrary view.

132 Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligation, with Commentaries Thereto, 2 Yearbook of the International Law Commission (2006), Principle 7.

> date of its admission into the Russian Federation unless otherwise determined by Russian legislation. Article 9(2) provided that, during the transitional period, the normative legal acts of the Autonomous Republic of Crimea and Sevastopol, as well as the Republic of Crimea ...also would apply in the Republic of Crimea and the Federal City of Sevastopol, unless subsequent Russian legislation provided otherwise. Article 9(3) confirmed that any acts covered by Article 9(2) nonetheless would not apply to the extent that they contradicted the Russian Constitution.[133] (emphasis added, references omitted)

110. Both the Treaty on Admission (Article 9)[134] and Law on Admission (Article 23) by which Crimea was admitted to the Russian Federation[135] refer only to "[l]egislative and other normative legal acts of the Russian Federation". As confirmed by the Claimants: "Neither the Annexation Treaty nor the Law on Admission included any special provision for the application of treaties during the transition period."[136]

111. Considering the very detailed provisions of the admission acts, it is likely that the Russian Federation would have expressly mentioned therein if it intended to provide for the instantaneous applicability of its treaties in Crimea, as its newly incorporated territory."

112. The Russian Constitution clearly distinguishes treaties from laws and other normative acts. [137] Indeed, the term "treaties of the Russian Federation" appears in a provision of the Treaty on Admission, but in another context[138] so the rules of interpretation militate against interpreting "legislative acts" as encompassing the treaties.[139] The BIT also uses the term "legislation" and the term "treaty" with distinct meanings. The former is understood to refer to domestic law.[140] Therefore, the admission acts did not provide for the application of the BIT to Ukrainian investors in Crimea.

---

133 First Stephan Report, ¶ 48.

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

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

136 Claimants' Answers, ¶ 30.5.

137 Treaties are expressly mentioned in the Constitution of the Russian Federation, Arts. 71-72 that describe the areas of exclusive jurisdiction of the Russian Federation. Second Stephan Report, ¶¶ 11-14.

138 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 4(3), 18 March 2014 (**CE-224-Am**). This Article provides: "Delimitation of the maritime space in the Black Sea and the Sea of Azov shall be conducted on the basis of *treaties of the Russian Federation*, and the rules and principles of international law." (emphasis added)

139 When writing about Ukrainian law, one of the experts clearly distinguished normative-legal acts from international treaties and agreements: "Ukrainian law is derived from the following key sources: normative-legal acts; international treaties and agreements"; First Paliashvili Report, ¶ 18-22.

140 *See, e.g.*, *Everest - Jurisdiction*, ¶ 130 (**CLA-29**): "The domestic law of Ukraine or the Russian Federation."

113. Additionally, both the Treaty on Admission and the Law on Admission established a transitional period until 1 January 2015, during which legal rights and duties in the Republic of Crimea would be integrated into Russian legal system.[141]

114. Article 15(4) of the Russian Constitution states that:

> international treaties and agreements of the Russian Federation shall be a component part of its legal system.

115. Thus, it is possible that the treaties of the Russian Federation were meant to apply only from the moment of full integration of Crimea into the legal system of the Russian Federation which was to occur on 1 January 2015.[142] It appears from the Law on Admission that the Russian Federation did not immediately establish the system of courts and local government, nor did all of its federal laws apply in the territory of Crimea at once. Courts and local bodies of the federal authorities were to be created during the transitional period.[143] Normative legal acts of the Autonomous Republic of Crimea, the city of Sevastopol, the Republic of Crimea and the city with the special status of Sevastopol were to remain valid until the end of the transitional period.[144] As conceded by the Claimants at the hearing: "it does make sense that the Russian Federation wanted to have legal certainty in Crimea and that they needed time to be able to institute a new legal regime."[145]

116. In the absence of an express provision on the effect of treaties during the transitional period in the text of the Treaty on Admission or the Law on Admission it cannot be concluded that there was an assumption of obligations under the BIT by the Russian Federation in the territory of Crimea in the relevant period.

2.3.5. Unilateral declarations by one party to the BIT do not suffice

117. Even assuming that the Respondent had accepted to extend the applicability of the BIT to the territory of Crimea from the admission date, something more is still required. In

---

141 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Art. 6, 18 March 2014 (**CE-224-Am**).

142 Such a solution was envisaged, for example, for the legal status of state, local and private private entities: "the legal status of [state, local and] private entities rested on pre-annexation Ukrainian legal acts until the end of the transitional period established by the Annexation Treaty and Law 6-FKZ. Firms such as Claimants thus retained the legal rights, powers, and obligations established under Ukrainian law that existed at the moment of annexation." First Stephan Report, ¶ 58.

143 Russian Federation, Federal Constitutional Law No. 6-FKZ, Arts. 7(9) and 9(1), 21 March 2014 (**CE-230**).

144 Russian Federation, Federal Constitutional Law No. 6-FKZ, Art. 23(2), 21 March 2014 (**CE-230**).

145 Tr., 50:22-25.

particular, it is doubtful that such a unilateral extension would have had any legal effect, because the applicability *ratione territoriae* of the BIT in the relevant period depended on the intentions and declarations of both Contracting Parties to the BIT.[146]

118. Even in cases of succession or lawful cession of territory, there exists no automatic continuity in respect of bilateral treaties (unless both contracting parties are member States of the VCST), because succession in respect of bilateral treaties has a voluntary character; that is, it depends not only on the State that acquired the territory, but also on the other interested State. The "entire territory" rule of the VCLT (Article 29) is not applied to a successor State in a bilateral treaty context until the other contracting party concedes. State practice shows that *both states have to confirm succession*:

> With regard to bilateral treaties concluded by the predecessor State, practice shows that the fate of these treaties is generally decided through negotiation between the successor State and the other party, no matter the category of State succession involved.[147]

119. The International Law Commission explains that the "personal equation" plays a more dominant role in bilateral treaty relations than in multilateral treaties. Thus, "the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests". As a result of this "personal equation" for the two parties involved in a bilateral treaty relationship, "it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory" (references omitted).[148] It is even more difficult to infer such automatic applicability of the BIT from the unilateral acts of one Contracting Party which are otherwise considered unlawful by the other Contracting Party.[149]

120. It appears from the evidence submitted that Ukraine had not notified the Russian Federation that it considered the Russian Federation to be bound by the BIT for the territory of

---

146 *See EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, ¶ 432.

147 International Law Association, Conclusions of the Committee on Aspects of the Law on State Succession, Resolution No. 3/2008, adopted at the 73rd Conference of the ILA, held in Rio de Janeiro, Brazil, 17-21 August 2008, at point no 8.

148 International Law Commission Report, Twenty-Sixth Session, 1974 (n 13), at 237.

149 First Paliashvili Report, ¶ 12: "These acts were illegal and invalid because, among other reasons, they contradicted the Ukrainian Constitution and laws of Ukraine, as well as the Constitution of the ARC (the "***ARC Constitution***") and the legislation applicable in the ARC, and exceeded the scope of authority of the organs of the ARC."

Crimea from 18 March 2014. At the same time, the continued applicability of the BIT in Crimea as a Ukrainian treaty has been expressly confirmed by the Claimants' Expert Witness on Ukrainian law.[150]

121. It further appears from the facts of the case that the Russian Federation had not notified Ukraine of its succession into the obligations under the BIT for the territory of Crimea. In cases of succession, a notification of the applicability of a treaty in the relevant territory is customarily given by the contracting parties. This is illustrated by the practice of both Ukraine and the Russian Federation after the dissolution of the U.S.S.R. [151]

2.3.6. Conclusion

122. Even if Crimea were to be considered "the territory of the Russian Federation" in the sense of the BIT, the majority does not have sufficient basis to conclude that the Russian Federation assumed the BIT obligations towards Ukrainian investors in the territory of Crimea immediately upon admission of Crimea into the Russian Federation, on 18 March 2014.

3. IS THERE AN "INVESTMENT MADE BY INVESTORS OF ONE CONTRACTING PARTY IN THE TERRITORY OF THE OTHER CONTRACTING PARTY IN ACCORDANCE WITH ITS LEGISLATION"?

123. Supposing that Crimea became the territory of the Russian Federation in the sense of the BIT after 18 March 2014, and that the Russian Federation did assume obligations towards Ukrainian investors in Crimea under the BIT on that date. In order for the Tribunal to have jurisdiction some further conditions would need to be fulfilled, being the conditions of applicability of the BIT in Articles 1(1), 9 and 12.[152] These provisions specify the threshold requirements for the Russian Federation's obligation to secure BIT rights in the territory of Crimea.

---

150 Second Expert Report of Dr. Irina Paliashvili, dated 22 February 2018 (hereinafter "**Second Paliashvili Report**"), ¶ 27: "Ukrainian law, *including international treaties of Ukraine*, applies to the entire territory of Ukraine, including the ARC and Sevastopol and is binding upon all bodies, individuals, and legal entities in the entire territory of Ukraine." (references omitted, emphasis added). This statement was confirmed by the expert in the Hearing: "From the point of view of Ukrainian law, all Ukrainian law and treaties apply to the territory of Crimea….Including the BIT." Tr., 210:17-21.

151 Claimants' Answers, ¶¶ 19.9, 19.15; Second Paliashvili Report, ¶¶ 47-49.

152 *See* ¶¶ 25-29 of this Opinion.

124. In its Response to the Notice of Arbitration, the Respondent has objected to jurisdiction,[153] making essentially three objections under these provisions: that the investments were not made in the territory of the Russian Federation in accordance with its legislation, that the BIT should not be applied retroactively to pre-existing investments in Crimea, and that the investments in question have not contributed to the development of the Russian Federation.

3.1. Investments made "in the territory of the other Contracting Party"

125. In this case, the very existence of treaty obligations depends on the condition that the investments were made by investors of one Contracting Party "in the territory of the other Contracting Party" – it is not a simple operation of Article 29 of the VCLT. The strength of this condition is underscored by the fact that the BIT refers to it in *seven* instances.[154]

126. In order to be "investors" within the ordinary meaning of the terms of the BIT, the Claimants would have had to make their investment in the territory of the other Contracting Party, and not their own. Since the Claimants are Ukrainian companies, in order to establish jurisdiction under Article 1(1) of the BIT they would have to prove that they invested tangible and intangible assets in the "territory of the other Contracting Party"; which in this case must be the territory of Russia.

127. However, the Claimants confirmed that Naftogaz invested tangible and intangible assets in Ukraine,[155] its own country.

3.2. Investments made "in accordance with its (the Russian Federation's) legislation"

128. The second requirement in Article 1(1) of the BIT is that the investments were made in accordance with the Russian Federation's legislation.

129. A temporal element is present in this requirement, because the assets must be invested in accordance with the Russian Federation's legislation at the time they are invested. The *Pezold v. Zimbabwe* award confirms that, for the purpose of the legality requirement,

---

153 Letter No. 06-5928/17 from the Ministry of Justice of the Russian Federation to the Permanent Court of Arbitration, dated 19 January 2017 (**CE-383**). The Respondent's objection is quoted in ¶¶ 23 and 135 of the Partial Award.

154 Russia-Ukraine BIT, Arts. 1(1), 2(a), 2(b), 5(1), 6, 8 and 12 (**CLA-99/CLA-169**).

155 Question from the Tribunal: "The obvious problem is that at the time the investments were made, they were not made by one contracting party in the territory of another contracting party. Do we agree on this?" Claimants: "Yes, that's correct", Tr., 134:6-10.

the relevant time for the determination is when the investment is made.[156] The Claimants concede this point.[157] Any subsequent change does not affect the assessment of whether the investment qualifies for protection under the BIT.

130. However, the Claimants' investments at the time when they were made, were invested in accordance with Ukraine's legislation.[158] For this reason, too, they do not fall under the definition of "investments" in Article 1(1) of the BIT.[159]

131. Therefore, the second requirement of Article 1(1) is not fulfilled, which must lead to the dismissal of the case for lack of jurisdiction. The lack of jurisdiction is based on the absence of consent to arbitration by the Respondent State for failure to satisfy an essential condition of its offer of this method of dispute settlement.[160]

3.3. Retroactive application to pre-existing investments

132. In contrast to the above, the majority holds that the critical date for assessment of the two conditions is not when the investment "is initially acquired but when a breach occurs."[161]

133. The majority bases the retroactive application of the BIT in the fact that the Russian Federation, having taken over Crimea by force of arms, deprived the Claimants of the legal protection of Ukrainian law and Ukrainian judicial institutions.[162] The Claimants have become foreign investors in the Russian Federation by the unilateral act of one of the Contracting States, *i.e.*, the Russian Federation.[163] When seized, the Claimants' investments were foreign investments even though they were not so originally.[164]

---

156 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 420 (**CLA-110**).

157 Tr., 140:5-14.

158 First Paliashvili Report, ¶ 11: "The Claimants' investments were initially made, prior to the Russian Federation's invasion and occupation of Crimea, in conformity with Ukrainian law"; ¶ 52: "Claimants' investments in the territory of the ARC were made under the general investment regime applicable throughout the territory of Ukraine"; ¶ 66: "those investments were made in conformity with Ukrainian law, and remained so at the material time." [the material time is defined in ¶ 4 of the First Paliashvili Report as the time between 20 February and 18 March 2014]; ¶ 88: "I have concluded that the investments described below were made in conformity with Ukrainian law, and remained in conformity with Ukrainian law at the material time." Tr., 208:3-5: "Claimants' investments again were made in conformity with Ukrainian law, and remained in conformity with Ukraine law as of occupation."

159 For the opposite view, *see* Partial Award, ¶¶ 192-196.

160 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 467.

161 Partial Award, ¶ 190.

162 Partial Award, ¶ 197.

163 Partial Award, ¶ 197.

164 Partial Award, ¶ 199.

134. Therefore, the majority concludes that the application of the BIT to the present case is aconsequence of the Russian Federation's military action and of the resulting need of the pre-existing Ukrainian investment for Treaty protection.[165] I respectfully disagree with accepting jurisdiction for a dispute such as the one at hand where the Russian Federation did not consent to arbitrate.

135. The holding that the Russian Federation assumed obligations under the BIT regarding investments occurring in the geographic space of Crimea does not necessarily lead to the conclusion that it assumed them towards Ukrainian investments that were made in Crimea before Crimea became its territory ("pre-existing investments").[166] Pursuant to Article 28 of the VCLT, there is a presumption of non-retroactivity, retroactivity being the exception.

136. The consent to arbitrate is delimited by the words used in the BIT. It is their interpretation only that can be decisive for the existence of jurisdiction of this Tribunal. In this case, what needs to be interpreted are the words used in Articles 1 and 12 of the BIT. The question is whether these words, taken as a whole, support the interpretation that the BIT applies to investments that were made foreign only by the unilateral acts taken by the Russian Federation on 18 March 2014.

137. There are essentially two reasons why the words "[which are][167] invested by an investor of one Contracting Party in the territory of the other Contracting Party" (Article 1) and "made by investors of one Contracting Party in the territory of the other Contracting Party" (Article 12) do not support the interpretation adopted by the majority. First, these words have a temporal meaning and, in the Claimants' case, refer to dates that precede 18 March 2014. Second, by using the phrase "by an investor of one Contracting Party" they clearly indicate that it is the investor and not the host State that, by making a cross-border transaction, makes an investment "foreign".

3.3.1. Ordinary meaning

138. The ordinary meaning of the word "made" carries a temporal element. An investment is made at a certain point in time. The form of the verb used ("made") implies that the process

165 Partial Award, ¶ 202.
166 Tr., 54:12-55:21.
167 The words "which are" are not to be found in the original text of the BIT. *See* footnote 29 in this Opinion.

of making was completed at a certain point in time. In certain parts of their submissions, the Claimants acknowledge the finite and temporal nature of the "made" requirement:

> Each Claimant's investments in Crimea were lawful under the laws of Ukraine *when such investments were made*.[168] (emphasis added, references omitted)

139. If the Contracting Parties had meant that simply the existence of investment in the Contracting Party's territory was enough to trigger protection, they would have used a different term than "made". For example, Article XIII of the 1992 BIT signed between the Russian Federation and the U.S.A. (not yet in force) states:

> This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. *It shall apply to investments existing at the time of entry into force as well as to investments made thereafter*. (emphasis added)

140. Similarly, in the *Chevron v. Ecuador* Interim Award,[169] the relevant portion of Article XII(1) of the U.S.-Ecuador BIT states that the BIT "shall apply to investments *existing at the time of entry into force as well as to investments made or acquired thereafter*." The Energy Charter Treaty, in defining the term "Investment", sets forth in Article 1 that the term "includes all investments, whether *existing at or made after* the later of the date of entry into force". The Energy Charter Treaty also defines the term "Making" in the following way: "Make Investments" or "Making of Investments" means *establishing new Investments*, acquiring all or part of existing Investments or moving into different fields of Investment activity." (emphasis added).

141. Obviously "made" and "existing" suggest a different temporal meaning. To include the situation that the Claimants wish to cover here, some "wordsmithing" would be required in Article 12 of the BIT. The provision would have to be worded as follows:

> This Agreement shall apply to all investments of investors of one Contracting Party *existing* in the territory of the other Contracting Party *at the date when that Party assumed obligations thereunder*.

168 Notice of Arbitration, ¶ 53.
169 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador: Interim Award*, 1 December 2008, ¶ 188.

142. However, the actual wording is different. In order to be covered by the present BIT, it is not enough that the investments exist in the territory of the other Contracting Party on the relevant date. In fact, the BIT does not mention "existing investments" at all. Pursuant to this BIT, the investment must be "made" in the territory of the other Contracting Party. That means that the investment must be foreign at the time it is made. In this case, the Ukrainian investments would have to be made in the territory of Crimea after 18 March 2014 to be treated as an investment in the Russian Federation (provided that the Claimants' interpretation of "territory" is accepted).

143. This temporal meaning is further reinforced by the requirement of lawfulness of the investment. Such lawfulness is assessed pursuant to the law of the other Contracting Party at the time of the making of the investment. Aware of such temporal meaning, the Claimants carefully avoid saying in which territory investments were made when they refer to the lawfulness of such investments:

> Naftogaz's investments were lawfully made—i.e., they were made "in accordance with" the legislation in force *in the territory*, as required by Article 1(1) of the BIT.[170] (emphasis added)

144. This is a conscious omission, because the Claimants would have to prove that the investments were made in accordance with Russian legislation at the time they were made.

145. Further examples of conscious omission are found in the Notice of Arbitration where the Claimants omitted the word "invested" when discussing the fulfilment of this condition:

> ...the dispute arose in connection with Naftogaz's investments, which *were in the territory* of the Russian Federation for the purposes of the Treaty.[171] (the word "invested" is missing)
>
> As Claimants will establish in this arbitration, Naftogaz's investments in Crimea *are "in the territory"* of the Russian Federation for the purposes of Article 1(1) of the Treaty.[172] (the word "invested" is missing)

146. These conscious omissions of the BIT conditions show that the Claimants' argument has issues. The problem is that, in the ordinary sense, the words "made" and "invested" have a temporal meaning and that the temporal requirement is not fulfilled in the present case.

---

170 AmSOC, ¶ 142.
171 Notice of Arbitration, ¶ 54.
172 Notice of Arbitration, ¶ 56.

3.3.2. Context

147. Turning to the wider context of the BIT, an examination of its terms discloses a number of other provisions that shed light on the question of why a temporal limitation ought properly to be understood in Articles 1(1) and 12.

148. As many as five provisions of the BIT have a bearing on the present analysis, including (i) the last part of Article 12, addressing the temporal applicability of the BIT; (ii) Article 5(1), addressing expropriation, (iii) Article 14(3), addressing the consequences of termination of the BIT, (iv) Article 1(4), defining territory; and (v) Article 1(1), last sentence, addressing changes in the type of investment.

149. It is convenient to start with Article 12, which provides that to be covered by the BIT an investment must be made by investors of one Contracting Party in the territory of the other Contracting Party "after January 1, 1992." For this requirement to be meaningful the time of making of the investment must be ascertainable. For example, there were certain investments that were made before 1 January 1992 in the relevant territories by investors of the other Contracting Party, but the BIT does not apply to them.

150. Further context is provided by Article 5 of the BIT which reads:

> Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated…

151. The word "made" used in this provision implies that the investment must be invested in the territory of the other Contracting Party before expropriation. In the present case, however, what happens according to the Claimants is that the alleged expropriation is undertaken by the same act that transforms the investments into investments "made" in the Russian Federation:[173]

> In sum, within the course of a single day, 17 March 2014, the so-called Republic of Crimea had purported to declare independence, to nationalize Naftogaz's principal investments in Crimea, and to transfer those investments to the Russian Chernomorneftegaz.[174]
>
> …both the annexation of Crimea and the expropriation of Claimants' major Crimea-based assets occurred on the date that the Annexation Treaty became effective. For that reason, these dates must go hand-in-hand.[175]

[173] This intepretation is accepted by majority in the Partial Award, ¶¶ 181-182.
[174] AmSOC, ¶ 70.
[175] AmSOC, footnote 308.

152. Article 14(3) addressing the consequences of termination of the BIT is also important for the contextual interpretation. Article 14(3) provides:

> 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. (emphasis added)

153. Under Article 14(3), "making" must precede the termination of the BIT in order for the BIT to protect that investment for another 10 years. If the investment has not been "made" before the date of termination, it will not fall under this provision, nor under coverage of the BIT. Thus, "made" must have a fixed temporal meaning in order to be compared to the date of termination, otherwise Article 14(3) would make no sense.

154. Finally, the inclusion of the final paragraph in Article 1(1) also confirms the temporal element contained in the term "made". It states:

> 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*. (emphasis added)

155. The investments first need to be made in the territory of a Contracting Party, in order to be altered in type. Both "were made" and "alteration" strongly point to the existence of a temporal element. There must be a possibility of determining the date when investments were made to ascertain whether their type has been altered since that time.

156. The word "made" is used in the BIT in seven further instances in connection with investments, always confirming its temporal meaning.

157. To conclude, an investment can only be "made" at a certain point in time, and it must be made either in Ukraine or in the Russian Federation. As regards Naftogaz investments, they were made long before 18 March 2014, in the territory of Ukraine.

3.3.3. The principle of good faith

158. In ¶¶ 197-202 of the Partial Award the majority relies on the good faith interpretation of Article 1(1) of the BIT. In my opinion, good faith interpretation and the principle of reasonableness do not demand that the temporal requirement be expressed in the way the majority seems to suggest in ¶ 198 of the Partial Award.

159. While Article 1(1) does not state expressly that the investment must be foreign at the time it was made, reasonableness surely requires such an interpretation.

3.3.4. Object and purpose

160. States can rebut the non-retroactivity presumption and declare treaty provisions retroactive by expressly stating this in the treaty itself. By declaring treaty provisions retroactive, Contracting Parties extend the applicability backwards in time to a given moment or period before the treaty's entry into force.[176] The Russian Federation did not express any intention for retroactive application, nor can such intention be based on Article 29 of the VCLT.

161. However, the intention for retroactive application may also be otherwise established, in particular by having regard to the nature of the treaty, *i.e.*, its object and purpose. Whether or not such a different intention prevails is a matter of interpretation according to Articles 31 and 32 of the VCLT.[177]

162. In order to reach the desired result, *i.e.*, the retroactive application of the BIT in the "Crimean cases", the majority has turned to consideration of the object and purpose of the BIT. The majority states that "to hold that the circumstances of the original investment control the application of the BIT undermines one of the purposes of the [BIT] which is...to protect existing investments,[178] which, at the time of the seizure, are 'foreign investments' at the mercy of the state which effects the compulsory acquisition."[179]

163. A good faith reading of Article 1(1) does not support the interpretation that assets invested by Ukrainian investors in Ukraine, can properly be considered to have been invested in the Russian Federation, and therefore to have acquired the protection of the BIT through no action of the investors but only as a consequence of the Russian Federation's conduct.

164. This is because the risk that is covered by the BIT is the risk of an entreperneur investing in another Contracting State. The BIT does not cover the risk of territorial change such as that which materialized here, that is, the risk that the territory in which investments are made will change hands between the Contracting Parties so that the Claimants' investments would end up

---

176 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 384.
177 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 384.
178 For a discussion of whether this one of the purposes of the BIT, *see* ¶¶ 63-65 of this Opinion.
179 Partial Award, ¶ 199.

in the territory of the other Contracting Party against their will. When the Claimants were making their investments they were not counting on the protection of the BIT against that risk.

3.3.5. Is the BIT denuded of effect if the pre-existing investments are not protected?

165. The majority has also relied on the arguments concerning the denuding of effect, or creation of a bubble or legal void,[180] that would allegedly occur if the BIT was not applied to this case.[181]

166. That triggers a question whether the inclusion of a temporal limitation in a treaty leaves "a bubble" in its application. The bubble referred to by the majority was created purposefully and intentionally by the Contracting Parties – they simply did not want to extend the BIT's protection to what represented domestic investments at the time of their making.

167. There would be no bubble for the Claimants' investments in non-application of the BIT to the present case, because the BIT was not applicable to them and their investments in the first place. They were domestic investors making domestic investments. Neither Ukraine nor the Russian Federation had any obligations under the BIT towards Naftogaz.

168. The fact that domestic investments are not covered by treaty provisions does not mean that there is a void in the application of the BIT, because the BIT requires a foreign element as a pre-condition for its application. The existence of a foreign element is fixed to the time of the making of the investment by the wording of the relevant articles of the BIT (Articles 1 and 12). Pursuant to the wording of this BIT, the existence of a foreign element at the time of the alleged breach is not enough.

169. The conclusion that the Claimants' investments are not covered by the BIT does not leave them without a remedy. International law provides them with a remedy against grave breaches of individual rights. That remedy is found in the European Convention on Human Rights, and the Claimants can protect their rights against unlawful expropriatory action before the European Court of Human Rights.[182]

---

[180] AmSOC, ¶ 119.

[181] Partial Award, ¶¶ 178 and 200, *quoting Belbek*, ¶ 265 (**CLA-3**).

[182] According to a 2014 press release of the Court, there were more than 20 individual applications pending before the Court, lodged against Ukraine or Russia or both related to the events in Crimea ECHR 345 (2014) 26.11.2014. A 2015 press release mentions more than 1,400 individual applications apparently related to the events in Crimea or the hostilities in Eastern Ukraine that are pending before the Court, lodged against both Ukraine and Russia or exclusively against one of those States. ECHR 296 (2015) 01.10.2015.

170. Overly broad interpretation of the BIT provisions to provide a remedy where one already exists elsewhere, or adaptation of the BIT provisions to changed circumstances, is not what an investment tribunal is called to do. Such neglect of the wording of the BIT and the intentions of the Contracting Parties when they signed it could eventually result in a backlash against investment arbitration and deprive investors of BIT protections in those cases for which BITs were actually intended.

3.4. The objective meaning of "investments"

171. In its third objection to jurisdiction, the Respondent raises the issue of what should be considered an investment.

172. The objective definition of investments was explained in the *Ukrnafta Interim Award*, by reference to previous awards:

> The Arbitral Tribunal therefore considers that the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk...By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment", the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment".[183]

173. Considering the way NJSC Naftogaz was established and how it acquired the bulk of the property claimed to be its investment in Russia, one must conclude that some of this property does not correspond to the objective meaning of NJSC Naftogaz's "investment".

174. NJSC Naftogaz is a Ukrainian state-owned public joint stock company formed on 25 May 1998 by Resolution No. 747 of the Cabinet of Ministers of Ukraine.[184] Other Claimants are Naftogaz subsidiaries. They were also formed by ordinances of the Cabinet of Ministers of Ukraine.[185]

---

[183] *Ukrnafta*, footnote 267 (**CLA-50**), *quoting Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 9 November 2009, ¶ 207.

[184] AmSOC, ¶ 18; First Paliashvili Report, ¶ 44.

[185] AmSOC, ¶ 18; First Paliashvili Report, ¶¶ 45-50. Charter of Subsidiary Company "Paramilitary (Gas) Emergency Rescue Services 'Likvo' of Naftogaz of Ukraine", Arts. 1.1-1.2, 9 July 2012 (**CE-112**); Charter of PJSC "Ukrgasvydobuvannya," Art. 1.1, 27 December 2012 (**CE-123**); Charter of PJSC "Ukrtransnafta," 14 June 2011 (**CE-95**); Cabinet of Ministers of Ukraine, Decree No. 256-p, 23 June 2001 (**CE-47**); Charter of "Gaz Ukraiiny" Subsidiary company of Naftogaz of Ukraine, 25 January 2011 (**CE-85**).

175. Chornomornaftogaz was Naftogaz's primary subsidiary in Crimea. Before NJSC Naftogaz was formed, Chornomornaftogaz was a state-owned enterprise that operated all the main gas pipelines and the Hlibovske underground gas storage facility in Crimea.[186] Chornomornaftogaz was established *in 1978*, in the former U.S.S.R., by Order No. 209 of the Ministry of Gas Industry, T-001 of 27 October 1978.[187] Throughout its existence, it had its registered office in Crimea[188] until August 2014 when it "reregistered" an office in Kyiv.[189] As presented by the Claimants, Chornomornaftogaz's investments in Crimea were "a critical piece of *Ukraine's strategy* to boost Naftogaz's hydrocarbon production and diversify its energy sources" (emphasis added).[190] These investments have been described in ¶¶ 72 and 73 of the Partial Award.

176. When it was formed in 1998, NJSC Naftogaz received its ownership of Chornomornaftogaz shares from the State Property Fund.[191] This status change can hardly be interpreted as "investment" or "invested" in the sense of Article 1(1) of the BIT. This is how Chornomornaftogaz became NJSC Naftogaz's primary subsidiary in Crimea.[192]

177. Also in May 1998, the Cabinet of Ministers of Ukraine passed a resolution requiring the State Property Fund of Ukraine to transfer the state-owned property used for transportation and storage of natural gas to NJSC Naftogaz for its use.[193] Thus in February 1999, by Agreement No. 76,[194] the State Property Fund transferred the state-owned property that Chornomornaftogaz operated in Crimea (including the state-owned main gas pipelines and the Hlibovske underground gas storage facility) to its corporate parent, NJSC Naftogaz, for NJSC Naftogaz's use and operational management.[195] Chornomornaftogaz continued operation of this state-owned property, with Ukrtransgaz later obtaining the right to operate certain other pipelines in Crimea.[196] Ukrtransgaz is a state-owned gas-transmission and storage company with a registered office in Ukraine. It was established in accordance with the Ordinance of the

---

[186] Claimants' Answers, ¶ 8.3.
[187] Order No. 209 of the Ministry of Gas Industry, T-0001, 20 October 1978 (**CE-608**); Tr., 168:4-6.
[188] AmSOC, ¶ 22.
[189] Tr., 169:17-21.
[190] AmSOC, ¶ 23
[191] Act No. 212 Transferring Chornomornaftogaz Shares to NJSC Naftogaz, T-0001, 9 September 1998 (**CE-622**); Claimants' Answers, ¶ 8.3.
[192] AmSOC, ¶ 21.
[193] Claimants' Answers, ¶ 8.4.
[194] Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, 4 February 1999 (**CE-32-Am**).
[195] Claimants' Answers, ¶ 8.5.
[196] Claimants' Answers, ¶ 8.6.

Cabinet of Ministers of Ukraine No. 360-p dated 13 June 2012 as a result of the reorganization of the affiliated companies of Naftogaz of Ukraine. [197]

178. It follows from this account that state-owned property was taken away from Chornomornaftogaz by the State of Ukraine and was given to NJSC Naftogaz, which then transferred it back to Chornomornaftogaz, but also partly to Ukrtransgaz, to operate. What was transferred were "rights to operate state-owned pipelines and gas-storage facilities in Ukraine that NJSC Naftogaz had received from the State Property Fund under Agreement No. 76."[198]

179. This account, taken from the Claimants' submissions, shows that it was not NJSC Naftogaz that was making an investment, but the State of Ukraine that in 1998 transferred State property that could not be privatized[199] from the State Property Fund to this state-owned and State-controlled[200] public joint stock company.

180. As regards the right to explore and develop natural resources, the Claimants explained that the people of Ukraine own all of the onshore and offshore oil and gas reserves in Crimea.[201] On behalf of the "people of Ukraine", the State of Ukraine issues special permits that grant rights to companies to extract reserves and to own the oil and gas that they extract.[202]

181. In this case it seems that those permits/rights of exploration and exploitation of natural gas reserves and operation of pipelines were not obtained as a result of a competitive process in which the rights were granted to Naftogaz in exchange for valuable consideration, but simply as a result of State administrative acts granting the use of a "natural monopoly"[203] to its own arms. Therefore, those permits in themselves cannot be qualified as Naftogaz investments, although they "fall within one of the categories listed in Article 1 of the BIT".

182. Finally, the gas stored in the Hlibovske underground gas storage facility could hardly be considered as Naftogaz's "investment" either. The gas was intended primarily for meeting the needs of the population and public institutions over the winter heating season.[204] It was

---

197 Charter of PJSC "Ukrtransgaz", 25 December 2012 (**CE-122**).
198 Claimants' Answers, ¶ 8.12.
199 Agreement on the Use of the State Property Which Cannot Be Privatized No. 76 Between the State Property Fund of Ukraine and Naftogaz, 4 February 1999 (**CE-32**).
200 First Paliashvili Report, ¶ 86.
201 Claimants' Answers, ¶ 7.1.
202 Claimants' Answers, ¶ 7.3.
203 First Paliashvili Report, ¶ 77; Tr., 16:3-9.
204 WS Kobolyev, ¶ 32. Tr., 183:24 et seq: „Naftogaz as a company is required by the Ukrainian State, to maintain the gas supply to certain consumer categories, first and foremost to households and central heating companies which provide heating for households."

nationalized for the same purpose.[205] Also, the fact that the Claimants obtained the gas on the basis of mandatory sales, is testament to the public purpose for which the gas was intended.[206]

183. It appears from these facts that the Naftogaz Group is essentially an investment of the State of Ukraine,[207] and the dispute is a dispute between two sovereign States about the rights over use of natural resources and infrastructure in Crimea. Obviously, the BIT does not protect investments of a Contracting Party (Ukraine) made in the territory of the other Contracting Party (Russia). Even if the BIT did protect such investments, as claimed by the majority in ¶ 166, the resolution of disputes between one Contracting Party as the investor and the other Contracting Party as the host State would fall under a different dispute resolution mechanism.[208]

3.5. Investments made before 1 January 1992

184. Pursuant to Article 12 of the BIT, investments made before 1 January 1992 are not covered by the Article 5 protection against expropriation. The BIT protections are applicable only to foreign investments made after this date. In other words, to the extent that the pipelines and gas-related investments were made during the time Ukraine and the Russian Federation were part of the U.S.S.R., they are not covered.

185. This exclusion from the scope of application relates primarily to Chornomornaftogaz's rights such as the right of use of underground storage in Hlibovske, and the right of use of the gas pipelines in Crimea, which existed prior to 1 January 1992.

3.6. Conclusion

186. The Contracting Parties used cumulative requirements for delimiting the applicability of the BIT, with the relevant criteria being the nationality of the investor, the territory where the investment was made, *and* the time of making the investment. None of these criteria can be excluded without compromising the Contracting Parties' intentions.

187. The requisite conditions for the application of the BIT have not been met. The Claimants were unable to demonstrate that they made investments in the Russian Federation. The Claimants acknowledged that their investments were made in Ukraine and that only the

---

205 State Council of the Republic of Crimea, Resolution No. 2141-6/14, Art. 6, 21 May 2014; State Council of the Republic of Crimea, Resolution No. 1758-6/14, 17 March 2014 on issues of energy security (**CE-202**).
206 First Paliashvili Report, ¶ 86.
207 Tr., 73:20-24.
208 Russia-Ukraine BIT, Art. 10 (**CLA-99/CLA-169**).

Respondent's actions brought them under the jurisdiction and effective control of Russia. Even if the BIT was binding on the Russian Federation in Crimea from 18 March 2014, the BIT does not apply retroactively to Ukrainian domestic investments that were made prior to that date. Additionally, some of the Claimants' investments were made before 1 January 1992 or do not come under the objective definition of "investments". Therefore, to the extent that they were made earlier or were the result of administrative acts of the State of Ukraine, the BIT does not apply to them, and the Tribunal has no jurisdiction in respect of disputes arising out of such investments.

4. LIABILITY OF THE RESPONDENT FOR ACTS OF NATIONALIZATION

188. The Tribunal must also decide on an issue that was not involved in the same way in previous "Crimea cases", being whether the BIT, even if generally applicable to "Crimea-like situations", is applicable to the acts of nationalization of which the Claimants complain. In this case, in contrast to the preceding cases based on the same BIT, the date of the purported assumption of BIT obligations by the Russian Federation is critical both for jurisdiction and for the finding of liability.

189. Article 13 of the ILC Articles provides that

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.[209]

190. As a general rule treaties do not apply retroactively. Article 28 of the VCLT provides:

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

191. The effect of the principle of non-retroactivity of treaties is that the substantive provisions of a BIT may not be relied on with respect to acts occurring before its entry into force, even where the BIT applies to investments made prior to the entry into force of the BIT. Whether obligations have retroactive effect is a rather different question from that of whether a BIT applies to investments made prior to its entry into force.[210]

---

[209] *See also Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium,* ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶¶ 168-169.

[210] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶¶ 172-173.

192. Thus, for liability to exist in this case, the cause of action must arise after the entry into force of the Russian Federation's BIT obligations in the territory of Crimea.[211] In the words of the majority, "if the seizure of the Claimants' assets took place *before* [the date of Russian annexation of Crimea and Sevastopol] then Russia inherited the seizure but did not itself seize the assets in question."[212]

4.1. Nationalization was carried out by legislation

193. The Claimants base their claim on direct expropriation:

> Ultimately, the actions taken by the Russian Federation bore the hallmark of a classic expropriation: the Russian Federation took a series of formal acts that deprived Naftogaz of its property rights, and such deprivations were permanent.[213]
>
> The Russian Federation expropriated Claimants' investments in Crimea by means of a series of legislative acts adopted in March and April 2014. [214] (references omitted)

194. It is generally accepted that direct expropriation is an instantaneous and completed act:

> Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act.[215]
>
> A measure is a "one time act", that is an act completed at precise moment, such as, for example, a nationalisation decree which is completed at the date of that decree.[216]

4.2. The acts of nationalization took place on 17 March 2014

195. Although the taking over of Chornomornaftogaz by the Crimean authorities began with the appointment of a new Chairman on 3 March 2014,[217] the majority establishes that the expropriation was conducted by the *Russian legislative activity* starting 18 March 2014.[218]

---

211 *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶¶ 11.2. and 18.13 (**CLA-118**).
212 Partial Award, ¶ 224.
213 AmSOC, ¶¶ 5-6 and ¶ 163.
214 Claimants' Answers, ¶ 10.1.
215 Article 8, ILC Articles Commentary (**CLA-73**).
216 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. A RB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.67 (**CLA-132**).
217 Partial Award, ¶ 99
218 Partial Award, ¶¶ 230, 231, 257, 262 and 268.

196. Two main legislative acts by which nationalization was undertaken in March 2014 are the Independence Resolution and the Nationalization Resolution, both adopted by the Parliament of the Republic of Crimea on 17 March 2014.[219] The first Resolution provided that:

> State property of Ukraine, located in the territory of the Republic of Crimea on the day this Resolution is adopted, shall become state property of the Republic of Crimea.[220]

197. The second Resolution "asserted Republic of Crimea state ownership over the movable and immovable property of Claimants Chornomornaftogaz and Ukrtransgaz"[221] that was located in the territory of Crimea.[222]

198. Both Resolutions became effective on the date of their adoption.[223] They were acts of direct expropriation because they transferred proprietary rights from the State of Ukraine, Chornomornaftogaz and Ukrtransgaz to the Republic of Crimea.[224]

199. These legislative acts, as well as the acts of force taken from 3-16 March 2014,[225] were taken before the Russian Federation allegedly assumed BIT obligations in Crimea. The majority is of the view that these legislative acts had no legal effect because they were adopted by a rogue legislature.[226] However, no other legislative acts adopted subsequently purported to transfer proprietary rights from Chornomornaftogaz and Ukrtransgaz to the Republic of Crimea or to the Russian Federation. [227]

200. In order for the Russian Federation to be held responsible for these acts of nationalization, they must have occurred at the time when the Russian Federation was already

---

219 Autonomous Republic of Crimea, Resolution No. 1745-6/14, 17 March 2014 (**CE-199**); State Council of the Republic of Crimea, Resolution No. 1758-6/14, 17 March 2014 (**CE-202**). *See* Partial Award, ¶ 225.

220 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 6, 17 March 2014 (**CE-199**).

221 First Stephan Report, ¶ 67.

222 State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 1, 17 March 2014 (**CE-202**).

223 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 9, 17 March 2014 (**CE-199**). State Council of the Republic of Crimea, Resolution No. 1758-6/14, ¶ 6, 17 March 2014 (**CE-202**).

224 Direct expropriation is defined as transfer of proprietory rights to the State or to a third party. *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶ 20.21 (**CLA-118**). *See also Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 427.

225 Partial Award, ¶¶ 99-106

226 Partial Award, ¶ 225.

227 These two resolutions were "the point of no return", *i.e.*, they were the expropriatory acts for Chornomornaftogaz and Ukrtransgaz property. No others were passed with regard to property of these two companies. *See* Claimants' response to the Question of the Tribunal, Tr., 33:12-13.

bound by the BIT in respect of the territory of Crimea. As the official commentary to the ILC Articles explains:

> Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law.[228]

201. Or, as explained in *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*:

> According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs...[229]

202. As a solution to the problem of liability for the acts preceding the effective date of the BIT obligations, the Claimants plead that the Tribunal should shift the date of the expropriation to whichever date is taken as the effective date of the BIT for Crimea. In other words, Naftogaz suggests that the date of expropriation should be changed and moved forward, so as to enter into the temporal scope of application of the BIT as determined by the Tribunal.[230] This is exactly what the majority has done.[231]

203. However, the date of legislative expropriation cannot be shifted back and forth. The acts of nationalization in this case took force on 17 March 2014.

4.3. The acts of nationalization had permanent effects

204. In direct expropriation cases, tribunals have stated that "there must be a forcible taking or transfer of title to the State", and that deprivation must have permanent effects.[232]

---

[228] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) (**CLA-73-Am**); Claimants' Answers, ¶ 36.3.

[229] Claimants' Answers, footnote 455, *quoting M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 90 (**CLA-124**).

[230] AmSOC, ¶ 136: "The Annexation Treaty triggered two key events: first, it caused the territory of Crimea to be annexed by the Russian Federation; and second, it incorporated certain pre-annexation acts of the so-called Republic of Crimea into Russian law, including those acts targeting Naftogaz's assets. Accordingly, if the Tribunal determines that the Annexation Treaty did not apply until 21 March 2014, the necessary consequence is that the date of these key expropriatory acts is also shifted to 21 March 2014. The day of the annexation and the day of the expropriatory acts targeting Claimants' Crimea-based assets go hand-in-hand."(references omitted). *See also* AmSOC, footnote 308 and Claimants' Answers, ¶ 10.18.

[231] Partial Award, ¶¶ 230-231.

[232] *Quiborax S.A. and Non Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 228 and 233 (**CLA-134**).

205. The Claimants argue that the 17 March Resolutions did not effect a permanent or irreversible deprivation for three reasons: (i) the Crimean authorities purported legal acts were unlawful and ineffective before 18 March 2014; (ii) the Claimants continued to operate their investments at least through 18 March 2014; (iii) the uncertainty of Crimea's future status meant that the Crimean authorities' actions lacked the necessary permanence and irreversibility to constitute an expropriation.[233]

206. The legal acts of the Crimean authorities, although unlawful under Ukrainian law, had the character of expropriation under international law. The Claimants have not established that they continued to manage and operate their investments past 17 March 2014.[234]

207. Resolution 1758 was the last step that sealed the previous acts of physical interference and it was understood by the leadership of Chornomornaftogaz to be permanent. In a letter written on 18 March 2014,[235] referring solely to the acts of the Republic of Crimea, Mr. Holovin, Chairman of the Board of Chornomornaftogaz described the acts of the Republic of Crimea in the following manner: "Thus, the present situation is an unauthorised seizure of the Company."

208. The unauthorized seizure that happened on 17 March 2014 was never reversed and had permanent effects.

4.4. The effects of the "retroactive ratification"

209. The Claimants' Expert Witness expressed the following opinion regarding the effective date of the Independence Resolution and the Nationalization Resolution:

> …these acts had no legal force under Russian law at the time of their promulgation (that is, on March 17, 2014), because Russian law *would have looked to Ukrainian law to determine their validity*. The Annexation Treaty and Law 6-FKZ94 *retroactively ratified* these acts and gave them legal effect as a matter of Russian law as of March 18, 2014.[236]

---

233 Tr., 339:6-13.

234 WS Nezhnova, ¶ 7: "From late February 2014 and into the early weeks of March 2014, First Deputy Chairman at the time, Volodymyr Plechun, tried to continue managing Chornomornaftogaz. However, Mr. Plechun departed from Crimea later in March 2014." The property of the Ukrainian Chornomornaftogaz including the permits, was transfered to the Russian Chernomorneftegaz on 17 March 2014 by virtue of Council of Ministers of the Republic of Crimea, Order No. 165-r, 17 March 2014 (**CE-204**), AmSOC, ¶ 68.

235 Letter of S. M. Holovin to Ukrainian Prime Minister A. Yatseniuk No. 20-990, 18 March 2014, p. 5 (**CE-218**).

236 First Stephan Report ¶ 64 (internal citations omitted). *See also* Tr., 328:24 et seq.

210. However, there is no basis in the Treaty on Admission nor in the Law on Admission for this opinion. There is nothing in these instruments that would defer the effects of nationalization to 18 March 2014.

211. Articles 23(2) and 23(3) of the Law on Admission[237] provide:

> 2. Normative legal acts of…the Autonomous Republic of Crimea…shall be valid in the territories of the Republic of Crimea…until the end of the transition period...
>
> 3. Normative legal acts of the Autonomous Republic of Crimea and the city of Sevastopol, the Republic of Crimea, and the city with the special status of Sevastopol that are inconsistent with the Constitution of the Russian Federation shall not apply.

212. The cited provisions provide that the acts of the Crimean Republic would be valid, unless they were inconsistent with the Constitution of the Russian Federation. This means that Russian law did not look to Ukrainian law but to the Constitution of the Russian Federation to determine their validity.[238] Ukrainian law would apply in the territory of the Republic of Crimea, only to the extent that it was not superseded by enactments of organs of the Republic of Crimea.[239]

213. The admission acts did not change the effective date of the two Resolutions of the Republic of Crimea which nationalized the property of the State of Ukraine, and the property of Chornomornaftogaz and Ukrtransgaz respectively. As the expert on Russian law testified, the Treaty on Admission and the Law on Admission retroactively confirmed the validity of those Resolutions, so their effective date remained the same.

4.5. The effects of attribution

214. As it follows from the Claimant's account of the facts, [240] at the time of expropriation, the Republic of Crimea was *de facto* running the territory of Crimea.

---

237 Russian Federation, Federal Constitutional Law No. 6-FKZ, 21 March 2014 (**CE-230**). Almost identical provisions are found in Arts. 9(2) and 9(3) of the Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, 18 March 2014 (**CE-224-Am**).

238 This was expressly confirmed by the Claimants: "So simply the language, the title 'Republic of Crimea' in Russian legislation -- which you can find in the Annexation Treaty and in the Law on Admission -- is a signal that Russia is treating as lawful acts that Ukraine did not recognise. Tr., 375:9-15.

239 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 2, 17 March 2014 (**CE-199**); First Stephan Report, ¶ 49.

240 AmSOC, ¶¶ 58-70.

215. The majority of the Tribunal has held that the relevant resolutions of the Parliament of the Republic of Crimea and conduct of the Crimean authorities that took place before 18 March 2014 are attributable to the Russian Federation on the basis of Article 8 of the ILC Articles.[241]

216. This holding means that the Russian Federation executed nationalization through acts of these authorities before it incorporated Crimea. However, attribution is not sufficient to establish liability.

217. Even if the expropriatory acts of the Crimean authorities that took place from 3 March 2014 (appointment of the new management of Chornomornaftogaz) to 17 March 2014 (the two Resolutions) are attributable to Russian Federation, they were taken at the time when the BIT was not yet binding on the Russian Federation in respect of the territory of Crimea.

218. The international obligations of the controlling State (Russia), at the time when the unlawful legislative acts were adopted, are the basis for the assessment of wrongfulness. Since the Russian Federation did not have obligations under the BIT towards Ukrainian investors in the territory of Crimea on 17 March 2014, the Russian Federation did not, by directing and controlling the conduct of the Republic of Crimea, assume responsibility to indemnify the Claimants for the Republic of Crimea's acts that were unlawful under Ukrainian law.

219. Although several of the BIT standards, and the prohibition against expropriation in particular, are a conventional codification of standards that have long existed in customary international law, the Tribunal does not have general jurisdiction over causes of action based on the obligations of States in customary international law. Hence, its jurisdiction *ratione temporis* is limited to alleged expropriatory acts which occurred after the date the Russian Federation purportedly assumed obligations for the territory of Crimea under the BIT.[242]

220. The majority holds that the Russian Federation assumed obligations under the BIT on 18 March 2014. It could be stated that the BIT obligations of the Russian Federation entered into force for Crimea on that date. It follows that acts undertaken before that date by the

---

241 Partial Award, ¶ 246, *referring to* Claimants' Answers, ¶ 44.12. In Claimants' Answers, ¶ 44.13, the Claimants state that the acts attributed to the Respondent under Article 8 ILC took place before 18 March 2014: "Applying these principles to the present case, the record reflects that the Russian Federation both directed and controlled the 'specific operation' in which the Crimean authorities were engaged in the days and weeks before Russia's purported annexation of Crimea on 18 March 2014."

242 *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶ 11.3 (**CLA-118**).

Republic of Crimea, even if attributable to the Russian Federation, are not within the jurisdiction *ratione temporis* of this Tribunal. The Tribunal therefore cannot decide on the liability of the Russian Federation for these acts.

4.6. The investment was expropriated before the BIT became applicable

221. Indeed, one coud look at this issue in another way: the Claimants assert that their investments became investments in the territory of the Russian Federation on 18 March 2014.[243] The Tribunal is limited *ratione temporis* to judging only those acts of the Respondent occurring after the date of the investor's purported investment in the territory of the Respondent State. The proposition that bilateral investment treaty claims cannot be based on acts or omissions occurring prior to a claimant's investment in the respondent State results from the nature of the host State's obligation under a bilateral investment treaty.[244]

222. This is an additional reason why the Tribunal has no jurisdiction in respect of the claims of Chornomornaftogaz and Ukrtransgaz. On 18 March 2014, those two companies had no investments in the Russian Federation because those investments had already been taken through direct expropriation conducted on 17 March 2014. At the time the BIT purportedly took effect in Crimea as part of Russian law, being 18 March 2014, the assets had already been expropriated.[245] As a member of the Tribunal stated at the hearing:

> …if you take a snapshot on 18th March as to the assets that came within the protection of the BIT, that snapshot would exclude the Claimants' assets because they had been nationalised by virtue of an enactment which Russia accepted as valid.[246]

223. As stated in *Voecklinghaus v. Czech Republic*, a tribunal has no jurisdiction *ratione temporis* where the investor retains no legal or beneficial ownership in his investment at the time of the alleged occurrence of the State's expropriatory act.[247]

224. Chornomornaftogaz and Ukrtransgaz lost their investments as a result of the Independence Resolution and the Nationalization Resolution of 17 March 2014. Accordingly, the Tribunal does not have jurisdiction to hear their claims for those investments that were

---

243 Tr., 56:4-6 and 299:13-18.

244 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 68; *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, 15 September 2011 ¶ 326; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013 ¶¶ 300, 304; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 326-327.

245 Tr., 58:1-2.

246 Tr., 58:23-59:2 (President of the Tribunal).

247 *Peter Franz Voecklinghaus v. Czech Republic*, Final Award, 19 September 2011, ¶ 165.

expropriated before the Russian Federation purportedly became bound by the BIT in the territory of Crimea.

4.7. Conclusion

225. The principle stated in Article 28 of the VCLT applies. The provisions of the BIT "do not bind the Party in relation to any act or facts which took place…before the date of entry into force of the Treaty".[248]

226. On 17 March 2014, when the Independence Resolution and Nationalization Resolution were adopted by the Crimean Parliament and entered into force, the BIT did not apply with respect of Ukrainian investments in the territory of Crimea.[249] Therefore, the Russian Federation cannot be held responsible under the BIT for the expropriatory acts adopted by the Crimean authorities on or before that day.

5. LIABILITY OF THE RESPONDENT FOR NATIONALIZATION OF STATE PROPERTY

5.1. The nationalization targeted state property

227. The decision on the liability of the Russian Federation for direct expropriation requires that the Tribunal establish that the Claimants had property or other property rights that were taken by the expropriatory measures. However, in ¶¶ 257-264 of the Partial Award, where it finds the Russian Federation liable for expropriation of the Claimants' investments, the majority, instead of establishing those facts, relies on its impression that "there is no doubt" that this occurred.[250] Even more cursory is the reasoning regarding the Russian Federation's failure to provide full and unconditional legal protection.[251]

228. The essential element of expropriation is "a 'taking' by the state of property that belongs to the investor."[252] The tribunal in *El Paso Energy International Co. v. Argentine Republic*

[248] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶ 132 (**CLA-122**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 132; 116 (**CLA-109**); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶¶ 115-117 (**CLA-135)**.

[249] Partial Award, ¶ 223.

[250] *See* ¶ 262 of the Partial Award.

[251] *See* ¶ 268 of the Partial Award.

[252] Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd ed. 2015), p. 332 (**CLA-88**).

explained that a direct expropriation involves a formal transfer of title from the foreign investor to the State.[253]

229. The acts of nationalization in this case, by their wording, transferred public or state-owned property from the State of Ukraine to the Republic of Crimea. Thus the Independence Resolution provided that:

> State property of Ukraine, located in the territory of the Republic of Crimea on the day this Resolution is adopted, shall become state property of the Republic of Crimea.[254]

230. Resolution No. 2033 of 11 April 2014 nationalized:

> …facilities of the gas pipeline system, *in state ownership or transferred for use to* the National Joint-Stock Company "Neftegaz of Ukraine", located in the territory of the Republic of Crimea...[255] (emphasis added)

231. Resolution 2085, promulgated by the State Council of the Republic of Crimea on 30 April 2014, declared that during the period of legal transition established by Article 6 of the Treaty on Admission and the Law on Admission:

> "all *state property* (of the state of Ukraine) and *abandoned property* located in the territory of the Republic of Crimea shall be considered the property of the Republic of Crimea."[256]

232. It further authorized the Crimean Council of Ministers in paragraph 2 to identify and perfect the Republic of Crimea's rights in this property, and to reorganize and liquidate State enterprises and other legal entities used to manage State property or property under the control of State organizations.

233. Naftogaz Group was operating in a strategic sector of Crimea's economy[257] and was granted the right of use of public and state-owned property. As a result, it was obviously affected by legislative measures enacted by the Parliament of the Republic of Crimea nationalizing state-owned property. However, the decision on liability would need to establish which property or which property rights were affected.

---

253 *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 265 (**CLA-116**).

254 Autonomous Republic of Crimea, Resolution No. 1745-6/14, ¶ 6, 17 March 2014 (**CE-199**).

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

256 State Council of the Republic of Crimea, Resolution No. 2085-6/14, ¶ 1, 30 April 2014 (**CE-259**).

257 AmSOC, ¶ 197.

234. Some evidence in the case file indicates that the property that was nationalized was not owned by Naftogaz pursuant to Ukrainian law. First, the equity that was taken was State-owned:

> Naftogaz of Ukraine *and its subsidiaries* (hereinafter collectively referred to as the "Group") are *beneficially owned* by the State of Ukraine. The Government of Ukraine, as represented by the Cabinet of Ministers of Ukraine, controls the Company through participation in the shareholders' meetings and the Supervisory Board meetings, as well as through the appointment of the Chairman of the Board and the Board members.[258] (emphasis added)

235. Second, the tangible property that was taken was apparently directly owned by the State of Ukraine, and not by the Claimants. Pursuant to Ukrainian Law 1636 and Law 1207:

> the soil, subsoil, air, water, and other resources located within the territory of Ukraine and its continental shelf and exclusive (maritime) economic zone, which are in the ownership of Ukrainian People, *as well as the property of state enterprises*,[259] institutions and organizations, *are in the ownership of the State of Ukraine* and cannot be transferred into the ownership of other states, or legal and physical persons, in any way other than as established by the laws of Ukraine.[260] (emphasis added)

236. This is confirmed by the evidence submitted by the Claimants. In a judgment on a criminal conviction against one of the Claimants' witnesses, the Kyiv District Court identified cash funds of Naftogaz as "state property".[261] One of the rare ownership certificates for real property that was submitted in the case files, indicates that the Pivdennyi resort was "state-owned".[262]

237. In the case of direct expropriations, the dispossession to the detriment of a private person coincides with the appropriation by a public person.[263] Here, it was not a private person, Naftogaz, but the State of Ukraine, that was dispossessed of its property. In parallel with the change of *de facto* jurisdiction over the territory from one State to the other, the State ownership of property also changed hands from one State to the other. [264] The majority's decision on

---

[258] 2014 Annual Report, p. 81 (**CE-145**).

[259] Constitution of Ukraine, 28 June 1996 (**CE-19**).

[260] First Paliashvili Report, ¶ 65, *citing* Law of Ukraine No. 1207-VII "On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine," Arts. 11.6, 15 April 2014 (**CE-255**).

[261] Sentence, Case No. 761/43004/17, Proceeding No. 1-кп/761/962/2018, 25 July 2018, pp. 111, 133 and 156 (**CE-807**).

[262] Excerpt from Real Estate Property Register recording property rights with respect to the unfinished resort in the Autonomous Republic of Crimea, 28 November 2012 (**CE-121**), *referred to* in AmSOC, ¶ 31, footnote 72.

[263] United Nations Conference on Trade and Development Series on Issues in International Investment Agreements II, Expropriation, UNCTAD/DIAE/IA.2011/7, 30 November 2011, p. 12.

[264] Claimants' Answers, ¶ 46.3; Tr., 122:12-15.

liability fails to establish with exactitude which property or property rights belonging to Naftogaz have been expropriated.

238. There is no doubt that the loss of the territory of Crimea entailed also a huge economic loss for the State of Ukraine.[265] However, this Tribunal is not the proper forum for redressing such loss. The State of Ukraine is not a protected investor under the BIT. The decision of this Tribunal on jurisdiction and liability might affect future cases of inter-State conflicts where the question of taking of property belonging to one Contracting State by the other Contracting State comes into focus. The resolution of such conflicts is not within the scope of disputes for which this BIT or other BITs were originally intended, and it could derail the original idea that was behind such instruments.

5.2. Conclusion

239. The Claimants bear the burden of proving that the property for which they claim compensation was their own property, rather than the property of the State of Ukraine. To the extent that they were unable to discharge that burden by showing that the property seized was their own property, there can be no liability for expropriation under Article 5 of the BIT.

Place of arbitration: The Hague, the Netherlands

Signed, this 13 day of February 2019,

M. Stanivuković

Professor Dr. Maja Stanivuković
Arbitrator

[265] AmSOC, ¶ 5: "Naftogaz, as Ukraine's state-owned oil and gas group, owned some of the most valuable energy assets in Crimea and was among the Russian Federation's chief targets, resulting in billions of dollars in losses."