RG (roll) No. 19/04161
Served by RPVA on 4 February 2021
Closing date: 8 February 2021
Hearing: 8 February 2021

To the President and Judges of Chamber 16, Section 5 of the Paris Court of Appeal

ACTION IN ANNULMENT AGAINST AN ARBITRAL AWARD MADE IN FRANCE
(ART. 1520 of the French Code of Civil Procedure)
SUBMISSIONS No. 4

FOR:

The **RUSSIAN FEDERATION**, bringing proceedings through the Ministry of Justice of the Russian Federation, itself represented by Mr Konstantin Chuychenko, Minister of Justice of the Russian Federation, fully empowered to act on behalf of the Russian Federation, 14, rue Gitnaya - Moscow - Russia;

Having as instructing solicitor: SELARL LEXAVOUE PARIS-VERSAILLES, through Maître Matthieu BOCCON-GIBOD, a lawyer registered with the Paris bar, 89, Quai d'Orsay, 75007 PARIS (Tel: +33.1.39.07.21.21 Fax: +33.1.39.07.21.22), Court ID: C 2477

Having as litigating lawyers: Maîtres Andrea PINNA and Anne-Fleur DORY, Lawyers registered with the Paris bar, FOLEY HOAG AARPI, 153, rue du Faubourg Saint-Honoré, 75008 PARIS (Tel.: +33 1 70 36 61 30 - Fax: +33 1 70 36 61 31), Court ID: B 1190

Applicant

AGAINST:

The Joint Stock Company "State Savings Bank of Ukraine", also known as: **JSC OSCHADBANK**, whose registered office is at 12G, rue Hospitalna - Kyiv 01001, Ukraine (hereinafter "OSCHADBANK" or the "Bank");

Having as instructing solicitor: the law firm, SELARL PELLERIN – DE MARIA – GUERRE, lawyers registered with the Paris bar, whose registered office is at 20 rue du Pont Neuf in Paris (75001), through Me Luca DE MARIA, Court ID: L 18

Having as litigating lawyers:	Maîtres Philippe PINSOLLE and Thomas VOISIN, of Quinn Emmanuel Urquhart & Sullivan, LLP, 6, rue Lamennais, 75008, Paris, Francc, Court ID: L 0055

Respondent

These submissions are the fourth submissions of the Russian Federation. Their content is unchanged from submissions no. 3 served on 21 January 2021 except for a framed addendum inserted after paragraph 187 in response to the new point of law raised by Oschadbank in its submissions served on 1 February 2021.

MAY IT PLEASE THE COURT

1. The dispute between Oschadbank and the Russian Federation arose as a result of the decision taken by Oschadbank, pursuant to decisions issued by the Ukrainian authorities, to cease all activity in Crimea in connection with the accession of that country to the Russian Federation in March 2014.

2. According to Oschadbank, following what it calls the "annexation" of Crimea, its branch was expropriated by the Russian Federation and the said branch constituted an investment within the meaning of the bilateral treaty of 27 November 1998 between the Russian Federation and Ukraine on the encouragement and mutual protection of investments (hereinafter the "BIT"). The respondent claims that such an investment is protected by the BIT because, *inter alia*, it was made on the territory of the Russian Federation.

3. However, like Ukraine, Oschadbank considers that Crimea is not part of the Russian Federation, owing to an alleged "unlawful annexation". The inconsistency is obvious: how can it consider that Crimea is not part of the Russian Federation while asserting the opposite view in respect of the application of the BIT?

4. It will be shown that the question of the State territory (Russia or Ukraine) to which Crimea belongs is one of the conditions for the application of the BIT. In the case of a territorial dispute, the BIT cannot apply in respect of Crimea, as it can only apply in mutually recognised territories.

5. However, the questions raised by the territorial dispute did not fall within the jurisdiction of the arbitral tribunal, which, after acknowledging the existence of the territorial dispute, could not settle that matter but only find that it did not have jurisdiction.

6. The arbitral award incurs annulment for reasons other than lack of territorial jurisdiction alone. The conditions of jurisdiction *ratione materiae* (existence of an investment) and *ratione temporis* (date of the investment) are also not met.

7. Regarding the latter condition, it has recently come to light that Oschadbank fraudulently concealed the fact that the Crimean branch was acquired and operated by Oschadbank before 1 January 1992, i.e. at a time when the BIT did not apply (Article 12). This circumstance not only entails annulment on the ground that the arbitrators were wrong in declaring themselves competent, but also on the ground of procedural fraud sanctioned by international procedural public policy (Article 1520 5° of the French Code of Civil Procedure).

8. Furthermore, the arbitral tribunal did not exercise the diligence required of an arbitrator when examining a case because, otherwise, the tribunal would have found that it lacked jurisdiction or, at the very least, dismissed Oschadbank's claims on the merits.

9. These circumstances render the arbitral award null and void on the basis of several grounds provided for in Article 1520 of the French Code of Civil Procedure.

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PART I – FACTS AND PROCEEDINGS

10. An action in annulment is pending before the Paris Court of Appeal against the arbitral award handed down on 26 November 2018[1] (the "Award") by an arbitral tribunal sitting in Paris composed of Messrs Charles Brower, Hugo Perezcano Diaz, arbitrators, and David Williams, president, in case no. 2016-14, under the aegis of the Permanent Court of Arbitration (hereinafter the "PCA").

11. Pursuant to the Award, the Russian Federation was ordered to pay a principal sum of USD 1,111,300,729 to the Public Joint Stock Company "State Savings Bank of Ukraine", also known as JSC Oschadbank (hereinafter "Oschadbank" or the "Bank").

12. Although Oschadbank is a commercial bank owned by the Ukrainian State, its history is closely linked to that of the Soviet Union.

13. Oschadbank is actually the current form, resulting from the gradual restructuring of the Soviet banking system, of the Ukrainian branch of the Soviet Union's Sberbank, itself the successor to the State Savings Banks. Furthermore, the Russian translation of "Savings Bank" is "Sberbank" and the Ukrainian translation is "Oschadbank".

14. Since the Soviet period, the State Labour Savings Banks have had a branch in Crimea, which continued to operate until 2014[2].

15. Oschadbank and its predecessors had thus established and operated a branch in Crimea for several decades, as stated, albeit vaguely, in the statement of claim:

> *"[until the accession of Crimea to the Russian Federation] Oschadbank had operated for decades as Crimea's largest banking operation through its local branch with the headquarters located at 55a Kyivska St. in Simferopol and its local subordinated outlets in Crimea"*[3].

16. However, following the accession of the Republic of Crimea and the city of federal significance Sevastopol (hereinafter "Crimea" or "the Crimean Peninsula") to the Russian Federation in March 2014, Oschadbank ceased its activities in Crimea, thereby contravening, *inter alia*, the measures taken by the authorities to protect depositors.

17. This is the origin of the dispute which gave rise to the arbitral Award.

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[1] Arbitral award issued on 26 November 2018, (hereinafter the "Award") (**exhibit FR-1**). The French translation of the Award is produced at the request of the Court (**exhibit FR-1b**).

[2] See below §§ 137 *et seq.*

[3] Statement of Claim, § 91. The Russian Federation adduces as **exhibit FR-2** the entire record of the arbitral proceedings as received from the Permanent Court of Arbitration.

18. On a preliminary basis, it shall be noted that the conditions of Crimea's accession to the Russian Federation or the lawfulness of its attachment to that Federation shall not be debated here. The arbitral tribunal formed pursuant to the BIT has never had jurisdiction to decide such a question[4], and nor does the Court of Appeal.

19. However, in its submissions of 15 December 2020, Oschadbank attempted to move the debate into this arena by repeatedly referring to an alleged "invasion" of Crimea. It does not hesitate to assert, in the very first lines of its submissions, that "*the dispute arises from the military invasion and occupation of Crimea by Russia as of February 2014, in breach of international law*"[5], in a clear attempt to discredit the Russian Federation in the eyes of this court.

20. The Russian Federation does not intend to engage in a debate which, as already said, has no place here, but it nevertheless very respectfully urges the Court not to let itself be misled by Oschadbank's assertions. Not only are they irrelevant in the present proceedings, but, contrary to what Oschadbank claims, the accession of Crimea to the Russian Federation has not been unanimously condemned as being contrary to international law. Contrary to the argument of illegal territorial annexation put forward by Oschadbank[6], eminent specialists in international law support the view that Crimea's independence, followed by its accession to the Russian Federation, complied with international law[7].

21. Beyond Crimea's accession to the Russian Federation, its dispute with Oschadbank is based on the facts recounted below.

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[4] Which is also one of the many reasons why the Award should be annulled.

[5] Oschadbank's submissions of 15 December 2020, § 4.

[6] Oschadbank's submissions of 15 December 2020, §§ 22 *et seq.*

[7] See, for example, C. Santulli, "La crise Ukrainienne : position du problème", Rev. Gén. Droit International Public, 2014, p. 799 *et seq.*, which considered that "*there is reason to accept that valid territorial title to Crimea has accrued to Russia*" (p. 813) (**exhibit FRJ-1**).

§1 Measures to regulate the banking sector following Crimea's accession to the Russian Federation

22. At the end of March 2014, the Parliament of the Russian Federation passed several laws in an attempt to maintain the continuity of banking activities in Crimea and thus avoid a major economic crisis.

23. Firstly, in accordance with the Accession Law of 21 March 2014, Ukrainian banks holding a licence from the National Bank of Ukraine (hereinafter "NBU") were authorised to continue operating in Crimea during a transitional period ending on 1 January 2015, during which banks could obtain a licence from the Russian central bank, the Bank of Russia[8].

24. The Federal Law of the Russian Federation No. 37-FZ of 2 April 2014 On Peculiarities of Functioning of Financial System of the Republic of Crimea and the Federal City of Sevastopol within the Transitional Period, imposed certain obligations on Ukrainian banks such as, for example, operating in Rubles (RUB)[9].

25. In addition, the Bank of Russia was empowered to wind up the activities of the branch of a bank that did not fulfil these obligations or failed to fulfil its obligations to its depositors[10].

26. In addition, another law of 2 April 2014, the Federal Law of the Russian Federation No. 39-FZ On the Defence of Interests of Natural Persons Having Deposits in Banks and solitary Structural subdivisions of Banks registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance of Sevastopol established the Depositors' Protection Fund (hereinafter the "DPF")[11].

27. This fund was tasked with compensating those depositors for any losses suffered as a result of defaults by banks[12]. In return, the DPF would be assigned the claims held by depositors against the defaulting banks whose activities in Crimea

[8] They could continue operating during a transitional period until 1 January 2015, during which they could apply for a licence from the Bank of Russia, cf. Accession Law, Art. 17(2) cited by the Arbitral Award §68.

[9] Federal Law of the Russian Federation No. 37-FZ of 2 April 2014, Article 3(1) (Exhibit CE-129 in the arbitration proceedings) (**exhibit FR-2**).

[10] Federal Law of the Russian Federation No. 37-FZ of 2 April 2014, Article 7(2) (Exhibit CE-129 in the arbitration proceedings) (**exhibit FR-2**).

[11] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014 (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[12] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, Articles 7 and 8 (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

were wound up by the Bank of Russia[13], and would take legal action directly against the defaulting banks to obtain repayment of the claims[14].

28. In disregard of these regulatory measures, which aimed to ensure the continuity of banking operations in Crimea and to protect depositors, Oschadbank nonetheless took the decision to cease operating in Crimea.

§2 The cessation by Oschadbank of its activities in Crimea

29. Thus, on the pretext – put forward during the arbitration proceedings – of protecting its assets in Crimea, Oschadbank deliberately ceased almost all day-to-day banking operations, ceased signing new contracts with its customers and sought to transfer to Ukraine all of the liquid and valuable assets that the Bank had in Crimea, as well as confidential information concerning its customers[15].

30. At the same time, on 6 May 2014, the NBU issued Resolution No. 260, prohibiting Ukrainian banks from conducting banking business in Crimea as of 6 June 2014[16].

31. On 19 May 2014, Oschadbank informed the NBU of its decision to terminate its operations in Crimea[17] and, on 26 May 2014, it notified it of the effective cessation of its operations in the region[18].

32. On 27 May 2014, the NBU removed the Crimean Branch of Oschadbank and its outlets from the Ukrainian State Register of Banks[19].

33. At the same time, given Oschadbank's failure to fulfil its obligations in connection with the operation of its Crimean Branch, on 26 May 2014, the Bank of Russia had no choice but to order the liquidation of Oschadbank's activities, in accordance with Article 7 of the Federal Law of the Russian Federation No. 37-FZ of 2 April 2014, "*due to non-fulfilment of obligations towards creditors (depositors) arising from actions of solitary structural subdivisions located on the territory of*

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[13] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, Article 6 (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[14] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, Article 7(3) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[15] Which Oschadbank itself acknowledges, cf. Statement of Claim, §§ 190, 196-199 (**exhibit FR-2**).

[16] NBU Resolution No. 260 of 6 May 2014, §§ 3 to 5 (Exhibit CE-179 in the arbitration proceedings) (**exhibit FR-2**).

[17] Email from Oschadbank to the NBU dated 19 May 2014 (Exhibit CE-188 in the arbitration proceedings) (**exhibit FR-2**).

[18] Email from Oschadbank to the NBU dated 26 May 2014 (Exhibit CE-192 in the arbitration proceedings) (**exhibit FR-2**).

[19] Statement of Claim, § 206 (**exhibit FR-2**).

the Republic of Crimea and the city of federal significance, Sevastopol"[20]. On the same day, the DPF announced that it would start receiving claims for compensation from Oschadbank customers on 29 May 2014[21].

§3 Measures taken against Oschadbank for the purpose of compensating its customers in Crimea

34. On 29 May 2014, in response to "*numerous applications (complaints) from physical persons who earlier entered into bank deposit and bank account agreements (hereinafter referred to as the "agreements) with* [Oschadbank]"), which was not fulfilling its obligations under contracts with its customers, the Crimean Public Prosecutor's Department initiated legal proceedings before the Court of Simferopol to bring an end to the Bank's failings[22].

35. In accordance with the provisions of Articles 139 and 140 of the Civil Procedural Code of the Russian Federation, the Public Prosecution Department also requested that, as a provisional measure, Oschadbank's assets in Crimea be administered by the DPF[23], which the Simferopol Court granted without delay on grounds of urgency[24].

36. On 17 September 2014, the Simferopol Court ruled on the merits and, finding that the Crimean Branch of Oschadbank had wound up its operations at the end of April 2014 and had ceased fulfilling its contractual obligations to its customers, it ordered Oschadbank "*to cease unlawful actions (inactions) in the form of failure to perform obligations arising out of the concluded deposit agreements*")[25].

37. At the same time, in accordance with the provisions of the Federal Law of the Russian Federation No. 39-FZ of 2 April 2014 on the protection of depositors, and as announced, the DPF began to examine claims for reimbursement from customers who were victims of Oschadbank's actions and the cessation of its activities.

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[20] Decision of the Bank of Russia dated 26 May 2014 (Exhibit CE-189 in the arbitration proceedings) (**exhibit FR-2**).

[21] Extract from the DPF website, communication *On Compensation Payments and Acquisition of Rights (Claims)* of 26/05/2014 (Exhibit CE-195 in the arbitration proceedings) (**exhibit FR-2**).

[22] Submissions of the Deputy Prosecutor of Crimea dated 29 May 2014 (Exhibit CE-203 in the arbitration proceedings) (**exhibit FR-2**).

[23] Submissions of the Deputy Prosecutor of Crimea dated 29 May 2014 (Exhibit CE-203 in the arbitration proceedings) (**exhibit FR-2**).

[24] Decision of the Court of Simferopol, Case no. 2-931/14, of 29 May 2014 (Exhibit CE-171 in the arbitration proceedings) (**exhibit FR-2**).

[25] Decision of the Court of Simferopol, Case no. 2-931/14, of 17 September 2014 (Exhibit CE-222 in the arbitration proceedings) (**exhibit FR-2**).

38. In 2014 alone, the amount of compensation paid by the DPF to depositors thus totalled around RUB 4.6 billion - or more than €60 million[26].

39. In order to obtain repayment of the sums paid to former Oschadbank customers, the DPF also brought actions against Oschadbank under the aforementioned Law No. 39-FZ[27].

40. In order to ensure the effective recovery of the sums owed by the Bank, the DPF also took enforcement measures against Oschadbank[28] and initiated proceedings against one of its main debtors, Solar Group.

41. Finally, the DPF took legal action against Oschadbank on behalf of its former customers seeking to obtain compensation from the Bank for them for losses suffered in excess of the DPF's compensation limit.

§4 Arbitration proceedings initiated by Oschadbank against the Russian Federation

42. This was the context in which, in January 2016, Oschadbank believed it could bring arbitration proceedings against the Russian Federation on the basis of the BIT.

43. In summary, the Bank claimed that it had suffered an unlawful expropriation of its Crimean Branch by the Russian Federation as a result of the aforementioned measures, which were intended to secure compensation for Oschadbank's former customers after it suddenly ceased operating in Crimea in breach of its contractual obligations to its depositors.

44. Oschadbank argued that it could therefore bring an action before an arbitral tribunal seeking an award against the Russian Federation on the basis of the aforementioned BIT.

45. The arbitration proceedings were initiated by notice to the PCA on 20 January 2016 of a request dated 18 January 2016 under the BIT[29].

46. Prior to that date, on 24 December 2015 and in response to Oschadbank's earlier notice of grievances in July 2015[30], the Ministry of Justice of the Russian Federation had written to Oschadbank stating that the BIT did not apply to the claims[31]. In the same letter, after noting the Bank's failure to meet its obligations, the Russian Federation nevertheless stated that the Bank could resume its banking

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[26] DPF Annual Report for 2014, p. 34 (Exhibit CE-40 in the arbitration proceedings) (**exhibit FR-2**).

[27] Statement of claim, § 228 (**exhibit FR-2**).

[28] Statement of claim, §§ 234-236 (**exhibit FR-2**).

[29] Notice of Arbitration of Oschadbank dated 18 January 2016 (**exhibit FR-2**).

[30] Notice of dispute by Oschadbank dated 8 July 2015 (**exhibit FR-2**).

[31] Letter from the Ministry of Justice of the Russian Federation to Oschadbank dated 24 December 2015 (**exhibit FR-2**).

activities in Crimea if it complied with the applicable regulations. Oschadbank did not respond to this letter and had clearly decided to initiate arbitration proceedings even though the Russian Federation had invited it to resume its banking activities in Crimea, which it had unilaterally ceased.

47. Then, on 23 June 2016, through its Ambassador in The Hague, the Russian Federation wrote again to the PCA on 21 June 2016, forwarding a letter from the Ministry of Justice of the Russian Federation dated 13 May 2016[32], returning the notice of Oschadbank's request for arbitration it had received from the PCA. The main purpose of the letter was to reject the PCA's notice and it did so in particularly clear terms:

> *"We return you herewith the Notice of Arbitration on the arbitration proceedings initiated under Article 9 of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments before the Permanent Court of Arbitration by the Public Joint Stock Company "State Savings Bank of Ukraine" vs. the Russian Federation (notice dated 22 February 2015)".*

48. In that same letter, the Russian Federation explained its reasons for rejecting service of the Notice of Arbitration on the grounds that the arbitral tribunal lacked jurisdiction and that the conditions for the application of the BIT had not been met in terms that, once again, were perfectly clear:

> *"It is manifest that such claims cannot be considered under the Agreement mentioned above and, therefore, the Agreement cannot serve as a basis for composing an arbitral tribunal to settle this claim.*
>
> *According to Clause 1 of Article 1 of the Agreement, the term "investments" means all kinds of assets and intellectual values which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws. The assets being the subject of dispute are located in the territory of the Republic of Crimea and the city of Sevastopol which were earlier part of Ukraine. The Bank's assets do not constitute investments, since they were not invested in the territory of the Russian Federation, and, even if they occurred, they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in conformity with the legislation of the Russian Federation. These assets have not been earlier subject to taxation under the*

[32] Letter from the Ministry of Justice of the Russian Federation of 13 May 2016 **(exhibit FR-2)**.

legislation of the Russian Federation and have not contributed to the development of the economy of the Russian Federation.

On the basis of the abovementioned the Russian Federation does not recognize the jurisdiction of an international tribunal at the Permanent Court of Arbitration in settlement of the abovementioned claim".

49. Despite the Russian Federation's rejection of the notice, the PCA and the arbitral tribunal considered that they could continue the arbitral proceedings without the participation of the Russian Federation, a fact that the arbitral tribunal underlined[33].

50. The Russian Federation, which has always maintained that the dispute fell outside the scope of the Treaty and therefore also contested the jurisdiction of the arbitral tribunal formed on the basis thereof, did not participate in the arbitral proceedings; the arbitration thus took place in its absence until the Award made on 26 November 2018, against which these submissions are issued[34].

51. Pursuant to the said Award, the Russian Federation was ordered to pay a principal sum of USD 1,111,300,729 to Oschadbank, plus interest accruing from 31 March 2014 at the six-month US dollar LIBOR rate, with annual capitalisation. This is the Award that the Court of Appeal is asked to annul.

§5 The action in annulment giving rise to these proceedings and the application for stay of execution

52. The Russian Federation brought the action in annulment before this Court of Appeal on 19 February 2019. On 25 March 2019, it lodged an application with the Procedural Judge seeking a stay of execution of the Award on the basis of Article 1526 paragraph 2 of the French Code of Civil Procedure (CPC).

53. Oschadbank had not instructed counsel to represent it in the main proceedings and was again not represented, notwithstanding the application for a stay of execution of which it was informed by email on the same day by Counsel for the Russian Federation[35].

54. Pending the possible appointment of counsel by Oschadbank, the oral hearing initially scheduled for 14 May 2019 was deferred until 2 July 2019, when the Procedural Judge finally heard the Russian Federation alone, in the absence of Oschadbank, which did not appear. The case was adjourned until 13 August 2019.

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[33] Award, §§ 192 *et seq.*, the tribunal indicating in particular that it would rule pursuant to Article 28 of the 1976 UNCITRAL Arbitration Rules.

[34] The arbitration proceedings are explained below.

[35] Email from counsel for the Russian Federation to counsel for Oschadbank dated 25 March 2019 (**exhibit FR-17**).

55. It was not until the evening of 7 August 2019, i.e. less than a week before the announced decision, that Oschadbank finally instructed counsel in the present proceedings. The following day, Oschadbank wrote to the Procedural Judge stating that it objected to the application for a stay of execution and the action in annulment and "*requested reasonable time to enable it to obtain a copy of the Russian Federation's written submissions and to prepare submissions in response with its counsel*"[36].

56. However, as the Russian Federation explained above and in a letter sent to the Procedural Judge on 9 August 2019[37], it had informed Oschadbank's counsel in the arbitration proceedings, now its litigation lawyers in these proceedings, on three occasions – 25 March 2019, 8 April 2019 and 30 April 2019 – communicating all of its submissions and exhibits[38]. Ironically, the lawyer who finally represented Oschadbank on 7 August 2019 had attended the hearing on the application held on 2 July 2019.

57. Moreover, on 9 August 2019, in another letter sent to the Procedural Judge after its letter of 8 August, Oschadbank acknowledged that it had been informed of the proceedings pending before the Court[39].

58. There can be no doubt, therefore, that Oschadbank was fully informed, as of 25 March 2019, of both the action in annulment and the application for a stay of execution as well as of the events that followed.

59. However, on 13 August 2019, the Procedural Judge who had been misled by Oschadbank's assertions that it had not been informed of the application for a stay of execution, ordered the reopening of the related proceedings and scheduled a new oral hearing for 8 October 2019.

60. By appearing in these proceedings at a very late stage, Oschadbank thus succeeded in delaying the examination of the application for a stay of execution, its objective also being to continue enforcing the Award unbeknownst to the Russian Federation.

61. Thus, on 23 July 2019, the Russian Federation learned from a number of press reports[40] that the Kyiv Court of Appeal had issued a decision granting exequatur of the Award on 17 July 2019. This decision was handed down without the Russian Federation having had the opportunity to present its defence, since none

[36] Letter from Oschadbank to the Procedural Judge dated 8 August 2019 (**exhibit FR-18**).

[37] Letter from the Russian Federation to the Procedural Judge dated 9 August 2019 (**exhibit FR-19**).

[38] Email from counsel for the Russian Federation to counsel for Oschadbank dated 25 March 2019 and attachments (**exhibit FR-17**), Email from counsel for the Russian Federation to counsel for Oschadbank dated 8 April 2019 and attachments (**exhibit FR-20**), Email from counsel for the Russian Federation to counsel for Oschadbank dated 30 April 2019 and attachments (**exhibit FR-21**).

[39] Letter from Oschadbank to the Procedural Judge dated 9 August 2019 (**exhibit FR-19**).

[40] Article from the Global Arbitration Review of 23 July 2019 (**exhibit FR-22**).

of the communications relating to these proceedings had been duly served on the Russian Federation.

62. On 18 September 2019, Oschadbank announced in a press release that it would implement enforcement measures without delay on the basis of the exequatur decision thus obtained[41]. With hindsight, these announcements explained Oschadbank's attitude: its sole aim had been to artificially delay the application for the stay of execution, in order to conceal the exequatur proceedings being conducted at the same time in Ukraine.

63. These circumstances particularly created the risk of a serious prejudice to the rights of the Russian Federation and, in particular, the risk of enforcement measures being implemented abroad in breach of its immunity from execution.

64. Yet, in an order issued on 22 October 2019, the Procedural Judge dismissed the Russian Federation's application for a stay of execution.

65. This decision, the reasoning of which is quite surprising having regard to the provisions of Article 1526 paragraph 2 of the CPC, states in particular that:

> "*41. However, on the one hand, the mere fact that JSC Oschadbank may consider initiating enforcement proceedings in various countries due to the extent of the Russian Federation's assets cannot be a relevant ground for ordering the stay of execution of an award, when the very purpose of the principle of execution is to enable payment of the award notwithstanding an action in annulment, and* ***given that no evidence is adduced in the present case of any enforcement measure taken and which has effectively been prejudicial, by reason of the law applicable in this State, to property protected by its immunity from execution***"[42]. *(our bolding and underlining)*

66. The Procedural Judge therefore dismissed the application for a stay of execution, lodged by the Russian Federation with the aim of preventing a risk of serious prejudice, on the grounds that the risk had not yet materialised. This amounts to requiring the fulfilment of an additional condition for which Article 1526 paragraph 2 of the CPC makes no provision[43].

67. Moreover, this decision appears to be contrary to the interpretation of this provision given by another section of the Paris Court of Appeal. Less than two years earlier, the Procedural Judge of Section 1 Chamber 1 had ruled that an application

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[41] Press release issued by Oschadbank on 18 September 2019, original in Ukrainian and free translation into French (**exhibit FR-42**).

[42] Order on the application for a stay of execution issued on 22 October 2019 (**exhibit FR-23**).

[43] This was noted by two commentators of the said Order, R. Dethomas, note Rev. arb. 2020, 477; Th. Clay, Recueil Dalloz 2020, p. 2499.

for a stay of execution is out of time when enforcement measures have already been taken:

> *"Whereas, in this case, it appears that the aforementioned attachment carried out in the amount of EUR 2,542,136.24 on 2 June 2017, has been declared effective in the amount of USD 2,124,236.97 (exhibit 12 of the applicant) and that, consequently, the provisional execution of the arbitral award has been completed up to that amount;*
>
> *Whereas the claim brought by GEMS is therefore devoid of purpose up to the attached amount, notwithstanding the action in progress that it has brought before the enforcement judge seeking the annulment of this attachment, as this objection does not call into question the attributive effect of the attachment document served"*[44].

68. It was important for the Russian Federation to submit an application for a stay of execution without delay owing to the interpretation of Article 1526 paragraph 2 CPC given by this Court, which considered that an application for a stay of execution lodged after enforcement measures had been taken was devoid of purpose.

69. In his order of 22 October 2019, the Procedural Judge adopted a different interpretation and decided that the Russian Federation's application was premature. As the Russian Federation had no effective means of challenging the said order, it could only accept it and reserve the right to lodge another application for a stay of execution in the event that the new condition laid down (evidence of an "*enforcement measure which has been taken and has effectively been prejudicial to property protected by the immunity from execution*" of the Russian Federation) were to be met.

70. The annulment proceedings continued and, following submissions by Oschadbank and the Russian Federation, notified on 16 January 2020 and 30 June 2020 respectively, on 19 November 2020 the Court heard two experts presented by the Russian Federation, namely Professor Xavier Boucobza, who signed an opinion on the applicability *ratione temporis* of the BIT[45] and Professor Yves Nouvel, who gave an opinion on the territorial applicability of the BIT[46]. At the Court's request,

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[44] Paris CA (Order of the Procedural Judge), 21 December 2017, *SCS GE Medical Systems c/ Mohamed Saleh Mansouri El Gmati and Société Tasharukiat Alsaqr Alakhdar*, RG No. 16/21530 (**exhibit FRJ-2**).

[45] Opinion of Professor Xavier Boucobza of 25 June 2020 (**exhibit FR-36**).

[46] Opinion of Professor Yves Nouvel of 29 June 2020 (**exhibit FR-33**).

a verbatim transcription[47] of the expert hearing was appended to the minutes of the hearing.

71. Oschadbank subsequently notified its submissions, on 15 December 2020, in response to those of the Russian Federation and in response to the hearings of the aforementioned experts. The fact that Oschadbank did not refer once to either the opinion or the hearing of Professor Boucobza shows the extent to which it is troubled by the question of the inapplicability of the BIT because the alleged investment was made before 1 January 1992. However, these submissions from the Russian Federation will endeavour to include the material explanations of Professor Boucobza confirming the arbitral tribunal's lack of jurisdiction and the ensuing annulment of the Award.

72. Oschadbank is in such an awkward position regarding the date of its investment, which renders the BIT inapplicable, that it concealed this fact from the arbitral tribunal. In fact, it was this concealment that prompted the Russian Federation, in parallel with the action brought before the Court of Appeal seeking annulment of the award, to apply to the arbitral tribunal for a revision of the Award on the basis of Article 1502 of the CPC.

§6 The application for revision lodged in August 2019

73. In the course of research undertaken when preparing its first submissions on the merits, which were served on 18 July 2019 in these proceedings, the Russian Federation discovered internal documents of Oschadbank in archives in Kyiv which Oschadbank had not presented to the arbitrators.

74. These documents show that the alleged investment of which Oschadbank claims to have been expropriated by the Russian Federation (the Crimean Branch) was acquired and operated by Oschadbank at a time when the BIT did not apply, since the BIT only applies to investments made on or after 1 January 1992[48].

75. After discovering this new fact concealed from the arbitrators, on 19 August 2019, the Russian Federation filed an application for revision of the arbitral Award to the arbitral tribunal that had handed it down, pursuant to the provisions of Article 1502 of the CPC[49].

[47] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020 (**exhibit FR-43**).

[48] Article 12 of the BIT: "*This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992*".

[49] Application for revision of the Award lodged by the Russian Federation on 19 August 2019 (**exhibit FR-24**).

76. The parties exchanged their respective submissions[50] and, when it submitted its latest statement of case to the arbitral tribunal on 25 November 2019, Oschadbank indicated that the organisation of a hearing to question the Russian Federation's witnesses and experts did not pose a problem, if the arbitral tribunal so wished:

> "[Oschadbank] *is ready and willing to subject the Respondent's witnesses to cross-examination, if the Tribunal so directs"*[51].

77. In a letter dated 10 December 2019[52], the Russian Federation informed the arbitral tribunal that, in accordance with the provisions of Article 15(2) of the 1976 version of the UNCITRAL Arbitration Rules, it wished such a hearing to be held not only to allow its witnesses and experts to be examined but also to respond to the new arguments, in particular the factual arguments, raised by Oschadbank in its submissions of 25 November 2019.

78. Contrary to what Oschadbank wrongly states[53], the Russian Federation's application was therefore fully justified, both in law under the provisions of the above-mentioned UNCITRAL Arbitration Rules and "having regard to the circumstances", and there was never any question of any "stalling manipulation". In fact, Oschadbank never refuted the Russian Federation's letter of 10 December 2019, confirming that, contrary to what Oschadbank is now insinuating, it never objected to the organisation of a hearing.

79. However, in a decision handed down on 23 December 2019[54], the arbitral tribunal unexpectedly decided of its own motion to suspend the revision proceedings until the Paris Court of Appeal had ruled on the action in annulment.

80. Relying on Oschadbank's assertions in the application for revision that the same issues were pending before the Paris Court of Appeal and before the arbitral tribunal, the arbitral tribunal believed it could justify its decision owing to an alleged risk of conflict between the award to be made in the application for revision and the judgment to be handed down in this action in annulment:

> "*The Tribunal accepts the Claimant's* [Oschadbank] *position that, notwithstanding the fact that the two proceedings are based*

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[50] Oschadbank's response dated 25 September 2019 to the application for revision of the Award (**exhibit FR-25**); Replication of the Russian Federation dated 25 October 2019 in the application for revision of the Award (**exhibit FR-26**); Oschadbank's reply dated 25 November 2019 in the application for revision of the Award (**exhibit FR-27**).

[51] Email from counsel for Oschadbank to the arbitral tribunal of 26 November 2019 (**exhibit FR-28**).

[52] Letter from counsel for the Russian Federation to the arbitral tribunal dated 10 December 2019 (**exhibit FR-29**).

[53] Oschadbank's submissions of 15 December 2020, § 76.

[54] Decision to stay consideration of respondent's application for revision and claimant's application for security for costs dated 23 December 2019 (**exhibit FR-30**).

> *on different Articles of the French Code of Civil Procedure, the Paris Court of Appeal is certain to address the same ultimate issue as has been presented to this Tribunal. The Parisian Court of Appeal will also likely conduct a full review of the jurisdiction issue.*
>
> *In the Tribunal's view, it is undesirable that both this Tribunal and the Parisian Court will issue rulings on the same underlying point, based on the same evidence. Proceeding with both applications risks conflicting decisions, as well as wasted time and costs arguing the issue twice.*
>
> *On this basis, and pursuant to the power under Article 15.1 of the UNCITRAL Rules to conduct proceedings in such manner as the Tribunal considers appropriate, the Tribunal has decided to stay the Revision Application until the Paris Court of Appeal has issued its decision on the Respondent's annulment application under Article 1520 of the French Code of Civil Procedure.*
>
> *Once the Court has issued its decision, the Tribunal will consider whether or not to lift the stay and to proceed to decide the Revision Application"*[55].

81. In so doing, the arbitral tribunal was once again misled by the procedural posturing of Oschadbank, which did not hesitate to argue anything and everything to serve its own interests.

82. Oschadbank is indeed not afraid of contradicting itself since, after arguing before the arbitrators that the Paris Court of Appeal would have to rule on the question of the application *ratione temporis* of the BIT, it maintains before this Court that the Russian Federation's cause of appeal is inadmissible and cannot be examined in these proceedings[56]. Although the objection to admissibility now raised by Oschadbank is completely unfounded, as will be shown[57], it is further evidence of Oschadbank's procedural underhandedness.

83. The arbitral tribunal's decision to stay ruling on the application for revision is also questionable in a number of other respects. First of all, it should be noted that none of the parties ever sought a stay of the revision proceedings and that the arbitral tribunal made its decision unilaterally. The stay of proceedings is also contrary to the Russian Federation's request of 10 December 2019 for a hearing to

[55] Decision to stay consideration of respondent's application for revision and claimant's application for security for costs dated 23 December 2019, §§ 24-27 (**exhibit FR-30**).

[56] Oschadbank's submissions of 15 December 2020, §§ 139 *et seq.*

[57] See below, §§ 318 *et seq.* and the opinion of Professor Yves-Marie Serinet dated 25 June 2020 (**exhibit FR-31**).

be held[58]. As already stated, this request was based on the clear terms of Article 15(2) of the 1976 UNCITRAL Arbitration Rules, applicable in this case, which grant the parties a genuine right to a hearing:

> *"If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. [...]".*

84. Secondly, the arbitral tribunal violated Article 1510 of the CPC, according to which "*irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the adversarial principle*". This Court of Appeal has already ruled that a decision taken by an arbitral tribunal of its own motion concerning the conduct of proceedings constitutes a breach of the adversarial principle when the parties have not been invited to discuss the matter beforehand[59].

85. Finally, beyond the procedural considerations, the decision of the arbitral tribunal is also questionable on the merits. Not only would it have been consistent with the French conception of the *competence-competence* principle, but it would also have been logical for the arbitral tribunal, when addressing questions relating to its jurisdiction in the context of the application for revision, to rule on this issue first, before the merits of its position were then, if necessary, submitted to the Court of Appeal. Professor Xavier Boucobza explains this as follows:

> *"57. Thus, it is clearly appropriate for the arbitral tribunal to be able to rule fully on the question of its jurisdiction first, before the national courts rule on the same question in the context of an action in annulment. Otherwise, the award could be set aside on the grounds that the BIT did not apply to the investment made before it came into force, even though the arbitral tribunal had not been able to rule on this point. It is obviously preferable for the arbitral tribunal to be able to settle all issues relating to jurisdiction before they are submitted to the court hearing the action in annulment. In addition to the fact that if the issue has been addressed and a detailed statement of reasons has been given, whatever its outcome, the court hearing the annulment will be able to base its decision on the award, it above all avoids the risk of the arbitral award being annulled, with all the*

[58] Letter from counsel for the Russian Federation to the arbitral tribunal dated 10 December 2019 (**exhibit FR-29**).

[59] See, for example, Paris CA, 16 October 2008, *SA Prim'Nature*, RG No. 07/12356, Rev. arb. 2010, 110: "*by finding the response of Prim'Nature to be inadmissible, even though Top Pommes de Terre had not made any such request, without inviting the parties to express themselves on this legal issue raised of their own motion, the arbitrators violated the adversarial principle*" (**exhibit FRJ-3**).

> *consequences that this entails, even though they were not able to rule on the issue that gives rise to the annulment.*
>
> *58. This should make it all the more attentive to an application for revision based on new arguments likely to modify its assessment of jurisdiction in relation to the provisions of the BIT, especially that of Article 12. Reopening the debate on this point in light of the facts discovered by the RUSSIAN FEDERATION will enable it to overturn or confirm the declaration of jurisdiction made in its Award of 26 November 2018. The aim is to settle the debate before the Court of Appeal has to rule on the application in annulment"*[60].

86. As a result of the decision to stay the proceedings on the Russian Federation's application for revision, it therefore falls to the Paris Court of Appeal to rule ahead of the arbitral tribunal on the question of the date on which the investment was made and the arbitral tribunal's jurisdiction under Article 12 of the BIT. The arbitral tribunal never settled this question[61]; moreover, and in violation of the *competence-competence* principle, it reserved the right to rule on the question after the Court of Appeal[62]. However, under the French *competence-competence* principle, it falls to the arbitral tribunal to rule first in chronological order on its own jurisdiction and not the national court of the seat of arbitration.

87. Therefore, it is now for this Court of Appeal to rule alone on the entire action in annulment and, in the submissions that follow, it will be shown that the said Award should be annulled on more than one account[63].

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[60] Opinion of Professor Boucobza dated 24 October 2019, §§ 57 and 58 (**exhibit FR-32**).

[61] On the plea of lack of jurisdiction based on the fact that the alleged investment was made before 1 January 1992, see below §§ 119 *et seq.*

[62] Decision to stay consideration of respondent's application for revision and claimant's application for security for costs dated 23 December 2019, § 27: "*Once the Court (of appeal of Paris) has issued its decision, the Tribunal will consider whether or not to lift the stay and to proceed to decide the Revision Application*" (**exhibit FR-30**).

[63] The submissions that follow are made without prejudice to the immunities (in particular from jurisdiction and execution) of the Russian Federation, which intends to avail itself of the said immunities before the French and foreign courts.

PART II – THE LAW

88. The Award is affected by several of the defects mentioned in Article 1520 of the CPC, which are liable to entail its annulment. In particular, the Award will be set aside because the arbitral tribunal wrongly declared itself competent (**Chapter 1**).

89. The Award also incurs annulment under international procedural public policy owing to Oschadbank's fraudulent concealment of the fact that its alleged investment was made before 1 January 1992, which renders the BIT inapplicable (**Chapter 2**).

90. Assuming for the sake of argument that, contrary to all possibility, the arbitral tribunal did have jurisdiction, it ruled in any event without complying with its terms of reference (**Chapter 3**).

CHAPTER 1 – THE ARBITRAL TRIBUNAL WRONGLY DECLARED ITSELF COMPETENT

91. The assessment by the arbitral tribunal of its own jurisdiction gives rise to an in-depth review, both in fact and in law, of the existence or absence of arbitral jurisdiction[64].

92. In the *Plateau des Pyramides* case, the *Cour de cassation* stated that:

> *"while the role of the Court of Appeal seised under Articles 1502 and 1504[65] of the New Code of Civil Procedure is limited to examining the defects listed by those provisions, no limitation is placed on the powers of that court to examine all the legal and factual considerations constituting the defects in question, and in particular to itself assess whether the arbitral tribunal ruled without an arbitration agreement[66]. (our underlining)*

93. More recently, in the *Abela* case, the *Cour de cassation* confirmed that the full review of the French court applies:

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[64] Cf. Opinion of Professor Xavier Boucobza dated 24 October 2019, §§ 54-55 (**exhibit FR-32**), Opinion of Professor Xavier Boucobza dated 25 June 2020 §§ 100-104 (**exhibit FR-36**).

[65] Corresponding to the provision of Articles 1520 and 1518 of the CPC, since the reform introduced by the French Decree of 13 January 2011.

[66] Cass. civ. 1, 6 January 1987, *Plateau des Pyramides*, *Rev. arb.* 1987, p. 469, note Ph. Leboulanger (**Exhibit FRJ-4**).

> *"whether or not the arbitral tribunal has declared itself competent, by examining all the legal and factual considerations that allow it to assess the scope of the arbitration agreement and to draw the conclusions as regards the tribunal's compliance with its terms of appointment"*[67]. *(our underlining)*

94. Lastly, this Court of Appeal has confirmed this solution when assessing the jurisdiction of a tribunal that has (wrongly) declared itself competent on the basis of a bilateral investment protection treaty:

> *"the court hearing the action in annulment reviews the arbitral tribunal's decision on its jurisdiction, whether or not it declared itself competent, by examining all the legal and factual considerations that allow it to assess the scope of the arbitration agreement. The same applies when, as in this case, the arbitral tribunal is seised on the basis of the provisions of a bilateral investment treaty"*[68]. *(our underlining)*

95. In exercising this review, this Court of Appeal must verify that all the conditions of the BIT were met in order to give rise to arbitral jurisdiction[69]. On the verification of the arbitral tribunal's jurisdiction, the *Cour de cassation* recently stated that "*the applicability of the arbitration clause deduced from the bilateral treaty depends on the fulfilment of all the conditions required by that treaty concerning the nationality of the investor and the existence of an investment*"[70].

96. It is by examining the **consent to arbitration** that the arbitral tribunal's jurisdiction to settle the dispute is determined, by verifying that the conditions required by the BIT (in particular *ratione loci, materiae, personae* and *temporis*) have been met. Consent cannot be presumed, but **must be expressed clearly and unambiguously**.

97. It will be noted in this regard that where it is claimed that a State's consent to arbitration results from an international treaty, the existence of that consent to arbitration cannot be assessed by applying the substantive rules of international

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[67] Cass. civ. 1, 6 October 2010, *Abela Foundation*, *Rev. arb.* 2010, p. 813, note F.-X. Train, (**Exhibit FRJ-5**).

[68] Consistent case law, see recently, Paris CA, Section 5, Ch. 16, 3 June 2020, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 19/03588 (**Exhibit FRJ-6**).

[69] Opinion of Professor Xavier Boucobza dated 24 October 2019, § 56 (**exhibit FR-32**).

[70] Cass. civ 1. 13 February 2019, *Transporte Dole et Alimentos Frisa c/ République bolivarienne du Venezuela*, No. 17-25851 (**Exhibit FRJ-7**).

arbitration laid down in the case law in matters of international trade[71]. The question is whether a State has waived its immunity from jurisdiction. This was expressly held, for example, in the partial arbitration award on jurisdiction in *Plama v. Bulgaria*[72]:

> *"Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires"*[73].

98. Such a solution is not specific to consent to arbitration; the manifestation of a clear and unequivocal intention on the part of the State is required for any type of waiver of immunity from jurisdiction. The United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCSI"), signed in New York on 2 December 2004, lays down the general principle that the State's consent to the exercise of jurisdiction must be "*expressly*" given[74]. The UNCSI establishes a real presumption of the existence of immunity from jurisdiction for the benefit of a State that is a defendant in judicial proceedings, with the result that the burden of proving that immunity does not apply (in particular by the State's agreement to appear before courts other than its own) lies with the claimant in the proceedings[75].

99. This was recently confirmed by the European Court of Human Rights ("ECHR") which ruled that:

> *"As regards the requirements of such express consent, Article 7 § 1 b) of the UNCSI refers to express contractual provisions by which a State clearly and unequivocally expresses its waiver".*

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[71] See for example, Cass. civ. 1, 8 July 2009, *Soerni*, appeal No. 08-16025 (**Exhibit FRJ-8**): "*a company's agreement to arbitration is not assessed by reference to any national law but by application of a substantive rule deduced from the principle of validity of the arbitration agreement based on the common will of the parties, the requirement of good faith and the legitimate belief in the powers of the signatory of the clause to conclude an act of day-to-day management that is binding on the company*".

[72] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 Decision on jurisdiction of 8 February 2005 (**exhibit FRJ-9**).

[73] *Ibid.* No. 198.

[74] Cf. Article 7 of the UNCSI.

[75] See for example, R. O'Keefe, Ch. Tams (dir.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, OUP 2013, p. 103 and 160 (**exhibit FRJ-10**).

And that in the case brought before it:

> *"[the ECHR] notes that three national courts have interpreted the clause contained in Article 8 of the employment contract in very different ways. Consequently, the Court considers that it is not a contractual clause whereby the Republic of Burundi expressly, clearly and unequivocally states its intention to waive its immunity from jurisdiction"*[76].

100. In this case, Oschadbank was the claimant in the arbitration proceedings and it was for Oschadbank to prove that the Russian Federation had consented to the arbitration and waived its immunity from jurisdiction, which it did not do.

101. Furthermore, where the jurisdiction of the arbitral tribunal is alleged by a party on the basis of an international treaty to promote investment, the consent of the State must be examined by interpreting the terms of the treaty in question. As the case law has held, the treaty is interpreted pursuant to Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "VCLT"), according to the ordinary meaning to be given to the terms and the object and purpose of a treaty[77].

102. In the present case, in order to declare itself competent, the tribunal considered that three conditions for the applicability of the BIT had been met: the territory[78], the investment[79] and the investor[80].

103. The Tribunal erred in declaring itself competent because the Russian Federation had not consented to arbitration, as the conditions of the BIT were not met. First, the various conditions for the application of the BIT will be discussed (**Section 1**), and then the reasons why they were not met in this case (**Section 2**).

104. Lastly, in its submissions of 15 December 2020, Oschadbank claims that the Russian Federation, which has consistently challenged the arbitral tribunal's jurisdiction in these proceedings, waived its right to rely on the irregularity stemming from the arbitral tribunal's lack of jurisdiction on the basis of Article 1466 of the CPC[81]. Such a claim cannot be accepted (**Section 3**).

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[76] ECHR, 5 February 2019, *Ndayegamiye-Mporamazina v. Switzerland*, Case No. 16874/12, spec. §§ 57 and 59 (**exhibit FRJ-11**).

[77] "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*", Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, (**exhibit FRJ-12**).

[78] Award §§ 196 *et seq.*

[79] Award §§ 220 *et seq.*

[80] Award §§ 236 *et seq.*

[81] Oschadbank's submissions of 15 December 2020, §§ 139-151.

Section 1 - Conditions of application of the BIT

105. Article 9 of the BIT provides for recourse to arbitration to settle certain disputes between a contracting State and an investor of the other contracting State:

> *"ARTICLE 9 SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY*
>
> *1. Any dispute between either Contracting Party and an investor of the other Contracting Party that arises in connection with the investments, including disputes, which concern the amount, terms of or procedure for payment of compensation, provided for in Article 5 hereof, or the procedure for effecting a transfer of payments, provided for in Article 7 hereof, shall be subject to a written notification, accompanied by detailed comments, which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall strive to settle such a dispute to the extent possible by way of negotiations.*
>
> *2. If the dispute is not resolved in that way within six months as of the date of the written notification, as mentioned in para 1 of this Article, it shall be referred for consideration to:*
>
> *a) a competent court or an arbitration court of the Contracting Party, in whose territory the investments were made;*
>
> *b) the Arbitration Institute of the Stockholm Chamber of Commerce;*
>
> *c) an ad hoc arbitral tribunal in conformity with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).*
>
> *3. The arbitral award shall be final and binding upon both parties to the dispute. Each Contracting Party shall undertake to enforce such an award in conformity with its laws"*[82].

106. This article seems to contain the usual dispute resolution clause found in an investment protection treaty. However, the definitions set out in the BIT are a specific feature that determine its scope of application; Article 1 defines the key terms "investment", "investor" and "territory", from which it follows that the

[82] The English translations of the Articles of the BIT reproduced below are the translations adopted by the arbitral tribunal in its Award. However, this does not necessarily mean that the Russian Federation accepts the translation as accurate.

dispute between Oschadbank and the Russian Federation does not fall within the scope of the BIT.

107. First, an investment is defined as:

> *1(1) "The term "investments" means all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws, and in particular: [...]*
>
> *Alteration of the type of investments, in which the funds will be invested, shall not affect their nature as investments, unless such alteration is contrary to the laws of a Contracting Party, in whose territory the investments were made ».*

108. Investor is defined as follows:

> *1(2) "The term "investor of a Contracting Party" means: [...] b) any legal entity, constituted under the law in force in the territory of that Contracting Party, provided, that the legal entity is competent under the laws of its Contracting Party to make investments in the territory of the other Contracting Party".*

109. And finally, the definition of territory is:

> *1(4) "The term "territory" means the territory of Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law".*

110. Another provision is also essential for the application and interpretation of the Treaty, namely the provision determining the application of the BIT in time, which is limited to investments made on or after 1 January 1992:

> *12 "This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992".*

111. The terms of the Treaty show that the conditions for its application were not met in this case, such that the Russian Federation did not give its consent to arbitration.

Section 2 – The conditions of application of the BIT are not met

112. A distinction must first be drawn between the applicability of the BIT and the conditions of the protection afforded by the BIT, as in this case some of the reasons for the arbitral tribunal's lack of jurisdiction stem from the former and others from the latter. This distinction has practical consequences because, if there is a ground for finding that the BIT is inapplicable, it will not even be necessary to

examine the system of protection afforded by the BIT in order to find that the arbitral tribunal lacks jurisdiction.

113. Some of the grounds for lack of arbitral jurisdiction at the centre of these proceedings thus result from the pure and simple inapplicability of the BIT. This is the case of the non-application *ratione temporis*. As the wording of Article 12 of the BIT, i.e. "*This Agreement shall apply*" clearly indicates, the requirement that the investment be made on or after 1 January 1992 is a condition for the applicability of the international treaty as a whole and not a condition solely of the protection afforded by the BIT, once the treaty has been deemed applicable.

114. This provision thus shows that two types of conditions must be verified when determining the jurisdiction of the arbitral tribunal. Firstly, the application of the treaty must be confirmed: otherwise the arbitration clause is inapplicable because all the provisions of the treaty are inapplicable. Once the treaty is considered applicable, it is also necessary to establish that the conditions for the application of the system of substantive and jurisdictional protection introduced by the treaty are met.

115. This difference was highlighted by Professor Boucobza both in his opinion[83] and when he was heard on 19 November 2020 when he explained:

> "***Pr X. Boucobza***.- *[...] when seeking the application of the Treaty, the investor must obviously demonstrate that the Treaty is applicable. The first question is: does [the] Treaty apply to the situation before us?*
>
> *Either the situation falls within the scope of the Treaty, in which case I will look at the Treaty, and study its provisions and stipulations to see whether or not there are grounds for the protection to apply.*
>
> *Or the Treaty is not applicable, in which case, I do not even need to examine the various provisions. I must simply declare myself, as an arbitral tribunal, incompetent."*[84]

116. It will be shown that, in this case, the BIT is not applicable to the dispute between the Russian Federation and Oschadbank (**Subsection 1**) and that, even if the BIT were applicable, the conditions for the jurisdictional protection provided for in the BIT are not met (**Subsection 2**).

[83] Opinion of Professor Xavier Boucobza dated 25 June 2020 (**exhibit FR-36**).

[84] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 27, lines 9 to 18 (**exhibit FR-43**).

Subsection 1 – The BIT is not applicable to the dispute between Oschadbank and the Russian Federation

117. The BIT is inapplicable in this case on two levels. First, it is inapplicable because Oschadbank's alleged investment (the Crimean Branch) was made before 1 January 1992, which is sufficient to exclude the applicability of the BIT since, under Article 12 thereof, it applies only to investments made on or after that date (**§1**).

118. Second, the BIT applies to the respective territories of Ukraine and the Russian Federation and cannot apply to territories not mutually recognised by the States parties to the BIT, which has been the case of Crimea since 2014. Consequently, in finding that Crimea is not a territory mutually recognised by the States parties to the BIT, the arbitral tribunal should have declared itself incompetent (**§2**).

§1 – The BIT is inapplicable because Oschadbank's alleged investment was made before 1 January 1992 (jurisdiction *ratione temporis*)

119. In the arbitration proceedings, Oschadbank claimed compensation for the expropriation of what it called its Crimean Branch, which it said it had been operating for decades, without providing further details:

> *"By the time of Russia's purported formal annexation of Crimea, Oschadbank had **operated for decades** as Crimea's largest banking operation through its local branch with the headquarters located at 55a Kyivska St. in Simferopol and its local subordinated outlets in Crimea (hereinafter the Crimean Branch or Oschadbank Crimea)"*[85]*. (our bolding)*

120. The compensation claimed by Oschadbank corresponded to the alleged expropriation of the bank's business operation in Crimea. Oschadbank thus claimed[86], and was granted by the tribunal[87], compensation that also includes the loss of future profits that the Crimean Branch should allegedly have generated.

121. Examples showing that Oschadbank considered the business operation to be its investment in Crimea are consistently found in the written submissions and arguments put forward during the arbitration proceedings. Among other things, it was stated during the hearing that:

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[85] Oschadbank Statement of Claim, § 91.

[86] Oschadbank Statement of Claim, § 560. Also see Mr Davidson's expert report dated 26 August 2016 **(exhibit FR-2)**.

[87] See for example, Award § 374 assessing the compensation for loss of future profits of the Crimea Branch at 484,616,757 dollars, i.e. almost half of the total compensation awarded by the court.

> *"The Claimant's covered investments under Article 1(1) of the Treaty included its extensive and profitable* ***business operation in Crimea, taken as a whole****, including more specifically its: […]"*[88]*. (our holding)*

122. The arbitral tribunal thus identified the Crimean Branch as Oschadbank's alleged investment[89] and awarded compensation for its alleged expropriation.

123. However, the tribunal, which was required to ascertain whether the conditions for the application of the BIT had been met, did not examine the date on which the alleged investment was made. Had it done so, it would have found that the Crimean Branch was established before 1 January 1992, a date on which the BIT did not therefore apply, a fact that the Russian Federation has recently discovered (**A**). During the arbitration proceedings, Oschadbank carefully avoided the issue of the date of the investment, even though the BIT can only protect investments made on or after 1 January 1992 (**B**).

A. – The alleged investment was made before 1 January 1992

124. Documents recently discovered by the Russian Federation and not disclosed to the arbitrators by Oschadbank show that Oschadbank and its predecessors founded and operated the branch in Crimea before 1 January 1992, a fact which in itself is sufficient to exclude the jurisdiction of the arbitral tribunal (**2**). In addition, the same documents show that Oschadbank itself was incorporated as an independent legal entity before 1 January 1992, which confirms that the Crimean Branch cannot constitute an investment falling within the scope of the BIT (**1**).

1. – Oschadbank was founded before 1 January 1992

125. The Bank's history goes back to the Soviet period and, in particular, to 27 November 1925 when the State Labour Savings Banks were founded ("государственные трудовые сберегательные кассы")[90]. On 17 July 1987, a new banking system was introduced in the Soviet Union with the creation of several

[88] Claimant's opening PowerPoint presentation, page 39 (page 99 of the PDF) (**exhibit FR-2**).

[89] See, for example, Award § 223 ("*the establishment of a branch of an Ukrainian Branch*"), § 346, § 366. The term "*Crimean Branch*" is also defined in the arbitral award as "*The branch of Oschadbank with headquarters in Simferopol (Crimea) and local outlets throughout the Crimean Peninsula*"

[90] Regulations of the Central Executive Committee of the USSR and the Council of People's Commissars of the USSR on the State Labour Savings Banks dated 27 November 1925 (**exhibit FR-3**).

banks, and the functions of the State Labour Savings Banks were assigned to the Savings Bank of the Soviet Union (hereinafter "Sberbank of the Soviet Union")[91].

126. Pursuant to the banking reform of 17 July 1987 and according to documents found in the Ukrainian Archives, in particular an internal document of the Bank from 2013 tracing its history since 1977[92], the branch in Ukraine, called the "Ukrainian Republican General Administration of the USSR Labour Savings Banks", was also reorganised[93]. From 17 July 1987 to 19 March 1991, the organisation existed under the name *Ukrainian Republican Bank of Sberbank of the Soviet Union*.

127. Sberbank of the Soviet Union was liquidated in 1991. Its regional branch in the Russian Federation (the *Russian Republican Bank of Sberbank of the Soviet Union*) was transferred to the Russian Federation. A commercial bank, Sberbank of Russia, was subsequently created with the assets contributed.

128. For its part, the regional branch established in Ukraine (the *Ukrainian Republican Bank of Sberbank of the Soviet Union* referred to above) was declared to be the property of Ukraine by Ordinance of the Supreme Rada of the Ukrainian SSR of 20 March 1991[94], with effect from 1 May 1991. Until 2 September 1991, the organisation existed under the name *Specialised Commercial Public Savings Bank of the Ukrainian SSR* and was owned by the State of Ukraine.

129. From 3 September 1991, and following Ukraine's Declaration of Independence after the fall of the Soviet Union[95], the organisation existed under the name *Specialised Commercial Public Savings Bank of Ukraine* (*Oschadbank of Ukraine*)[96]. This date, 3 September 1991, is fundamental, since it was the day on which the Bank's Board met and approved the Bank's Articles of Association, creating an entity with legal personality separate from that of the State of Ukraine.

[91] Regulation of the Central Executive Committee of the USSR and the Council of Ministers of the USSR on Improving the State's Banking System and Increasing its Influence on Economic Efficiency No. 812 dated 17 July 1987, Sections 3, 8 (**exhibit FR-4**).

[92] Central Public Archive of the Supreme Authorities of Ukraine, Record No. 4753, Inventory of folders for permanent storage No. 1 for the period 1981-1999, pp. 1-9, drawn up in Kyiv on 20 September 2013 (**exhibit FR-5**).

[93] Regulation of the Central Executive Committee of the USSR and the Council of Ministers of the USSR on Improving the State's Banking System and Increasing its Influence on Economic Efficiency No. 812 dated 17 July 1987, Sections 3, 8 (**exhibit FR-4**).

[94] Ordinance of the Supreme Rada of Ukraine No. 873-XII on the entry into force of the law on banks and banking activities of 20 March 1991, Section 2 (**exhibit FR-6**).

[95] Ordinance of the Supreme Rada of Ukraine No. 1427-XII on the declaration of independence of Ukraine of 24 August 1991 (**exhibit FR-7**).

[96] Minutes of the Meeting of the Board of Directors of the Bank No. 1 on 3 September 1991 (**exhibit FR-8**). As already mentioned, the Ukrainian equivalent of the Russian term Sberbank is Oschadbank.

130. The Bank's Articles of Association approved by the Bank's Board on 3 September 1991, which the Russian Federation was recently able to obtain from the Archives in Kyiv, expressly state that:

> *"1. The Specialised Commercial Public Savings Bank of Ukraine (Oschadbank of Ukraine), hereinafter the "Bank", was established in accordance with the Law of the Ukrainian SSR of 20 March 1991 "On Banks and Banking Activities" and is part of the banking system of Ukraine.*
>
> *2. The Bank is a legal entity and, with all its branches, constitutes a unified system of the Bank. [...]*
>
> *4. The Bank and its branches are independent of the supreme authorities of Ukraine, unless otherwise provided by Ukrainian law"*[97].

131. The aforementioned 2013 archive document attests to the fact that the Bank was founded by the State, i.e. by the Cabinet of Ministers of Ukraine, and that "*the State exercises and implements the powers of the holder of the shares in the share capital that belong to it [...]*"[98].

132. A few months later, on 31 December 1991, the Bank was registered with the National Bank of Ukraine as a commercial company with legal personality separate from the State of Ukraine[99].

133. Accordingly, the holding structure of the Crimean Branch changed as follows:

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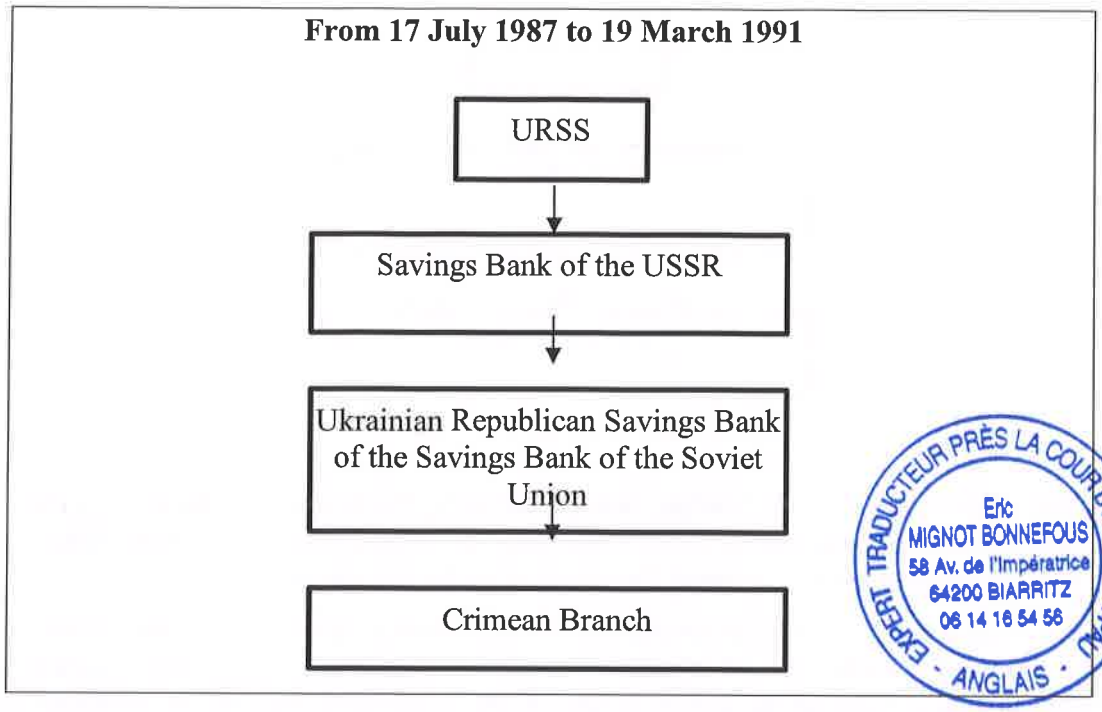
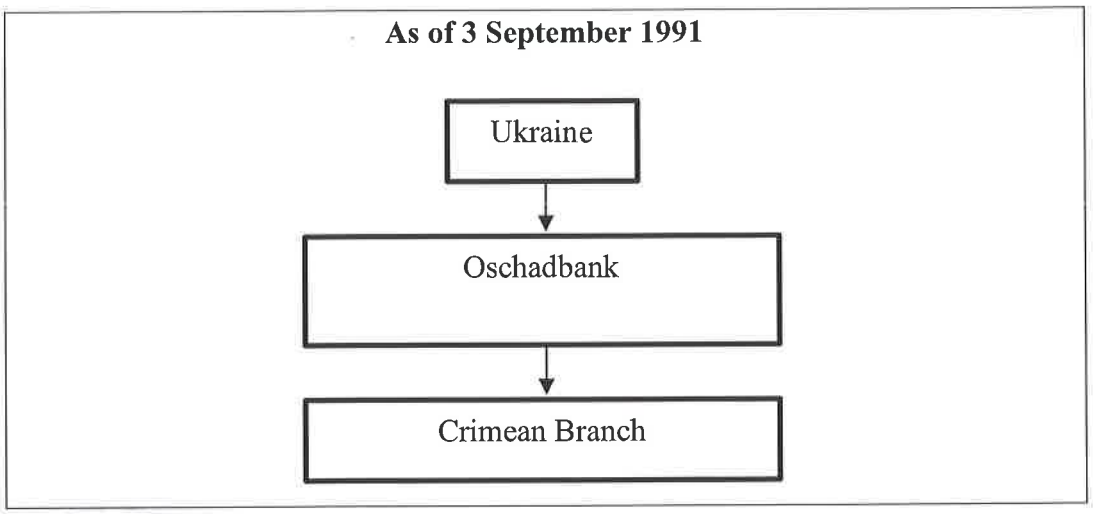
[97] Articles of Association of the Specialised Commercial Public Savings Bank of Ukraine approved by the Board of the Bank on 3 September 1991 and registered by the National Bank of Ukraine on 31 December 1991 (**exhibit FR-9**).

[98] Central Public Archive of the Supreme Authorities of Ukraine, Record No. 4753, Inventory of folders for permanent storage No. 1 for the period 1981-1999, pp. 1-9, drawn up in Kyiv on 20 September 2013 (**exhibit FR-5**).

[99] Articles of Association of the Specialised Commercial Public Savings Bank of Ukraine approved by the Board of the Bank on 3 September 1991 and registered by the National Bank of Ukraine on 31 December 1991 (**exhibit FR-9**).





134. This change in the holding was presented by the Russian Federation in its reply to the application for revision[100] and was not contested by Oschadbank either in the proceedings for revision of the award or in the present proceedings.

135. In the years that followed, and in accordance with the Decree of the President of Ukraine No. 106 of 20 May 1999[101] and the Ordinance of the Cabinet of Ministers of Ukraine No. 876 of 21 May 1999[102], the Bank changed its corporate form, without changing its legal personality or holding structure. This was when the Bank took on its current name of *Public Savings Bank of Ukraine*, also known as Oschadbank, and henceforth existed in the form of a public joint stock company.

136. Pursuant to the 1999 Decree and Ordinance, "*the Bank succeeds to the rights and obligations*" of its predecessor and its entire share capital continues to belong to the State. This is not contested by Oschadbank either. Among the various subdivisions of the Bank, the Crimean Branch has always existed.

2. – The Crimean Branch was established before 1 January 1992

137. The Crimean Branch was established during the Soviet period and has operated continuously ever since. The Crimean Branch was already very active during this period, as the annual statistical summaries show: for example, the

[100] Reply of the Russian Federation dated 25 October 2019 in the application for revision of the Award (**exhibit FR-26**) § 27.

[101] Decree of the President of Ukraine No.106 on the reorganisation of the Specialised Commercial Public Savings Bank of Ukraine dated 20 May 1999 (**exhibit FR-10**).

[102] Ordinance of the Cabinet of Ministers of Ukraine No. 876 on certain issues concerning the management of the Specialised Commercial Public Savings Bank of Ukraine dated 21 May 1999 (**exhibit FR-11**).

summary of 1 January 1971 already listed 733,672 deposit accounts[103]. The Crimean Branch is therefore an investment made during the Soviet period and as such is excluded from the scope of the BIT.

138. This is confirmed by the documents found by the Russian Federation in the Kyiv Archives. In particular, the above-mentioned minutes of the Bank's Board meeting of 3 September 1991 show that the Crimean Branch was still operating on that date and that its Director was a Member of the Bank's Board; furthermore, she was designated by name (Ms Valentina Matviivna Suslova)[104].

139. The Crimean Branch in also mentioned in the By-Laws of the Bank's Board approved at the Board Meeting of 3 September 1991[105] and in the Bank's Articles of Association approved on the same date[106].

140. Oschadbank now argues that Oschadbank's acquisition of the Crimean Branch dates from 2 January 1992, which corresponds to the date on which the Crimean Branch was registered with the Ukrainian authorities, i.e. one day after the BIT came into force[107]. However, the date of administrative registration does not coincide with the date on which the investment was made.

141. Indeed, although Article 1.2 of the Internal Regulation of the Crimean Branch produced by Oschadbank in the arbitration proceedings indicates that the said Branch was registered on 2 January 1992[108], the fact remains that it existed and was already operating well before that date, and formed part of the assets contributed by the State of Ukraine to the Bank during 1991.

142. The registration of the Crimean Branch is a purely administrative act which does not coincide with the date of the investment, i.e. the acquisition and operation of the Crimean Branch, which took place before that date, as evidenced by the

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[103] Statistics on the main performance indicators of the Public Labour Savings Bank of the Autonomous Soviet Socialist Republic of Crimea as at 1 January 1971 (**exhibit FR-12**).

[104] Minutes of the Meeting of the Board of Directors of the Bank No. 1 of 3 September 1991, pp. 3-5 (**exhibit FR-8**).

[105] By-Laws of the Board of the Savings Bank of Ukraine approved by the Board of Directors of the Bank at its meeting on 3 September 1991, Section 7 (¶ 2) (**exhibit FR-13**).

[106] Articles of Association of the Specialised Commercial Public Savings Bank of Ukraine approved by the Board of the Bank on 3 September 1991 and registered by the National Bank of Ukraine on 31 December 1991, § 47 (**exhibit FR-9**).

[107] Oschadbank's submissions of 15 December 2020, § 159.

[108] Regulation of the Crimean Republican Directorate of JSC "Oschadbank" No. 484 "On the Branch – Crimean Republican Directorate of Public Joint Stock Company "State Savings Bank of Ukraine", dated 31 July 2013 (the "Crimean Branch's Regulation")", Article 1.2 (exhibit CE-18 in the arbitration proceedings) (**exhibit FR-2**). It will be noted that the partial translation provided to the arbitral tribunal by Oschadbank did not include a translation of this provision of the Internal Regulation of the Crimean Branch. This was an intentional omission to avoid drawing the arbitral tribunal's attention to the date on which the investment was made. Oschadbank's procedural fraud will be discussed in the chapter on breach of international public policy, see below §§ 355 *et seq.*

above-mentioned documents obtained by the Russian Federation from the Kyiv Archives[109]. In its statement of claim dated 25 November 2019 in the application for revision, Oschadbank acknowledges this by admitting that the Crimean Branch was "*formally established*"[110] and "*formally acquired*"[111] on 2 January 1992, i.e. that these events are of a purely administrative nature. However, Oschadbank is careful not to mention when the acquisition and actual and effective operation of the Crimean Branch took place. The reason for its silence is clear, as these dates are prior to 1 January 1992.

143. In its submissions in these proceedings dated 15 December 2020, Oschadbank continues to assert that:

> *"The branch in this region [in Crimea], which also came from the former Sberbank of the Soviet Union, under which it had previously existed, was* ***registered with the authorities*** *on 2 January 1992"*[112]*. (our bolding)*

144. *The registration* of the Crimean Branch with the Ukrainian authorities does not constitute the act of investment within the meaning of the BIT. The investment is the act of Oschadbank acquiring or establishing the Crimean Branch and not the act of subsequently registering something that Oschadbank had previously acquired. Sufficient proof of this is provided by reference to the definition in Article 1(1) of the BIT, which reads as follows *"investments" means all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party* […]" and the developments that follow concerning this provision[113].

145. At no point does Oschadbank assert, or indeed adduce any evidence, that the Crimean Branch was acquired on or after 1 January 1992. Moreover, it could not do so because it is established, and indeed not contested, that Oschadbank had been operating the Crimean Branch since before that date.

146. Therefore, Oschadbank's alleged investment was made before 1 January 1992, i.e. the date from which investments made by investors of one contracting State in the territory of the other contracting State could have benefited from the protection of the BIT. This fact was carefully concealed by Oschadbank and the tribunal was unaware of it during the arbitration proceedings.

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[109] Cf. **exhibits FR-5, FR-8, FR-9 and FR-13**.

[110] Reply from Oschadbank dated 25 November 2019 in the application for revision of the Award, §67 **(exhibit FR-27)**.

[111] Reply from Oschadbank dated 25 November 2019 in the application for revision of the Award, §69 **(exhibit FR-27)**.

[112] Oschadbank's submissions of 15 December 2020, §16. See also §159 in which Oschadbank asserts that "*The argument is factually wrong; the Crimean branch was registered on 2 January 1992*", without in any way demonstrating that the registration constitutes an act of investment within the meaning of the BIT.

[113] See below §§ 248 *et seq.*

B. – The BIT only applies to investments made on or after 1 January 1992

147. To demonstrate that the BIT applies only to investments made on or after 1 January 1992, a first section will discuss the meaning of Article 12 of the BIT pursuant to the Vienna Convention on the Law of Treaties (hereinafter "VCLT") in the light of the history of the negotiation of the BIT (**1**), and a second part will focus on the factual and legal futility of the position maintained by Oschadbank and wrongly adopted by the arbitral tribunal (**2**).

1. – The meaning of the condition laid down in Article 12 of the BIT

148. As stated above, Article 12 of the BIT provides that *"[t]his Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992"*.

149. The meaning is clear: the BIT does not apply to investments made before that date. Since the BIT provides for recourse to arbitration to settle any disputes that may arise (Article 9), the non-application *ratione temporis* of the BIT means that the Russian Federation did not make any offer to arbitrate in respect of investments made prior to 1 January 1992 and that any arbitration proceedings would be brought before a tribunal lacking jurisdiction.

150. The Russian Federation consulted Professor Xavier Boucobza who, in his opinion dated 25 June 2020, analysed Article 12 of the BIT and the arguments submitted by Oschadbank before this Court of Appeal[114] and concluded that:

> *"Article 12 of the BIT concluded between the Russian Federation and Ukraine on 27 November 1998 is very clear:* "This Agreement shall apply to all investments, made by the investors of one Contracting Party on the territory of the other Contracting Party as of 1 January 1992*". Other than by depriving this provision of its meaning, an investment made before 1 January 1992 cannot fall within the jurisdiction of the arbitral tribunal under the BIT. The use of the expression* "made by the investors" *means in particular that investments made before 1 January 1992, but which continue to exist thereafter, do not benefit from the protection afforded by the BIT. To reason otherwise would be to render meaningless the clauses of the BIT which provide that the treaty will apply to investments already in existence but only if they were made after a certain date"*[115].

[114] Opinion of Professor Xavier Boucobza dated 25 June 2020 (**exhibit FR-36**).

[115] Opinion of Professor Xavier Boucobza dated 25 June 2020, conclusions 3° (**exhibit FR-36**).

151. The terms of Article 12 are so clear that they do not require any interpretation[116] and this was confirmed by Professor Boucobza when he was heard on 19 November 2020:

> *"**The President**.- [...] You also state in your opinion that it is, and I quote: "perfectly clear", without "distorting the clear provisions of the BIT", that on a reading of Article 12 of the BIT, in order to benefit from the protection granted by the BIT, the investment must have been made on or after 1 January 1992."*
>
> *Are you of the view that the wording of Article 12 is not even open to interpretation?*
>
> ***Pr X. Boucobza**.- The article is clear and is not ambiguous."*[117]

152. By undertaking an interpretation to find the meaning of Article 12 of the BIT beyond its nonetheless clear terms, the same conclusion would be reached. This can already be seen from the context of the BIT. As indicated above, the BIT was concluded on 27 November 1998 and came into force on 27 January 2000. In accordance with Article 28 of the VCLT[118], laying down the principle of the non-retroactivity of international treaties, the BIT only applies to investments made after its entry into force, unless otherwise specifically provided in the treaty[119].

153. Article 12 is precisely one of those specific clauses, the purpose of which is to extend the temporal scope of application of the BIT to investments made before its entry into force. However, the BIT does not apply to all investments made before its entry into force, but only to those made on or after 1 January 1992.

154. The choice of 1 January 1992 was not made by chance: the intention of the contracting parties was to protect only investments made after the dissolution of the Soviet Union[120]. Since the establishment of the Branch in Ukraine predates that date

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[116] For a similar reasoning on the conditions of subject-matter jurisdiction laid down in the Spain-Venezuela BIT, Paris CA, Section 5, Ch. 16, 3 June 2020, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 19/03588 (**Exhibit FRJ-6**): "*51. It follows from the terms of the BIT according to the ordinary meaning to be given to them, without any need to interpret them, that the investment protected by the Treaty is an asset invested by an investor of the other contracting party, such that the investment justifying the jurisdiction ratione materiae of the arbitral tribunal is one made by an investor who holds the nationality of the other contracting party, by virtue of its legislation, on the date on which it makes that investment in the territory of the other party.*" (our underlining).

[117] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 30, lines 3 to 12 (**exhibit FR-43**).

[118] Article 28 VCLT "*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 entry into force of the treaty with respect to that party*".

[119] Opinion of Professor Xavier Boucobza dated 25 June 2020, §§ 33 *et seq.* (**exhibit FR-36**).

[120] Also see Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 26, line 32 to page 27, line 5 (**exhibit FR-43**).

by several decades, it is not an investment to which the BIT applies. If, contrary to all probability, the Court of Appeal considered this to be non-decisive, and were to consider that account should be taken of the date on which the Bank was created as a legal entity separate from the State of Ukraine and acquired and operated the branch in Crimea, this also predates 1 January 1992, as stated above.

155. Provision could have been made for the BIT to apply to all previous investments, regardless of when they were made. There are bilateral investment protection treaties that so provide, such as the Dutch model treaty[121], but this is not the case here. If Article 12 of the BIT is to have any *effet utile* (useful effect), the precise date on which Oschadbank made its investment must be taken into account. For Oschadbank's alleged investments to be protected irrespective of the date on which they were made, it would have been necessary to rewrite Article 12 of the BIT by deleting any reference to time, for example in one of the following ways:

> *"This Agreement shall apply to all investments, ~~made by~~ of the investors of one Contracting Party in the territory of the other Contracting Party ~~as of 1 January 1992~~".*
>
> Or:
>
> *"This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party ~~as of 1 January 1992~~ before or after its entry into force".*

156. Such rewritings of the BIT are prohibited, as Oschadbank pointed out in its submissions of 15 December 2020[122].

157. An interpretation of Article 12 of the BIT that included all investments, regardless of when they were made, would deprive that provision of its meaning and useful effect. As Professor Boucobza points out:

> *"Other than by rendering this provision meaningless, an investment made before 1 January 1992 cannot fall within the jurisdiction of the arbitral tribunal under the BIT. The use of the expression "made by the investors" means in particular that investments made before 1 January 1992, but which continue to exist thereafter, do not benefit from the protection afforded by the BIT. This is the meaning of clauses which take account of investments existing prior to the effective date of the BIT or which only cover some of those investments which exist at the time the*

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[121] See Article 10 of the Dutch Model BIT (1997 version) according to which: "*the provisions of the Agreement shall, from the date of its entry into force thereof, also apply to investments which have been made before that date*" (**exhibit FR-17**).

[122] Oschadbank's submissions of 15 December 2020, § 107

> *treaty comes into force, provided that they were made after a certain fixed date.*
>
> *To reason otherwise would be to render meaningless the clauses of BITs which provide that the treaty will apply to existing investments, but only if they were made before a certain date. As Oschadbank itself points out, Article 31(1) of the VCLT considers that:* "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose""[123].

158. Professor Boucobza explained this in the following terms at the hearing on 19 November 2020, in response to a question from counsel for Oschadbank, who suggested that since the BIT entered into force on 27 January 2000, Article 9 of the BIT, the offer to arbitrate, applied absolutely:

> *"**Ph. Pinsolle**.- Forgive me, but I thought we agreed that the offer to arbitrate had been applicable since 2000 didn't we?*
>
> ***Pr X. Boucobza**.- Yes, it applies precisely to a certain number of situations that are covered, as I said, by Article 12, i.e. for investments made on or after 1 January. How else do you want to interpret Article 12? You are depriving it of all effect. The offer of arbitration is not absolute: it is not "I offer arbitration" for just anything.*
>
> *Let's take the example of a French investor who wants to invest in Russia. Can it invoke Article 9? No. And why can't it invoke Article 9? Because it is not a Ukrainian investment in Russia.*
>
> *Well, in exactly the same way, since the investment, or if the investment was not made on or after 1 January 1992, there is no valid offer to arbitrate for that investment: the protection does not apply."*[124]

159. During the negotiation of the BIT, the provision that became Article 12 was the subject of concrete and significant discussions between the Russian Federation and Ukraine, as a consultation of its preparatory work confirms. Referring to the preparatory work is one of the supplementary means of interpretation of a treaty provided for in the VCLT, pursuant to Article 32:

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

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[123] Opinion of Professor Xavier Boucobza dated 25 June 2020, §§ 67-69 (**exhibit FR-36**).

[124] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 42, lines 13 to 26 (**exhibit FR-43**).

> *meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable".*

160. During the negotiation of the BIT, Ukraine proposed a very broad temporal application on at least three occasions. In the drafts submitted in 1994 and 1997, Ukraine proposed extending the application of the BIT to investments made both before and after its entry into force. The 1994 and 1997 Ukrainian drafts respectively provided that:

> *"This Treaty shall apply to the investments carried out on the territory and in accordance with the laws of one Contracting Party by investors of the other Contracting Party both prior to and after the effective date of this Treaty"*[125].
>
> *"The terms and conditions of this Treaty shall be applied to investments carried out by investors of each Contracting Party both before and after this Treaty comes into effect and be applied with effect from its coming into effect"*[126].

161. It was not until the negotiation meeting held in Moscow from 19 to 21 January 1998 between the Ukrainian and Russian delegations that the reference to the date of 1 January 1992, proposed by the Russian Federation, finally appeared. The draft BIT on which the two parties reached an agreement on the main points then stipulated, as regards the application *ratione temporis*, as follows:

> *"This Treaty shall be applied to all investments carried out by investors of either Contracting Party on the territory of the other Contracting Party (since 1 January 1992) [both before and after this Treaty comes into effect and be applied with effect from its coming into effect]"*[127]. *(our underlining)*

162. The reference made in the January 1998 draft to two alternative wordings – one in parentheses () and the other in square brackets [] – shows that this point was still under discussion in January 1998 and was one of the issues still to be decided at future meetings between the parties.

163. The fact that, in the version of the BIT finally adopted, the reference to the date of 1 January 1992 was retained, is evidence of the parties' intention to exclude investments made earlier, in particular during the Soviet period, and demonstrates the importance for the Russian Federation, contrary to Ukraine's proposal, of providing for that temporal delimitation. Determining the exact date on which Oschadbank made its investment was therefore essential.

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[125] Ukrainian proposal of 1994, Article 10, English translation in the exhibit (**exhibit FR-37**).

[126] Ukrainian proposal of 1997, Article 12, English translation in the exhibit (**exhibit FR-38**).

[127] Minutes of the negotiation meeting of 19 to 21 January 1998 signed by the heads of the Russian and Ukrainian delegations, Article 13, English translation in the exhibit (**exhibit FR-39**).

164. It is surprising, however, to note that, although the arbitral tribunal was aware that Article 12 was one of the "*Key Provisions of the Treaty*"[128], the tribunal did not address the question of the temporal application of the BIT[129]. The tribunal only discussed the question of temporality in the definition of investment, and then only in an incorrect manner[130]:

> *"In the English version of the Treaty text there is no temporal requirement in the definition of investment that would limit investments to those made after the Russian Federation's obligations under the Treaty became effective in the Crimean Peninsula. The Tribunal has no evidence before it to suggest that the English translation is inaccurate in any way. Accordingly, the Tribunal finds that it is immaterial for the purposes of determining jurisdiction that the investments were made before the accession of the Crimean Peninsula to the Respondent"*[131].

165. However, the application *ratione temporis* of the BIT, which is a preliminary question to that of the conditions of protection because it determines whether the treaty is applicable in its entirety to the dispute at hand[132], is not mentioned in the Award.

166. It is not mentioned in Oschadbank's submissions either, in particular in its statement of claim in the arbitration proceedings. Oschadbank only addresses the question of jurisdiction *ratione temporis* in connection with the alleged acts of the Russian Federation[133], without ever referring to the date of the investment of which it claims to have been expropriated.

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[128] Award, pages 22-23.

[129] Opinion of Professor Xavier Boucobza dated 25 June 2020, §§ 89-94 (**exhibit FR-36**).

[130] See below §§ 285 *et seq.*

[131] Award § 226. This paragraph of the Award is the basis on which Oschadbank is attempting to convince the arbitral tribunal that Oschadbank's investment was made (within the meaning of Article 12 of the BIT) in March 2014, which is not true (cf. below § 171 *et seq.*).

[132] See above § 112 *et seq.*, on the difference between the scope of application of the treaty and the conditions of protection of investments provided for in the BIT. See also, Professor Boucobza's explanation: "***Pr X. Boucobza***.- *[...] In reality, in the very definition of investment, not temporal but investment, which is detailed in Article 1, it is what will enable the investor to benefit from protection or not. But the Treaty still has to be applicable. If, in practice, the Treaty is not applicable for reasons of its application in time, there is no need to look at the provisions of the Treaty to see whether or not, for example, there is a right of ownership.*", Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 29, lines 15 to 21 (**exhibit FR-43**).

[133] Statement of Claim, §§ 353 *et seq.* in a section titled "*The Tribunal has temporal jurisdiction over the entirety of the Russian Federation's Conduct that Devalued the Claimant's Investments*" (**exhibit FR-2**).

167. At no point during the hearing, which lasted three days, did Oschadbank raise the question of the date of its alleged investment. When Oschadbank first raised the question of the arbitral tribunal's jurisdiction *ratione temporis*, it was to address the issue, albeit irrelevant to the assessment of the requirement of Article 12 of the BIT, of the application of the BIT to alleged acts of the Russian Federation around the time of Crimea's accession to the Russian Federation:

> *"We're going to move to the Tribunal's Jurisdiction Ratione Temporis. And there is nothing in the Treaty suggesting that this Tribunal does not have temporal jurisdiction after the 21st or the 18th of March, 2014, but we have put forward an argument that this Tribunal must also consider acts and omissions of the Russian Federation predating those particular dates and going all the way to the 1st of March"*[134].

168. Oschadbank's failure to mention the date on which its alleged investment was made is confirmed by Professor Xavier Boucobza:

> *"Clearly, the only temporal issue raised by Oschadbank in relation to the jurisdiction of the arbitral tribunal concerns the time of the State act complained of (tempus commissi delicti) but not that of the investment within the meaning of Article 12 of the BIT"*[135].

169. Finally, it was only the State of Ukraine, intervening as a non-disputing party, that addressed the question of the temporal scope of application of the BIT, confirming the interpretation given above that it applied only to investments made on or after 1 January 1992:

> *"The clear intent of Article 12 was to maximize the temporal application of the Treaty, specifically to cover investments that were not protected by the Treaty at the time they were initiated. Like most bilateral investment treaties of its era, the Treaty was written to protect pre-existing investment (covering the period from 1992, shortly after the dissolution of the USSR, to 1998, when the treaty was concluded). [...] Under the Treaty,* ***so long as the investment was made after January 1, 1992****, it is irrelevant whether the Treaty applied at that time"*[136]. *(our bolding)*

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[134] Transcription of the arbitration hearing, day 1, 27 March 2017, p. 103, lines 2-9 (**exhibit FR-2**).

[135] Opinion of Professor Xavier Boucobza dated 25 June 2020, § 84 (**exhibit FR-36**).

[136] Submission of Ukraine as non-disputing party, 29 November 2016, § 32 (**exhibit FR-2**). The Russian Federation does not agree with the other arguments put forward by Ukraine in its intervention in the arbitration proceedings.

170. Thus, in order to determine whether the BIT was applicable *ratione temporis*, Oschadbank would have had to establish that the alleged investment (the goodwill constituting the Crimean Branch) had been made on 1 January 1992 at the earliest. The arbitral tribunal should have examined this point in order to determine whether the BIT was applicable and whether the consent of the Russian Federation was established in this case[137].

2. – The factual and legal futility of Oschadbank's position regarding the interpretation of the BIT

171. In its submissions, Oschadbank does not develop a position on the meaning to be given to Article 12 of the BIT, and therefore does not challenge the interpretation put forward by the Russian Federation. It merely argues that the alleged investments date from March 2014[138].

172. In its developments on the date of the investment, Oschadbank only discusses the definition of investment within the meaning of Article 1(1) of the BIT[139], which is a different question relating to the determination of the conditions of protection afforded by the BIT and not to the preliminary question of verifying the application of the BIT *ratione temporis* posed by Article 12. The futility of Oschadbank's arguments on the characterisation of the protected investment within the meaning of Article 1(1) of the BIT will be demonstrated below[140]. At this stage, it will merely be shown that, in the context of determining the application *ratione temporis* of the BIT governed by Article 12, the question addressed by Oschadbank is irrelevant.

173. A first demonstration of the artificial nature of Oschadbank's analysis can be found in its own words:

> *"152. In assessing the date on which the Crimean assets became investments within the meaning of the BIT, the Tribunal found that these assets had all the characteristics of an investment within the meaning of the BIT except for the geographical requirement of being located on Russian territory. Until March 2014, these assets were in fact located on Ukrainian territory.*

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[137] With this omission, not only did the arbitral tribunal wrongly declare itself competent, but it also failed to comply with its terms of reference (below §378 *et seq.*). Oschadbank's deliberate failure to bring to the arbitral tribunal's attention the documents discovered by the Russian Federation, which establish with certainty that Oschadbank was founded before 1 January 1992 and that it owned the Crimean Branch before that date, constitutes procedural fraud which is sanctioned by the annulment of the arbitral Award on the basis of breach of international procedural public policy (below §355 *et seq.*).

[138] Oschadbank's submissions of 15 December 2020, §§152-153.

[139] Oschadbank's submissions of 15 December 2020, §§ 154-191.

[140] See below §§ 285 *et seq.*

> *They were therefore held by Oschadbank but not yet invested on Russian territory.*
>
> *153. As of 21 March 2014, they were transferred to Russian territory and the Tribunal correctly held that they were no longer merely assets but had become investments within the meaning of the BIT* [...]"[141]. (*our underlining*)

174. As Professor Xavier Boucobza's analysis of the Award shows, the arbitral tribunal did not find that Oschadbank made its investments in March 2014[142]. Even if the tribunal had found that it did, it would have been wrong, which in any event would have led to the annulment of the Award, since the review by the annulment court involves a complete review of the arbitral tribunal's legal and factual assessment of its jurisdiction[143].

175. Oschadbank's assertion that it made its investment in March 2014, for the purposes of meeting the condition of Article 12 of the BIT (and of Article 1(1) of the BIT) is factually and legally false.

176. Factually, it is wrong to say that the Crimean Branch was "transferred" to Russian territory "with effect from 21 March 2014", as the Crimean Branch was never relocated. It had been located in Crimea since the Soviet period and had been acquired (and operated) by Oschadbank since before 1 January 1992[144], such that the investment could not have been made in March 2014 when Crimea joined the Russian Federation.

177. Legally, Oschadbank's position results from a fanciful interpretation of Article 12 of the BIT, according to which the date of the investment is the date on which an asset becomes located, and what is more by events beyond the investor's control, in the territory of the other contracting party.

178. This is confirmed by the wording of Article 12 of the BIT which refers to investments "made" in the territory of the other contracting party and not investments "located" there. It should be added that, in the official Russian version, the verb used is "осуществленным" (osushchestvlennym), which translates as "made" or "carried out". The verb "осуществлять" (osushchestvlyat') is used here in its perfective aspect, which refers to a completed and not an ongoing action. In the context of Article 12, this means that an investment must be made on or after 1 January 1992 for the BIT to be applicable. Conversely, the BIT is inapplicable in the case of an investment made before that date. The use of the perfective aspect of the verb "to make" particularly means that investments made before 1 January 1992, but which continue thereafter, do not benefit from the protection afforded by

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[141] Oschadbank's submissions of 15 December 2020, §§152-153.

[142] Opinion of Professor Xavier Boucobza of 24 October 2019, §§ 43 *et seq.* (**exhibit FR-32**).

[143] See above §§ 91 *et seq.*

[144] See above §§ 137 *et seq.*

the BIT, thereby confirming that the act of investment must be made after 31 January 1991, which is not the case of Oschadbank's alleged investment.

179. Oschadbank's argument that its investment dates back to March 2014 is absurd, as Professor Boucobza has shown, because, if it were accepted, then the date on which the investment was made would coincide with the date on which it was expropriated:

> *"The change to Crimea's status is the act that is criticised here as regards the protection of the investment. It cannot be the date on which the investment was made. This can be simply proven by contradiction. If the attachment of Crimea to the Russian Federation and its subsequent acts were deemed to affect an investment that benefits from the protection of the BIT, the investor would then be compensated precisely because of that act, deemed unlawful (contrary to the provisions of the Treaty). This would amount to compensating the investor for the consequences of that act. How, then, could such an act be deemed a source of the Russian Federation's liability and at the same time be the act that marks the starting point and the basis of the investment? In short, considering that the attachment of Crimea to the Russian Federation constitutes both an investment "in" the Russian Federation and an expropriation "by" the Russian Federation is simply not possible"*[145].

180. This point was discussed at the hearing of Professor Boucobza before the Court on 19 November 2020, when he was asked whether it was possible to date the investment to the date on which the dispute arose[146]. Professor Boucobza explained that this was impossible in the following terms:

> *"**Pr X. Boucobza**.- These really are two completely different issues in investment law, and I would even go so far as to say they are almost diametrically opposed.*
>
> *The reason is because when you invest in a country, you do not invest for the dispute. You do not invest in order to hold the State liable. So it's not at that point. When you invest in a country, you do so because you want to invest there and because you benefit from this protection. So you are placing your investment under the protection of the Treaty. Therefore, it is not at the same time.*

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[145] Opinion of Professor Xavier Boucobza dated 25 June 2020, § 80 (**exhibit FR-36**).

[146] "***Mrs F. Schaller***.- *In the alternative, since a party is unable to assert the date of its investment, or at least justify it, is there not a rule that would require the second best way of dating the investment to be used, which would be precisely the date on which the dispute arose, i.e. 2014? If we do not know the date of the investment, is it an alternative rule to look at the date on which the dispute arose?*", Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 34, line 33 to page 35 line 4 (**exhibit FR-43**).

> *Then something happens. The State takes an action which you contest, and you seek the protection under the Treaty.*
>
> *You cannot therefore consider that your investment and the act that you deem unlawful were carried out at the same time, otherwise the logic of investment law does not apply. You invested. You were protected and they committed an unlawful act.*
>
> *The date of the investment cannot coincide with the date of the act that is considered, or invoked, as being unlawful."*[147]

181. The situation is made all the more ridiculous by the fact that, during the arbitration proceedings, Oschadbank invoked allegedly unlawful actions by the Russian Federation dating back to the beginning of March 2014[148], i.e. even before the accession of Crimea to the Russian Federation. This amounts to arguing that Russia breached the BIT even before Oschadbank made its investment, which is counter-intuitive, to say the least. How can it logically maintain that the Russian Federation breached its obligations to protect an investment before it was even made?

182. And there is more: the question is not when the assets (the Crimean Branch) "became" an investment within the meaning of the BIT, as Oschadbank wrongly claims, but when the investment was "made". That is the condition laid down by Article 12 of the BIT. Therefore, even assuming that an investment can acquire protection under the BIT after it has been made[149], that same investment must still have been made on or after 1 January 1992, which is not the case of the Crimean Branch, since Oschadbank acquired and operated it before that date.

183. Oschadbank pretends to confuse the definition of investment (which is a condition of the protection provided by the BIT and a matter of jurisdiction *ratione materiae*) and the date on which the investment is made (which is a condition of the applicability of the BIT and a matter of jurisdiction *ratione temporis*), two matters which the BIT clearly distinguishes: the first is governed by Article 1(1) thereof and the second by Article 12[150]. This is explained by Professor Boucobza as follows:

> *"Oschadbank's analysis relates solely to the definition of investment under Article 1(1) and the definition of investor under Article 1(2) of the 1998 BIT between Ukraine and the Russian Federation.*

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[147] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 35, lines 5 to 19 (**exhibit FR-43**).

[148] See Award § 131.

[149] This point is contested and will be discussed later in the study of the conditions of protection in the event that the BIT is applicable, see below §§ 248 *et seq.*

[150] The confusion maintained by Oschadbank can be seen from its suggestion that the same reasons lead to resolving the issues of the subject-matter and temporal jurisdiction of the BIT (cf. Oschadbank's submissions dated 15 December 2020, §§ 194-198).

> *It therefore confuses the question of determining the application ratione materiae of the BIT and the resulting jurisdiction rationae materiae (Article 1 of the BIT) with the question of the application ratione temporis of the BIT and the resulting jurisdiction rationae temporis (Article 12 of the BIT)"*[151].

184. During the hearing of the experts before the Court on 19 November 2020, Oschadbank outlined a new theory in an attempt to avoid the annulment court reviewing the lack of jurisdiction *ration temporis*. It suggested that the question of the date on which the investment was made was a substantive issue - which escapes review under article 1520 of the CPC - and not a question of jurisdiction:

> *"**Me Ph. Pinsolle**.- [...] Wouldn't the alternative interpretation be to say that the Arbitral Tribunal can find that it has jurisdiction, once it finds that there is an investment within the meaning of Article 9, and that the question of whether that investment is later, perhaps, is a purely substantive issue relating to whether it is protected? It exists, but it is not protected. As you can see, this is a matter of substance and no longer a matter of jurisdiction. [...]*
>
> ***The President**.- The question is: "Is it possible to have an alternative interpretation according to which the Arbitral Tribunal could accept jurisdiction once there is an investment within the meaning of Article 9 and then decide, on the merits, the question of whether this investment benefits from protection?""*[152]

185. This theory cannot be accepted because identifying the date on which the investment is made is a condition of the application of the BIT, which therefore determines upstream the applicability of the arbitration clause in Article 9, as Professor Boucobza explained in his reply to the question put to him:

> *"**Pr X. Boucobza**.- To me, the answer is clearly no. [...] Because Article 12 lays down the condition for the application of the Treaty. It is expressly and explicitly stated in the condition for the application of the Treaty.*
>
> *The question is whether the investment is then protected by the stipulations of the Treaty, and the protection only applies if the Treaty applies to the investment.*
>
> *Let me put it to you this way: let's imagine that the arbitral tribunal found that the investment was made before 1 January 1992. What would the consequence be? What conclusion would it draw? It would say: the Treaty is not applicable. Since the*

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[151] Opinion of Professor Xavier Boucobza dated 25 June 2020, §§ 64-65 (**exhibit FR-36**).

[152] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 43, lines 9 to 21 (**exhibit FR-43**).

> *investment was made before 1 January, the Treaty is not applicable. And then what conclusion would the arbitral tribunal draw? It would say: "I have jurisdiction but you cannot be protected because this condition of protection...". No, the Treaty is not applicable and I, the arbitral tribunal, have no basis on which to decide whether your investment is protectable or not. I do not have jurisdiction. The Treaty is not [applicable]. The offer of arbitration is contained in the Treaty. It is part of the protection afforded by this Treaty."*[153]

186. The question of identifying the date on which the investment was made cannot be a substantive condition, and this is also clear from the case law of the *Cour de cassation* on the verification role of the arbitral tribunal when it held that "*the applicability of the arbitration clause deduced from the bilateral treaty depends on the fulfilment of all the conditions required by that treaty concerning the nationality of the investor and the existence of an investment*"[154].

187. This is probably why the new argument outlined by Oschadbank at the hearing of the experts on 19 November 2020, was not included in the submissions it notified one month later, on 15 December 2020.

[153] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 43, line 23 to page 44 line 12 (**exhibit FR-43**).

[154] Cass. civ 1, 13 February 2019, *Transporte Dole et Alimentos Frisa c/ République bolivarienne du Venezuela*, No. 17-25851 (**Exhibit FRJ-7**).

Addendum

In the end, it was in the submissions it notified overnight between 1 and 2 February 2021, i.e. a few hours before the initially scheduled closing date, that Oschadbank raised the new legal argument according to which the condition laid down in Article 12 of the BIT was a substantive condition and not a condition of jurisdiction which, therefore, escapes review by the Court of Appeal hearing the action in annulment of the arbitral award on the basis of Article 1520 of the French Code of Civil Procedure[155].

Raising a new legal argument at the last minute is contrary to Article 15 of the CPC[156] and it shows, if any confirmation were necessary, the procedural disloyalty of Oschadbank, stemming from the fact that Oschadbank could have (and therefore should have) raised this argument much earlier. Indeed, there was nothing to prevent Oschadbank from doing so in its earlier submissions, which it notified on 16 January 2020 and 15 December 2020, since the Russian Federation had invoked the non-fulfilment of the conditions for the applicability of the BIT set out in Article 12 thereof from the very beginning of these proceedings, to support its claim that the arbitral tribunal lacked jurisdiction.

The new legal argument was not only untimely, it is also groundless.

Recourse to arbitration is based on an offer to arbitrate stipulated in Article 9 of the BIT. This offer to arbitrate can only apply if the BIT itself applies. However, as stated above, Article 12 contains a condition for application *ratione temporis* of the BIT. If this condition is not met, the BIT as a whole does not apply, which means that the offer to arbitrate set out in Article 9 of the BIT is inapplicable.

Moreover, the offer to arbitrate is made subject to certain conditions because, as Professor Boucobza pointed out at his hearing before the Court on 19 November 2020, the States parties to the BIT did not offer arbitration "for just anything"[157]. It is therefore necessary to know which disputes can be referred to arbitration. Determining the scope of the offer to arbitrate depends on a number of conditions.

These conditions are set out in the BIT and Article 9 itself contains some of them, but so do other provisions of the Treaty. The situation is exactly the same when the arbitration agreement is conventionally stipulated in the contract and applies to disputes arising therefrom. In order to rule on the applicability of the arbitration clause, the arbitrators hearing the case must refer to the contract in order to

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[155] Oschadbank's submissions dated 1 February 2021, pages 38 to 49, §§ 99 to 149.

[156] According to which "*Parties must disclose in due time to one another factual arguments supporting their claims, the means of evidence they produce and the legal arguments they rely upon so that each party may organise its defence.*"

[157] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 42, lines 19 to 20 (**exhibit FR-43**).

determine its scope. Since they are applying the competence-competence principle, there can be no doubt that this is not a substantive matter.

Oschadbank's simplistic position that only Article 9 of the BIT lays down the conditions of the offer to arbitrate[158] cannot be upheld. Oschadbank argues that subjecting the offer to arbitrate to the condition of the investment being made on or after 1 January 1992 would amount to adding a condition to the BIT that it does not contain[159].

But it is quite the opposite. By asking for the condition in Article 12 to be excluded from the offer to arbitrate, Oschadbank is actually asking for a condition of the BIT to be removed. As Professor Boucobza pointed out at his hearing, a different interpretation would deprive Article 12 of all effect[160].

In the two judgments on which Oschadbank believes it can rely, i.e. *Garcia Armas* and *Komstroy*[161] – the jurisdiction of the arbitral tribunal was also assessed based on the definitions of investment and investor given in stipulations of the treaty other than the arbitration clause. This clearly shows that, for it to be relevant to the examination of jurisdiction, the condition of application must merely be provided for in the treaty, even if it is not formally included in the clause containing the offer to arbitrate. This is effectively the case with Article 12 of the BIT, such that the Russian Federation is not asking this Court "*to add a condition of jurisdiction not provided for in the Treaty*", as Oschadbank erroneously maintains[162]. Article 12 of the BIT therefore contributes to delimiting the scope of the offer to arbitrate.

The investor's acceptance must not alter the offer to arbitrate in any way. However, this is exactly what Oschadbank has tried to do here: it initiated arbitration proceedings for a situation that the BIT, and therefore the offer, do not cover, i.e. for an investment made before 1 January 1992.

Finally, Oschadbank claims that once the BIT is in force – in this case since 27 January 2000 – the offer to arbitrate applies to all existing investments, regardless of when they were made. In other words, Oschadbank argues that the offer to arbitrate is not limited to investments made on or after 1 January 1992 (as

[158] Oschadbank's submissions dated 1 February 2021, § 111 and § 142.

[159] Oschadbank's submissions dated 1 February 2021, § 116.

[160] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 42, lines 18 (**exhibit FR-43**).

[161] Oschadbank's submissions dated 1 February 2021, §102 and § 145.

[162] Oschadbank's submissions dated 1 February 2021, § 145.

Article 12 provides) and that Article 14.1 of the BIT, the provision governing its entry into force in 2000, is the only provision that matters[163].

However, the sole fact that the Treaty came into force does not suffice to trigger the offer to arbitrate. As the offer is subject to precise conditions, it cannot apply to all disputes. As Professor Boucobza explained:

> *"**Ph. Pinsolle**.- Forgive me, but I thought we agreed that the offer to arbitrate had been applicable since 2000 didn't we?*
>
> ***Pr X. Boucobza**.- Yes, it applies precisely to a certain number of situations that are covered, as I said, by Article 12, i.e. for investments made on or after 1 January. How else do you want to interpret Article 12? You are depriving it of all effect. The offer of arbitration is not absolute: it is not "I offer arbitration" for just anything.*
>
> *Let's take the example of a French investor who wants to invest in Russia. Can it invoke Article 9? No. And why can't it invoke Article 9? Because it is not a Ukrainian investment in Russia.*
>
> *Well, in exactly the same way, since the investment, or if the investment was not made on or after 1 January 1992, there is no valid offer to arbitrate for that investment: the protection does not apply.*
>
> ***The President**.- The question was: "But you told us that the offer to arbitrate came into effect on 27 January 2000?".*
>
> *The answer is: "Yes, it did, but the offer to arbitrate does not apply outside the conditions laid down in Article 12, i.e. to investments made on or after 1 January 1992"* [164].

During his hearing, Professor Boucobza added the following:

> ***Pr. X. Boucobza**.- To add one more point here, jurisdictional protection, i.e. the offer to arbitrate, is a protection in investment law. It is what is known as procedural protection. Once again, it is not applicable to everything: it is only applicable if the treaty affording protection applies itself."*[165]

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[163] Oschadbank's submissions dated 1 February 2021, § 138 and 144.

[164] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 42, lines 13 to 31 (**exhibit FR-43**).

[165] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 43, lines 1 to 5 (**exhibit FR-43**).

In fact, a BIT affords two kinds of protection for investors: substantive protection (e.g. guarantees against expropriation, promise of fair and equitable treatment, etc.) and jurisdictional protection (possibility of recourse to arbitration). To consider that Article 12 of the BIT only delimits the field of substantive protection, but not that of the jurisdictional protection, is totally artificial and no provision of the BIT suggests that the protections afforded by the Treaty should be treated differently (*ubi lex*).

Finally, even by considering, contrary to all probability, that the condition laid down in Article 12 of the BIT is a substantive issue and does not concern jurisdiction, Oschadbank is still wrong when it claims that the condition of Article 12 of the BIT "escapes" the review of the court hearing the action in annulment[166]. Since Oschadbank concealed the fact that its alleged investment was made before 1 January 1992 from the arbitrators, it committed a procedural fraud, which gives rise to a review by this Court of Appeal under international public policy, as will be explained below[167].

188. It follows that the BIT is inapplicable because Oschadbank's alleged investment was made before 1 January 1992. The BIT is also territorially inapplicable in this case because it cannot apply to territories not mutually recognised by the States Parties to the BIT, which is the case of Crimea.

[166] Oschadbank's submissions dated 1 February 2021, §§ 147-149.

[167] See below, §§ 355-377.

§2. – The BIT is not territorially applicable to Crimea (jurisdiction *ratione loci*)

189. Oschadbank asserts that pursuant to Article 1(1) of the BIT, its "*Crimean assets have been invested in the territory of Russia since March 2014*"[168]. At the same time, Oschadbank asserts that Crimea is not part of the territory of the Russian Federation, since the current situation is the result of what it describes as an unlawful annexation[169]. In its intervention as a non-disputing party, Ukraine adopted the same analysis[170]. This approach therefore consists of maintaining that, in general, Crimea is not part of the Russian Federation, but that for the purposes of the BIT, Crimea should be treated as part of the territory of the Russian Federation.

190. In its Notice of Arbitration, Oschadbank stated from the outset that it wished to base the jurisdiction of the arbitral tribunal on this legal fiction. In its Notice of Arbitration, Oschadbank stated that:

> *"Oschadbank considers Russia's actions in respect of Crimea wholly illegal under Ukrainian and international law, and rejects entirely the grounds, legal or otherwise, on which Russia purports to have annexed Crimea and proclaimed it to be part of its sovereign territory"*[171].

And that:

> *"without prejudice to the Claimant's [Oschadbank] stated position that Russia's purported annexation of Crimea violated Ukrainian and international law, the Claimant's investments must be treated **as if** they were located in Russian territory for purposes of the Treaty [BIT] [...]"*[172]. *(our underlining and bolding)*

191. Ultimately, according to Oschadbank, Crimea is not Russian Federation territory, but it should be treated ***as if*** it were, in order to apply the BIT.

192. As Oschadbank's submissions clearly show, the territorial belonging of Crimea (to the Russian Federation or to Ukraine) is disputed between the States Parties to the BIT. Now, this dispute is material to the applicability of the BIT, which applies only to investments made by investors of one contracting State in the territory of the other contracting State, the BIT defining the Territory as being the territory of Ukraine *or* the territory of the Russian Federation (Article 1(4) BIT): "*The term "territory" means the territory of Ukraine or the territory of the Russian*

[168] Oschadbank's submissions of 15 December 2020, p. 37.

[169] Oschadbank's submissions of 15 December 2020, *passim*.

[170] Submission of Ukraine as non-disputing party, 29 November 2016 (**exhibit FR-2**).

[171] Oschadbank's Notice of arbitration of 18 January 2016, § 16 (**exhibit FR-2**).

[172] *Ibid.* §18.

Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law".

193. If the BIT in its entirety does not apply in respect of Crimea, it follows that the procedural protection provided for in Article 9 thereof (the offer to arbitrate) does not apply either.

194. The fact that the two States parties to the BIT now disagree as to whether Crimea is part of the territory of Ukraine or of the Russian Federation is not contested. Yet, if an investment for which protection is sought has been made in a territory disputed by the two signatory States of the BIT, the treaty cannot apply to it, which is the case of Crimea, a territory over which the Russian Federation and Ukraine both believe they have territorial title and in the absence of reciprocity (**A**). The inapplicability of the BIT could only cease if the territorial dispute is resolved. However, the arbitral tribunal constituted on the basis of the BIT does not have jurisdiction to rule on the territorial dispute between Russia and Ukraine (**B**).

A. – The BIT cannot apply to a territory disputed by the States parties and in the absence of reciprocity

195. To find that it was territorially competent, the arbitral tribunal discussed the condition of Territory within the meaning of the BIT at length[173]. However, this discussion is not only obscure – and in places even incomprehensible – it also reaches the wrong conclusion. Above all, this discussion is pointless because the tribunal failed to address the preliminary issue that was material in determining whether the BIT could apply to Oschadbank's claim.

196. The arbitral tribunal simply rejected, peremptorily, the objection that the BIT did not apply to the disputed territory of Crimea, without giving the slightest reason, let alone any demonstration:

> *"The Tribunal does not accept that the Crimean Peninsula is no longer covered by the Treaty as a result of the dispute between the Respondent and Ukraine as to which State has de jure sovereignty over the region"*[174].

197. But as Professor Yves Nouvel, who was consulted by the Russian Federation, points out, this question was fundamental[175]. Disputed title to the territory renders the BIT inapplicable as regards Crimea (**1**). The BIT is all the more inapplicable as the condition of reciprocity is not met, since Ukraine refuses to regard Crimean investments as Russian investments and, as such, investments protected by the BIT (**2**).

[173] Award §§ 196-219.

[174] Award, § 197.

[175] Opinion of Professor Yves Nouvel dated 29 June 2020, §§ 20-21 (**exhibit FR-33**).

1. – The BIT does not apply to Crimea, a territory that is not mutually recognised

198. Where the two States parties to the BIT are not (or are no longer) of the same view as to whether a territory belongs to one State or the other, the BIT cannot apply to a territory that they do not mutually recognise.

199. This is so in a case, such as that of Crimea, in which both States claim title to the same territory. The Russian Federation considers that it has acquired valid territorial title within the meaning of international law. However, as Oschadbank confirms in its submissions[176], "*Ukraine does not recognise Russia's authority over Crimea*".

200. It follows that the agreement on the territorial status of Crimea that existed when the BIT was concluded in 1998 – when it was not disputed that Crimea was part of Ukraine – no longer exists between the contracting States.

201. The BIT cannot be applied to a territory that is not mutually recognised. This is the conclusion reached by Professor Yves Nouvel at the end of his opinion:

> *"The BIT concluded between the Russian Federation and Ukraine is intended to apply only in respect of the territory of one of the States parties recognised as such by the other Party, which excludes Crimea from the scope of application of this Agreement due to the Parties' disagreement as to its territorial status"*[177].

202. The inapplicability of the BIT with respect to Crimea is due primarily to the interpretation of the very terms of the BIT, since most of its provisions refer to a territorial condition that is by nature undisputed and mutually recognised by the States parties[178]. For example, this is the case of the definition of investment, which lays down the essential characteristic of an investment of assets made by an investor of one Contracting Party "*within the territory of the other Contracting Party in accordance with the latter's legislation*"[179].

203. During the hearing on 19 November 2020 before the Court of Appeal, Professor Yves Nouvel explained that the BIT can only apply to a territory that is not disputed between the States parties:

> *"[T]here is necessarily a consensual distribution of spaces. In other words, the Treaty is a shared view of the things it incorporates. If I say "territory of the Russian Federation", I am not saying "territory under Russian sovereignty or control, in the*

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[176] Footnote page 108.

[177] Opinion of Professor Yves Nouvel of 29 June 2020, § 61 (**exhibit FR-33**).

[178] Opinion of Professor Yves Nouvel of 29 June 2020, §§ 14 *et seq.* (**exhibit FR-33**).

[179] Article 1(1) of the BIT.

> *eyes of Russia", but "in the eyes of Russia but seen as such by Ukraine".*
>
> *This consensual dimension emerges from the definition given in Article 1(4).*
>
> *But it is also present in a series of terms which, as I see it, are very indicative in the Treaty."*[180]

204. A reminder of this need for "*consensual distribution of space*" can be found elsewhere in the BIT. This is the case of the definition of investor, which is "*a legal person registered in one of the Contracting Parties with the capacity to make investments in the territory of the other Contracting Party*"[181].

205. Secondly, several substantive provisions of the BIT describe the obligations of the States as regards the treatment of foreign investments by explicitly linking those obligations to the territory belonging to that State through the use of the possessive "*its territory*"[182].

206. Professor Nouvel stated that, in his opinion:

> *"[F]ollowing this assessment of interpretation, you will come to the conclusion that the territory of the Russian Federation, howsoever it is understood, i.e. whether it concerns sovereignty, territorial or extraterritorial jurisdiction, or even control, is necessarily something that the Parties agree upon. Any divergence of opinion, i.e. any breakdown in the common understanding of what the territory is, takes us outside the territorial scope of application of the Treaty."*[183]

207. In addition to the terms of the BIT itself, the mechanism of the treaty cannot apply where the alleged investment was made in a territory over which both contracting States claim to have valid title, such as Crimea in this case[184]. This is why Professor Yves Nouvel explains that:

> *"In a sovereign territory that is not mutually accepted, the territorial nexus required by the whole Treaty becomes impossible to establish. Although the Tribunal has authority to*

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[180] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 7, lines 15 to 24 (**exhibit FR-43**).

[181] Article 1(2) of the BIT.

[182] Opinion of Professor Yves Nouvel of 29 June 2020, §§ 29 *et seq.*, referring to Articles 2, 3 and 4 of the BIT which use the phrase "*in its territory*" (**exhibit FR-33**).

[183] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 8, lines 10 to 16 (**exhibit FR-43**).

[184] On the malfunctioning of the BIT if it were applied to non-mutually recognised territories, see Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 8, lines 17 *et seq.* (**exhibit FR-43**).

determine the position of the investment in a geographical area, it does not have authority to determine whether that geographical area belongs to one of the contracting Parties"[185].

208. Admitting, as the arbitral tribunal did, that the BIT applies to a territorial area not mutually recognised, could lead to absurd results[186].

209. The inapplicability of the BIT can be seen, for example, by the fact that the requirement that the investment be in accordance with the law of the host State set out in Article 1(1) of the BIT does not function. It is quite simply impossible to apply this condition in a territory where the two contracting States have competing claims, such as Crimea, and both consider that their national legislation is applicable.

210. This example alone, taken from the conditions for admission of an investment, is sufficient to demonstrate that the BIT cannot apply in a territory that is not mutually recognised.

211. The table below shows why the BIT continues to apply to investments in non-disputed territories, but no longer applies to investments in or from disputed territories.

[185] Opinion of Professor Yves Nouvel of 29 June 2020, § 35 (**exhibit FR-33**).

[186] Opinion of Professor Yves Nouvel of 29 June 2020, § 36 (**exhibit FR-33**).

Territorial Application of the BIT		
Investment Flow	**Solution**	**Comment**
Investment from Russia to Ukraine (excluding Crimea)	BIT applicable	Concerns mutually recognised territories
Investment from Ukraine to Russia (excluding Crimea)	BIT applicable	Concerns mutually recognised territories
Investment from Ukraine to Crimea	BIT inapplicable	Territory of Crimea not mutually recognised. Status of Oschadbank's alleged investment
Investment from Crimea to Ukraine	BIT inapplicable	Territory of Crimea disputed. Ukraine refuses to consider Crimea as territory belonging to the Russian Federation.
Investment from Russia to Crimea	BIT inapplicable	Russia considers Crimea to be Russian territory (internal investment)
Investment from Crimea to Russia	BIT inapplicable	Russia considers Crimea to be Russian territory (internal investment)

212. The table above shows that any investment originating in and destined for Crimea, the disputed territory, could not give rise to the protection afforded by the BIT, since it does not apply.

213. This requirement of undisputed and mutually recognised territory for the BIT to apply is not a general rule of public international law. It is specific to the wording and nature of the international treaty in question. During his hearing before the Court, Professor Yves Nouvel made this clear and stated that there are international treaties of a different nature to bilateral investment protection treaties that may apply to disputed territories, such as treaties protecting human rights. The arbitral tribunal refused to examine the specific purpose of the BIT, its structure and above all its terms and, by "circular reasoning", refused, without giving any reasons, to examine whether the territorial dispute between the two States parties to the BIT rendered the treaty inapplicable in respect of Crimea[187].

[187] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 16, line 6 to page 17 line 24. **(exhibit FR-43)**.

214. Oschadbank does not provide any convincing argument to counter Professor Nouvel's demonstration that the BIT does not apply to Crimea because of the territorial dispute between the Contracting Parties.

215. First, it will be noted that it has not adduced any report by an expert in public international law to challenge the demonstration and conclusions of Professor Nouvel. This is particularly noticeable given that Oschadbank did produce before the arbitral tribunal the opinion of Malcom Shaw[188], a professor of public international law, which addressed, on over 50 pages, albeit erroneously, the definition of territory, but above all failed to address the essential preliminary question of the territorial dispute over Crimea.

216. Second, Oschadbank asserts that "as a general rule, a treaty does not cease to apply to a territory because of differences of opinion over its territorial belonging"[189]. Oschadbank does not actually challenge the fact that a territorial dispute may be such as to render a treaty inapplicable in respect of the disputed territory, but merely refutes the general scope of such a principle. However, neither the Russian Federation nor Professor Nouvel have expressed a "general" position, but are of the opinion that the territorial dispute renders the BIT in particular, not just any international treaty, inapplicable to Crimea. Oschadbank's assertion and all the precedents it cites[190] in support of this general assertion, which concern treaties distinct from the BIT and therefore rule on disputes in the presence of a territorial dispute, are completely irrelevant here.

217. The Russian Federation has never challenged the fact that international treaties may apply in the presence of a territorial dispute between the two contracting States, and some even have the purpose of introducing an *ad hoc* legal regime in a territory that is not mutually recognised[191], but on no account does this demonstrate that the BIT in particular is applicable to a territory that is not mutually recognised. In other words, it is not because in some cases an international treaty remains applicable in the presence of a territorial dispute between the contracting

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[188] **Exhibit FR-2**, Expert Opinion of Professor Malcom N Shaw QC of 24 August 2016.

[189] Oschadbank's submissions of 15 December 2020, § 114.

[190] Oschadbank's submissions of 15 December 2020, §§ 115 *et seq.*

[191] This the case of the disputed international treaty that gave rise to the arbitral award of 18 February 2013 in the dispute between India and Pakistan that Oschadbank wrongly believes it can cite in support of its position (**Oschadbank Exhibit RJ-41**, PCA Case No. 2011-1, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award of 18 February 2013). The arbitral tribunal specifically held that the international treaty (the Indus Waters Treaty of 1960) was applicable notwithstanding the territorial dispute between the contracting States since its very purpose was to govern the use of the river's waters as a result of the said territorial dispute: "*The Treaty was negotiated and concluded amid difficulties in the relations between India and Pakistan. One of the most profound and sensitive issues between the Parties was (and remains) the question of sovereignty over Jammu and Kashmir. While negotiating the Treaty, the danger that unresolved questions of sovereignty could stand in the way of agreement on the allocation of the waters of the Indus river system was plain to the representatives of the World Bank and the Parties, who clearly sought to craft the Treaty so as to avoid those difficulties*" (abovementioned award § 360).

States that this is always the case. Moreover, Oschadbank does not argue the contrary: at no point does it challenge the fact that a territorial dispute can, under the treaty concerned, render it inapplicable. This is precisely what Professor Nouvel demonstrated: there is no general rule, the analysis must be made on the basis of the treaty in question and the BIT cannot be applied to a territory that is not mutually recognised. On this point, Oschadbank's submissions do not provide any evidence that counters Professor Yves Nouvel's demonstration.

218. Lastly, Oschadbank's final argument is purely procedural and does not address the question raised. According to Oschadbank, the Russian Federation admitted that "*the BIT is applicable despite the existence of a dispute between the parties over the sovereignty of Crimea*"[192]. To support this assertion, Oschadbank cites truncated extracts from the submissions filed in these proceedings, omitting to specify that they were drafted "*assuming that the other conditions for the application of the BIT are met, which is not the case*"[193]. Oschadbank also asserts that "*even Russia itself admitted before the Swiss Federal Court that it was not necessary to rule on the admissibility of the integration of Crimea and the legality of the territorial claims in order to apply Article 9 of the BIT*"[194]. However, it can be seen from the cited passage of the Swiss Federal Court's judgment that it does not state that the Russian Federation "*admitted*" anything, but only that it "*did not deny*". Above all, the Russian Federation has not changed its position, which it could have done: the Russian Federation has consistently considered that it was not necessary to settle the territorial dispute first, for the arbitral tribunal to declare itself incompetent. To do so, it could simply have established the existence of the dispute, which the arbitral tribunal did not do, and it is for this reason that the award incurs annulment.

219. The lack of reciprocity further renders the BIT inapplicable in respect of Crimea.

2. – The inapplicability of the BIT due to the lack of reciprocity in respect of Crimea

220. Even assuming that technically the BIT could apply in respect of territorial areas such as Crimea, which is not the case, the application of the BIT in such a situation is impossible owing to the lack of reciprocal application in respect of Crimea, as Professor Yves Nouvel explained when he was heard by the Court on 19 November:

> "***The President***.- *I have one last little question, and I will end with this for the Court. How can this ground of inapplicability, i.e. this lack of reciprocity, render inapplicable the arbitration agreement included in the Treaty, and therefore the jurisdiction*

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[192] Oschadbank's submissions of 15 December 2020, § 113.

[193] See, in particular, the first submissions of the Russian Federation of 18 July 2019, § 106.

[194] Oschadbank's submissions of 15 December 2020, § 126.

> *of the Arbitral Tribunal? In fact, there are two questions: the application of the Treaty and the question of how disputes arising under the Treaty are to be settled. How does this inapplicability due to the lack of reciprocity entail the inapplicability of the arbitration agreement included in this Treaty?*
>
> ***Pr Y. Nouvel**.- I no longer have the passage from my opinion but at one point I quote an arbitrator, Sir Franklin Berman, who heard a case involving Peru and another State ("Industria Nacional de Alimentos, S.A. [formerly Empresas Lucchetti] and Indalsa Perú, S.A. [formerly Lucchetti Perú] v. The Republic of Peru, ICSID Case No. ARB/03/4"). He said, and I quote:*
>
> *"Peru did not accept arbitration to any greater extent than the other Party to the BIT".*
>
> *Well, it is this formula that should be taken into consideration in this case: the Russian Federation did not accept arbitration to any greater extent than Ukraine. When Ukraine says: "My offer to arbitrate cannot apply to investments originating in Crimea", then by strict reciprocity, there cannot be an offer to arbitrate on the part of the Russian Federation for the benefit of Ukrainian investments made in Crimea.*
>
> *In other words, the offer to arbitrate follows the same principle of strict symmetry and Ukrainian legislation has therefore limited the offer to arbitrate without applying it to Crimea. It cannot be applied to Crimea given this lack of reciprocity.*
>
> ***The President**.- Thank you.*
>
> *In short, the answer is: The Russian Federation cannot accept arbitration to any greater extent than Ukraine because of this principle of reciprocity. The offer to arbitrate follows the same principle of strict symmetry referred to above."*[195]

221. There is no doubt that the purpose of the BIT, like any bilateral investment treaty, is to create rights and obligations relating to the protection of reciprocal investments[196]. By its very nature, the BIT is a bilateral treaty involving reciprocal obligations between the parties. This is clear from the preamble to the BIT, which expressly states that:

> *"The Cabinet of Ministers of Ukraine and the Government of the Russian Federation, hereinafter referred to as the Contracting Parties,*

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[195] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 14, line 14 to page 15 line 9. (**exhibit FR-43**).

[196] Opinion of Professor Yves Nouvel of 29 June 2020, §§ 41 *et seq.* (**exhibit FR-33**).

developing the basic provisions of the Agreement on Cooperation in the Sphere of Investment Activity dated 24 December 1993,

having an intention to create and maintain favorable conditions for reciprocal investments,

desiring to create favorable conditions for the promotion of economic cooperation between the Contracting Parties,

have agreed on the following: [...]". (our underlining)

222. However, this object and purpose of the BIT cannot be achieved in respect of a territory that is not mutually recognised. How can one "*promote economic cooperation*" or stimulate "*reciprocal investment*" in a territory to which both the Russian Federation and Ukraine claim territorial title? There can only be reciprocity in relation to mutually recognised territories.

223. An analysis of the obligations assumed by the Russian Federation and Ukraine under the BIT also shows their consubstantial reciprocity in the Treaty, failing which its application is not justified. All the undertakings made are symmetrical: the Russian Federation promises to protect Ukrainian investments in the Russian Federation and Ukraine promises to protect Russian investments in Ukraine[197].

224. Such reciprocity cannot be implemented for territories, such as Crimea, over which the contracting States dispute sovereignty. Ukraine does not guarantee BIT protection for investments in Ukraine originating in Crimea because Ukraine considers Crimea to be Ukrainian territory in which Ukrainian laws apply[198]. This circumstance means that the reciprocity on which the BIT is based would be flouted if the BIT applied to investments made in Crimea from Ukraine.

225. Moreover, Oschadbank does not challenge the requirement of reciprocal application of the BIT or assert that Ukraine applies the treaty reciprocally. It merely states that the Russian Federation's argument, as clarified by Professor Yves Nouvel "*is based on the fact that Ukraine allegedly enacted a law stating that a Russian company established in Crimea would not be recognised by the State of Ukraine*", that "*as this law does not cover Ukraine's international obligations, the*

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[197] Opinion of Professor Yves Nouvel of 29 June 2020, spec. §§ 48-49 (**exhibit FR-33**).

[198] See, for example, Law of Ukraine No 1207-VII of 15 April 2014 On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine (**exhibit FR-2**, exhibit CE-157 in the arbitration proceedings) which stipulates in Article 1 "*The temporarily occupied territory of Ukraine (here and after – temporarily occupied territory) is an integral part of the territory of Ukraine. The application of the Constitution and the laws of Ukraine shall extend to such territory*" and in Article 3 "*For the purposes of this Law, the temporarily occupied territory of Ukraine shall be defined as follows: 1) The land territory of the Autonomous Republic of Crimea and of the city of Sevastopol and the inland waters of Ukraine adjacent to these territories* [...]".

argument is purely speculative"[199] and that a *"State cannot hide behind its national law to escape its international obligations"*[200].

226. However, contrary to Oschadbank's assertion, the Ukrainian position does have an effect. Naturally, the Russian Federation is not "*hiding behind its national law to escape its international obligations within the meaning of Article 27 of the Vienne Convention on the Law of Treaties*"[201], as the Russian Federation is not invoking its own domestic law but the law of Ukraine. Above all, once again, Oschadbank is pretending not to understand the Russian Federation's argument. As Professor Nouvel pointed out, Ukrainian domestic law is not the basis for a defence of non-performance, but attests to the fact that Ukraine also considers that the BIT is not applicable with respect to Crimea:

> *"**Pr Y. Nouvel**.- The Ukrainian law draws the conclusions from the inapplicability of the Treaty, as I explained it in the first part, i.e. on the question of the difference of opinions. It is a subsequent conduct of the Parties that can be interpreted to determine the meaning of the Treaty. It is the concrete application. Moreover, they did not consider themselves bound by this agreement. The subsequent conduct of Ukraine is relevant to assessing jurisdiction. It shows that, in their concrete and effective analysis: "Application to Crimea is over. Except for my investors."*
>
> ***The President**.- The answer is: "Ukrainian law draws the conclusions from the inapplicability of the Treaty and this subsequent conduct is relevant to the interpretation of the Treaty"*"[202].

227. This situation is different from a defence of non-performance. But the fact remains that the reciprocity on which the BIT is based would be flouted if the treaty were applied to investments made in Crimea from Ukraine. This is precisely what Professor Yves Nouvel said during his hearing:

> *"**The President**.- The second argument you put forward is that the BIT cannot apply because the condition of reciprocity inherent in the Treaty cannot be met in that same territory: here, one Party to the Treaty has the right to deny its application to which you are referring, I imagine, because of the alleged failure of the other contracting Party to fulfil its obligations. Is that correct?*

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[199] Oschadbank's submissions of 15 December 2020, §§ 131-132.

[200] Oschadbank's submissions of 15 December 2020, § 134.

[201] Oschadbank's submissions of 15 December 2020, § 134.

[202] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 19, lines 20 to 30 (**exhibit FR-43**).

This is a question of the substance of...

Pr Y. Nouvel.- *Not exactly. The focus is not on the defence of non-performance.*

The President.- *That was my question. Is this the substance or not?*

Pr Y. Nouvel.- *It is not the defence of non-performance. The issue here is the perfect symmetry of obligations. As far as you are concerned, if there is no offer to arbitrate on one side, in other words for investments from Crimea made in Ukraine, there is necessarily no reciprocal offer, because reciprocity has been organised in this way in the Treaty. So it is not a case of a breach or non-performance, it is simply a case of non-application because once Ukraine ceases to apply and recognises the inapplicability that I mentioned, the obligation ceases on the other side.*

The President.- *The answer is therefore: "It is not a question of a defence of non-performance; it is a question of perfect symmetry in the fulfilment of obligations".*

Pr Y. Nouvel.- *Yes that's correct."*[203]

228. The reciprocal application of international treaties is a fundamental rule of international law[204]. Reciprocal application of international treaties is also a fundamental principle recognised by French law. The requirement of reciprocity is enshrined in Article 55 of the French Constitution, which states that an international treaty that is not reciprocally applied is devoid of legal authority in France[205], and the *Conseil d'Etat* has ruled that it is for the courts (and not the public authorities alone) to ascertain whether or not the condition of reciprocal application of an international treaty has been met:

> *"Whereas, pursuant to the 14th paragraph of the Preamble to the Constitution of 27 October 1946: The French Republic, faithful to its traditions, shall respect the rules of public international law; those rules include the pacta sunt servanda rule, which implies that any treaty in force is binding on the parties and must be performed by them in good faith; pursuant to Article 55 of the Constitution of 4 October 1958: Treaties or agreements duly*

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[203] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 13, line 22 to page 14 line 13 (**exhibit FR-43**).

[204] Opinion of Professor Yves Nouvel of 29 June 2020, §§ 55 *et seq*, and the references cited (**exhibit FR-33**).

[205] Article 55 of the French Constitution: *"Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party"*.

> *ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party; it is for the administrative court, when an argument is raised before it alleging that an administrative decision has wrongly, on the basis of the conditions set out in Article 55, either excluded the application of the stipulations of an international treaty or applied those stipulations, to ascertain whether or not the condition of reciprocity was met; to do so, it must, in exercising its investigative powers and after hearing the observations of the Minister for Foreign Affairs and, where applicable, those of the State in question, submit those observations to the adversarial debate, in order to assess whether there is sufficient factual and legal evidence having regard to all the findings of the investigation, to establish that the condition concerning the application of the treaty by the other party is, or is not, met"*[206].

229. Reciprocity is therefore not only a policy condition for the application of international treaties but also, and above all, a legal condition which the courts must verify for the application of treaties[207]. If the arbitral tribunal had conducted this verification, it would have found that the BIT did not apply to the dispute between the Russian Federation and Oschadbank and, consequently, that it lacked jurisdiction.

230. In the end, the applicability of the BIT means that it does not apply to territories disputed between the contracting States, such as Crimea. The BIT could only be applied to the territory of Crimea if the dispute between the two contracting States were to be resolved. However, the territorial dispute between the Russian Federation and Ukraine does not fall within the jurisdiction of an arbitral tribunal formed on the basis of the BIT. Consequently, the arbitral tribunal could not declare itself competent to rule on Oschadbank's claim concerning its alleged investment in Crimea and its alleged expropriation.

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[206] CE Ass., 9 July 2010, *Mme Cheriet-Benseghir*, petition no. 317747 **(exhibit FRJ-13)**.

[207] Oschadbank asserts that "*in the absence of denunciation of an agreement, it is not for the courts to verify whether the condition of reciprocity referred to in Article 55 of the 1958 Constitution has been met*", Oschadbank's submissions of 15 December 2020, § 137 which cite a ruling from 1984 (Cass. civ. 1, 6 March 1984, No. 82-14.008 **Oschadbank exhibit RJ-49**). This ruling corresponds to case law that can be considered outdated since France was condemned by the European Court of Human Rights in the Chevrol case (ECHR, 13 Feb 2003, *Chevrol v France*, app. 49636/99). On this point, see P. Dailler, M. Forteau, A. Pellet, Droit international public, 8th ed. 2009, No. 183, pp. 318-319).

B. – The lack of jurisdiction of the arbitral tribunal to rule on the territorial dispute over Crimea

231. It has been shown that, when part of the territory is not mutually recognised, the BIT cannot be applied to investments from or to that part and therefore to the dispute between Oschadbank and the Russian Federation. Of course, the BIT will only remain inapplicable while the territorial dispute lasts. Once the dispute has been settled and there is no longer any disagreement between the States Parties as to territorial sovereignty, the BIT becomes applicable again, since the "territory" condition that runs through the whole BIT, as defined in Article 1(4), is met. The territorial dispute is therefore a preliminary issue that must be resolved before the other issues relating to the application of the BIT can be decided, whether they concern jurisdiction, admissibility or the substance of Oschadbank's claim.

232. The question then arises of whether an arbitral tribunal constituted on the basis of Article 9 of the BIT, like the tribunal that made the Oschadbank Award, has jurisdiction to rule on the territorial dispute between the Russian Federation and Ukraine concerning Crimea.

233. The answer to this question is no, for at least two reasons, namely the lack of subject-matter jurisdiction and the lack of personal jurisdiction.

234. It shall be noted that the subject-matter jurisdiction of the arbitral tribunal is limited to deciding investment disputes. Article 9 of the BIT limits jurisdiction to: "*Any dispute between either Contracting Party and an investor of the other Contracting Party that arises in connection with the investments [...]*". Now, as Professor Yves Nouvel explains, the territorial dispute over Crimea between the Russian Federation and Ukraine is clearly not a dispute between a Contracting Party and the investor of the other Contracting Party in connection with an investment, which means that the arbitral tribunal does not have jurisdiction to hear it[208].

235. Contrary to the other conditions of application of the BIT, whether *ratione personae*, *materiae* or *temporis*, which are specific to the investor (Oschadbank) or to the alleged investment (the Crimean Branch)[209], the condition of territorial application transcends the individual investor (and therefore the dispute between that investor and a State) and concerns the relations between the States parties to the BIT.

236. Although the question of determining the territorial affiliation of Crimea arises in connection with the dispute between the Russian Federation and Oschadbank as a preliminary issue, Article 9 of the BIT on the basis of which the arbitral tribunal is formed does not give it jurisdiction to settle this matter. This was confirmed by Professor Yves Nouvel at the hearing on 19 November 2020:

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[208] Opinion of Professor Yves Nouvel of 29 June 2020, spec. §§ 32 and 35 (**exhibit FR-33**).

[209] Conditions of application of the BIT which will be discussed below, showing that in this case they are not met.

> *"**The President**.- The question is: "Can an international arbitral tribunal rule on questions of sovereignty if it has received a mandate to do so from the two States concerned?*
>
> *So, an agreement between the two parties stating: "I give you jurisdiction to settle these questions of sovereignty?"*
>
> ***Ph. Pinsolle**.- Yes, or to settle an issue concerning borders, for example.*
>
> ***Pr Y. Nouvel**.- These questions, like others for that matter, effectively require an attribution of jurisdiction, which must be express*"[210].

237. This was the solution adopted by the award handed down on 21 February 2020 by an arbitral tribunal hearing an action brought by Ukraine concerning the Black Sea, the Sea of Azov and the Kerch Strait under Article 287 of the Montego Bay Convention of 10 December 1982 on the Law of the Sea[211]. The Tribunal declared itself incompetent to rule on most of Ukraine's claims, considering that the resolution of those claims was contingent upon the resolution of the territorial dispute over Crimea, a dispute that the Tribunal did not have jurisdiction to settle[212].

238. This solution is entirely transposable to the situation in which the arbitral tribunal found itself in the present case: in order to determine whether the territorial condition laid down by the BIT was met, the arbitral tribunal would have had to rule on the territorial dispute between the Russian Federation and Ukraine. But the arbitral tribunal does not have jurisdiction to settle this territorial dispute. Therefore, it could but declare itself incompetent to rule on the investment dispute which, to be settled, requires the territorial dispute to be resolved first.

239. There is also an obstacle pertaining to the personal jurisdiction of the arbitral tribunal. Unlike the case leading to the above-mentioned award of 21 February 2020, Ukraine was not a party to the Oschadbank proceedings which, in accordance with the well-established "indispensable party" rule of international law, deprived the arbitral tribunal of jurisdictional authority to rule given the absence of Ukraine[213].

240. Oschadbank does not challenge the fact that an arbitral tribunal formed on the basis of Article 9 of the BIT does not have jurisdiction to settle a territorial

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[210] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 20, lines 1 to 10 (**exhibit FR-43**).

[211] Award concerning the Preliminary Objection of the Russian Federation of 21 February 2020 handed down in the case PCA 2017-06 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation) (**exhibit FRJ-14**).

[212] *Ibid.* see spec. §§ 191-196.

[213] Cf. International Court of Justice, judgment of 15 June 1954, *Monetary gold removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America). (**exhibit FRJ-15**).

dispute between the Russian Federation and Ukraine. However, Oschadbank does consider that its dispute with the Russian Federation can be settled without the need to determine the territorial affiliation of Crimea:

> *"An arbitral tribunal that has not been given a mandate to settle a territorial dispute may, in the case of disputes relating to the sovereignty of a given territory, settle the dispute referred to it, provided that it is not asked to settle the territorial dispute in question."*[214] (our underlining)

241. According to Oschadbank, the arbitral tribunal has jurisdiction provided that it is not asked to settle the territorial dispute. This is not a serious argument and is not confirmed by the precedents it cites. As Professor Nouvel has shown, the mere wishes of the arbitration claimant do not render the resolution of the territorial dispute dispensable. Everything depends, objectively, on whether the resolution of that dispute is a prerequisite for the application of the treaty in question, which depends on whether its application implicitly requires the territorial dispute to be resolved. As stated above, the BIT cannot apply in respect of a territory that is not mutually recognised. The resolution of the territorial dispute is therefore an absolutely vital prerequisite to the applicability of the BIT and therefore to the jurisdiction of the arbitral tribunal (provided that all the other conditions of the applicability of the BIT are met, which is not the case here).

242. The Russian Federation does not challenge the fact that, in some cases, the situation may be different and that the application of an international treaty or the settlement of a specific dispute may coexist with a territorial dispute and does not require the latter to be settled. But this is not always the case. In the case between the Philippines and China concerning maritime rights in the South China Sea cited by Oschadbank[215], the arbitral tribunal declared itself competent to settle the maritime dispute, specifying that the territorial dispute over certain islands (which it did not have jurisdiction to settle) did not have to be resolved first because its resolution would have had no impact on the outcome of the dispute before the tribunal[216]. The situation is in no way comparable to the one in this case, where it has been shown that the existence of a territorial dispute between the Contracting Parties to the BIT renders it inapplicable in respect of Crimea. Consequently, there is no doubt that this territorial dispute must be resolved first, in order for the BIT to be applicable.

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[214] Oschadbank's submissions of 15 December 2020, § 115.

[215] Oschadbank's submissions of 15 December 2020, § 117, citing *South China Sea Arbitration (Philippines v. China),* Award, PCA No. 2013-19, 12 July 2016 **(Oschadbank exhibit RJ-43)**.

[216] This is clear from the partial award on jurisdiction and admissibility in this case, which Oschadbank nonetheless omits from the proceedings, Case PCA No. 2013-19, *The South China Sea Arbitration (Philippines v. China),* Award on jurisdiction and admissibility, 29 October 2015, § 153 **(Exhibit FRJ-42)**.

243. As a result, Oschadbank's argument that the arbitral tribunal did not make an "*incursion*" into the sphere of the territorial dispute between Russia and Ukraine because it determined the meaning of the term Territory "*solely for the purposes of the BIT*"[217] is ineffective. Once again, Oschadbank pretends not to understand the Russian Federation's position, as clarified by the opinion of Professor Yves Nouvel. The arbitral tribunal is not criticised for having settled the territorial dispute between the contracting parties to the BIT. The Russian Federation's argument is that the BIT is not applicable owing to the existence of that dispute, and the ensuing fact that Crimea is not a mutually recognised territory. As the inapplicability of the BIT with respect to Crimea affects all of the treaty's provisions and thus the offer to arbitrate contained in Article 9 thereof, the arbitral tribunal should have declared itself incompetent.

244. As a result, the arbitral tribunal was wrong to declare itself competent by considering that the condition of jurisdiction *ratione loci* was met, which entails the annulment of the Award.

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* *

245. Assuming, contrary to all probability, that the BIT can apply because, firstly, Oschadbank made its alleged investment after and not before 1 January 1992 (*quod non*) and, secondly, because the BIT could apply to a territory not mutually recognised (*quod non*), the arbitral tribunal must be found to lack jurisdiction nonetheless.

246. This is because Oschadbank does not meet the conditions to benefit from either the subject-matter or the jurisdictional protection afforded by the BIT.

247. This particularly stems from the fact that the Crimean Branch was acquired before 2014, i.e. at a time when it is not disputed that Crimea was part of Ukraine, such that the alleged investment was not international at the time it was made, but was a Ukrainian investment in Ukraine. However, it is this date which must be taken into account to determine whether the condition in Article 1(2) of the BIT relative to the investment is met, which it is not, such that Oschadbank's alleged investment is not a protected investment within the meaning of the BIT.

[217] Oschadbank's submissions of 15 December 2020, §§ 122-124.

Subsection 2 – The conditions of protection stipulated by the BIT are not met (jurisdiction *ratione materiae*)

248. Assuming that the BIT is applicable, the arbitral tribunal does not have jurisdiction since the conditions for protection are not met. For the same reasons as those developed above, these conditions are of two kinds, *ratione temporis* and *ratione loci*[218]. There is also a ground of lack of jurisdiction *ratione materiae,* since the alleged investment was, in any event, made by a legal person governed by Ukrainian law in Ukraine. The fact that Crimea subsequently acceded to the Russian Federation did not, as if by magic, transform a purely internal investment into a foreign investment, which is the only type of investment that the BIT aims to protect. Consequently, the requirement of Article 1(1) of the BIT is not met.

249. The fact that the Crimean Branch of the Bank was established, acquired and operated by Oschadbank before 2014, the year in which Crimea acceded to the Russian Federation, is not contested[219], and neither is the fact that Crimea was part of Ukrainian territory prior to 2014. Therefore, assuming that Oschadbank's investment was an investment, it was a Ukrainian investment made in Ukraine.

250. However, the BIT can only apply in the presence of a foreign investment, since it only protects – and promotes – investments that are foreign (and not domestic) at the time they are made (**§1**). The reasoning adopted by the arbitral tribunal, and defended by Oschadbank, to find that it made a foreign investment in this case is purely artificial (**§2**).

§1 The BIT can only apply in the presence of an investment that is foreign at the time it is made

251. Confirmation that the BIT only covers investments that are foreign from the outset can be found in the terms of the Treaty. An investment is defined as "*all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with*

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[218] When he was heard, Professor Boucobza demonstrated that the arbitral tribunal lacks jurisdiction *ratione temporis* both on the basis of a condition of non-application of the treaty and a condition of non-application of the protection afforded by an applicable treaty: "***Pr X. Boucobza.*** *- […] Secondly, to be honest, the situation would be the same in either case: being aware of the facts, the Arbitral Tribunal should have found that, since the investment was not made after 1 January 1992, the protection could not apply. The protection includes procedural protection, so there is the offer to arbitrate and, consequently, it would not have been able to benefit from it.*" Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 32, lines 25 to 30 (**exhibit FR-43**).

[219] It was noted above that the Crimean Branch was acquired and operated even before 1 January 1992, which also shows that the condition of Article 12 of the BIT is not met.

its laws, and in particular: [...]"[220]. Therefore, the protection applies to assets invested by an investor of one of the contracting parties in the territory of the other contracting party in accordance with its laws.

252. The question was therefore whether the Crimean Branch was an asset invested by an investor (Oschadbank) of one of the contracting parties (Ukraine) in the territory of the other contracting party (the Russian Federation). Consequently, it is the question of when the components of the investment and its foreign nature are examined that must be determined.

253. The answer depends particularly on what is meant by the expression "asset invested". Depending on whether it is understood to mean "the asset **that was invested**" (investment made) or "the asset **that is invested**" (investment merely held) in the territory of the other contracting party to the BIT, the same conclusion is not necessarily reached.

254. By focusing solely on the **investment situation** (an asset that is invested, therefore an asset that is simply held), the Crimean Branch, which was an asset located on Ukrainian territory at the time the investment was made, could be an asset that was on the territory of the Russian Federation at the time of the alleged breach of the BIT and at the start of the arbitration proceedings, and therefore a Ukrainian asset in Russia.

255. On the other hand, if the **investment action** (an asset that was invested) is considered, the necessary conclusion is that the focus must be on the date on which the investment was made and that, on that date, the Crimean Branch was a Ukrainian investment in Ukraine that is excluded from the scope of the BIT.

256. This temporal issue is central to the debate, i.e. whether, in order to characterise the investment, it is necessary to look at the date on which it was made or at a later date such as the date of the alleged breach of the BIT or that of the start of the arbitration proceedings.

257. In order to settle this issue, the BIT must be interpreted in accordance with the general rule of interpretation of Article 31 of the VCLT, which provides that:

> *Article 31 "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [...]"*[221].

A. – The terms of the BIT

258. It is necessary to start with a literal interpretation based on an examination of the ordinary meaning of the terms of the BIT. Several points in the text show that

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[220] Article 1(1) BIT, in the English version applied by the tribunal in the Award.

[221] Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, (**exhibit FRJ-12**).

the foreign nature of the investment should be assessed on the date on which it was made, i.e. the investment must have a cross-border nature at the time it was made.

259. First of all, the very terms of Article 1(1) of the BIT point to this view.

260. This can be seen by referring to the Russian and Ukrainian versions of the BIT, which, it should be recalled, are the only official versions. Any analysis of the ordinary meaning of the terms of the BIT must therefore necessarily be made in the light of those two languages.

261. This analysis was undertaken at the request of the Russian Federation by two experts: Professor Tatiana Nikolaevna Kurokhtina, an expert in Slavic languages, in particular Russian and Ukrainian, and Professor Sergey Tyulenev, an expert in translation. Both of these experts confirmed the Russian Federation's interpretation that the investment condition set out in the BIT corresponds to a positive action, the fact of investing an asset, and not to a passive attitude, that of simply holding an asset.

262. In her opinion, Professor Kurokhtina clearly indicated as follows:

> *"12. The reflexive imperfective verb vkladyvat'sia ('**вкладываться**') [to be put in/to be invested] used in Paragraph 1 of Article 1 is derived from the verb vlozhit' (vlozhit'sia) ('вложить (вложиться)') [to be put in/to be invested – here perfective, - translator's note] having several meanings and, in the context in question, used in the meaning "to place [something] somewhere, to give [something] to be used in an enterprise, undertaking (money, funds)". Despite the formal indicators of the passivity of the verb (suffix "–ся"), the inner semantics of the lexical unit vkladyvayutsia ('**вкладываются**') [are put in] carries the meaning of an active action, an act of investing, transfer of values, funds, capital. [...]*
>
> *18. [...] It should be expressly noted that it is impossible to replace the verb* vkladyvat'sia *('**вкладываться**') [*to be put in/to be invested*] with any other verbs that can be used in other contexts in syntactical constructions with the lexical unit* investments. *For instance, the verb* **to be possessed by** *(Russian '**находиться**') (*investments are possessed by somebody*) or* **to own/hold** *(Russian '**обладать/держать**') (*to own investments/to hold investments*) are not synonymic with the lexical unit in question. The semantics of the aforementioned verbs has no meaning of action related to the making of investments which is decidedly inconsistent with the semantic content of the verb* vkladyvat'sia *('**вкладываться**') [*to be put in/to be invested*]. The verb closest to it in terms of its meaning*

and functions is the verb osuschestvliatsia *('***осуществляться***') [*to be made*] and participles derived from it"*[222].

263. Professor Tyulenev corroborates this analysis in his opinion. Taking Professor Kurokhtina's analysis as a starting point, he states that where:

> *"10. Both in the Russian and Ukrainian versions of the Agreement [BIT] in Paragraph 1 of Article 1 the verb used to describe an action with assets ("вкладываются" (vkladyvayutsia)) "carries the meaning of an active action, an act of investing, transfer of assets, funds, capital" (see Dr. Kurokhtina's analysis in Answers to Questions Concerning the Interpretation of the 1998 Agreement on Promotion and Mutual Protection of Investments between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine, para. 12)".*

It should be considered that:

> *"17. Both English translations of the verb vkladyvat'sia ('to be put in' (English Translation 1) or 'to be invested' (English Translation 2)) express adequately the semantics of the Russian and Ukrainian verbs denoting active steps to put something into something else/somewhere.* ***The English verbs used cannot be replaced, without a shift in their meanings, by verbs such as 'own', 'hold', 'possess', 'be located', 'be present' or their participles or other grammatical variants, such as 'owned', 'held', 'possessed', '(been) located/present'.*** *The English verb 'invest' is defined, as was illustrated above in the Oxford Dictionary of English,* ***as the action of putting rather than owning or holding or any similar type of action****, and characteristically, it is defined in the Oxford Dictionary of English through the verb 'put'"*[223].

264. Therefore, the two linguistic experts consulted respectively on the meaning of the official Russian and Ukrainian versions of the BIT and of its English translation, confirm that the concept of investment necessarily derives from active behaviour on the part of the investor, namely the fact of investing an asset, and not from a passive attitude limited to merely holding the asset in question. The action of investing must naturally be carried out in the territory of the other State party to the BIT, as Article 1(1) expressly stipulates.

265. Oschadbank has attempted to challenge this analysis by submitting the opinion of Professor Andriy Danylenko[224]. However, this single opinion does not

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[222] Opinion of Professor Tatiana Nikolaevna Kurokhtina of 24 June 2020, §§ 12 and 18 (**exhibit FR-34**).

[223] Opinion of Professor Sergey Tyulenev of 24 June 2020, §§ 10 and 17 (**exhibit FR-35**).

[224] **Oschadbank Exhibit RJ-72**: Opinion of Professor A. Danylenko, 14 December 2020.

shed any relevant light on the interpretation of Article 1(1) of the BIT as it is completely confused, if not incomprehensible. Moreover, it is limited for the most part to making peremptory assertions which are not sufficient to invalidate the conclusions of the aforementioned linguistic expert opinions of Professors Kurokhtina and Tyulenev submitted by the Russian Federation[225].

266. In addition, it shall be noted that the two contracting States (Russia and Ukraine) are of the same opinion regarding the meaning of the BIT when it comes to considering that the investment requires an action and not the mere holding. Indeed, in *PAO Tatneft v. Ukraine*, the latter argued before the UK courts for such an interpretation of the BIT in no uncertain terms:

> *"55. In relation to Tatneft's claim in respect of what was said to amount to a de facto expropriation of Amruz and Seagroup's shares in Ukrtatnafta,* ***Ukraine argues that there was no relevant "investment"*** *for the purposes of Article 9 of the BIT, and any dispute in connexion with those shares was not agreed to be referred to arbitration by that Article.*
>
> *56. Ukraine's argument is as follows:*
>
> *(1) Article 9(1) of the BIT provides: [...]*
>
> *(2) It follows that there is no agreement to submit to arbitration any dispute with a "investor" (i.e. claim by an investor) that does not arise in connection with an "investment".*
>
> *(3) Article 1(1) and (2) of the BIT define "investment" and "investor" inter alia as follows:*
>
> *"Investments" means assets and intellectual property of all kinds that are invested by an investor of one Contracting Party within the territory of the other Contracting Party in accordance with the latter's legislation... [...]*
>
> *57.* ***There are also references to making investments or investments being "made" in the relevant territory*** *in Articles 2, 4, 5 and 12; and Article 3 refers to "investments made by investors". Ukraine contends that these provisions show that only an investment made in Ukraine (or Russia) is a qualifying investment.*
>
> *58. Guidance as to the concept of making an investment is provided by the decision of Teare J in Gold Reserve.* ***Ukraine contends that that decision shows that:***

[225] Opinion of Professor Tatiana Nikolaevna Kurokhtina of 24 June 2020 (**exhibit FR-34**) and Opinion of Professor Sergey Tyulenev of 24 June 2020 (**exhibit FR-35**).

> *(i) making an investment requires the input of resources by the investor into the relevant asset in return for an interest in that asset [35];*
>
> *(ii)* ***mere passive ownership of an asset is insufficient****: what is required is an active relationship between the investor and the investment [37]"*[226]*. (our bolding)*

267. Oschadbank has not provided any evidence that challenges this reality.

268. Accordingly, the ordinary meaning of the terms of Article 1(1) of the BIT shows that, in order to characterise the investment, it is necessary to look at the date on which it was made, i.e. at the time the investor took the action of investing the asset in question, to determine whether it was made in the territory of the other contracting State. This is not the case of Oschadbank's alleged investment, which was made when Crimea was part of Ukraine, such that it is a Ukrainian investment in Ukraine to which the BIT does not afford protection, in particular the jurisdictional protection provided by the arbitration clause in Article 9.

269. This is all the less questionable given that Article 1(1) of the BIT provides that an investment must be made "*in conformity with its laws*", i.e. the laws of the host State. If, at the time it is made, the investment is made in the territory of another State – that of the other contracting party or that of a third State – it would be impossible to verify the conformity of the investment with the laws of the host State. It cannot seriously be argued that the lawfulness of an investment made in Ukraine would be assessed in accordance with Russian law.

270. Considering that the lawfulness of the investment would be assessed at a later date, such as the date of the alleged breach of the BIT or the start of the arbitration proceedings, would not make sense as it could lead to absurd results[227]. It would be tantamount to admitting that, by amending its legislation, the State receiving the investment (the host State) could render illegal an investment that was legal when it was made and, consequently, deprive it of the protection afforded by the BIT. This is certainly not what the parties to the BIT intended, as one of the objectives of bilateral investment protection treaties is precisely to protect foreign investors against possible arbitrary changes to the laws of the host States.

271. This is why the lawfulness of the investment is required and assessed at the time the investment is made and not at a later date. This is a requirement for the admission of the investment. This date is also the one that counts from the State's

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[226] *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm), Judgement of the High Court of 13 Juillet 2018, §§ 55-58 (**exhibit FR-16**).

[227] Also see Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which: *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable."* (our underlining) (**exhibit FRJ-12**).

point of view, because the protection follows the receipt of the investment and, by stipulating a condition of legality, the State notifies the investor that it only intends to receive investments that are lawfully made.

272. Other provisions of the BIT confirm this interpretation, for example the provision on alteration of investments, which stipulates that:

> *"Alteration of the type of investments, in which the funds will be invested, shall not affect their nature as investments, unless such alteration is contrary to the laws of a Contracting Party, in whose territory the investments* ***were made****". (article 1(1) of the BIT, last paragraph, our bolding and underlining)*

273. This provision on any alterations that may be made to an investment while it is held – to provide that such alterations would not in principle be liable to disqualify it as an investment – once again demonstrates that the investment is characterised based on what happens at the time it is made.

274. The provision determining the temporal scope of the BIT confirms this interpretation. Article 12 provides that the BIT "*shall apply to all investments,* ***made*** *by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992*"[228] (our bolding and underlining). Defining the scope of application to investments "made" in the territory of the other contracting party as of 1 January 1992 confirms that, in order to assess whether the condition of investment is met, the date taken is the date on which it is made and not a different date. The temporal limit on the application of the BIT only makes sense if the investments protected are those made in the territory of the other contracting party, and not investments merely held. Otherwise, investments held would be protected irrespective of the date on which they were made, and the temporal limit on the application of the BIT would be without effect[229].

275. Finally, the terms of the investor-State dispute resolution clause further confirm this interpretation. The various options open to the investor under Article 9 of the BIT include the right for the investor to apply, rather than to an international arbitral tribunal, to "*a competent court or an arbitration court of the Contracting Party, in whose territory the investments were made*". If the BIT had envisaged that the investment might initially be made in the territory of a State other than the defendant, it would have stipulated that the investor could bring legal action in the courts of the defendant State. However, since the BIT instead provides that the investor may bring proceedings in the courts of the State in which it made the investments, this necessarily implies that the protected investments were made from the outset in the territory of the State against which the action is brought. Any different interpretation would not make sense, because it would mean that Oschadbank could have submitted its dispute with the Russian Federation to the

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[228] Article 12 of the BIT, in the English version applied by the tribunal in the Award.

[229] On the arbitral tribunal's lack of jurisdiction *ratione temporis* because Oschadbank's alleged investment was made before 1 January 1992, see above §§ 119 *et seq.*

Ukrainian courts, which are the courts where Oschadbank made its alleged investment.

276. This interpretation of the definition of investment is endorsed by Professor Maurice Mendelson in his opinion dated 11 August 2017, drafted at the request of the Russian Federation in the context of proceedings before the Swiss Federal Court, where the question of the definition of investment under the BIT also arose[230]. Professor Mendelson particularly considered that:

> *"[...] the alleged investments made by the Claimants in Crimea failed to satisfy the definition of investments as set out in Article 1(1) of the bilateral Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Mutual Protection of Investments of 27 November 1998 ('the Ukraine-Russia BIT', or 'the BIT'). The principal reason is that, when made, these were not, in the relevant controlling words of Article 1(1), 'tangible assets [or] intellectual property of any kind [which are] invested by an investor of one Contracting Party in the territory of the other Contracting Party...' (emphasis added). As I shall explain, when properly understood, this requires the territory in question to have been the territory of the other Contracting Party at the time that the investment was made: In other words, a foreign investment in the host Contracting Party. The investments claimed to have been made by the Claimants do not fulfil this criterion: they were made by Ukrainian nationals in Ukraine"*[231].

277. A literal interpretation of the provisions of the BIT is therefore sufficient to show that, in order to be protected, an investment must be of a foreign (and therefore cross-border) nature on the date it is made.

B. – The object, purpose and context of the BIT

278. The other techniques for interpreting international treaties provided for by the VCLT confirm this interpretation.

279. This is the case of the object and purpose of the BIT. The preamble to the BIT unambiguously shows that the object and purpose of the BIT is to promote and protect investments from the territory of one party in the territory of the other. It emphasises that the States Parties have "*an intention to create and maintain favorable conditions for reciprocal investments, [and desire] to create favorable conditions for the promotion of economic cooperation between the Contracting Parties*"[232]. (our underlining)

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[230] Opinion of Professor Maurice Mendelson of 11 August 2017 (**exhibit FR-14**).

[231] Above-mentioned opinion, executive summary, § 4.

[232] Preamble to the BIT.

280. Another element confirming that the sole purpose and object of the BIT is to protect foreign investments can be found in the aforementioned Article 12, which limits protection to investments made on or after 1 January 1992. This date was chosen because it was close to the end of the USSR. The BIT was therefore not intended to protect investments made during the Soviet period[233]. This means that the object and purpose of the BIT was not to protect domestic investments, but foreign investments. This is because, under the USSR, Russian investments in Ukraine (or vice versa) were purely internal investments. These investments would have become foreign investments after the dissolution of the USSR. However, such investments were excluded from the scope of the BIT, which confirms the intention to only protect investments that were foreign when they were made.

281. Professor Boucobza repeated this rationale for the application of the BIT at his hearing before the Court on 19 November 2020:

> *"So in this case, the Treaty between Russia and Ukraine has a clause on its application in time: the BIT came into force on 27 January 2000 and Article 12 of the Treaty provides that it covers, retroactively, all investments made on or after 1 January 1992. This is what Article 12 provides for: there is a retroactive clause going back to 1 January 1992.*
>
> *The logic is perfectly understandable, naturally, because the USSR came to an end on 26 December 1991 and the aim of the drafters of the Treaty was to ensure that:*
>
> - *investments made in the USSR were not granted protection - it was the USSR, so they are not protected;*
> - *investments made in the post-USSR world, if I may put it that way, i.e. precisely when States had acquired a different form of sovereignty, were afforded protection."*[234]

282. The context of the BIT is also an important element of interpretation and Article 31 of the VCLT provides that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty* […]". The preamble to the BIT, which contains these contextual elements, explicitly refers to the treaty which preceded it and which it was intended to develop. This is the Agreement on Cooperation in the Field of Investment Activity dated 24 December 1993 concluded by the States, including Russia and Ukraine, which were formerly

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[233] It has also been shown that Oschadbank's alleged investment was made before 1 January 1992, see above §§ 124 *et seq.*

[234] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 26, line 27 to page 27 line 5 (**exhibit FR-43**).

part of the USSR ("the 1993 Treaty")[235]. All the provisions of that treaty, including its preamble, emphasise the considerable importance of economic cooperation between States and refer to cross-border investments.

283. Although, as Oschadbank points out[236], the actions in annulment brought by the Russian Federation were dismissed by the Swiss Federal Supreme Court on 16 October 2018[237], Oschadbank is careful not to add, however, that the action was only dismissed following very lively debates during which the position that the investment must be cross-border in nature at the time it is made was strongly supported by Judge Kathrin Klett. The decision reached by the Federal Court was therefore not unanimous and gave rise, which was exceptional in the Swiss legal system, to a "public deliberation" during which each of the five Swiss judges expressed their position on the question at the hearing held in Lausanne[238].

284. The arbitral tribunal should have followed the opinion given by Judge Klett. But instead, the tribunal declared itself competent on the ground that the BIT was applicable to an alleged investment that was internal at the time it was made. This is another reason why the tribunal should have declined jurisdiction.

§2 The futility of the reasoning adopted by the arbitral tribunal and defended by Oschadbank

285. The arbitral tribunal wrongly settled the central issue of the condition of investment, by assertion and with virtually no reasoning. In paragraph 226 of the Award, the tribunal considers that:

> *"1. Temporal requirement*
>
> *226. In the English version of the Treaty text there is no temporal requirement in the definition of investment that would limit investments to those made after the Russian Federation's obligations under the Treaty became effective in the Crimean Peninsula. The Tribunal has no evidence before it to suggest that the English translation is inaccurate in any way. Accordingly, the Tribunal finds that it is immaterial for the purposes of determining jurisdiction that the investments were made before the accession of the Crimean Peninsula to the Respondent". (our underlining)*

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[235] Agreement on cooperation in the field of investment activity dated 24 December 1993 (**exhibit FR-2**).

[236] Oschadbank's submissions of 15 December 2020, §§ 170 *et seq.*

[237] Judgments of the Swiss Federal Supreme Court of 16 October 2018 in cases 4A 396 2017 and 4A 398 2017, *Russian Federation v. Stabil and Ukrnafta* (**exhibit FR-15**).

[238] See the affidavits of Elliott Geisinger dated 10 January 2019 and Christopher Boog dated 11 January 2019 (**exhibit FR-16**).

286. However, it was noted above that the interpretative evidence converges in favour of the temporal requirement, and this is particularly supported by the opinions of the linguistic experts in Slavic languages. It is important to note, once again, that this analysis is material, since the official languages of the BIT are Russian and Ukrainian. In this regard, Oschadbank's reference to the fact that the presiding arbitrator of the tribunal, David Williams, is an English speaker[239], is devoid of relevance.

287. Furthermore, the requirement that the investment must comply with national law contained in the very definition of investment (Article 1(1) BIT) was sufficient to establish that the investment had to be foreign from the date it was made and that there is a temporal requirement that the tribunal disregarded.

288. Therefore, assuming that the other conditions for the application of the BIT are met, which is not the case, the BIT can only apply to Ukrainian investments made in Crimea after its accession to the Russian Federation.

289. The arbitral tribunal decided the opposite in paragraph 226 of the Award, considering that the BIT could apply to investments made at a time when Crimea was part of Ukraine, and could therefore apply to an investment that was purely domestic (Ukrainian in Ukraine) at the time it was made. This decision is contrary to the terms of the BIT, which is intended to protect foreign investments only. The tribunal was therefore wrong to declare itself competent to hear the case.

290. A comparison between the terms of the BIT as they stand and the terms of the BIT as they should have been for the tribunal's decision to be possible shows the extent to which the Tribunal rewrote the BIT.

291. Article 1(1) BIT provides:

> *"The term "investments" means all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws, and in particular: [...]".*

292. For the interpretation given by the arbitral tribunal to be possible, the article should have been written:

> *"The term "investments" means all kinds of assets and intellectual values, which are ~~invested~~ held by an investor of one Contracting Party in the territory of the other Contracting Party ~~in conformity with its laws~~, and in particular: [...]"*

293. An investment protection treaty simply cannot be rewritten in this way. Just as it is forbidden to add a condition to a treaty for which it makes no provision, it is equally forbidden to delete a condition provided for in the treaty, which is what the tribunal did here.

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[239] Oschadbank's submissions of 15 December 2020, § 166.

294. Where the parties to an investment protection treaty intend to protect investments merely held by a foreign investor, irrespective of when they were made, the wording of the treaty is different. There are many BITs which protect investments simply on the basis of the date on which they are held and not the date on which they are made. One of the clearest examples is the Dutch model BIT, which in its 1997 version – but later versions do not differ on this point – states that "*the provisions of the Agreement shall, from the date of its entry into force thereof, also apply to investments which have been made before that date*"[240]. All the other provisions of that treaty refers to **investments of nationals** of the other contracting party and not **to investments made by nationals**. The arbitration clause of Article 9 provides that:

> *"Each Contracting Party hereby consents to submit any legal* ***dispute*** *arising between that Contracting Party and a national of the other Contracting Party* ***concerning an investment of that national*** *in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965". (our bolding and underlining)*

295. The Dutch BIT model is an example of a treaty that protects **all investments held**, regardless of when they were made[241]. However, the BIT between Russia and Ukraine on the basis of which Oschadbank brought its action before the arbitral tribunal, only protects **investments made** and not those merely held.

296. Oschadbank attempts in vain to justify the arbitral tribunal's decision by referring to extracts from arbitral awards taken out of context and which therefore do not have the scope that it believes it can give them, if only because they ruled on different issues from those arising in the case before the Court and were handed down in respect of treaties drafted differently from the BIT.

297. This is the case in the partial award handed down on 8 September 2006 in *Mytilineos v. Serbia*[242], in which one of the questions concerned the economic substance of the investment, and not the date on which the actual existence of the investment was to be assessed. The arbitral tribunal was not asked to settle the question arising here, of whether the alleged investment must be foreign at the time it is made or whether it may become so at a later date. Oschadbank carefully omits

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[240] Article 10 of the Dutch model BIT (1997version) (**exhibit FRJ-17**). The reference to the 1997 version is interesting because it shows the existence of a practice that was already established when the BIT was negotiated.

[241] This model has served as the basis for numerous treaties which protect investments held, irrespective of when they were made. See, for example, the BIT between the Netherlands and Georgia of 3 February 1998.

[242] **Oschadbank Exhibit RJ-11**, cited in Oschadbank's submissions of 15 December 2020, § 175.

to mention that the bilateral investment protection treaty between Greece and Yugoslavia of 25 June 1997[243] made no provision for any temporal limit, unlike the BIT. Article 12 of that treaty provided that:

> *"This Agreement shall apply to investments made by investors of either Contracting Party in the Territory of the other Contracting Party consistent with the latter's legislation,* ***prior to as well as after the date of its entry into force****. However, the provision of this Agreement shall be applicable from the date of its entre into force". (our underlining)*

298. A comparison with Article 12 of the BIT clearly shows that in this case, the date on which the investment was made is material, whereas in *Mytilineos v. Serbia*, it was completely irrelevant. Consequently, Oschadbank cannot rely on this arbitral award in support of its allegations. Oschadbank was only able to give the impression that the question was the same as in the present case through a truncated citation of the award (omitting paragraphs 127 and 128).

299. Oschadbank also failed to mention that, in the case cited, the tribunal did not reach a unanimous agreement on the interpretation to be given to the bilateral investment protection treaty between Greece and Yugoslavia, precisely on the question of the definition of investment, and that one of the arbitrators drafted a dissenting opinion[244].

300. The same is true of the arbitral award handed down on 9 May 2012 in *InterTrade v. Czech Republic*[245], the decision handed down on 13 July 2018 in *PAO Tatneft v. Ukraine* by the English High Court of Justice[246], and of the decision handed down on 20 December 2019 by that same court in *Korea v. Dayyani*[247]. The question that arose in the three cases referred to by Oschadbank was even further removed from the one arising here, since it was whether or not the investment needed to contribute to the economy of the host State in order to be protected under the treaty. This is different to the question under discussion here, which shows that the decisions on which Oschadbank believes it can rely are irrelevant to the present case.

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[243] BIT between Greece and Yugoslavia of 25 June 1997 (**exhibit FRJ-18**).

[244] Dissenting opinion of Professor Dobrosav Mitrovic dated 6 September 2006 (**exhibit FRJ-19**). The aim here is not to take a stand on the outcome of this arbitral award or on the opinion of the dissenting arbitrator, but to point out that the question decided is not at all the same as the question arising before this Court of Appeal.

[245] **Oschadbank Exhibit RJ-19**, cited in Oschadbank's submissions of 15 December 2020, §§ 176-177.

[246] **Oschadbank Exhibit RJ-44**: *PAO Tatneft v. Ukraine* - [2018] EWHC 1797 (Comm), 2018 WL 03420059, 13 July 2018.

[247] **Oschadbank Exhibit RJ-46**: *Korea v. Dayyani* - [2019] EWHC 3580 (Comm), 2019 WL 07038249, 20 December 2019

301. The same can also be said of the award handed down on 30 November 2018 in *Mera Investment Fund Limited v. Republic of Serbia*[248] because, contrary to what Oschadbank argues, the treaty on which the investor relied (the treaty between Cyprus and Serbia) was not worded in the same way as the BIT. Oschadbank omits the fact that, unlike the BIT, the Cyprus-Serbia treaty covers all investments irrespective of when they are made, such that the date on which they are made cannot have any impact. Article 12 of that treaty provides that:

> *"This provisions of this Agreement shall relate to investments made by investors of one Contracting Party* ***prior to and after*** *entry into force of this Agreement, but shall apply only to cases arisen after entry into force of this Agreement" (our bolding and underlining)*

302. Thus, whereas the BIT refers to the investment **action** as indicated above, the treaty between Cyprus and Serbia refers to the investment **situation**[249]. This is precisely what allowed the arbitral tribunal, in the case on which Oschadbank believes it can rely, to find that investments merely **held** were eligible for protection[250], which is not true in this case.

303. In actual fact, none of the arbitral awards upon which Oschadbank relies can have the slightest impact in these proceedings. It shall also be noted that Oschadbank fails to cite a recent arbitral award which contradicts its position[251].

304. Furthermore, these are only arbitral awards and have no authority with regard to this Court of Appeal, which is precisely asked to review the validity of arbitral awards in the context of an action in annulment. In support of its position, Oschadbank does not cite any case law of the French annulment court, precisely because the decisions that have been handed down explicitly contradict it.

305. Thus, in *Venezuela v. García Armas*, the Court of Appeal had the opportunity to underscore the distinction that must be made between the protection of an investment made and the protection of an investment merely held. In that case, the question was whether the investor had to have the nationality of the contracting State (Spain), other than the host State of the investment (Venezuela), at the time it made the investment – which would have excluded investments made when the investor did not have Spanish nationality from protection – or whether it merely needed to have that nationality on the date of the alleged breach and the start of the arbitration proceedings. Analysing the terms of the investment protection treaty between Spain and Venezuela, the Paris Court of Appeal concluded that the treaty

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[248] **Oschadbank Exhibit RJ-36**, cited in Oschadbank's submissions of 15 December 2020, §§ 178-181.

[249] On the difference between investment action and investment situation, see above §§ 253-255.

[250] **Oschadbank Exhibit RJ-36**, § 107.

[251] Award on Jurisdiction, 18 June 2020, *Sergei Vikctorovich Pugachev v. Russian Federation* (**exhibit FRJ-43**), spec. §§ 398 *et seq.*

required an investment to have been made and not merely held, such that the nationality of the other contracting State had to be held on the date on which the investment was made:

> *"Considering, however, secondly, that pursuant to Article I.2 of the BIT: "The term 'investments' means any type of assets invested by investors of one Contracting Party in the territory of the other Contracting Party"; that pursuant to Article I.1: "The term 'investors' means: (a) natural persons who are nationals of one of the Contracting Parties under their national law and who make investments in the territory of the other Contracting Party";*
>
> *Considering that according to the ordinary meaning to be given to these terms,* ***the investment is not an asset merely "held" by an investor of the other Contracting Party*** *- which would exclude any reference to the date of acquisition -* ***but an asset "invested" by an investor of the other Contracting Party*** *- which necessarily refers to a condition of nationality of the investor on the date of the investment;*
>
> *Whereas the award should therefore be annulled in that it does not include any element of temporality in determining protected investments"*[252]*. (our bolding)*

306. Although this ruling was recently quashed[253], it was quashed for other reasons that have no effect on the way in which the Court of Appeal interpreted the investment protection treaty. This was very recently confirmed by this Court of Appeal, on referral after cassation, by asserting that a distinction must be drawn between investments "made" and investments "held":

> *"It follows from the terms of the BIT according to the ordinary meaning to be given to them, without the need to interpret them, that an investment protected by the Treaty is an asset invested by an investor of the other contracting party, such that* ***an investment justifying the jurisdiction ratione materiae of the arbitral tribunal is an investment made by an investor*** *who holds the nationality of the other contracting party, pursuant to its*

[252] Paris CA, Section 1, Ch. 1, 25 April 2017, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 15/01040, D. 2017. 2559, obs. Th. Clay; Rev. Arb, 2017. 648, note M. Laazouzi; Cahiers arbitrage 2017. 674, note W. Ben Hamida (**exhibit FRJ-20**).

[253] Cass. civ. 1, 13 February 2019, appeal no. 17-25851 (**exhibit FRJ-7**).

legislation, ***on the date on which it makes that investment in the territory of the other party****"*[254]*. (our bolding)*

307. A similar reasoning concerning the analysis of the terms of the BIT leads to the conclusion here that the investment must be foreign on the date on which it is made. In other words, according to the BIT, the investment must have been made in the territory of the other contracting State (here the Russian Federation), which is not the case with the Crimean Branch, since Oschadbank acquired and operated it when Crimea was unquestionably still part of the territory of Ukraine.

308. Transposing the solution adopted in *García Armas* to this case is all the more justified as the definition of investment given in this BIT is very similar to the definition given in the treaty between Spain and Venezuela, with both referring to assets that are "invested" and not merely "held".

309. Oschadbank makes a clumsy attempt to argue that the solution adopted by the Court of Appeal in that case cannot be transposed to these proceedings, because the question raised concerned the status of investor and not that of investment[255]. But the argument does not hold: the Court's reasoning in *García Armas* relates to the definition of investment in order to require an investment made and not an investment merely held, as this Court expressly stated in its ruling of 3 June 2020.

310. The two cases are perfectly comparable since, in both, it is the temporal element that must be assessed to verify the investment. In *García Armas*, it was held that the investor had to be a national of the host State in order to make an investment that was eligible for protection under the treaty and that it could not acquire that nationality after the investment had been made. In this case, the question is whether the investment must be foreign at the time it is made (i.e. made in the territory of the host State) or whether it can become foreign at a later date.

311. In support of its interpretation of the condition of investment, Oschadbank[256] cites the decision handed down by the Swiss Federal Supreme Court on 25 March 2020 in *Clorox v. Venezuela*[257] which, on the basis of the same provision of the Spain-Venezuela BIT applied by this Court of Appeal in *García Armas*, held conversely that:

> *"There is no basis for inferring from the phrase "invested by investors" the requirement that an active investment must necessarily have been made by the investor itself in exchange for consideration. On the contrary, the BIT does not contain any requirements beyond the requirement that an investor of one*

[254] Paris CA, Section 5, Ch. 16, 3 June 2020, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 19/03588 (**exhibit FRJ-6**).

[255] Oschadbank's submissions of 15 December 2020, §§ 187-188.

[256] Oschadbank's submissions of 15 December 2020, §§ 186-187.

[257] Swiss Federal Supreme Court, 25 March 2020, *Clorox v. Venezuela*, No. 4A_306/2019 (**Oschadbank exhibit RJ-47**).

contracting party holds assets in the territory of the other contracting party."[258]

312. There is no need for a detailed analysis to see that this judgment is in clear contradiction with the case law of this Court of Appeal which, in *García Armas*, decided the exact opposite on two occasions with respect to the definition of investment. The ruling handed down in *Clorox* reflects a general attitude on the part of Swiss courts to grant protection to investments that are merely held, without giving any effect to the treaty's reference to investments made. Their attitude forms the very basis of the rulings which refused, after the dissensions within the Federal Court referred to above[259], to annul the awards handed down in *Stabil* and *Ukrnafta*[260].

313. If, in *Clorox, Stabil* and *Ukrnafta,* the Federal Court had followed the Paris Court of Appeal's solution and the meaning to be given to the definition of investment in *García Armas*, its decisions would have been different. As a result of Oschadbank's allegation based on the *Clorox* ruling, the Court of Appeal is therefore faced with the choice of either confirming its case law by holding that Oschadbank did not make a protected investment within the meaning of the BIT, as the Russian Federation requests, or reversing its case law and aligning itself with the Swiss position. For the reasons set out above, the Russian Federation is of the opinion that the meaning given by the Paris Court of Appeal to the condition of protected investment is correct, whereas the meaning given by the Swiss Federal Court is not.

314. As stated above, the express requirement laid down in the BIT that the investment be lawful reinforces the requirement, if this were necessary, that the investment must be foreign at the time it is made.

315. In an attempt to overcome the inconsistency resulting from the fact that it is impossible to verify the compliance of the investment with the laws of the host State at the time Oschadbank made its alleged investment, the Court decided, without giving any reasons, to proceed with that verification on the date of Crimea's accession to the Russian Federation[261]. Apart from the fact that the tribunal's assessment is wrong, there is nothing in the BIT to indicate that the verification of compliance was to be made on that date. In order to declare itself competent at all costs, the arbitral tribunal once again rewrote the BIT, which it did not have the authority to do.

316. Thus, after deleting one condition of the BIT (the requirement that the investment be foreign on the date it is made), the tribunal modified another

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[258] Aforementioned ruling, § 3.4.2.7.

[259] See above § 283.

[260] Rulings of the Swiss Federal Supreme Court of 16 October 2018 in cases 4A 396 2017 and 4A 398 2017, *Russian Federation v. Stabil and Ukrnafta* **(exhibit FR-15)**.

[261] Award §§ 227-229.

condition by acting as if the investment alleged by Oschadbank had been made in 2014, whereas it is not challenged that the Crimean Branch was acquired and operated well before that date at a time when Crimea was part of Ukrainian territory, and moreover at a time when the BIT did not afford protection.

*
* *

317. It follows from these developments that the arbitral tribunal lacks jurisdiction with respect to Oschadbank's claim – *ratione temporis, loci* and *materiae* – each of these grounds of lack of arbitral jurisdiction leading to the annulment of the Award because, contrary to what Oschadbank maintains, the Russian Federation has not waived its right to invoke the arbitral tribunal's lack of jurisdiction.

Section 3 – The Russian Federation has not waived its right to invoke the arbitral tribunal's lack of jurisdiction

318. Finally, Oschadbank has argued that the Russian Federation has, in any event, waived its right to avail itself of the lack of jurisdiction *ratione temporis*[262] and *ratione materiae*[263] of the arbitral tribunal, since it did not raise it before the arbitrators, which is not true[264].

319. Oschadbank based this allegation in its submissions of 16 January 2020, on Article 1466 of the CPC, which provides that "*A party who, knowingly and without legitimate reason, refrains from invoking an irregularity in good time before the arbitral tribunal shall be deemed to have waived the right to invoke it*" and the ruling handed down by the Paris Court of Appeal in *Schooner* which considers that:

> *"the waiver provided for in the aforementioned Article 1466 of the Code of Civil Procedure concerns precisely and concretely articulated grievances and not categories of pleas. The aim of that provision - which is to prevent a party from reserving weapons in the event that the award goes against it - would not be achieved if, by way of a single ground for bringing an appeal, the appellant were allowed to develop an argument before the court that differed in law and in fact from the one it had submitted to the arbitrators. This scope attributed to Article 1466 of the Code of Civil Procedure is not incompatible with the full review exercised by the court hearing the action in annulment with regard to the grounds for bringing the appeal, since in ruling on arguments identical to those that had been submitted to the arbitrators, it is bound neither by their interpretation of the law nor by their assessment of the facts"*[265].

320. Since the *Schooner* ruling was quashed by the *Cour de cassation*[266], Oschadbank has nonetheless maintained its objection to admissibility in its submissions dated 15 December 2020[267], which would seem all the more unfounded as the *Cour de cassation* decided quite explicitly that:

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[262] Oschadbank's submissions of 15 December 2020, §§ 139-151.

[263] Oschadbank's submissions of 15 December 2020, § 193.

[264] However, Oschadbank does not contend that the Russian Federation has waived its right to invoke the lack of jurisdiction *ratione loci* of the arbitral tribunal.

[265] Paris CA, Section 1, Ch. 1, 2 April 2019, *Schooner Capital LLC et autres c/ République de Pologne*, RG 16/24358 (**exhibit FRJ-21**)

[266] Cass. civ. 1, 2 December 2020, *Schooner Capital LLC et autres c/ République de Pologne*, appeal no. 19-15.396 (**Oschadbank exhibit RJ-71**).

[267] Oschadbank's submissions of 15 December 2020, § 151.

> *"It follows that where jurisdiction has been argued before the arbitrators, the parties are not deprived of the right to raise new grounds and arguments on this issue before the court hearing the action in annulment and to adduce new evidence for that purpose."*

321. Oschadbank cannot reasonably criticise the Russian Federation for not challenging the jurisdiction of the arbitral tribunal, which gives rise to the commonly accepted hypotheses of waiver. In French law, the case law holds that a party who is summoned before the arbitral tribunal and defends itself on the merits is deemed to have waived its right to invoke the arbitral tribunal's lack of jurisdiction at a later date, in particular in the context of an action in annulment[268].

322. This criticism cannot be levelled at the Russian Federation, firstly because it has consistently challenged the jurisdiction of the arbitral tribunal and, secondly, because it did not defend itself on the merits during the arbitration proceedings. This is confirmed by Professor Yves-Marie Serinet in his opinion of 25 June 2020, in the following terms:

> *"It would therefore be illogical, if not impossible, to try to raise against the Russian Federation a provision which, literally, presupposes finding that the party refrained and the arbitral tribunal was formed, when the lack of jurisdiction of the arbitral tribunal in this case was challenged even before it was formed"*[269].

323. Oschadbank is actually criticising the fact that the Russian Federation did not sufficiently develop its plea as to arbitral jurisdiction. However, Oschadbank's allegation of a waiver by the Russian Federation cannot be accepted, firstly because the conditions laid down in Article 1466 of the CPC are not met (**subsection 1**), secondly, because Oschadbank reads into Article 1466 of the CPC something that it does not say (**subsection 2**) and, thirdly, because Article 1466 of the CPC is in any event inapplicable where the party invoking the irregularity did not participate in the arbitration proceedings (**subsection 3**).

Subsection 1 – The conditions for a waiver under Article 1466 of the CPC are not met in this case

324. At least two of the conditions required for the waiver, namely refraining (**§1**) and knowledge (**§2**) are not met in this case.

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[268] Among the abundant case law, see for example, Paris CA 24 June 1997, *Highlight Communications International AG c/ Europex*, Rev. Arb. 1997, 588 obs. D. Bureau (**exhibit FRJ-22**). On the question in general, L. Cadiet, "La renonciation à se prévaloir des irrégularités de la procédure arbitrale", Rev. arb., 1996.3 (**exhibit FRJ-23**).

[269] Opinion of Professor Yves-Marie Serinet of 15 June 2020, § 59 (**exhibit FR-31**).

§1 The Russian Federation invoked the arbitral tribunal's lack of jurisdiction and Oschadbank even acknowledged that it did

325. Although the Russian Federation did not participate in the arbitration proceedings, it promptly challenged the jurisdiction of the arbitral tribunal. In particular, it did so in a letter from its Ministry of Justice dated 13 May 2016[270], which underlined the arbitrators' lack of jurisdiction and the fact that the conditions for the application of the BIT are not met in no uncertain terms:

> *"It is manifest that such claims cannot be considered under the Agreement mentioned above and, therefore, the Agreement cannot serve as a basis for composing an arbitral tribunal to settle this claim.*
>
> *According to Clause 1 of Article 1 of the Agreement, the term "investments" means all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws. The assets being the subject of dispute are located in the territory of the Republic of Crimea and the city of Sevastopol which were earlier part of Ukraine. The Bank's assets do not constitute investments, since they were not invested in the territory of the Russian Federation, and, even if they occurred, they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in conformity with the legislation of the Russian Federation. These assets have not been earlier subject to taxation under the legislation of the Russian Federation and have not contributed to the development of the economy of the Russian Federation.*
>
> *On the basis of the abovementioned the Russian Federation does not recognize the jurisdiction of an international tribunal at the Permanent Court of Arbitration in settlement of the abovementioned claim".*

326. In that letter, the Russian Federation challenged, *inter alia*, the territorial, subject-matter (absence of investment) and temporal jurisdiction. As regards the pleas of lack of jurisdiction, allegedly waived according to Oschadbank, it is sufficient to note that, concerning the lack of investment by Oschadbank within the meaning of the BIT, the Russian Federation's letter explicitly cites Article 1(1) of the BIT. It is therefore impossible to claim, as Oschadbank does, that the Russian Federation did not challenge the jurisdiction *ratione materiae* of the arbitral tribunal[271].

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[270] Letter from the Ministry of Justice of the Russian Federation of 13 May 2016 (exhibit FR-2).

[271] Oschadbank's submissions of 15 December 2020, § 193.

327. As regards the challenge to jurisdiction *ratione temporis*, Oschadbank's procedural conduct is, at the very least, disloyal, which renders its claim inadmissible under the estoppel rule. In its submissions of 15 December 2020, Oschadbank states that "none of these objections [contained in the above-mentioned letter of 13 May] relates to the application *ratione temporis* of the BIT"[272]. However, Oschadbank had argued the exact opposite just a few weeks earlier: in its first statement of case in the application for revision, Oschadbank stated, with regard to the plea of lack of jurisdiction based on the fact that the alleged investment predated 1 January 1992:

> *"50 In its correspondence of 13 May 2016, the Respondent [the Russian Federation] disputed, inter alia, the Tribunal's jurisdiction ratione temporis. In particular, the Respondent argued:*
>
> > *The Bank's assets do not constitute investments, since they were not invested in the territory of the Russian Federation, and, even if they occurred, they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in conformity with the legislation of the Russian Federation. [...]*
>
> *51. The argument that the Respondent now makes in its Application is a slight variation of the contention made in its 13 May 2016 letter, and in substance concerns the same question"*[273].

328. Oschadbank not only acknowledged, in the application for revision, that the Russian Federation had challenged the jurisdiction *ratione temporis* of the arbitral tribunal, it also told the arbitrators that the Paris Court of Appeal, in these proceedings, would rule on the Russian Federation's plea as to arbitral jurisdiction based on the date of the investment under Article 12 of the BIT:

> *"In deciding the Respondent's application, the Paris Court of Appeal will review de novo the issue of the Tribunal's jurisdiction and will deal with the Respondent's arguments based on the alleged dates of acquisition of the Crimean assets"*[274].

329. This is how Oschadbank obtained a stay of proceedings on the application for revision, as the arbitral tribunal based its decision to stay the application for

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[272] Oschadbank's submissions of 15 December 2020, § 140.

[273] Oschadbank's response dated 25 September 2019 in the application for revision of the Award, §§ 50-51 (**exhibit FR-25**).

[274] Oschadbank's reply dated 25 November 2019 in the application for revision of the Award, § 11 (**exhibit FR-27**).

revision precisely on the fact that the Paris Court of Appeal would rule on this plea as to jurisdiction:

> *"The Tribunal accepts the Claimant's [Oschadbank's] position that, notwithstanding the fact that the two proceedings are based on different Articles of the French Code of Civil Procedure, the Paris Court of Appeal is certain to address the same ultimate issue as has been presented to this Tribunal. The Parisian Court of Appeal will also likely conduct a full review of the jurisdiction issue"*[275]*. (our underlining)*

330. Oschadbank cannot now backtrack: it cannot, without contradicting itself, assert that the Russian Federation did not invoke the lack of jurisdiction *ratione temporis* and that the ground of annulment based on that lack of jurisdiction is inadmissible before this Court of Appeal, since in so doing Oschadbank finds itself in a situation of estoppel, which Professor Serinet expresses in perfectly clear terms:

> *"In this case, the contradictory positions expressed by Oschadbank during the various appeals lodged against the award handed down by the Permanent Court of Arbitration on 26 November 2018 in Paris have been detrimental to the Russian Federation by deferring the examination of its application for revision.*
>
> *Unless procedural disloyalty is established, it is therefore for the Paris Court of Appeal to declare inadmissible the plea of inadmissibility of the action in annulment based on Article 1466 of the Code of Civil Procedure"*[276]*.*

331. Ultimately, the Russian Federation has generally challenged the jurisdiction of the arbitral tribunal and has also specifically challenged the subject-matter and temporal jurisdiction of the BIT. Regarding the latter, Oschadbank expressly acknowledged this before attempting to backtrack. But even if the Russian Federation had not challenged jurisdiction *ratione temporis* during the arbitration proceedings, it could not be considered to have waived its right to do so, since it did not discover that Oschadbank had acquired the Crimean Branch before 1 January 1992 until after the arbitration proceedings.

§2 The Russian Federation was unaware that Oschadbank had acquired the Crimean Branch before 1 January 1992

332. Assuming, by some unlikely chance, that the Russian Federation could be considered not to have challenged the arbitral tribunal's jurisdiction *ratione temporis*, this could not lead to the application of Article 1466 of the CPC, since it

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[275] *Decision to stay consideration of respondent's application for revision and claimant's application for security for costs* of 23 December 2019, § 24 (**exhibit FR-30**).

[276] Opinion of Professor Yves-Marie Serinet of 25 June 2020, §§ 90-91 (**exhibit FR-31**).

was only after the Award was handed down that it discovered that the Crimean Branch had been acquired before 1 January 1992, which excludes it from the scope of the BIT by virtue of Article 12 thereof. Article 1466 of the CPC can only entail a waiver where the irregularity was not invoked by the party to whom it caused a grievance, "*knowingly and without legitimate reason*", which means that the waiver is excluded where the irregularity was not known.

333. The condition of knowledge is consubstantial with the waiver, since one cannot waive something of which one is unaware, which is reflected in the fact that "*a party cannot of course be criticised for failing to raise a grievance before the Arbitral Tribunal which it discovered after the award had been made*"[277].

334. The circumstance in which the Russian Federation found out that Oschadbank's alleged investment predates 1 January 1992, and is therefore excluded from the temporal scope of protection of the BIT, is the discovery in the Kyiv Archives of the documents adduced in these proceedings as **exhibits FR-5, FR-8, FR-9** and **FR-13**, which it made in June 2019, i.e. after the Award had been handed down on 26 November 2018. The research, conducted over several months, which led to this discovery, is described in detail by Mr Andrey Kondakov in his witness statement[278].

335. This discovery made after the Award, which led to filing the application for revision before the arbitral tribunal on 19 August 2019[279], precludes any waiver in this case: how could the Russian Federation have raised, before or during the arbitration proceedings, a grievance of which it only became aware after the Award had been handed down[280]?

336. Moreover, the Russian Federation was particularly prompt because, as soon as it discovered that Oschadbank had acquired the Crimean Branch before 1 January 1992, it did not fail to raise this ground of lack of jurisdiction before the arbitral tribunal itself by lodging the aforementioned application for revision.

Subsection 2 – Oschadbank reads into Article 1466 of the CPC something that it does not say

337. It has been shown in the previous subsection that the Russian Federation did challenge the jurisdiction of the arbitral tribunal by invoking the grounds of lack of jurisdiction of which it was aware from the outset of the arbitration proceedings and

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[277] P. Fouchard, E. Gaillard and B. Goldman, *Traité de l'arbitrage commercial international*, Litec, 1996, p. 942, para 1606 (**exhibit FRJ-24**).

[278] Witness statement by Andrey Kondakov dated 25 October 2019 and appendices numbered AK-1 to AK-10 (**exhibit FR-40**).

[279] Application for revision of the Award brought by the Russian Federation on 19 August 2019 (**exhibit FR-24**).

[280] Opinion of Professor Yves-Marie Serinet of 25 June 2020, §§ 71-76 (**exhibit FR-31**).

that it cannot be criticised for failing to raise the grounds of lack of jurisdiction of which it was unaware and which it only discovered after the Award had been made.

338. Oschadbank suggests that this is not sufficient and that the Russian Federation should have explained its challenge to arbitral jurisdiction even further. Oschadbank had so far referred to the ruling handed down by this Court on 2 April 2019 in *Schooner*[281] and now refers to the ruling by the *Cour de cassation* of 2 December 2020[282]. It claims that the conditions of Article 1466 of the CPC are met in this case, because the objections as to jurisdiction raised before this Court are "*of a completely different nature to the one[s] raised before the arbitrators*"[283].

339. Not only is the perfectly clear wording of the decision made by the *Cour de cassation* on 2 December 2020 manifestly contrary to Oschadbank's reading of it[284], Oschadbank fails, in any event, to mention that the decision was handed down in a case different from the one in these proceedings.

340. In *Schooner*, an action in annulment was brought against an arbitral award finding, favourably to the Republic of Poland, that the tribunal lacked jurisdiction, the appellant (alleged investor) criticising the arbitrators for wrongly declaring themselves **in**competent, even though their jurisdiction was characterised on a basis – in particular the most-favoured-nation clause contained in the BIT – that the claimant in the arbitration proceedings (alleged investor) had not raised. The claimant in the arbitration proceedings therefore criticised the arbitral tribunal for failing to find a basis for its jurisdiction that it had not itself invoked.

341. It can immediately be seen how different the *Schooner* case is from the case before the Court here. As Professor Boucobza points out, in investment arbitration, "*it is for the investor who wishes to invoke the benefit of an investment protection treaty to prove that it can actually benefit from it*" and "*it is not for the State to invoke factual elements that would contradict this application*"[285].

342. In this case, it is for the claimant to prove precisely that the State consented to arbitration, which cannot be presumed[286], and not for the State to justify, by detailing all the reasons, why it did not consent to arbitration. The State may of

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[281] Paris CA, Section 1, Ch. 1, 2 April 2019, *Schooner Capital LLC et autres c/ République de Pologne*, RG 16/24358 (**exhibit FRJ-21**).

[282] Cass. civ. 1, 2 December 2020, *Schooner Capital LLC et autres c/ République de Pologne*, appeal no. 19-15.396, (**Oschadbank exhibit RJ-71**).

[283] Oschadbank's submissions of 15 December 2020, § 146.

[284] Once again, the *Cour de cassation* unequivocally accepts that "*new grounds and arguments*" may be developed before the court hearing the action in annulment in support of the lack of jurisdiction previously raised before the arbitrators (see above § 320). – Cass. civ. 1, 2 December 2020, *Schooner Capital LLC et autres c/ République de Pologne*, appeal no. 19-15.396, (**Oschadbank exhibit RJ-71**).

[285] Opinion of Professor Xavier Boucobza of 24 October 2019, § 63 (**exhibit FR-32**).

[286] See above §§ 96 *et seq.*

course do so, but it is not required to do so, and no waiver on its part can be inferred from an unsubstantiated objection.

343. Professor Serinet also pointed out this difference:

> *"The present situation is different [from that in Schooner]. It was not for the respondent State, which moreover did not appear, to invoke elements that could contradict the application of the BIT on the various conditions determining the jurisdiction of the arbitral tribunal. Accordingly, no waiver can be attributed to it in this respect"*[287].

344. The Court of Appeal has made this clear in the context of the present case, which differs from the *Schooner* case, in which the arbitral tribunal was criticised for wrongly declaring itself competent on the basis of a BIT. Thus, in the Nreka case, the Czech Republic complained that the arbitrators had wrongly declared themselves competent for reasons that had not been put forward or discussed during the arbitration proceedings. The investor argued that the ground for annulment was inadmissible because, as it had not been raised during the arbitration proceedings, the State had waived the right to raise it. The Court of Appeal dismissed this argument in very clear terms:

> "*Whereas the Court, in assessing the meaning and scope of the arbitration agreement constituted by the above provisions of the BIT, conducts an independent examination, in fact and in law, of the grounds and arguments of the parties; whereas it is irrelevant in this respect, contrary to the arguments of the Czech Republic or Mr Pren Nreka on the application of the estoppel rule, that the arguments raised in the annulment proceedings concerning the absence of an arbitration agreement were raised before the arbitrators from the moment the objection as to jurisdiction was raised during the arbitration proceedings, since it cannot be inferred from the fact that an argument was not previously raised before the arbitrators that the appellant accepted their jurisdiction"*[288]. *(our underlining)*

345. The *Schooner* ruling handed down by the Court of Appeal cannot be considered to go back on this solution. Indeed, none of the commentators on the ruling of 2 April 2019 considered that it did[289]. Such a solution is perfectly consistent with the conception of the *competence-competence* principle followed by French arbitration law, and one author points out that:

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[287] Opinion of Professor Yves-Marie Serinet of 25 June 2020, § 70 (**exhibit FR-31**).

[288] Paris CA, 25 September 2008, *République Tchèque c/ Nreka*, Rev. arb. 2009, 337, note E. Fadlallah, (**Exhibit FRJ-25**). On this ruling, Opinion of Professor Yves-Marie Serinet of 25 June 2020, § 61 (**exhibit FR-31**).

[289] Cf. J. Jourdain-Marques, obs. in Dalloz actualité 17 April 2019 (**Exhibit FRJ-26**)

> *"if the claim – the plea of lack of jurisdiction – has been raised before the arbitrators and is admissible as having been raised in limine litis, it is possible for "arguments", i.e. new grounds, to be submitted to the court hearing the action against the award"*[290].

346. But there is more: the alleged *Schooner* 'case law' of the Paris Court of Appeal is incompatible with the most recent case law of the *Cour de cassation*, such that, even assuming that the *Schooner* ruling is to be interpreted as Oschadbank proposes, it does not correspond to positive law. In an *Antrix* decision of 4 March 2020, the *Cour de cassation* overturned an appeal ruling which had declared inadmissible a ground for annulment based on the irregular constitution of the arbitral tribunal on the basis of Article 1466 of the CPC, holding that:

> *"In ruling as it did, although Antrix's argument before the arbitral tribunal that the clause providing for arbitration proceedings conducted in accordance with the rules and procedures of the ICC or UNCITRAL was unreasonable necessarily challenged the legality of the composition of the arbitral tribunal, which was constituted under the aegis of the ICC, since the alternative option of choosing UNCITRAL rules provided by the clause implied ad hoc arbitration, to the exclusion of institutional arbitration, such that the argument raised before the exequatur judge, to the effect that the arbitration clause was aimed at ad hoc arbitration without ICC involvement in the appointment of the arbitral tribunal, was not contrary to the argument raised before that tribunal, the Court of Appeal violated the aforementioned provisions"*[291].

347. The *Cour de cassation* therefore refused to find a waiver in a case in which the grievance (that the arbitral tribunal was unlawfully constituted) was indirectly deduced from the objection to the unreasonable nature of the arbitration clause. By definition, the grievance was not "*concretely articulated*" as the *Schooner* ruling required, but the waiver was not found, such that by accepting that one ground of appeal makes it possible to circumvent the waiver for another ground of appeal, the *Cour de cassation* has already disapproved the interpretation given by the Court of Appeal to Article 1466 of the CPC[292]. As a logical consequence of the contradiction

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[290] M. Boucaron-Nardetto, Le principe compétence-compétence en droit de l'arbitrage, thesis, pref. J-B. Racine, PUAM 2013, § 704 (**exhibit FRJ-27**),

[291] Cass. civ. 1, 4 March 2020, *Antrix Corporation Limited c/ Devas Multimedia Private Limited*, appeal no. 18-22019, (**exhibit FRJ-28**).

[292] Opinion of Professor Yves-Marie Serinet of 25 June 2020, § 62 which shows that the Antrix ruling "*logically contradicts the reasoning in Schooner.*" (**exhibit FR-31**).

highlighted in June 2020 by Professor Serinet, the *Cour de cassation* quashed the *Schooner* ruling by confirming the absence of a waiver[293].

348. In addition, finally, Article 1466 of the CPC does not apply to a party that did not participate in the arbitration proceedings.

Subsection 3 – Article 1466 of the CPC does not prohibit a party who did not participate in the arbitration proceedings from invoking the irregularity

349. Finally, and in any event, it is recognised that Article 1466 of the CPC cannot be invoked against a party that did not participate in the arbitration proceedings, which always has the right to invoke the arbitral tribunal's lack of jurisdiction in the action in annulment of the award in which the arbitrators declared themselves competent. Professor Serinet is of the opinion that:

> *"The exceptions to the application of Article 1466 of the Code of Civil Procedure include, first and foremost, an exception that is self-evident: the defendant's failure to appear.*
>
> *A party that fails to appear in the arbitration proceedings therefore retains the possibility of invoking grounds for the annulment of the award before the court hearing the action in annulment, but the rule that it has waived the right to invoke procedural irregularities cannot be invoked against it"*[294].

350. In the same vein, Professor Eric Loquin considers that:

> *"the rule can but be approved. The absence of that party cannot be seen as an implicit waiver of the right to raise such grievances, quite the contrary. The same is true of estoppel. No contradiction can be inferred from the silence of the absent party"*[295].

351. This solution, which relates to the arbitral tribunal's obligation to verify its own jurisdiction and consent to arbitration[296], has been confirmed by this Court of Appeal when it held that a party that did not participate in the arbitration proceedings had not waived its right to seek the annulment of the award on the grounds that the arbitrators wrongly declared themselves competent:

> *"Whereas KfW claims that the grievances raised by INVERRAZ before this Court should be declared inadmissible because they were not raised before the arbitrators;*

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[293] Cass. civ. 1, 2 December 2020, *Schooner Capital LLC et autres c/ République de Pologne*, appeal no. 19-15.396, (**Oschadbank exhibit RJ-71**).

[294] Opinion of Professor Yves-Marie Serinet of 25 June 2020, §§ 34-35 (**exhibit FR-31**).

[295] E. Loquin, J.-Cl. Procédure civile, fasc. 1036, Arbitrage. Instance arbitrale, procédure devant les arbitres, 2015, no. 126 (**exhibit FRJ-29**).

[296] On this obligation of arbitrators, see below §§ 417 *et seq.*

> *Whereas, in response to the request for arbitration filed by KfW with the International Chamber of Commerce in December 2005, INVERRAZ raised objections as to the existence of an arbitration agreement; whereas, pursuant to Article 6 (2) of the Rules of Arbitration of the International Chamber of Commerce, the International Court of Arbitration decided that the arbitration would take place nevertheless and that the arbitrators would rule on their jurisdiction; whereas INVERRAZ then announced its decision not to participate in the proceedings; whereas the terms of reference were drawn up and the tribunal constituted, in accordance with the provisions of the Arbitration Rules, despite the non-participation of INVERRAZ;*
>
> *Whereas at no point did INVERRAZ participate in the arbitration proceedings, it cannot be criticised for not having raised before the arbitrators the pleas that it has submitted to the Court"*[297].

352. There is no doubt that this solution is still positive law since, in a decision of 21 May 2019, the Paris Court of Appeal unambiguously considered, in respect of Article 1466 of the CPC, that:

> *"the waiver by a party of its right to raise an irregularity must be assessed in the light of its conduct during the arbitration proceedings. In this case, Mr D... and Mr K... did not take any part in the arbitration proceedings. It cannot be inferred from their failure to do so that they waived their right to invoke the arbitral tribunal's lack of jurisdiction. The plea is therefore admissible."*[298]*. (our underlining)*

353. It follows from the foregoing that as the Russian Federation raised and maintained its objection to jurisdiction while deciding not to participate in the arbitration proceedings, it has not waived its right to invoke the lack of jurisdiction of the arbitral tribunal in this action in annulment. Professor Yves-Marie Serinet indeed shows, in his opinion of 25 June 2020, that:

> *"– The waiver deemed on the basis of Article 1466 of the Code of Civil Procedure that Oschadbank intends to raise against the Russian Federation does not meet the conditions laid down by that provision.*

---

[297] Paris CA, Section 1, Ch. 1, 21 January 2010, *Société Inversiones Errazuriz Limitada SA c/ société Kreditanstalt für Wiederaufbau*, Rev. arb. 2010, 339, note approb. F.-X. Train (**exhibit FRJ-30**). Opinion of Professor Yves-Marie Serinet of 25 June 2020, §§ 45-460 (**exhibit FR-31**).

[298] Paris CA, Section 1, Ch. 1, 21 May 2019, *Messieurs D. et K. c/ société Subway International BV*, RG no. 17/07210 (**exhibit FRJ-31**). See Opinion of Professor Yves-Marie Serinet of 25 June 2020, §§ 48-49 (**exhibit FR-31**).

Firstly, an exception to the rule in Article 1466 of the Code of Civil Procedure applies in the event of non-participation of the defendant, as set out by the Paris Court of Appeal in a decision of 21 January 2010 and then in a decision of 21 May 2019, subsequent to the reform of arbitration law introducing Article 1466 of the Code of Civil Procedure.

Secondly, on 13 May 2016, the Russian Federation expressly contested the jurisdiction of the arbitral tribunal, ante litis, before the arbitral tribunal was constituted. In particular, it argued, on the basis of Article 1(1) of the BIT, that Oschadbank could not avail itself of an investment within the meaning of that provision of the treaty.

Finally, the ground of lack of jurisdiction ratione temporis raised in the action in annulment of the arbitral award was discovered by the Russian Federation after the award had been made. Even if the Russian Federation had refrained from invoking it, it could not have done so "knowingly".

– During the application for revision lodged by the Russian Federation on 19 August 2019 against the arbitral award handed down in France on 26 November 2018, Oschadbank asserted a position radically contrary to the one it has developed before the Paris Court of Appeal hearing the action in annulment lodged against that same award. As a result of estoppel, Oschadbank may not invoke the inadmissibility of the action in annulment before the court hearing that action, under Article 1466 of the French Code of Civil Procedure"[299].

354. However, it is Oschadbank which, by its disloyal procedural conduct, committed a fraud that entails the annulment of the Award, also on the basis of international public policy.

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[299] Opinion of Professor Yves-Marie Serinet of 25 June 2020, p. 22 **(exhibit FR-31)**.

CHAPTER 2 – THE PROCEDURAL FRAUD COMMITTED BY OSCHADBANK CONSTITUTES A BREACH OF INTERNATIONAL PUBLIC POLICY

355. As stated above, on 19 August 2019, the Russian Federation filed an application for revision of the Award to the arbitral tribunal pursuant to Article 1502 of the CPC after discovering documents internal to the Bank in the Archives in Kyiv which attest that Oschadbank's alleged investment was, in any event, made prior to 1 January 1992, which precludes the application of the BIT pursuant to Article 12 thereof. These facts can also lead to the annulment of the Award, as the *Cour de Cassation* confirmed in the *Westman* case in response to an appeal claiming that only the application for revision was available:

> *"While procedural fraud can exceptionally make it possible to revoke the arbitration award that it affects, it may also be sanctioned with regard to international procedural public policy, such that the action in annulment provided for in Article 1502.5° of the new Code of Civil Procedure remains available* [now Article 1520 5° of the CPC]"[300].

356. This solution was not called into question by the French Decree of 13 January 2011[301], such that the procedural fraud committed by Oschadbank may be sanctioned by the Court of Appeal on the ground of non-compliance with international public policy.

357. The purpose of this chapter is not to demonstrate once again that the conditions for protection *ratione temporis* under the BIT were not met and that the court wrongly declared itself competent[302]. The aim here is to show that Oschadbank's concealment of documents from the arbitral tribunal and its failure to inform the Tribunal of the date of its alleged investment (the acquisition and operation of the Crimean Branch) constitute procedural fraud which renders the Award null and void for contravening international procedural public policy.

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[300] Cass. civ. 1, 19 December 1995, *Société Westman International Ltd v. société European Gaz Turbines*, appeal no. 93-20863; *Rev. Arb.* 1996, 49 note D. Bureau (**exhibit FRJ-32**).

[301] On the coexistence of actions for review and actions in annulment under the new system, see in particular, J. Pellerin, "Le cas de la fraude", in E. Loquin, S. Manciaux (dir.), L'ordre public et l'arbitrage, CREDIMI vol. 42, LexisNexis 2014, p. 177 *et seq.*, spec. § 3 "*French law offers a range of sanctions against the perpetrators of fraud or against the award tainted by it [...] Arbitration law offers a number of actions against awards: the application for revision, which is the appropriate action, the action in annulment, which, in the context of grievances, can cover fraud, and third-party opposition*" (**exhibit FRJ-33**).

[302] See above §§ 119 *et seq.*

358. This can be shown, firstly, by describing the conditions laid down by the courts to characterise procedural fraud (**section 1**) and, secondly, to note that these conditions are met (**section 2**).

Section 1 – The conditions of procedural fraud in French arbitration law

359. Procedural fraud, such as that committed by Oschadbank, is "*the deliberate intention of a party to the arbitration proceedings to deceive the arbitral tribunal in order to distort its decision*"[303].

360. The jurisprudential definition of procedural fraud was given by the Paris Court of Appeal in the *Thales/Brunner* ruling[304], one of the cases involved in the *Taiwan Frigate* affair. According to the Court:

> *"procedural fraud committed in the context of arbitration may be sanctioned under international procedural public policy; whereas it presupposes that false documents have been produced, that false testimonies has been gathered or that documents relevant to the resolution of the dispute have been fraudulently concealed from the arbitrators, such that their decision was misled".*
>
> It added that:
>
> *"the ground that review of the merits of awards is prohibited [cannot] usefully be invoked, since the dispute relates precisely to the alteration, through the manoeuvring of one party, of the assessment of the facts made by the arbitrators".*

361. The definition of procedural fraud is therefore the same as the one used for review[305]. Therefore, the opinions of Professors Boucobza and Serinet, as well as the witness statement of Mr Andrey Kondakov, which the Russian Federation produced in the application for revision of the Award, are entirely relevant to enable the Court to assess the procedural fraud in the action in annulment[306].

362. Three conditions are required: a material element (manoeuvres such as the concealment of documents), an intentional element and the fact that the arbitrators' decision was misled, i.e. that the manoeuvres were a determining factor in their decision. These conditions are met in this case, as Professor Xavier Boucobza confirmed in his opinion of 24 October 2019[307].

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[303] J. Pellerin, op. cit. § 1.

[304] Paris CA, Section 1, Ch 1, 1 July 2010, *Société Thalès v. société Brunner Sociedad Civil de Administraçao Ltda et autres*, Rev. Arb. 2010, 856, note B. Audit; L.C. Delanoy, "Les arrêts Frégates de Taïwan ou le nouveau théorème de Thalès", Cah. Arb. 2011, 754 (**exhibit FRJ-34**).

[305] In this sense explicitly, J, Pellerin, op.cit. § 18.

[306] (**Exhibits FR-32**, **40** and **41**).

[307] Opinion of Professor Xavier Boucobza of 24 October 2019 (**exhibit FR-32**).

Section 2 – The conditions for procedural fraud are met in this case

363. Oschadbank's procedural fraud in this case lies in the fact that it failed to inform the arbitral tribunal of the date on which the investment was made and failed to produce documents that were material for the resolution of the dispute.

364. With regard to the deliberate silence of Oschadbank as to the date of its investment, Professor Boucobza considers that:

> *"If, in investment arbitration proceedings, the investor withholds decisive information as to the date on which the investment was made, when this date is material in determining whether or not the Investment Protection Treaty applies, this can be considered to constitute fraud within the meaning of Article 595, paragraph 1, 1° of the Code of Civil Procedure. Remaining silent about an element that is known to be essential suggests intent to mislead the arbitral tribunal"*[308].

365. With regard to the concealment of the documents found by the Russian Federation, Professor Boucobza noted that:

> *"In this case, OSCHADBANK definitely held information concerning the date of acquisition of the Crimean branch. If that date is in fact prior to 1 January 1992, it is a material piece of information withheld by one of the parties. It knew that this date, which characterises the date on which the alleged investment was made, was material to the arbitral tribunal's ability to assess, with full knowledge, the conditions of its own jurisdiction under Article 12 of the BIT. OSCHADBANK therefore knowingly withheld a material fact from the arbitral tribunal"*[309].

366. Now, Oschadbank's procedural fraud necessarily had a decisive influence on the outcome of the dispute:

> *"In this case, there can be no doubt that the facts newly discovered by the RUSSIAN FEDERATION are decisive for the solution adopted by the arbitral tribunal. The application of Article 12 of the BIT, which provides that "this Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992", defines the temporal scope of the treaty and is therefore decisive in determining the jurisdiction of the arbitral tribunal.*

[308] Opinion of Professor Xavier Boucobza of 24 October 2019, § 26 (**exhibit FR-32**).

[309] Opinion of Professor Xavier Boucobza of 24 October 2019, § 30 (**exhibit FR-32**).

> *The question of the arbitral tribunal's jurisdiction is a preliminary question which necessarily determines the course of the arbitral award"*[310].

367. The opinion of Professor Xavier Boucobza and his analysis of French case law show that Oschadbank's argument according to which "*the documents were not decisive in determining the jurisdiction of the Arbitral Tribunal under Article 12 of the BIT*"[311] cannot be accepted.

368. The manner in which the Russian Federation discovered, in the course of the research carried out with a view to preparing the first submissions in this action in annulment, that Oschadbank had acquired and operated the Crimean Branch before 1 January 1992, is described in detail and documented by Mr Andrey Kondakov in his witness statement of 25 October 2019[312], which establishes that neither the Russian Federation nor the arbitral tribunal were aware of the concealed information and documents.

369. It is worthwhile reproducing an extract (pages 3 to 5) from Mr Kondakov's evidence in these submissions:

> *"Soon after the Award was rendered, the Centre was instructed by the Ministry of Justice of the Russian Federation to organize the defense of the State, and selected the law firm Foley Hoag to initiate set aside proceedings against the award before the Paris Court of appeal and to request a stay of the enforcement. The first meeting I had in Paris with Foley Hoag's attorneys was on 8 February 2019. It is during this meeting that the issue of the date of the making of the investment by Oschadbank through the acquisition of the Crimean Branch was first discussed.*
>
> *At a subsequent meeting on 2 March 2019, Foley Hoag informed us that they could not have obtained the answer to this question by the sole analysis of the arbitration file and, therefore, that it was necessary to proceed to further research with the assistance of lawyers in Russia. The Centre and the Ministry of Justice identified the law firm Monastyrsky, Zyuba, Stepanov & Partners in Moscow ("MZS"). After an initial contact with MZS and required State authorization obtained, an engagement letter was signed around the beginning of April 2019.*
>
> *On 2 April 2019, the first question from Foley Hoag was transferred through the Centre to MZS in the form of a one-page document (exhibit AK-1) indicating that the issue to be*

[310] Opinion of Professor Xavier Boucobza of 24 October 2019, §§ 50-51 (**exhibit FR-32**).

[311] Oschadbank's submissions of 15 December 2020, §§ 268 *et seq*.

[312] Witness statement by Andrey Kondakov on 25 October 2019 and appended documents numbered AK-1 to AK-10 (**exhibit FR-40**).

investigated by MZS "relates to the creation of the Crimean Branch of Oschadbank and the determination of its date. One of the potential set aside ground in the French proceedings is the lack of jurisdiction ratione temporis in case the investment was made before 1 January 1992."

On 10 April 2019, MZS sent the first results of the investigation, highlighting that the researches were not conclusive and additional investigation, including research that could have been conducted by Ukrainian lawyers, was necessary. MZS "pre-investigation assessment report" is attached as exhibit AK-2, and is partially redacted given that the document also related to other matters than the investigation concerning the Oschadbank matter.

After MZS's initial findings, which were not conclusive, further discussions took place during a conference call held on 12 April 2019. On 19 April 2019, after carrying out additional investigation that proved not to be conclusive, MZS sent a message indicating:

"As the next step, we propose instructing Ukrainian lawyers to search their archives. According to public sources (http://tsdavo.gov.ua/4/stocks/62571197/) relevant documents should be held in Kiev in the Central State Archive of Main Executive and Management Bodies of Ukraine (Центральний державний архів вищих органів влади та управління України) the address is: 03110, м. Київ-110, вул. Солом'янська, 24. The task for the Ukrainian counsel would be to search for "any confirmation or evidence that the Ukrainian Republican Bank of Sberbank of USSR conducted banking activity in Crimea during the period of its existence from 1987 to 1991. Any document mentioning Crimea in general or its towns would therefore be relevant". – But I suppose [Foley Hoag] is in the position to formulate the request more accurately." (exhibit AK-3).

On the same day, Foley Hoag commented noting that indeed the missing element was to know when the Crimean Branch was transferred from the State of Ukraine to a "separate legal (commercial) entity" (exhibit AK-4).

As a consequence of this, the Centre decided to involve counsel in Ukraine to carry out the additional investigation needed and, on 26 April 2019, we introduced a Ukrainian law firm, which name I cannot disclose, to Foley Hoag which sent the request for investigation on 29 April 2019 (exhibit AK-5).

On 17 May 2019, the Ukrainian law firm sent an e-mail indicating that "as we anticipated, there are not many documents in the open sources specifically referring to activities of Oschadbank in

> *Crimea. For relevant documents, if they are still needed, one should probably look in the National Bank of Ukraine and/or archive institutions" (exhibit AK-6).*
>
> *Given that the information and documents gathered by the Ukrainian law firm were not yet conclusive for the investigation, on 27 May 2019, Foley Hoag suggested this law firm to access the Central State Archive of Main Executive and Management Bodies of Ukraine (the 'Central State Archive') for further research (exhibit AK-7). On 7 June 2019, a request to access the Central State Archive was made (exhibit AK-8).*
>
> *On 27 June 2019, the Ukrainian law firm indicated that they "managed to get access to certain documents relating to the transformation of the Soviet Ukrainian Oschadbank to Ukrainian bank and [that they will] be able to provide [...] with relevant summary of our findings on Monday" (exhibit AK-9).*
>
> *Eventually on 1 July 2019, the Centre and Foley Hoag received the transmission of the documents gathered by the Ukrainian law firm in the Central State Archive, which included the documents produced in these proceedings as exhibits RE-1, RE-2, RE-3 and RE-4[313] (exhibit AK-10)."*

370. The explanation of the extensive investigations that were necessary for the Russian Federation to find the documents establishing that the Crimean Branch, i.e. Oschadbank's alleged investment, had been acquired and operated before 1 January 1992, shows that the information was not easily accessible and was not available to the arbitral tribunal.

371. Oschadbank's conduct further confirms that these documents and information were deliberately concealed from the arbitral tribunal. As indicated above, Oschadbank produced the Internal Regulations of the Crimean Branch[314] during the arbitration proceedings. Article 1.2 of those regulations states that the Crimean Branch was "registered" with the Ukrainian authorities on 2 January 1992, which Oschadbank now recognises[315]. However, this provision was not translated into English when it was produced in the arbitration proceedings and it is not contested that none of the arbitrators is fluent in Ukrainian. If Oschadbank had provided the arbitrators with a translation of this provision of the Crimean Branch's Internal Regulations, they would have seen that the Branch had been

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[313] Exhibits RE-1 to RE-4 in the application for revision are **exhibits FR-5, FR-8, FR-9 and FR-13** in this action.

[314] Regulation of the Crimean Republican Directorate of JSC "Oschadbank" No. 484 "On the Branch – Crimean Republican Directorate of Public Joint Stock Company "State Savings Bank of Ukraine", of 31 July 2013 (the "Crimean Branch's Regulation")" (exhibit CE-18 in the arbitration proceedings) **(exhibit FR-2)**.

[315] Oschadbank's submissions of 15 December 2020 §§ 16 and §159.

administratively "registered" on 2 January 1992 and that the investment had therefore, in all likelihood, been made before that date[316]. There is no doubt that a diligent arbitral tribunal would have asked questions and requested documents concerning the actual date on which the investment was made. It should therefore have been provided with the documents obtained by the Russian Federation from the Archives in Kyiv and found that the conditions of Article 12 of the BIT were not met.

372. Oschadbank's argument claiming that it has always been "*transparent*" with the arbitral tribunal[317] and citing, in support of this purported transparency[318], Article 1.2 of the Regulations of the Crimean Branch which it produced in the arbitration proceedings but was careful not to translate, cannot be accepted as proof of transparency. On the contrary, it is confirmation of procedural fraud, since Oschadbank cannot reasonably deny the fact that the arbitration proceedings were conducted in English and that none of the arbitrators spoke Ukrainian.

373. In view of these circumstances, the intentional element of fraud is all the more apparent.

374. In the application for revision, Oschadbank argued that the documents obtained were in no way material to the outcome of the dispute because the arbitral tribunal had already ruled on the question of the date of the investment and had adopted an interpretation of Article 12 of the BIT that rendered the discovery of the documents by the Russian Federation irrelevant. Oschadbank asserted, with reference to paragraph 226 of the Award[319], that according to the Arbitral Tribunal Oschadbank had made its investment in 2014 at the time of Crimea's accession to the Russian Federation [320]. Oschadbank makes the same claim in these proceedings[321].

375. Oschadbank is putting words in the arbitrators' mouths. In a detailed analysis of the Award, Professor Boucobza demonstrates that the arbitral tribunal did not rule on the question of the date of investment either in § 226 or elsewhere in the Award:

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[316] On the difference between investment and its administrative registration, see above §§ 140 *et seq*.

[317] Oschadbank's submissions of 15 December 2020, §263.

[318] Footnote on page 267 of Oschadbank's submissions of 15 December 2020.

[319] On this paragraph of the Award, see above, §§ 285 *et seq*.

[320] See Oschadbank's response in the application for revision of 25 September 2019, §§ 48-55 (**exhibit FR-25**). Also see Oschadbank's submissions of 15 December 2020, page 53, which asserts that "*the investments were made in 2014*" in an attempt to deny that the Crimean Branch was acquired and operated before 1 January 1992 and therefore excluded from the scope of protection of the BIT pursuant to Article 12 thereof (on the futility of Oschadbank's argument, see above §§ 285 *et seq*.).

[321] Oschadbank's submissions of 15 December 2020, §§ 273-276.

> *"This reference to the arbitral award is not decisive since the tribunal does not address the question of the date of the investment in relation to the entry into force of the Treaty. The question is very different and is therefore whether the investment could be considered to have been made in Russia, even though Crimea only became part of the RUSSIAN FEDERATION in 2014. This is not the same question at all, and in fact they bear absolutely no relation to each other [...]*
>
> *The only question discussed and decided here (§ 226 of the Award) is whether investments made by Ukrainian investors in the Crimean Peninsula prior to Crimea's accession to the RUSSIAN FEDERATION on 21 March 2014 can be considered to be protected investments. At no point in this part of the Award does the arbitral tribunal decide on the protection of investments made before 1 January 1992 in the light of Article 12 of the BIT"*[322].

376. Actually, as the arbitral tribunal did not rule on the date on which Oschadbank made its investment, nor on the interpretation or even the application of Article 12 of the BIT, the conclusion must be drawn that the lack of knowledge of the fact that was concealed – i.e. that the investment was made before 1 January 1992 – was decisive in the arbitrators' decision.

377. As the conditions of procedural fraud are met, the violation of international public policy is established.

[322] Opinion of Professor Xavier Boucobza of 24 October 2019, §§ 43 and 45 (**exhibit FR-32**).

CHAPTER 3 – THE ARBITRAL TRIBUNAL RULED WITHOUT COMPLYING WITH ITS TERMS OF REFERENCE

378. Even if, by some extraordinary chance, the Court of Appeal were to consider that the arbitral tribunal had jurisdiction, the arbitral Award would nevertheless have to be set aside insofar as "*the Arbitral Tribunal ruled without complying with its terms of reference*" (article 1520 3° CPC).

379. The arbitrators did not spend the necessary time analysing the case **(Section 1)** and, in these conditions, did not exercise their jurisdictional power as they should have done. For example, on at least two points, the tribunal did not carry out the verifications it was required to make by its terms of reference **(Section 2)**.

Section 1 – The arbitral tribunal did not spend the necessary time examining the file

380. The arbitration proceedings, which were initiated by Oschadbank on 20 January 2016[323] and concluded with the Award issued on 26 November 2018, lasted almost three years during which a considerable number of documents were exchanged, produced and submitted to the arbitral tribunal for analysis.

381. Thus, several thousand pages of documents were filed by Oschadbank and consequently had to be analysed by the arbitral tribunal in order to render its Award:

- the Statement of Claim of Oschadbank of 26 August 2016, comprising 179 pages,

- the two Witness Statements appended to it[324] as well as the three expert reports by Professors Malcolm N. Shaw (66 pages and 81 exhibits), William E. Butler (32 pages and 16 exhibits) and Jeffrey E. C. Davidson (94 pages and 33 exhibits,

- no fewer than 288 factual documents and 190 legal documents, in addition to the 130 documents submitted in support of the above-mentioned expert reports[325], making a total of 608 documents, many of which were particularly voluminous,

- Oschadbank's Post Hearing Submission of 11 April 2017[326] and its Submission on Costs of 5 May 2017[327].

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[323] By notice to the PCA of Oschadbank's application of 18 January 2016 made on the basis of the BIT.

[324] Award § 28.

[325] 81 exhibits for the Shaw report, 16 for the Butler report and 33 for the Davidson report.

[326] Award § 50.

[327] Award § 52.

382. In addition, there is the Non-Disputing Party Submission of Ukraine of 1 December 2016.

383. However, given the number of hours declared by each member of the arbitral tribunal, it is materially impossible for the tribunal to have had time to examine all of the information submitted in the proceedings.

384. The time spent by the arbitrators in analysing the case may be deduced from the fees they declared and which appear in the Award[328], with regard to the hourly rate – which is particularly high – of USD 710 set out in the Terms of Appointment[329]:

Time spent by the arbitrators		
Arbitrator	Fees declared (USD)	Number of hours
Charles Brower	198,587.00	279.7
Hugo Perezcano Díaz	132,592.50	186.75
David A.R. Williams	254,059.00	357.8

385. This corresponds, on average, to 274.75 hours per arbitrator for the duration of the arbitration proceedings, or just over 90 hours per year for each member of the arbitral tribunal[330].

386. By comparing the average time spent by each of the arbitrators with the volume of the documents submitted in the proceedings, taking as a calculation basis an average volume of 15 pages for the exhibits, which is more than a reasonable basis considering that the exhibits almost all contain several dozen pages, and some many more, corresponding to more than 9,500 pages in total, the arbitrators spent barely more than a minute and a half studying each one.

387. This seems a very short amount of time in order to understand and rigorously analyse the submissions, witness statements, expert reports, exhibits and other documents produced and relating to an investment arbitration proceeding involving particularly complex factual and legal issues.

388. It seems particularly short given that, in reality, the working time invoiced by the arbitrators was not entirely spent studying the documents submitted, but also included other particularly time-consuming tasks which necessarily considerably reduced the time they spent examining the case file in the strict sense of the term.

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[328] Award § 400.

[329] Draft Terms of appointment appended to the letter from the PCA to the parties dated 28 July 2016, § 9.1 **(exhibit FR-2)**.

[330] To avoid any misunderstanding, the Russian Federation adds that it does consider that the arbitrators should have charged higher fees, but that they should have devoted more time to studying the arbitration documents while applying a reasonable hourly rate.

389. Firstly, there are dozens and dozens of pages of correspondence between the arbitral tribunal and the parties, in particular Oschadbank, concerning in particular:

- Procedural Order No. 1 and the Tribunal's Terms of Appointment, as well as the first Procedural Conference[331] relating, in particular, to the establishment of the seat of the arbitration in Paris and defining a procedural schedule,

- the Russian Federation's objection to the tribunal's jurisdiction in its letter of 23 June 2016[332],

- the absence of a statement of defence from the Russian Federation[333],

- the Non-Disputing Party Submission of Ukraine[334],

- Oschadbank's communication to the arbitral tribunal of a partial award made in another case involving the BIT[335],

- Procedural Order No. 2[336] concerning the hearing.

390. This correspondence alone necessarily required the arbitral tribunal to work a significant number of hours, whether it was reading, analysing and responding to the observations made by Oschadbank or drafting the other correspondence addressed to the parties and the related documents (in particular the two procedural orders and the Terms of Appointment).

391. At the end of the proceedings, a hearing on jurisdiction and the merits was held from 27 to 29 March 2017. The members of the arbitral tribunal therefore attended the proceedings for three days, plus the time required for each member of the tribunal to travel to Paris, where the hearing was held[337].

392. In addition, after the hearing, Oschadbank sent further documents to the tribunal, including a Post-Hearing Submission dated April 11, 2017 regarding Activ Solar[338] and, on May 5, 2017, its Submission on Costs[339], which the arbitrators had to analyse.

393. Lastly and above all, the arbitrators had to deliberate and then draft the Award which, although highly open to criticism, nonetheless comprises 131 pages.

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[331] Award §§ 17, 25-27, 30.

[332] Award §§ 18-24, also see above §§ 325 *et seq.*

[333] Award §§ 30-31 s.

[334] Award §§ 33-36.

[335] Award §§ 39-42.

[336] Award § 37.

[337] Award § 43.

[338] Award §50.

[339] Award §52.

These tasks inevitably required a significant number of working hours, thereby reducing the amount of time, as calculated above, that the members of the arbitral tribunal spent reading and analysing the documents submitted into evidence.

394. In such circumstances, given the volume of the arbitration file, the complexity of its factual and legal issues, the importance of what was at stake, if only having regard to the considerable sums claimed by the Claimant (more than one billion US dollars), the duration of the arbitration proceedings (almost three years), and the extent of the arbitrators' tasks in the proceedings, it is clear that they were materially unable, in the particularly short time they spent on the case, to carry out the careful, precise and rigorous analysis that the case nonetheless required.

395. The arbitral tribunal's lack of command in the present case is even less questionable in the light of a recent event that fully illustrates the arbitrators' failure to fulfil their duty of care.

396. On 7 December 2020, counsel for the Russian Federation received an email from the presiding arbitrator of the Arbitral Tribunal, David Williams, asking what stage the application for revision lodged by the Russian Federation on 19 August 2019 had reached, even though, as mentioned above, on 23 December 2019[340], the Arbitral Tribunal decided of its own motion to suspend the application for revision until the Paris Court of Appeal had ruled on the action in annulment:

> *"Dear Ms Dory & Ms Pinna,*
>
> *I refer to your email of 19 August 2019 when you advised that the Russian Federation was pursuing an Application for Revision of the Award pursuant to Article 1502 of the French Code of Civil Procedure.*
>
> *Would you please advise of the current status of that Application for Revision.*
>
> *Yours sincerely*
>
> *Sir David Williams KNZM, QC"*[341]

397. These circumstances confirm, if confirmation were needed, the lack of careful handling of this case by the arbitrators, who are even unable to keep track of the proceedings and need to ask the parties.

398. The arbitral tribunal's lack of due diligence is also beyond doubt.

399. However, Oschadbank does not hesitate to claim that "*such a grievance is absurd*"[342], even though it contents itself with this sole invective, since it does not

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[340] Decision to stay consideration of respondent's application for revision and claimant's application for security for costs of 23 December 2019 (**exhibit FR-30**).

[341] Exchange of emails between David Williams, Chair of the Arbitral Tribunal, and counsel for the Russian Federation of 7 December 2020 **(exhibit FR-44)**.

[342] Oschadbank's submissions of 15 December 2020, §212.

provide the slightest evidence that the arbitral tribunal devoted the necessary time to examining the arbitration file or that it was not required to do so.

400. Thus, the case law that Oschadbank believes it can cite has no relevance in this case since, in the ruling of the Paris Court of Appeal of 23 June 2005[343], the appellant in the action in annulment, Bombardier, complained that the arbitrators had failed to comply with their terms of reference on the ground that they had authorised the communication of documents in German, whereas the terms of reference referred only to English. This has nothing to do with the issue in the case at hand.

401. Bombardier mainly claimed a violation of the adversarial principle, again in connection with the production of documents in German, alleging that its counsel in the arbitration proceedings, as well as one of the arbitrators, had been unable to understand German:

> *"Lastly, Bombardier complains that the* ***principles of adversarial proceedings and equal treatment of the parties were not respected with regard to the language of the arbitration****, since the tribunal accepted documents in German, even though one of the arbitrators and counsel for the appellant in the proceedings did not understand that language."* [344]

This is the point on which the above-mentioned decision is particularly reasoned, notably with the extract to which Oschadbank refers, out of context.

402. Thus, contrary to the position of the Russian Federation, Bombardier was not invoking a lack of due care that was not compliant with the arbitral tribunal's terms of reference. It is therefore difficult to see how Oschadbank can state, without fear of discrediting itself, that "*this ruling perfectly illustrates the principle that Russia is now trying to challenge: the fact that the court hearing the action in annulment may not criticise the methodology and the time spent by the arbitral tribunal on the arbitration file*"[345]. In fact, it is clear that the decision in question does not concern a case comparable to these proceedings.

403. This is also the case of the ruling handed down by the Paris Court of Appeal on 24 November 2015[346]. Oschadbank again asserts with aplomb that "*Russia's criticism of the arbitral tribunal and the criticism raised by the appellant [sic.] in the ruling are similar: they both criticise the arbitrators for not having spent enough time on the arbitration file and therefore for having been unable to read*

[343] **Oschadbank Exhibit RJ-7**: Paris Court of Appeal, 23 June 2005, no. 2004/04732.

[344] **Oschadbank Exhibit RJ-7**: Paris Court of Appeal, 23 June 2005, no. 2004/04732.

[345] Oschadbank's submissions of 15 December 2020, § 217.

[346] **Oschadbank Exhibit RJ-23**: Paris Court of Appeal, 24 November 2015, no. 15/01768.

and analyse all the documents in the file"[347]. There is reason to question whether the Respondent in the action has actually read the ruling on which it relies.

404. Once again, the complaint that the arbitrators' terms of reference had been breached was not raised at all, as the applicant had based its appeal on the failure to state reasons for the award and to comply with the adversarial principle. This can be seen simply by referring to the applicant's submissions, reproduced in the ruling in question:

> *"**On the first ground of annulment, alleging that no reasons were given for the award (1492 6° of the Code of Civil Procedure)***
>
> *The applicant considers that the decision of the arbitration commission for journalists, which relied on only two of the documents submitted to it for assessment to deduce that there had been no serious misconduct, is insufficiently reasoned. He adds that the reasons given were the same as the ones used by the commission in the case concerning his wife, even though their situations differed. [...]*
>
> ***On the second ground of annulment alleging a violation of the adversarial principle (1492 4° of the Code of Civil Procedure)***
>
> *The applicant complains that the arbitration commission assessed considerations in its decision that were not submitted to the parties, namely* 'the journalist's loyalty in respect of the quality of his work, the repercussions of this cessation of work on the rest of his career and the uncertain prospects of returning to work due to his age*', when the commission was not competent to assess these facts."* [348]

405. While citing decisions which therefore bear no relation whatsoever to the grievance raised by the Russian Federation that the arbitral tribunal failed in its duty of diligence and, in so doing, ruled without complying with its terms of reference, Oschadbank does not hesitate to assert that "*Russia has not, however, produced any case law or doctrine in support of this argument*"[349]. The developments that follow, which were already set out in the Russian Federation's previous submissions, show that Oschadbank is once again demonstrating confounding bad faith.

406. Contrary to what Oschadbank would have us believe, it is a fact that one of the essential tasks and duties of arbitrators is to study the arbitration file, and in particular the submissions and exhibits, an obligation that is generally referred to as the obligation (or duty) of diligence. In French arbitration law, this obligation,

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[347] Oschadbank's submissions of 15 December 2020, § 217.

[348] **Oschadbank Exhibit RJ-23**: Paris Court of Appeal, 24 November 2015, no. 15/01768.

[349] Oschadbank's submissions of 15 December 2020, § 211.

which arises from the arbitrator's contract, is now also found in Article 1464, paragraph 3 of the Code of Civil Procedure, applicable to international arbitration, which states that "*The parties and the arbitrators shall act expeditiously and fairly in the conduct of the proceedings*". The duty of diligence is widely discussed in connection with the liability of arbitrators, but it is generally considered to be part of the arbitrator's contractual and adjudicative role.

407. Professor Stoffel-Munck recently considered that:

> *"28. [The arbitrator] is also required to conduct proceedings in accordance with certain principles reflecting the standard of good quality justice. This is part of the contractual service he provides. The parties have chosen the arbitrator and remunerate the latter for providing a service of a certain quality. During the proceedings, the arbitrator must act with the care, technical skill and diligence that his co-contractors are entitled to expect of him. This aspect of the arbitrator's role is more contractual than adjudicative, in the sense used above (supra, no. 16). However, one fuels the other, and it is the Code of Civil Procedure that sets out these procedural duties.*
>
> *29. The duty of loyalty, referred to in Article 1464 of the Code of Civil Procedure, is the most overarching expression of this. This concept can cover most of the attitudes that the arbitrator must adopt in order to justify the trust that all the parties must be able to place in him. [...]*
>
> *31. Diligence in following the case could also be included, such that an arbitrator who fails to read the submissions or exhibits commits a fault whose contractual nature does not appear to be covered by his quasi-immunity. But are arbitrators not exercising their adjudicative role when they carry out their preparatory work for the hearing and deliberation? If we see this role as a process, he is definitely fulfilling that role. For all that, the complaint against the arbitrator does not consist of accusing him of failing in an intellectual operation, i.e. a "misjudgement" in the substantive sense of the term. [...]"*[350].

408. Since 1987, this duty of diligence has been considered essential, with the IBA Rules of Ethics for International Arbitrators providing that:

> *"Article 2.3. A prospective arbitrator should accept an appointment only if he is able to give the arbitration the time and attention which the parties are reasonably entitled to expect. [...]*

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[350] Ph. Stoffel-Munck, La responsabilité de l'arbitre, Rev. arb. 2017, p. 1123-1145, spec. §§ 28-31 (**exhibit FRJ-35**).

> *Article 7, Duty of Diligence. All arbitrators should devote such time and attention as the parties may reasonably require having regard to all the circumstances of the case, and shall do their best to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake".*

409. This analysis is shared by some of the most experienced arbitrators:

> *"The duty of diligence is once again a complex concept, encompassing a series of specific duties:*
>
> *- **First and foremost, the arbitrator must have a full understanding of the case**. This applies primarily to the presiding arbitrator, but also to the co-arbitrators. Experience has shown, however, that this is not always the case, with some shamelessly relying on the work of the presiding arbitrator. A good arbitral tribunal is determined at least as much by the quality of the co-arbitrators as by that of its chair. Only then can each one make a real contribution to the decision. As in any activity, this can only be achieved through hard work"*[351]*. (our bolding)*

410. Oschadbank believes it can undermine the scope of this abundant doctrine by asserting that it concerns not the question of the arbitrators' role, but that of their liability[352]. Here again, the weakness of the argument is obvious. The foregoing extracts indisputably confirm that the arbitrators' role entails the obligation to study the arbitration file. The fact that an arbitrator failing in this obligation may, at the same time, incur liability, only reinforces the idea that this is an essential part of the arbitrator's role, their compliance with which, pursuant to Article 1520 3° CPC, is necessarily subject to review by the court hearing an action for annulment. Moreover, the arbitrator's liability is examined when the arbitral award that he made is set aside, and not when the action in annulment of the award has been dismissed: annulment of the award and liability of the arbitrator often go hand in hand.

411. This is all the more unquestionable given that the doctrine cited by Oschadbank itself enshrines the existence of a "*duty of availability*" on the part of the arbitrator, implying in particular availability in terms of time, and which is undeniably a matter of respecting his role:

> *"'Would you kindly spare a quarter of an hour for this small matter?', wrote Charpentier de Sérancourt on 31 December 1775 to an arbitrator who was struggling to fulfil his duties, showing that the question of an arbitrator's availability is not a recent one.*

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[351] P. Tercier, L'éthique des arbitres, in, G. Keutgen, *L'éthique dans l'arbitrage*, Bruylant, 2012, p. 17-36, spec. p. 32-33 (**exhibit FRJ-36**).

[352] Oschadbank's submissions of 15 December 2020, §220.

> *However, as it is now certain that litigants rightly demand more from their arbitrator than a quarter of an hour of his time, the problem has become more acute. All the more so as the availability of the arbitrator is one of the raisons d'être of arbitration. As Claude Reymond asks:* '…what judge in what country can devote the time required for an arbitration case to any single case?'
>
> *Accordingly, there is unanimous agreement on the arbitrator's obligation to be available* 'in time and with due concern' *throughout the arbitration proceedings and until the award is made. This obligation to be available, which is contained in certain arbitration rules, is one of the ethical rules that the International Bar Association recommends to arbitrators. It has even been said to be part of a* lex mercatoria processualis.
>
> *For the arbitrator, this means that he must accept his role only if he is materially able to perform it. In other words, the arbitrator must ensure that he has the time required to perform his adjudicative duty. […]"*[353]

412. Finally, there is nothing in Oschadbank's submissions to contradict the Russian Federation's analysis that, indisputably, given the aforementioned circumstances, the arbitral tribunal did not devote the necessary time to examining the file.

413. Contrary to what Oschadbank, which does not hesitate to distort the argument put forward by the Russian Federation, would have us believe, it is clearly not a question of "*requiring the arbitrators to know by heart all the documents*" of the arbitration proceedings[354]. As indicated in the aforementioned doctrine cited by the Defendant in this regard, the arbitrators must fulfil their obligation to "*know the file [which] can only be an obligation of due care*"[355]. Now, by failing to devote the necessary time to analysing the case, the arbitral tribunal did not take care to become familiar with it.

414. The arbitral tribunal did indeed breach the duty of diligence incumbent upon it and therefore ruled without complying with its terms of reference. The arbitral award must be set aside for that reason alone. Such a breach was undoubtedly detrimental to the Russian Federation, since the breach by the arbitrators of their terms of reference resulted in the carelessness with which the arbitral tribunal ruled on several essential points, which will now be discussed, and which confirm the breach of the duty of diligence.

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[353] T. Clay, L'arbitre, Dalloz, 2001, p. 604-607, §§784-786 **(exhibit FRJ-44)**, also produced partially by Oschadbank **(Oschadbank exhibit RJ-55)**.

[354] Oschadbank's submissions of 15 December 2020, § 221.

[355] **Oschadbank Exhibit RJ-55**: T. Clay, L'arbitre, Dalloz, 2001 (extract).

Section 2 – The arbitral tribunal failed to carry out the verifications required of it under its terms of reference

415. The arbitrators, who, as we have just seen, did not devote the necessary time to analysing the case file, particularly failed to perform the basic verifications that they should have made in the course of their duties. In particular, firstly, they failed to examine their jurisdiction as they should have done **(Subsection 1)** and, secondly, merely accepted Oschadbank's assertions as true without verifying them **(Subsection 2)**.

416. For all intents and purposes and by way of introduction, it shall be made clear that, contrary to Oschadbank's contention that it is attempting to distort the Russian Federation's arguments, the Russian Federation, although challenging the Award on the merits, is in no way attempting to obtain a revision of the arbitral Award of the merits[356]. In the developments below, the Russian Federation merely shows that the arbitral tribunal, at least on the two points set out below, failed to perform the verifications it should have made under its terms of reference. Evidence of this failure lies in the erroneous solutions reached by the tribunal. They are therefore not, *per se*, the subject of the discussion that follows. However, even without seeking a revision of the Award on the merits – which, once again, is not the purpose of its argument – the Russian Federation, by referring to those erroneous solutions, shows that the tribunal was unable to perform the verifications required of it, since, otherwise, it would never have arrived at those solutions.

Subsection 1 – The arbitral tribunal did not comply with its terms of reference when examining its own jurisdiction

417. In addition to wrongly declaring itself competent, as shown above[357], the arbitral tribunal also breached its terms of reference by failing to positively verify whether the Russian Federation had agreed to arbitration by ascertaining that all the conditions for the application of the BIT were met. The arbitrators merely ruled – erroneously, as demonstrated above – on what they had considered to be the only challenges to their jurisdiction raised by the Russian Federation.

418. Here, the principle should be recalled: consent to arbitration is analysed as a waiver by a State of its sovereignty and immunity from jurisdiction, which cannot be presumed and must be positively characterised by the tribunal[358].

419. The arbitral tribunal therefore failed to fulfil its obligations when it held itself competent and, in particular, without examining all the conditions required for consent to arbitration –including the fundamental condition of the date on which of the alleged investment was made referred to above[359]. The arbitral tribunal should

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[356] Oschadbank's submissions of 15 December 2020, §§ 230 *et seq.*

[357] See above §§ 91 *et seq.*

[358] See above §§ 96 *et seq.*

[359] See above §§119 *et seq.*

have undertaken this examination all the more given that the Russian Federation had denied having given its consent to arbitration.

420. But the tribunal merely examined what it itself understood, too restrictively, of the challenges to jurisdiction mentioned in the Russian Federation's letter of 13 May 2016[360], by confining itself to examining only what it believed to be the objections to jurisdiction raised by the Russian Federation and dismissing them, instead of verifying whether all the conditions laid down for its jurisdiction had been met, which was precisely not the case:

> *"In the Tribunal's view, the Respondent's arguments appear to be that (i) the Claimant's assets in the Crimean Peninsula were not "invested in the territory of the Russian Federation"; (ii) the investments were made before the accession of the Crimean Peninsula to the Respondent; (iii) the investments were not made in conformity with the Respondent's legislation; (iv) the Claimant's investments were not subject to taxation under the Respondent's legislation; and (v) the Claimant's investments did not contribute to the development of the Respondent's economy. Having already addressed and rejected the first argument, the Tribunal will address each of the remaining arguments in turn"*[361].

421. Ruling on challenges as to jurisdiction – which are arbitrarily extrapolated – is not the same as ruling on its own jurisdiction, which it is the duty of the arbitral tribunal to do. It is for the arbitral tribunal to establish its jurisdiction, since this constitutes a derogation, and even more so when one of the parties is a State.

422. Numerous decisions set out this principle, particularly with regard to the consent of the State. For example, the ICSID arbitration award of 8 December 2008 in *Wintershall Aktiengesellschaft v. Republic of Argentina* considered that:

> *"[...] the Centre and ICSID tribunals appointed by the Centre, do not have general jurisdiction over States – they are tribunals of limited powers; and no presumption in favour of their jurisdiction can be made. On the contrary, the acceptance by a State of the jurisdiction of an international court or tribunal always requires to be expressed by means of a positive act or conduct (of "contracting-in")"*[362].

423. The French conception of the *competence-competence* principle is in line with the analysis in international law and requires the arbitrators to fully verify the

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[360] Cited above (**exhibit FR-2**).

[361] Award § 225.

[362] Award made under the auspices of ICSID on 8 December 2008 in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, § 69 (**exhibit FRJ-37**).

arbitral jurisdiction, which is again verified in its entirety in the annulment action[363]. In the *Czech Republic v. Nreka* case, cited above[364], this Court of Appeal expressly held that this verification must be complete even if new specific grounds of lack of jurisdiction are raised for the first time before the court hearing the action in annulment.

424. The obligation of the arbitral tribunal to verify its own jurisdiction and thus the consent to arbitration is further reinforced when the defendant in the arbitration proceedings does not appear. As one author states, reflecting the generally accepted view:

> *"In short, we believe that the arbitral tribunal has an obligation, in the event that the defendant does not appear, to examine its jurisdiction of its own motion in order to satisfy itself that such jurisdiction exists. The question of how far the tribunal can go without playing the role of counsel for the absent party does not arise here, because the issue here is not about protecting, or not, the interests of the absent party to the detriment of the claimant, but rather that of verifying its own powers which, in order to exist, require the undeniable agreement of all the parties"*[365].

425. The arbitral tribunal is not therefore required, as Oschadbank claims, to substitute itself, in the exercise of its defence, for the party not participating in the arbitration proceedings[366].

426. However, as has just been shown, it is indisputable that the tribunal must not merely content itself, as it did in this case, either with assuming the claimant's assertions as to its jurisdiction to be correct, or with ruling on challenges to jurisdiction – which, moreover, are misunderstood. On the contrary, the role of the arbitral tribunal requires it to examine all the conditions needed to establish consent to arbitration, and this examination must be all the more active when one of the parties is absent.

427. This was confirmed by Professor Xavier Boucobza at his hearing before this Court of Appeal on 19 November 2020, when he was asked precisely this question:

> *"**Mrs F. Schaller**.- I have more of a request for clarification than a question, but it could still be a question. Insofar as the Award was rendered in the absence of the Russian Federation, which did*

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[363] See Opinion of Professor Xavier Boucobza of 24 October 2019, §§ 98 *et seq.* (**exhibit FR-32**).

[364] Paris CA, Section 1, Ch. 1, 25 September 2008, *République Tchèque c/ Monsieur Pren Nreka*, RG no. 07/04674; Rev. arb. 2009, 337, note I. Fadlallah (**exhibit FRJ-25**).

[365] A. Dimolitsa, L'office de l'arbitre dans les procédures par défaut, Cahiers de l'Arbitrage V, Pédone, p. 68 *et seq.*, spec. p. 72 (**exhibit FRJ-38**). Also see, M. Boucaron-Nardetto, Le principe compétence-compétence en droit de l'arbitrage, thesis, pref. J-B. Racine, PUAM 2013, § 531 (**exhibit FRJ-27**).

[366] Oschadbank's submissions of 15 December 2020, §§224 *et seq.*

> *not participate in the arbitration proceedings, in reality this question was not asked.*
>
> ***The President**.- The question is: "In the absence of the Russian Federation in the arbitration proceedings, the Arbitral Tribunal did not have the opportunity to answer...".*
>
> ***Pr X. Boucobza**.- [...]*
>
> *[I]t was, in a way, for both the investor and the Arbitral Tribunal to consider its jurisdiction and to verify that the conditions laid down by the Treaty were met.*
>
> *Could the Arbitral Tribunal have known whether or not the investment had been made before or after 1 January 1992? In any event, it could have asked the question since the rule is clearly set out in Article 12, so it should have checked and asked whether the investment was made before 1 January 1992 or not. Moreover, in the other cases over Ukraine, which gave rise to the decisions made by the Swiss Federal Court, the question was raised and was settled because that was the case: the investments were made after that date and note was taken of that fact. In this case, the arbitral tribunal could have raised this question, but it did not."*[367]

428. The doctrine cited by Oschadbank itself says the same thing:

> *"In the absence of one of the parties [...] the Tribunal should not be acting as a party adverse to the party who does attend. The role of the Tribunal is neutral although* ***it is necessarily more active than the Tribunal would be if both parties were in attendance****"*[368]*. (our bolding and underlining)*

429. In the present case, this is not what the arbitral tribunal did.

430. This is so true that Oschadbank is unable to demonstrate the contrary and merely asserts it without establishing it[369]. Thus, in its submissions, Oschadbank provides nothing other than considerations that, at the very most, only relate to compliance with the adversarial principle. Oschadbank states that the tribunal ensured that the Russian Federation received the procedural documents, that it allowed the Russian Federation to express its point of view during the proceedings, that it gave the Russian Federation time to respond to Oschadbank's submissions and exhibits, that it gave the Russian Federation sufficient notice of the hearing and,

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[367] Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020, page 33, line 9 to page 34 line 23 (**exhibit FR-43**).

[368] **Oschadbank Exhibit RJ-40**: Thomas H. Webster, Handbook of UNCITRAL Arbitration, 3rd ed., Sweet & Maxwell, 2019, § 30-34, cited by Oschadbank in its submissions of 15 December 2020, §224.

[369] Oschadbank's submissions of 15 December 2020, §§227-228 and §§230-239.

finally, that it sent the Russian Federation all the transcripts of the hearing and invited it to comment on them[370]. However, the Russian Federation does not question any of this because none of it concerns the shortcomings in the verifications that the court should have made, but which it failed to make, concerning its jurisdiction.

431. In reality, the arbitral tribunal did fail to positively verify its jurisdiction in all respects. In so doing, the arbitral tribunal failed to comply with the task it was required to do. As mentioned above, this failure led to an even more serious violation, since the arbitral tribunal wrongly declared itself competent by accepting the existence of an alleged consent to arbitration in respect of an alleged investment made before 1 January 1992, i.e. at a time when the BIT did not apply.

432. The arbitral tribunal repeated this violation of its terms of reference on 23 December 2019[371], when it was asked in the context of the application for revision to rule on its jurisdiction with regard to Article 12 of the BIT, which it had omitted to do on the first occasion. Instead of taking the opportunity to remedy its initial failing, the arbitral tribunal refused to rule, this time expressly, by hiding behind this action in annulment. Such an attitude is, as noted above[372], at odds with the conception of the *competence-competence* principle in French arbitration law, according to which the arbitrator not only has the right, but also the obligation, to rule on his own jurisdiction before the state courts.

433. The Award must therefore be set aside because the arbitral tribunal failed to comply with its terms of reference. The annulment is all the more justified by the fact that, in addition, the arbitrators failed to verify Oschadbank's assertions on the merits of the case, thereby committing a further violation of their terms of reference.

Subsection 2 – The arbitral tribunal did not comply with its terms of reference when examining the merits of the case

434. It is worthwhile noting that during the examination of the case on the merits, Oschadbank proceeded by simple assertion on several material aspects of the dispute, without any demonstration or offer of evidence, and that the arbitral tribunal believed it could follow Oschadbank without undertaking the slightest verification or assessment. The arbitrators failed in their duty of diligence on several key aspects, which are at the very base of the Award. The Russian Federation will simply present the most obvious example of this failing: that of the attribution to the Russian Federation of acts allegedly carried out by the DPF.

435. The arbitral tribunal held that the acts of the DPF were imputable to the Russian Federation **(1)** without examining the legal conditions of attribution **(2)** or

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[370] Oschadbank's submission of 15 December 2020, §226.

[371] Decision to stay consideration of respondent's application for revision and claimant's application for security for costs of 23 December 2019 (**exhibit FR-30**)

[372] See above §§ 415 *et seq.*

examining the arbitration file (**3**), which would have allowed it to see that Oschadbank's assertions were false.

§1 The arbitral tribunal's failure to verify Oschadbank's assertions as to the attribution of the DPF's acts to the Russian Federation

436. During the arbitration proceedings, Oschadbank argued that the DPF was responsible for the alleged loss of its investment in Crimea, claiming that the Russian Federation had "*orchestrated the takeover of Oschadbank Crimea via the DPF*"[373], by implementing the mechanism for compensating depositors who were victims of the Bank's default and initiating the actions for indemnity after paying compensation[374].

437. In its Statement of Claim, Oschadbank stated as follows:

> *"The Russian Federation's conduct vis-à-vis the Claimant's investment may be seen as a composite measure. [...] The Russian Federation's composite measure comprises, but is not limited to, the following acts and omissions for which it is responsible under international law: [...]*
>
> *(ix) the Russian Federation's assumption for control over and administration of all assets of Oschadbank Crimea through the DPF [...]"*[375]*. (our underlining)*

438. In order to see the Russian Federation be held liable for an alleged appropriation of the Crimean Branch, it was therefore essential for Oschadbank to show that it was responsible for the acts of the DPF. This is undoubtedly an essential consideration if Oschadbank's claims were to succeed.

439. However, in support of this, Oschadbank merely made assertions which were not substantiated by any evidence and were surprisingly concise. Oschadbank's allegations concerning the attribution of the acts of the DPF to the Russian Federation represent no more than three paragraphs totalling just over ten lines, which the applicant can therefore reproduce below without burdening these submissions:

> *"410. The DPF is a creation of the Russian State. It was formed by the Deposit Insurance Agency of the Russian Federation as provided in, and for the purposes of implementing provisions of the Federal Law on Crimean Depositor Protection. Throughout the course of 2014 the Russian Federation set up a broad network of DPF offices in Crimea.*

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[373] Statement of Claim, title of section 2 on page 65 (**exhibit FR-2**).

[374] Statement of Claim, §§223-239 (**exhibit FR-2**).

[375] Statement of Claim, §386 (**exhibit FR-2**).

> *411. The DPF is an instrument of the Russian State under the direction and control of the Russian Government. As defined in the DPF Charter, its main objective is to implement provisions of the Federal Law on Crimean Depositor Protection and the Federal Law on the Crimean Financial System.*[633] *The DPF played a key role in facilitating the Russian Federation's control over the Crimean banking system.*
>
> *412. Applying the functions of structure, function and control in accordance with the ILC Articles, it is plain that the Russian Federation may be held responsible under international law in respect of the DPF's actions"*[376].

440. The manner in which the tribunal addressed this key issue of the attribution of the DPF's acts to the Russian Federation is highly questionable, since it simply copied Oschadbank's assertions, in order to infer that the Russian Federation was responsible for the DPF's acts and award compensation in excess of USD 1 billion. Here again, in view of its conciseness, the applicant will reproduce the relevant extract from the Award:

> *"262. In relation to the DPF, the Tribunal recalls the following considerations raised by the Claimant:*
>
> 1. *The DPF was formed by the Deposit Insurance Agency of the Russian Federation for the purposes of implementing the Federal Law on Crimean Depositor Protection;*
>
> 2. *The DPF is an instrument of the Respondent under the direction and control of the Respondent's Government;*
>
> 3. *The DPF's main objective is to implement provisions of the Federal Law on Crimean Depositor Protection and the Federal Law on the Crimean Financial System; and*
>
> 4. *The DPF played a key role in facilitating the Respondent's control over the Crimean banking system.*
>
> *263. For the foregoing reasons, the Tribunal finds that the Respondent is responsible under international law and under Article 8 of the ILC Articles for the DPF's actions"*[377].

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[376] Statement of Claim, §§223-228 (**exhibit FR-2**).

[377] Award, §§262-263.

441. The almost word-for-word reproduction of Oschadbank's assertions in the Award, without in any way justifying their relevance, and without any sign of the slightest critical assessment by the arbitral tribunal, is sufficient to demonstrate the total lack of review and verification on its parts on the question of the attribution of the DPF's acts to the Russian Federation.

442. In its written submissions, Oschadbank attempts in vain to defeat this argument and, on the contrary, confirms its relevance. While it begins by recounting its arguments and then the reasoning of the tribunal in an attempt to demonstrate the attribution of the DPF's acts to the Russian Federation, it is clear that, in reality, the tribunal's reasons are completely copied from Oschadbank's submissions, and devoid of any critical approach. Oschadbank's submissions merely confirm the 'cut and paste' process of its Statement of Claim that the arbitral tribunal clearly used in its Award[378].

443. However, fully reproducing Oschadbank's arguments led the Court to adopt an erroneous solution, since the conditions for attributing the acts of the DPF to the Russian Federation were not met in this case.

§2 The conditions laid down by international law for the attribution of acts of the DPF to the Russian Federation

444. The arbitral tribunal's failing is all the more evident in that Article 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles"), on which the tribunal based its finding that the Russian Federation was responsible for the acts of the DPF, provides that:

> *"Article 8. Conduct directed or controlled by a State*
>
> *The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"*[379].

445. For the arbitral tribunal to find, as it did, that the acts of the DPF were attributable to the Russian Federation, it therefore had to establish that the Russian Federation had instructed the DPF or, at the very least, that it had specifically exercised control over the DPF.

446. There is no doubt that it is for the claimant to prove that the acts attributed to the State were carried out on its instructions or under its control. This solution, which is also based on common sense, is widely accepted in international law. For

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[378] Oschadbank's submissions of 15 December 2020, §§ 242-243.

[379] Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, p. 109 **(exhibit FRJ-39)**.

example, in its decision of 10 June 2015 in *Lao Holdings v Lao People's Democratic Republic*, the arbitral tribunal recalled that, on the question of attribution:

> *"a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government [...]"*[380]. *(our underlining)*

447. The fact that the allegedly responsible entity is owned by the State or that the State exercises general control over it is not sufficient to prove that the acts complained of are attributable to the State. Arbitral tribunal decisions to this effect abound[381]. As the commentary on the ILC Articles indicates:

> *"The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State"*[382].

448. Arbitral tribunals consistently apply these principles. For example, in *Jan de Nul v Arab Republic of Egypt*, in an award issued on 6 November 2008, the arbitral tribunal noted that:

> *"International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and specific control of the State over the act the attribution of which is at stake"*[383]. *(our underlining)*

449. However, in this case, the statement of claim is completely silent on the fact that the Russian Federation gave instructions to the DPF concerning Oschadbank's

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[380] *Lao Holdings N. V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)12/6, Decision on the Merits, dated 10 June 2015, §11, also see 85 (**exhibit FRJ-40**).

[381] See: *UAB E Energija (Lithuania) v Republic of Latvia,* ICSID Case No. ARB/04/13, Award, 21 December 2017, §§ 825-826; *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13,* Decision on Liability and the Principle of Quantum, 30 December 2016, § 452; *Mr. Kristian Almås and Mr. Geir Almås v The Republic of Poland,* PCA Case No 2015-13, Award, 27 June 2016, § 270; *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey,* ICSID Case No. ARB/11/28, Award, 10 March 2014, § 311.

[382] Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, p. 113 (**exhibit FRJ-39**).

[383] *Jan de Nul N.V. and Dredging International N. V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, §173 (**exhibit FRJ-41**).

Crimean Branch or, at the very least, exercised control over the DPF's acts allegedly responsible for the loss of Oschadbank's investment in Crimea.

450. Thus, on the question of attribution, the arbitral tribunal based its decision on Article 8 of the ILC Articles, which required Oschadbank to establish a very specific situation, namely that it prove the instructions or control exercised by the Russian Federation over the DPF's acts of which it was complaining. However, in the Award, the arbitral tribunal merely repeated Oschadbank's assertions almost word for word, even though at no point did they refer to the conditions of Article 8 of the ILC Articles – and even less so, the fact that they had been met – and were extremely laconic on the issue of attribution.

451. This further shows that the arbitral tribunal did not undertake any review of the question of the attribution of the DPF's acts to the Russian Federation, since it accepted it even though the arbitration documents did not contain the slightest evidence to that effect.

452. If the arbitrators had examined this question of attribution in accordance with their terms of reference and by exercising due diligence, they would necessarily have found that the Russian Federation could not be held liable for the acts of the DPF. Yet, the arbitrators' task was particularly easy, as the documents in the arbitration file, if the arbitral tribunal had analysed them, as it was required to do by its obligations under its terms of reference, were sufficient to establish that the conditions set out in Article 8 of the ILC Articles had not been met in this case.

§3 The arbitration file shows that the conditions for attributing the acts of the DPF to the Russian Federation were not met in this case

453. The file submitted to the arbitrators clearly shows that the DPF is an entity (i) with legal personality distinct from that of the Russian Federation and which enjoys (ii) management autonomy and (iii) financial autonomy, which means that it does not receive instructions from and is not controlled by the Russian State.

454. The DPF was established by the Federal Law of the Russian Federation No. 39-FZ of 2 April 2014 On the Defense of Interests of Natural Persons Having Deposits in Banks and solitary Structural subdivisions of Banks registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal significance, Sevastopol, for the purpose of compensating depositors for their losses[384], being assigned the claims of the said depositors against

[384] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, articles 7 and 8 (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

the defaulting banks[385] and taking legal action against the defaulting banks in order to obtain reimbursement of the compensation paid[386].

455. As Oschadbank itself admitted in its statement of claim, the DPF is "an **autonomous** non-profit organisation"[387]. The autonomous nature of the DPF was expressly laid down in Federal Law No 39-FZ, which provided that the DPF would be founded by a State corporation, the Deposit Insurance Agency (hereinafter the "DIA"), "in the form of an **autonomous** noncommercial organization"[388]. Similarly, the DPF Charter repeatedly states that the DFP is an "**autonomous** non-profit organisation"[389].

456. The autonomy of the DPF is fully confirmed by the provisions of Federal Law No. 39-FZ of 2 April 2014, which refers in particular to the fact that the DPF has its own assets[390], holds bank accounts[391], is not liable for the debts of the Russian Federation[392] and takes action itself to recover the claims of depositors who were victims of defaulting banks which are assigned to it[393].

457. In addition, the aforementioned Federal Law defines the DPF's role and powers. The DPF must therefore fulfil and use them in compliance with these provisions, under the conditions and within the limits they stipulate and, in general, in compliance with all Russian legislation and the regulatory acts issued by the DIA. This is precisely what the DPF Charter stipulates when it states that the DPF must carry out its activities "*in accordance with the Law on the Defense of interests of persons, the Law on the peculiarities of the functioning of the financial system and*

[385] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 6 (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[386] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 7(3) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[387] Statement of Claim, §130 (**exhibit FR-2**).

[388] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(1) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[389] The Charter of the Autonomous Non-profit Organization "Depositor Protection Fund" (Exhibit CE-126 in the arbitration proceedings) (**exhibit FR-2**).

[390] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(5) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[391] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(3) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[392] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(6) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[393] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 7(12) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

other regulatory legal acts of the Russian Federation and administrative regulatory acts of the [DIA]"[394].

458. However, there is no legal mechanism authorising the State of the Russian Federation to interfere in the fulfilment by the DPF of its role, with the result that the latter enjoys complete management autonomy. Moreover, Federal Law No 39-FZ expressly excludes the possibility of the Russian State exercising control over the activities of the DPF, since it provides that oversight of the DPF is exercised by the Board of Directors of the DIA[395], which is itself an entity with legal personality separate from that of the Russian Federation.

459. In addition, as in the case of the DPF, there is no mechanism enabling the Russian Federation to interfere in the activities of the DIA, as Russian law expressly prohibits any interference by Russian federal or regional State bodies, local authorities or the Central Bank in the activities of the DIA, which founded the DPF and which has legal personality separate from both the Russian Federation and the DPF.

460. The DFP therefore unquestionably enjoys autonomy in its management in relation to the Russian Federation. Similarly, it also enjoys financial autonomy.

461. First, Federal Law No 39-FZ of 2 April 2014 expressly stipulates that the DPF must use its own resources in order to fulfil its role:

> *"The [DPF] shall* ***use its own property*** *in order to fulfill the functions provided by the present Federal Law."*[396] *[...]*
>
> *"Expenses for conducting measures connected with the acquisition by the [DPF] of rights (or demands) with regard to deposits and the effectuation of contributory compensation payments, including expenses for the payment of services of organizations enlisted to receive applications of depositors and the effectuation of contributory compensation payments, taking of measures for the satisfaction of rights (or demands) acquired by the [DPF] with regard to deposits in accordance with the present Federal Law* ***shall be financed at the expense of property of the [DPF]****"*[397]*. (our bolding and underlining)*

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[394] The Charter of the Autonomous Non-profit Organization "Depositor Protection Fund", article 2.2. (Exhibit CE-126 in the arbitration proceedings) (**exhibit FR-2**).

[395] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(14) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[396] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(5) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[397] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, article 4(7) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

462. To this end, the DPF has its own resources which it obtains from actions for indemnity brought against defaulting banks in respect of claims assigned to the DPF after paying compensation to depositors. In addition, as mentioned above, the DPF has its own bank accounts and is not liable for the obligations of any third party, including the Russian State[398]. It is therefore clear from the foregoing that the DPF has its own assets, distinct from those of the Russian Federation, which it manages with complete autonomy.

463. Therefore, the DPF enjoys undeniable functional and financial independence from the Russian State, such that it cannot be considered to receive instructions from or be under the control of the State of the Russian Federation, and all the more as regards the acts which Oschadbank seeks to attribute to the Russian Federation.

464. If the Award indicates otherwise and states that "*the DPF is an instrument of the Respondent under the direction and control of the Respondent's Government*"[399], and holds, under Article 8 of the ILC Articles, that the Russian Federation was liable for the acts of the DPF, it is because the Court merely reproduced Oschadbank's assertions without verifying them.

465. In its submissions, Oschadbank does not challenge the Russian Federation's analysis as to the impossibility of attributing the acts of the DPF to it. It merely states that it "*contests*" the Russian Federation's reasoning, without indicating in what way it does so[400]. Once again, it hides behind the totally ineffective argument of an alleged application for revision of the Award on the merits by the Russian Federation, when it is clear that the tribunal has violated its terms of reference.

466. Had it complied with its terms of reference, the arbitral tribunal would necessarily have found that the acts of the DPF could in no way be attributed to the Russian Federation and that, consequently, the latter could not be held liable for any alleged unlawful expropriation from Oschadbank of its Crimean Branch.

467. The Russian Federation therefore asks the Court to set aside the Award in this regard, on the basis of Article 1520(3) of the CPC.

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* *

468. As the Award incurs annulment, the Russian Federation should not be expected to bear the costs incurred by it in these proceedings. It therefore requests

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[398] Federal Law of the Russian Federation No. 39-FZ of 2 April 2014, articles 4(3) and 4(6) (Exhibit CE-130 in the arbitration proceedings) (**exhibit FR-2**).

[399] Award, §262.

[400] Oschadbank's submissions of 15 December 2020, §245.

that Oschadbank be ordered to pay it EUR 300,000 under Article 700 CPC and to pay all costs.

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ON THESE GROUNDS

Having regard to Article 1520 of the French Code of Civil Procedure
Having regard to all the grounds set out in these submissions

Your Court is hereby asked to:

Annul the arbitral award handed down in Paris on 26 November 2018 in PCA Case No. 2016-14;

Order JSC Oschadbank to pay to the Russian Federation the sum of €300,000 under Article 700 of the French Code of Civil Procedure;

Order JSC Oschadbank to pay the full costs, with payment to SELARL LEXAVOUE PARIS-VERSAILLES.

WITHOUT PREJUDICE

LIST OF EXHIBITS

FACTUAL EXHIBITS

Factual exhibits served on 18 July 2019

Exhibit FR-1	Arbitral award handed down on 26 Novembre 2018
Exhibit FR-2	Complete file of the arbitration proceedings as received from the Permanent Court of Arbitration (in electronic format)
Exhibit FR-3	Regulations of the Central Executive Committee of the USSR and the Council of People's Commissars of the USSR on the State Labour Savings Banks dated 27 November 1925
Exhibit FR-4	Regulation of the Central Executive Committee of the USSR and the Council of Ministers of the USSR on Improving the State's Banking System and Increasing its Influence on Economic Efficiency No. 812 dated 17 July 1987
Exhibit FR-5	Central Public Archive of the Supreme Authorities of Ukraine, Record No. 4753, Inventory of folders for permanent storage No. 1 for the period 1981-1999, pp. 1-9, drawn up in Kyiv on 20 September 2013
Exhibit FR-6	Ordinance of the Supreme Rada of Ukraine No. 873-XII on the entry into force of the law on banks and banking activities of 20 March 1991
Exhibit FR-7	Ordinance of the Supreme Rada of Ukraine No. 1427-XII on the declaration of independence of Ukraine of 24 August 1991
Exhibit FR-8	Minutes of the Meeting of the Board of Directors of the Bank No. 1 on 3 September 1991
Exhibit FR-9	Articles of Association of the Specialised Commercial Public Savings Bank of Ukraine approved by the Board of the Bank on 3 September 1991 and registered by the National Bank of Ukraine on 31 December 1991
Exhibit FR-10	Decree of the President of Ukraine No.106 on the reorganisation of the Specialised Commercial Public Savings Bank of Ukraine dated 20 May 1999
Exhibit FR-11	Ordinance of the Cabinet of Ministers of Ukraine No. 876 on certain issues concerning the management of the Specialised Commercial Public Savings Bank of Ukraine dated 21 May 1999
Exhibit FR-12	Statistics on the main performance indicators of the Public Labour Savings Bank of the Autonomous Soviet Socialist Republic of Crimea as at 1 January 1971

Exhibit FR-13	By-Laws of the Board of the Savings Bank of Ukraine approved by the Board of Directors of the Bank at its meeting on 3 September 1991
Exhibit FR-14	Opinion of Professor Maurice Mendelson of 11 August 2017
Exhibit FR-15	Judgments of the Swiss Federal Supreme Court of 16 October 2018 in cases 4A 396 2017 and 4A 398 2017
Exhibit FR-16	Affidavits of Elliott Geisinger dated 10 January 2019 and Christopher Boog dated 11 January 2019

Factual exhibits served on 30 June 2020

Exhibit FR-17	Email from counsel for the Russian Federation to counsel for Oschadbank dated 25 March 2019
Exhibit FR-18	Letter from Oschadbank to the Procedural Judge dated 8 August 2019
Exhibit FR-19	Letter from the Russian Federation to the Procedural Judge dated 9 August 2019
Exhibit FR-20	Email from counsel for the Russian Federation to counsel for Oschadbank dated 8 April 2019 and attachments
Exhibit FR-21	Email from counsel for the Russian Federation to counsel for Oschadbank dated 30 April 2019 and attachments
Exhibit FR-22	Article from the Global Arbitration Review of 23 July 2019
Exhibit FR-23	Order on the application for a stay of execution issued on 22 October 2019
Exhibit FR-24	Application for revision of the Award lodged by the Russian Federation on 19 August 2019
Exhibit FR-25	Oschadbank's response dated 25 September 2019 to the application for revision of the Award
Exhibit FR-26	Replication of the Russian Federation dated 25 October 2019 in the application for revision of the Award
Exhibit FR-27	Oschadbank's reply dated 25 November 2019 in the application for revision of the Award
Exhibit FR-28	Email from counsel for Oschadbank to the arbitral tribunal of 26 November 2019
Exhibit FR-29	Letter from counsel for the Russian Federation to the arbitral tribunal dated 10 December 2019
Exhibit FR-30	Decision to stay consideration of respondent's application for revision and claimant's application for security for costs of 23 December 2019
Exhibit FR-31	Opinion of Professor Yves-Marie Serinet of 25 June 2020
Exhibit FR-32	Opinion of Professor Xavier Boucobza of 24 October 2019
Exhibit FR-33	Opinion of Professor Yves Nouvel of 29 June 2020
Exhibit FR-34	Opinion of Professor Tatiana Nikolaevna Kurokhtina of 24 June 2020

Exhibit FR-35	Opinion of Professor Sergey Tyulenev of 24 June 2020
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Exhibit FR-37	Ukrainian proposal of 1994
Exhibit FR-38	Ukrainian proposal of 1997
Exhibit FR-39	Minutes of the negotiation meeting of 19 to 21 January 1998 signed by the heads of the Russian and Ukrainian delegations
Exhibit FR-40	Witness statement by Andrey Kondakov dated 25 October 2019 and appendices numbered AK-1 to AK-10
Exhibit FR-41	Opinion of Professor Yves-Marie Serinet of 24 October 2019
Exhibit FR-42	Press release issued by Oschadbank on 18 September 2019, original in Ukrainian and free translation into French

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Exhibit FR-1b	French translation of the arbitral award handed down on 26 November 2018
Exhibit FR-43	Verbatim transcription of the hearing of Professors Yves Nouvel and Xavier Boucobza on 19 November 2020
Exhibit FR-44	Exchange of emails between David Williams, Chair of the Arbitral Tribunal, and counsel for the Russian Federation of 7 December 2020

LEGAL EXHIBITS

Legal exhibits served on 30 June 2020

Exhibit FRJ-1	C. Santulli, "La crise Ukrainienne : position du problème", Rev. Gén. Droit International Public, 2014, p. 799 *et seq.*, which considered that "*there is reason to accept that valid territorial title to Crimea has accrued to Russia*"
Exhibit FRJ-2	Paris CA (Order of the Procedural Judge), 21 December 2017, *SCS GE Medical Systems c/ Mohamed Saleh Mansouri El Gmati et Société Tasharukiat Alsaqr Alakhdar*, RG No. 16/21530
Exhibit FRJ-3	Paris CA, 16 October 2008, *SA Prim'Nature*, RG No. 07/12356, Rev. arb. 2010, 110
Exhibit FRJ-4	Cass. civ. 1, 6 January 1987, *Plateau des Pyramides*, *Rev. arb.* 1987, p. 469, note Ph. Leboulanger
Exhibit FRJ-5	Cass. civ. 1, 6 October 2010, *Abela Foundation*, *Rev. arb.* 2010, p. 813, note F.-X. Train

Exhibit FRJ-6	Paris CA, Section 5, Ch. 16, 3 June 2020, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 19/03588
Exhibit FRJ-7	Cass. civ 1. 13 February 2019, *Transporte Dole et Alimentos Frisa c/ République bolivarienne du Venezuela*, No. 17-25851
Exhibit FRJ-8	Cass. civ. 1, 8 July 2009, *Soerni*, appeal no. 08-16025
Exhibit FRJ-9	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 Decision on jurisdiction of 8 February 2005
Exhibit FRJ-10	R. O'Keefe, Ch. Tams (dir.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, OUP 2013
Exhibit FRJ-11	ECHR, 5 February 2019, *Ndayegamiye-Mporamazina v. Switzerland*, Case No. 16874/12
Exhibit FRJ-12	Vienna Convention on the Law of Treaties of 23 May 1969
Exhibit FRJ-13	CE Ass., 9 July 2010, *Mme Cheriet-Benseghir*, petition no. 317747
Exhibit FRJ-14	Award concerning the Preliminary Objection of the Russian Federation of 21 February 2020 handed down in the case PCA 2017-06 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)
Exhibit FRJ-15	International Court of Justice, judgment of 15 June 1954, *Monetary gold removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)
Exhibit FRJ-16	*PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm), Judgement of the High Court of 13 July 2018
Exhibit FRJ-17	Article 10 of the Dutch model BIT (1997 version)
Exhibit FRJ-18	BIT between Greece and Yugoslavia of 25 June 1997
Exhibit FRJ-19	Dissenting opinion of Professor Dobrosav Mitrovic of 6 September 2006
Exhibit FRJ-20	Paris CA, Section 1, Ch. 1, 25 April 2017, *République Bolivarienne du Venezuela c/ Monsieur Serafin García Armas, Madame Karina García Gruber*, RG No. 15/01040
Exhibit FRJ-21	Paris CA, Section 1, Ch. 1, 2 April 2019, *Schooner Capital LLC et autres c/ République de Pologne*, RG 16/24358
Exhibit FRJ-22	Paris CA, 24 June 1997, *Highlight Communications International AG c/ Europex*, Rev. Arb. 1997, 588 obs. D. Bureau
Exhibit FRJ-23	L. Cadiet, "La renonciation à se prévaloir des irrégularités de la procédure arbitrale", Rev. arb., 1996.3

Exhibit FRJ-24	P. Fouchard, E. Gaillard and B. Goldman, *Traité de l'arbitrage commercial international*, Litec, 1996, para 1606
Exhibit FRJ-25	Paris CA, 25 September 2008, *République Tchèque c/ Nreka*, Rev. Arb. 2009, 337, note I. Fadlallah
Exhibit FRJ-26	J. Jourdain-Marques, obs. in Dalloz actualité 17 April 2019
Exhibit FRJ-27	Boucaron-Nardetto, Le principe compétence-compétence en droit de l'arbitrage, thesis, pref. J-B. Racine, PUAM 2013
Exhibit FRJ-28	Cass. civ. 1, 4 March 2020, *Antrix Corporation Limited c/ Devas Multimedia Private Limited*, appeal no. 18-22019
Exhibit FRJ-29	E. Loquin, J.-Cl. Procédure civile, fasc. 1036, Arbitrage. Instance arbitrale, procédure devant les arbitres, 2015, No. 126
Exhibit FRJ-30	Paris CA, Section 1, Ch. 1, 21 January 2010, *Société Inversiones Errazuriz Limitada SA c/ société Kreditanstalt für Wiederaufbau*, Rev. arb. 2010, 339, note approb. F.-X. Train
Exhibit FRJ-31	Paris CA, Section 1, Ch. 1, 21 May 2019, *Messieurs D. et K. c/ société Subway International BV*, RG No. 17/07210
Exhibit FRJ-32	Cass. civ. 1, 19 December 1995, *Société Westman International Ltd v. société European Gaz Turbines*, appeal no. 93-20863; *Rev. Arb.* 1996, 49 note D. Bureau
Exhibit FRJ-33	J. Pellerin, "Le cas de la fraude", in E. Loquin, S. Manciaux (dir.), L'ordre public et l'arbitrage, CREDIMI vol. 42, LexisNexis 2014
Exhibit FRJ-34	Paris CA, Section 1, Ch. 1, 1 July 2010, *Société Thalès v. société Brunner Sociedad Civil de Administraçao Ltda et autres*
Exhibit FRJ-35	Ph. Stoffel-Munck, La responsabilité de l'arbitre, Rev. arb. 2017, p. 1123-1145
Exhibit FRJ-36	P. Tercier, L'éthique des arbitres, in, G. Keutgen, *L'éthique dans l'arbitrage*, Bruylant, 2012
Exhibit FRJ-37	Award made under the auspices of ICSID on 8 December 2008 in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14
Exhibit FRJ-38	A. Dimolitsa, L'office de l'arbitre dans les procédures par défaut, Cahiers de l'Arbitrage
Exhibit FRJ-39	Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, p. 109
Exhibit FRJ-40	*Lao Holdings N. V. v Lao People's Democratic Republic, ICSID Case No. ARB(AF)12/6, Decision on the Merits*, 10 June 2015
Exhibit FRJ-41	*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

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Exhibit FRJ-42	PCA Case No. 2013-19, *The South China Sea Arbitration (Philippines v. China),* Award on jurisdiction and admissibility, 29 October 2015
Exhibit FRJ-43	Award on Jurisdiction, 18 June 2020, *Sergei Vikctorovich Pugachev v. Russian Federation*
Exhibit FRJ-44	T. Clay, L'arbitre, Dalloz, 2001, p. 604-607

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