



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

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

- and -

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

PCA CASE NO. 2015-21

- between -

**(1) JSC CB PRIVATBANK
(2) FINANCE COMPANY FINILON LLC**

The Claimants

- and -

THE RUSSIAN FEDERATION

The Respondent

PARTIAL AWARD

The Arbitral Tribunal

Professor Pierre-Marie Dupuy (Presiding Arbitrator)

Sir Daniel Bethlehem QC

Dr. Václav Mikulka

Registry

Mr. Martin Doe

Ms. Evgeniya Goriatcheva

Permanent Court of Arbitration

4 February 2019

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

21 April 2014 Central Bank Resolution (or 21 April 2014 Resolution)	Resolution of the Central Bank of the Russian Federation No. PH-33-1 “On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance,” 21 April 2014
21 April 2014 Court Decision (or 21 April 2014 Decision)	Decision issued by the Simferopol Central District Court on 21 April 2014
<i>Belbek Arbitration</i>	An arbitration before a tribunal constituted in accordance with the Treaty and the UNCITRAL Rules between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as claimants and the Russian Federation (PCA Case No. 2015-07)
Belbek LLC	Aeroport Belbek LLC
BIT	Bilateral investment treaty
Claimants	PrivatBank and Finilon
[REDACTED]	[REDACTED]
Crimea	The region known as the “Autonomous Republic of Crimea” under the Ukrainian Constitution and the “Republic of Crimea” under the Russian Constitution
Crimean Banking Law	Federal Law of the Russian Federation No. 37-FZ “On the Special Features of the Functioning of the Financial System of the Republic of Crimea and the City of Federal Significance of Sevastopol during the Transition Period,” 2 April 2014
Crimean Peninsula	Crimea and the city of Sevastopol
<i>Everest</i>	PCA Case No. 2015-36, <i>Everest Estate LLC, et al. v. The Russian Federation</i>
FET	Fair and equitable treatment
Finilon	Finance Company Finilon LLC, a claimant in this arbitration

[REDACTED]

[REDACTED]

First Skvortsov Report	Expert Report of Professor Oleg Skvortsov dated 10 June 2016
Foreign Investment Law	Federal Law of the Russian Federation No. 160-FZ “On Foreign Investments in the Russian Federation,” 9 July 1999, as amended on 19 July 2011
FPS	Full protection and security
FZV Law	Federal Law of the Russian Federation No. 39-FZ “On the Protection of the Interests of Natural Persons Having Deposits in Banks and Standalone Business Units Registered and/or Operating in the Republic of Crimea and in the Federal City of Sevastopol,” 2 April 2014
ILC	International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, 2001
Incorporation Agreement	Agreement between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation dated 18 March 2014
Incorporation Law	Federal Constitutional Law of the Russian Federation No. 6-FKZ “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol,” 21 March 2014
Interim Award	Interim Award issued by the Tribunal on 24 February 2017
Merits hearing	Hearing held in this arbitration from 1-3 November 2017
Militia Order	Order of the Supreme Council of the Autonomous Republic of Crimea No. 1734-6/14 “Statute on the People’s Militia of Crimea,” 11 March 2014
Nationalisation Decree	Decree No. 2085-6/14 of the State Council of the Republic of Crimea “On matters of management of the property of the Republic of Crimea,” 30 April 2014

Parties	The Claimants and the Respondent
PCA	Permanent Court of Arbitration

[REDACTED]

[REDACTED]

PrivatBank JSC CB PrivatBank, a claimant in this arbitration

Resolution No. 260 Resolution of the National Bank of Ukraine No. 260 dated 6 May 2014

Respondent The Russian Federation

[REDACTED]

[REDACTED]

[REDACTED]

RNKB Russian National Commercial Bank

[REDACTED]

Second Skvortsov Report Expert Report of Professor Oleg Skvortsov dated 16 October 2017

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

[REDACTED]

Stabil PCA Case No. 2015-35, *Stabil LLC, et al. v. The Russian Federation*

[REDACTED]

[REDACTED]

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

Ukrnafta PCA Case No. 2015-34, *PJSC Ukrnafta v. The Russian Federation*

UNCITRAL Rules UNCITRAL Arbitration Rules, 1976

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

I. INTRODUCTION

1. The claimants in this arbitration are: (i) JSC CB PrivatBank,¹ a commercial banking institution registered at 50 Naberezhna Peremogy Street, Dnipropetrovsk,² Ukraine 49094 (“**PrivatBank**”); and (ii) Finance Company Finilon LLC, a financial services company registered at 32 Naberezhna Peremogy Street, Dnipropetrovsk, Ukraine 49094 (“**Finilon**” and, together with PrivatBank, the “**Claimants**”). The Claimants are represented in these proceedings by Messrs. John M. Townsend, James H. Boykin and Vitaly Morozov, and Ms. Eleanor Erney, of Hughes Hubbard & Reed LLP, 1775 I Street, NW, Washington, D.C. 20006, United States of America; Messrs. Marc-Olivier Langlois (until 5 June 2018) and Leon Ioannou of Hughes Hubbard & Reed LLP, 8 rue de Presbourg, Paris 75116, France; and, until 15 August 2018, Professor Dr. Kaj Hober of 3 Verulam Buildings, Gray’s Inn, London, WC1R 5NT, United Kingdom.
2. The respondent in this arbitration is the Russian Federation, a sovereign State (the “**Respondent**” and, together with the Claimants, the “**Parties**”). As of this date, the Respondent has not appointed any representatives in these proceedings.
3. The arbitration concerns measures allegedly taken by the Russian Federation in 2014-2015 that are said to have violated the Claimants’ rights under Articles 2, 3 and 5 of the *Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* dated 27 November 1998 (the “**Treaty**”)³ in respect of their investment in a banking network in the Crimean Peninsula.
4. In its Interim Award of 24 February 2017 (the “**Interim Award**”), the Tribunal decided certain issues of jurisdiction and admissibility, and joined the consideration of all other issues of jurisdiction and admissibility to the second phase of the proceedings. This Partial Award addresses the outstanding issues of jurisdiction and admissibility, as well as the Claimants’ claims of the Respondent’s liability.

II. PROCEDURAL HISTORY

5. The Interim Award recounts in detail the procedural history of this arbitration from its commencement until the date on which that award was issued. In this Section, the Tribunal recalls

¹ When the arbitration was commenced, PrivatBank was a “public joint stock company.” As indicated in the Claimants’ correspondence of 5 July 2018, it became a “joint stock company” as of 14 June 2018.

² The Tribunal notes that the city of Dnipropetrovsk was renamed Dnipro in May 2016.

³ The Treaty entered into force on 27 January 2000.

only the key procedural details from the early phase of the proceedings and describes developments since February 2017.

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

6. [REDACTED]

7. On 13 January 2015, two Ukrainian claimants represented by the same counsel as the Claimants in these proceedings, Aeroport Belbek LLC (“**Belbek LLC**”) and Mr. Igor Valerievich Kolomoisky, commenced an arbitration against the Russian Federation under the Treaty (the “**Belbek Arbitration**”).⁴ Between January and April 2015, a tribunal was constituted in the *Belbek* Arbitration, comprising the same members as would later be appointed to this Tribunal.

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

B. CONSTITUTION OF THE TRIBUNAL AND RECEIPT OF CORRESPONDENCE FROM THE RESPONDENT

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

10. On 4 June 2015, the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) designated Mr. Michael Hwang as the appointing authority in this matter.

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

12. [REDACTED]

⁴ *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2015-07.

[REDACTED]

[REDACTED]

[REDACTED]

13. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

15. By the same letter of 6 July 2015, the PCA informed the Parties that it had communicated the Respondent's Letters to the Tribunal. On behalf of the Tribunal, the PCA indicated that the Tribunal considered the content of the Respondent's Letters to constitute an objection by the

Respondent to the jurisdiction of the Tribunal and to the admissibility of the Claimants' claims under Article 21 of the UNCITRAL Rules.

C. THE RESPONDENT'S DEFAULT AND BIFURCATION OF THE PROCEEDINGS

16. On 18 August 2015, the Tribunal issued its **Procedural Order No. 1**, providing, *inter alia*, that the International Bureau of the PCA would act as registry in these proceedings. On the same date, the Tribunal also issued its **Rules of Procedure**, fixing The Hague, the Netherlands as the place of arbitration and establishing a timetable for the proceedings.

17. [REDACTED]

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

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

D. PRELIMINARY PHASE ON ADMISSIBILITY AND JURISDICTION

20. In its Procedural Order No. 2, the Tribunal, adopting the procedure followed in the *Belbek* Arbitration, put three questions to the Claimants and 22 questions to both Parties regarding issues of jurisdiction and admissibility, [REDACTED]

[REDACTED]

[REDACTED] The Respondent did not submit any responses to the Tribunal’s questions.

21. The Tribunal’s questions to the Parties were the following:

QUESTION TO CLAIMANTS

1. Claimants are invited to identify the precise date from which, in their view, the Russian Federation started to have obligations under the Ukraine-Russia BIT in respect of Ukrainian investments in the Crimean peninsula and the precise date from which, in their view, Claimants became investors within the meaning of Article 1(2)(b) of the Ukraine-Russia BIT.
2. The Claimants are invited to provide documentary evidence showing that they were entities “constituted in accordance with the legislation in force in” Ukraine, during the period from 1 February 2014 to 1 May 2015 in the case of PJSC CB PrivatBank (“PrivatBank”) and the period from 1 November 2014 to 1 May 2015 in the case of Finance Company Finilon LLC (“Finilon”).
3. The Claimants are invited to provide a complete description of the corporate structure of Finilon during the period from 1 November 2014 to 1 May 2015.

QUESTIONS TO THE PARTIES

4. [REDACTED]

[REDACTED] In this connection, the Parties are invited to provide a detailed, documented timeline of the “events of February and March 2014 that led to the Russian Federation’s annexation of Crimea.”

5. [REDACTED] The Parties are invited to elaborate and/or comment on this submission, including, but not exclusively, by discussing:


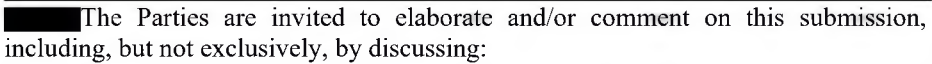
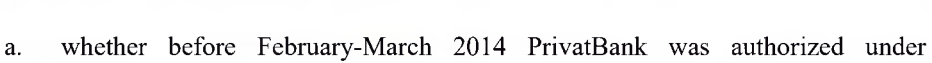
- a. whether the Claimants’ investment is covered under the Article 1(1) terms “all kinds of material and intellectual property”;
 - b. whether indirect investments are covered under Article 1(1);
 - c. whether a contribution to the economy of the host State is a requirement for an investment to qualify under Article 1(1) and, if so, whether this requirement is met in the present case;
 - d. whether the Claimants’ investments were in conformity with the laws of Ukraine and/or the Russian Federation before February-March 2014; and
 - e. whether the Claimants’ investments were in conformity with the laws of Ukraine and/or the Russian Federation after February-March 2014.
6. The Parties are invited to elaborate on the meaning to be given to the expression “to make an investment.” In addition, in light of Article 1(1) of the Ukraine-Russia BIT, which refers to property “contributed by an investor of one Contracting Party on the

territory of the other Contracting Party,” and Article 12 of the Ukraine-Russia BIT, which refers to “investments made by the investors of one Contracting Party on the territory of the other Contracting Party,” the Parties are invited to comment on the question of whether the Ukraine-Russia BIT applies in situations where, at the time of the making of the investment, the investor was a national of the State in which the investment was made.

7. The Parties are invited to comment on the relevance, if any, of the phrase “as defined in conformity with international law” in Article 1(4) of the Ukraine-Russia BIT to the issues of jurisdiction and admissibility in this arbitration.
8. The Parties are invited to elaborate and/or comment [REDACTED] that the Crimean Peninsula “remained part of the independent Ukraine” after the dissolution of the Soviet Union.
9. The Parties are invited to describe the status of the Autonomous Republic of Crimea and the City of Special Status Sevastopol under Ukrainian law prior to February-March 2014 and, in particular, to describe the division of competencies between the Autonomous Republic of Crimea and the City of Special Status Sevastopol on the one hand and the central government of Ukraine on the other hand, and to comment on the relevance, if any, of such division of competencies on the territorial scope of the application of treaties.
10. The Parties are invited to describe the status of the Republic of Crimea and the Federal City of Sevastopol under Russian law after February-March 2014 and, in particular, to describe the division of competencies between the Republic of Crimea and the Federal City of Sevastopol on the one hand and the central government of the Russian Federation on the other hand, and to comment on the relevance, if any, of such division of competencies on the territorial scope of the application of treaties.
11. The Parties are invited to elaborate and/or comment on the analogy [REDACTED] between “the treaties cited by the ICJ and the ECtHR” and the Ukraine-Russia BIT.
12. The Parties are invited to comment on the relevance, if any, of Article 3(3) of the Ukraine-Russia BIT to the issues of jurisdiction and admissibility in this arbitration.
13. The Parties are invited to comment on the relevance, if any, of the non-recognition by Ukraine of the Russian Federation’s annexation of the Crimean peninsula, to the applicability of the Ukraine-Russia BIT in the present case.
14. [REDACTED]
15. The Parties are invited to discuss whether the Ukraine-Russia BIT requires settlement negotiations between the Parties as a condition precedent to the commencement of arbitration and whether such a condition was met in the present case.
16. The Parties are invited to comment on the relevance and common acceptance, if at all, of the principle expressed by the Supreme Court of Aden in *Anglo-Iranian Oil Co. Ltd v. Jaffrate (the Rosemary)* [1953] 1 Weekly Law Reports 246; also at 20 International Law Reports (1953), p. 316, and related cases, to the issues of jurisdiction and admissibility in this arbitration, including whether the principle, insofar as it may be relevant and commonly accepted, requires the Tribunal to form a view (contrary to the Claimants’ submissions) of the legal effect of the annexation of Crimea.

17. Separately from Question [14] above, the Parties are invited to elaborate on the question of the legality under international law of the Russian Federation's annexation of the Crimean peninsula and the impact, if any, on the issues of jurisdiction and admissibility in this case.
18. The Parties are invited to provide information regarding the practice of Ukraine and the Russian Federation concerning the application of bilateral treaties between the two States with respect to Crimea since February-March 2014.
19. The Parties are invited to provide information regarding the practice of third States concerning the application of their bilateral treaties with Ukraine and the Russian Federation with respect to Crimea since February-March 2014.
20. The Parties are invited to comment on the relevance, if any, of the International Law Commission's *Draft Articles on the Effects of Armed Conflicts on Treaties* to the issues of jurisdiction and admissibility in this arbitration.
21. The Parties are invited to comment on the relevance, if any, of the provisions of the 1978 Vienna Convention of the Succession of States in respect of Treaties ("VCST") that they might consider pertinent, including, but not exclusively, by discussing:
 - a. the extent to which such provisions may be considered as reflecting a rule or rules of customary international law; and,
 - b. the relevance of such rule or rules of customary international law to the issues of jurisdiction and admissibility in this case.
22. The Parties are invited to comment on the relevance, if any, of the question of radical change of the conditions of a treaty's operation for this case, in particular concerning the issue of applicability of the Ukraine-Russia BIT with respect to Crimea after February-March 2014.
23. The Tribunal notes that the Claimants have used different terms to describe the status of the Crimea at various places in their pleadings. The Tribunal accordingly invites the Claimants to indicate what in their view was the de jure and the de facto status of the Republic of Crimea vis-à-vis the Russian Federation, during each of the following time periods:
 - (a) from February 20 to March 6, 2014;
 - (b) from March 6 to 18, 2014; and,
 - (c) after March 18, 2014.

This question is not an invitation to the Claimants to address the issue of the legality or illegality of the annexation of the Republic of Crimea and its incorporation into the Russian Federation but rather only the status of the Republic of Crimea during the periods in question.

24. 

The Parties are invited to elaborate and/or comment on this submission, including, but not exclusively, by discussing:
 - a. whether before February-March 2014 PrivatBank was authorized under Ukrainian law or competent in accordance with legislation of Ukraine to make investments on the Crimean peninsula; and,
 - b. whether after February-March 2014 Privatbank and Finilon were authorized under Ukrainian law or competent in accordance with legislation of Ukraine to make and/or maintain investments on the Crimean peninsula.

25. [REDACTED]

22. On 23 May 2016, having consulted the Parties, the Tribunal appointed Dr. Anna Tsirat as Tribunal expert on Ukrainian civil law and Professor Oleg Skvortsov as Tribunal expert on Russian civil law and communicated signed copies of their respective Terms of Reference. An expert report by Dr. Tsirat was communicated to the Parties on 10 June 2016 and an expert report by Professor Skvortsov (the “**First Skvortsov Report**”) was communicated to the Parties on 14 June 2016. [REDACTED]

23. On 3 June 2016, having consulted the Parties, the Tribunal admitted into the record of these proceedings a submission of Ukraine as non-disputing party to the Treaty dated 16 May 2016. [REDACTED] The Respondent did not submit any comments

24. A hearing on jurisdiction and admissibility was held from 12-14 July 2016 in Geneva, Switzerland. It took place concurrently with the hearing in the Belbek Arbitration, although the two cases remained separate and were not consolidated. The Respondent did not attend or otherwise participate in the hearing.

25. [REDACTED] The Respondent did not make any post-hearing submissions.

26. [REDACTED]

E. INTERIM AWARD

27. On 24 February 2017, the Tribunal rendered its Interim Award, stating in its operative part as follows:

For the foregoing reasons, the Tribunal finds that:

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

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

28. [REDACTED]

29. On 27 March 2017, the Tribunal re-issued its Interim Award, correcting four typographical errors.

F. SECOND PHASE

30. By letter from the PCA dated 1 March 2017, the Tribunal invited the Parties to make submissions regarding the procedural calendar for the next phase of the proceedings.

31. [REDACTED]

32. [REDACTED]

33. By letter from the PCA dated 24 March 2017, the Tribunal invited the Claimants to file the decision on jurisdiction in *Everest* along with all other materials in support of their written pleadings, in accordance with the procedural calendar to be established.

34. [REDACTED]
[REDACTED] By letter from the PCA dated 1 May 2017, the Tribunal informed the Parties that it was prepared to accept the Claimants' proposal subject to any comments to the contrary received from the Respondent by 5 May 2017. The Respondent did not provide any comments.

35. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

36. On 11 July 2017, the Tribunal issued **Procedural Order No. 3**, in which it: (i) decided to bifurcate the proceedings between a phase in which it would address the remaining questions of jurisdiction and admissibility, as well as questions of liability, and, in the event that liability is established, a phase in which it would address questions of quantum of damages; (ii) established a procedural calendar for the first of these two phases, in which the Tribunal would put questions to the Parties in advance of a hearing; (iii) invited the Parties to indicate which witnesses they wished to present at the upcoming hearing; (iv) granted the Claimants' application to submit the awards on jurisdiction in *Ukrnafta* and *Stabil* into the record of this arbitration; and (v) informed the Parties that it was minded to instruct its Russian law expert, Professor Skvortsov, to prepare an additional report addressing some of the Tribunal's questions to the Parties, as well as their responses thereto.

37. On the same day, 11 July 2017, in accordance with the timetable established in Procedural Order No. 3, the Tribunal addressed the following fifteen questions to the Parties regarding issues of liability and remaining issues of jurisdiction and admissibility:

QUESTIONS TO THE CLAIMANTS

1. The Claimants are invited to address:
 - (i) the role and responsibilities of a tribunal that has jurisdiction over a dispute when faced with liability issues in the absence of a respondent (noting that the Tribunal concluded in its Interim Award that it has *proprio motu* responsibilities as regards questions of jurisdiction); and
 - (ii) the appropriate burden and standard of proof principles in respect of the liability proceedings in such circumstances.
2. With respect to Resolution of the National Bank of Ukraine No. 260 dated 6 May 2014 [REDACTED] ("Resolution No. 260"), the Claimants are invited to clarify:
 - (i) whether this resolution applied to Finance Company Finilon ("Finilon");

Parties are also invited to address whether the Claimants' alleged investments in the present case meet such an objective definition. In particular, the Parties are invited to address whether PrivatBank's investments had a sufficient duration, given Resolution No. 260 and the fact that the Respondent established a deadline by which Ukrainian banks had to obtain licenses from the Russian Central Bank to continue their operations.

7. The Parties are invited to elaborate on the question of whether the Claimants' investments were "invested . . . in accordance with . . . legislation [of the other Contracting Party]" as required by Article 1(1) of the Treaty, including by discussing:

(i) the time at which compliance with this requirement should be assessed in this case;

(ii) whether the Claimants' investments had to comply with the legislation of the Russian Federation or Ukraine;

(iii) whether, if compliance with Russian legislation was required, there was a requirement for the Russian Federation to admit the Claimants' investments as foreign investments in the Russian Federation; and

(iv) the relationship between this requirement in Article 1(1) and Article 2(1) of the Treaty, which provides that a Contracting Party "shall allow . . . investments in so far as it is in conformity with its respective laws".

8. At the hearing (Tr., 13 July 2016 at 255-256), Professor Skvortsov stated that, to be properly characterized as "investments" in the Russian Federation, the Claimants' assets should have been taken out of and "reinvested" in the Crimean Peninsula. The Parties are invited to address this statement.

9. [REDACTED]

and how it relates to the definition of "investments" in Article 1(1) of the Treaty. The Claimants are also invited to indicate under which law the transactions were effectuated.

10. The Parties are invited to address the relevance (if any) of the following arbitral awards to the remaining issues of jurisdiction in this arbitration:

(i) Decision on Jurisdiction dated 20 March 2017 in *PCA Case No. 2015-36, Everest Estate LLC et al. v. The Russian Federation*;

(ii) Award on Jurisdiction dated 26 June 2017 in *PCA Case No. 2015-34, PJSC Ukrnafta v. The Russian Federation*; and

(iii) Award on Jurisdiction dated 26 June 2017 in *PCA Case No. 2015-35, Stabil LLC et al. v. The Russian Federation*.

11. [REDACTED]

[REDACTED] In this connection, the Parties are invited to comment on the relevance of Article 21 of the Federal Law of the Russian Federation No. 395-1 "On banks and banking activities" dated 2 December 1990.

12. The Parties are requested to submit a copy of the decision of the Crimean Court of Appeals referred to in paragraph 49 of the Claimants' Statement of Claim.

13. [REDACTED]

14. The Parties are invited to submit copies of the court documents pertaining to the criminal proceedings against Mr. Kolomoisky [REDACTED]. The Parties are also invited to comment on whether the reasons cited for these criminal proceedings provide a justification for the Respondent's alleged measures against the Claimants' investments in the Crimean Peninsula.

15. The Parties are invited to provide copies of, and comment on, the relevance to the Claimants' case of any Russian legislation setting out the role and function of the Russian Depositor Protection Fund mentioned, *inter alia*, at paragraph 3 of the Statement of Claim.

38. [REDACTED]

39. The Respondent did not submit any responses to the Tribunal's questions by the 15 August 2017 deadline. Nor did it indicate within the applicable time period the witnesses it wished to examine at the hearing on the merits.

40. By letter from the PCA dated 31 August 2017, the Tribunal informed the Parties of its decision to instruct its Russian law expert, Professor Skvortsov, to prepare an additional report [REDACTED] and invited the Parties to comment on a draft Addendum to the Expert Terms of Reference of Professor Skvortsov. The Parties did not submit any comments on the draft Addendum.

41. [REDACTED]

42. By letter from the PCA dated 8 September 2017, the Tribunal provided the Parties with a copy of the signed Addendum to Professor Skvortsov's Terms of Reference.

43. On 16 October 2017, Professor Skvortsov submitted his second expert report, in Russian, to the Tribunal (the “**Second Skvortsov Report**”). The Tribunal communicated the Russian version of the report to the Parties on 17 October 2017 and its English translation on 18 October 2017.

44. [REDACTED]

G. HEARING IN THE SECOND PHASE AND POST-HEARING EVENTS

45. A hearing on the remaining issues of admissibility and jurisdiction, as well as on liability (the “**merits hearing**”), was held from 1-3 November 2017 at the Peace Palace in The Hague, the Netherlands.

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

47. The following persons were present:

Tribunal:

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

Tribunal-appointed Expert:

Professor Oleg Skvortsov

PCA:

Mr. Martin Doe
Ms. Evgeniya Goriatcheva
Ms. Maria Kiskachi
Mr. Fortunat Nadima Nadima

Claimants:

[REDACTED]
[REDACTED]

PrivatBank

Mr. John M. Townsend
Mr. James H. Boykin
Mr. Vitaly Morozov
Ms. Marina Drapey
Ms. Eleanor Erney
Mr. Alexander Bedrosyan
Ms. Ekaterina Botchkareva
Ms. Svitlana Stegnyy
Hughes Hubbard & Reed LLP

[REDACTED]
[REDACTED]

[REDACTED]
Claimants' fact witnesses

[REDACTED]
Claimants' expert on Russian law

Court Reporter:
Ms. Dawn K. Larson

Interpreters:
Mr. Sergei Mikheyev
Mr. Yuri Somov

48. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

49. The Tribunal-appointed expert on Russian law, Professor Skvortsov, also appeared at the hearing. Questions were put to him by counsel for the Claimants and by the Tribunal.

50. Additionally, the Tribunal posed several questions to the Claimants' counsel during the hearing, including the following:

1. [REDACTED]
[REDACTED]
[REDACTED] Could the Claimants (i) elaborate on this statement; and (ii) provide any case law on the interpretation of the UNCITRAL Rules and the Dutch Code in this respect?
2. [REDACTED]
3. [REDACTED]
[REDACTED] Could the Claimants please explain on what basis the Tribunal has jurisdiction over Finilon in view of this statement?
4. The Claimants are invited to provide copies of any written reports (including by e-mail) [REDACTED] may have received from his colleagues in Crimea concerning:
 - o the events of February-March 2014;
 - o the seizure, on 19 April 2014, of all the cash stored in the main vault of the Crimean Division by "the Crimean 'authorities,' with assistance from the Paramilitary Forces and the Russian Federal Security Service ('FSB')" [REDACTED] and [REDACTED]

- o the seizure of many of PrivatBank's branches in Crimea by the Russian authorities and the Paramilitary Forces [REDACTED]
5. The Claimants are invited to provide a copy, if available, of the court decision dismissing the PrivatBank's appeal of the 21 April 2014 court order which transferred its assets to the FZV, t [REDACTED]
[REDACTED]
 6. [REDACTED]
[REDACTED]
[REDACTED]
 7. The Claimants are invited to explain how the Crimean and Sevastopol Divisions were structured within PrivatBank. In this connection, the Claimants are invited to address [REDACTED] that each of these Divisions had its own balance sheet [REDACTED]
[REDACTED]
 8. What was the law applicable to PrivatBank's loan contracts with its clients? Was there a forum selection clause? Were there standard terms and conditions in this regard, and if so, could the Claimants submit a copy of these?
 9. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
 10. The Claimants are invited to clarify whether the Russian Depositor Protection Fund has compensated any of PrivatBank's depositors.
 11. The Claimants' witnesses have referred to the closure of PrivatBank's branches and the seizure of the contents of the PrivatBank vault as the act of a group that includes State and non-State actors. Could the Claimants address the issue of attribution of responsibility to the Russian Federation for these acts?
 12. How much cash in what currencies was in the vault at the time of the seizure of its contents on 19 April?
 13. Was PrivatBank's cash shortage limited to foreign currency or did it extend to local currency?
 14. Did the NBU hold foreign cash in its vaults in Crimea? If not, how was the NBU supposed to assist PrivatBank with its foreign cash shortage?
 15. Does the Canada-USSR BIT apply to Crimea? Is this necessary in order to invoke the MFN clause in relation to that BIT?
 16. If the Canada-USSR BIT were not to apply to Crimea, would Canadian investors receive "more favourable" treatment than Ukrainian investors for the purpose of the Claimants' claim under the MFN clause in Article 3 for breach of fair and equitable treatment?
 17. Do the Claimants make a national treatment claim under Article 3 of the Treaty?
 18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The Claimants are invited to clarify whether they are simply saying that the Tribunal need not decide their claims under Articles 2 and 3 or whether

they are advancing an affirmative proposition that the Tribunal should not decide these claims in the event that it finds a breach of Article 5.

19. Does the use of the verb “made” in Article 5 of the Treaty impose any temporal or other limitation on the scope of application of that Article?
20. The Claimants are invited to address the question of the presence or lack of a public interest as an element of the illegality of the expropriation under Article 5. In particular, the basis for the various decisions of the Simferopol District Court appears to be PrivatBank’s failure to fulfil its obligations to depositors. Could the Claimants comment on this justification for the measures taken by the court and its relevance to their case on expropriation?
21. [REDACTED]
22. In addition to answering the specific questions that follow below, the Claimants are invited generally to expand upon their case on expropriation under Article 5 of the Treaty, addressing each of the following elements of their claim with a degree of granularity and at the level of individual interests in different kinds of property:
 - a) What investment interest (e.g., cash, debts, movable property, immovable property, etc.) was expropriated?
 - b) On what specific date was that investment interest expropriated?
 - c) By what specific act and actor (e.g., an identified executive agent, a court, etc.) did the expropriation occur?
 - d) How was each individual taking contrary to each of the elements of Article 5(1) of the Treaty, i.e.:
 - o was not “taken in the public interest”;
 - o was not taken “under due process of law”;
 - o was “discriminatory”;
 - o was not “accompanied by prompt, adequate and effective compensation”?
 - e) How is “expropriation” defined for purposes of these responses?
23. The Claimants are invited to explain why a date prior to 21 March 2014 should not be considered as the date of expropriation, [REDACTED]
24. [REDACTED]

- [REDACTED]
25. [REDACTED]
26. Would you agree that the decisions of the Simferopol District Court of 21 April and 4 June 2014 (CE-62 and CE-275), being decisions for interim measures, were temporary in nature and became permanent only with the decision of 16 September 2014 (CE-89)? If the Tribunal were to so find, then would 16 September 2014 be properly considered, on your case, as the date of direct expropriation under Article 5 of the Ukraine-Russia BIT?
27. Do the Claimants argue that the amendments of 3 September and 9 October 2014 to the 30 April 2014 decree of the State Council of the Republic of Crimea constituted an expropriation or other breach of the Treaty?
28. The Claimants are invited to indicate with specificity their criticisms of the proceedings and decisions of the Simferopol Court?
29. Did the Claimants have notice of each of the proceedings before the Simferopol Court? If not, how do the Claimants support their allegation of lack of notice in the face of statements to the contrary by the Simferopol Court?
30. Given that the Claimants argue that the expropriation of PrivatBank and other Treaty breaches occurred, whether wholly or in part, through judicial decisions, the Claimants are invited to address whether the Claimants were required to exhaust, or at least reasonably pursue, local remedies in respect of judicial or administrative decisions. Do the Claimants argue that such local remedies are or were futile?
31. With regard to the issue raised in the prior question, is it the Claimants' position that there has been a denial of justice?
32. Could the Claimants comment on the relevance of Resolution No. 260 of the National Bank of Ukraine, which on 5 May 2014 prohibited Ukrainian banks from pursuing banking operations in the Crimean Peninsula, for the assessment of causation between the alleged Treaty breaches and the Claimants' alleged damages? In particular, if PrivatBank were to have been allowed to recommence its operations, how did PrivatBank intend to get around the restrictions imposed by Resolution 260?
33. If PrivatBank were to have been allowed to recommence its operations, how did PrivatBank intend to get around other restrictions imposed by Ukrainian law, such as those mentioned by [REDACTED]
34. In relation to the above questions, and insofar as relevant, the Claimants are invited to address the original languages of the Treaty.

51. On 7 November 2017, the Tribunal convened a joint procedural conference for both this arbitration and the *Belbek* Arbitration in order to discuss next steps. The procedural conference was attended by the same counsel for the Claimants as the merits hearing. It was not attended by the Respondent. [REDACTED]

52. A transcript of the hearing was delivered electronically to the Parties at the end of each hearing day. On 17 November 2017, hard and electronic copies of the complete transcript of the hearing were circulated to the Parties, with an invitation to propose corrections. [REDACTED]. The Respondent made no comments on the hearing transcript.

53. As stated by the Tribunal at the close of the hearing, and confirmed by subsequent letter of 17 November 2017, the Parties were invited to submit post-hearing briefs addressing the questions posed by the Tribunal to counsel during the hearing, as well as other matters arising from the hearing.

54. [REDACTED]
[REDACTED] The Respondent did not make any post-hearing submissions.

55. [REDACTED]
[REDACTED]

56. By letter dated 5 July 2018, noting the absence of comment from the Respondent, the Tribunal invited the Claimants to submit a copy of the merits award in the *Everest* arbitration into the record and indicated that it would also find it useful to have access to an appellate decision of the Moscow City Court dated 22 September 2014, relating to the Tribunal's question No. 14 of 11 July 2017 (reproduced at paragraph 37 above).

57. [REDACTED]
[REDACTED]

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

⁵ [REDACTED]

[REDACTED]

58. The Tribunal indicated that the address of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation would be added to the distribution list for all future correspondence in this matter.

59. [REDACTED]

60. [REDACTED]

61. By letter from the PCA dated 6 August 2018, the Tribunal took notice of the 24 July 2018 judgment of the English High Court in *PJSC Commercial Bank Privatbank v Igor Valeryevich Kolomoisky, Gennadiy Borisovich Bogolyubov, Teamtrend Limited, Trade Point Agro Limited, Collyer Limited, Rossyn Investing Corp, Milbert Ventures Inc and ZAO Ukrtransitservice Limited* [2018] EWHC 1910, which concerned proceedings by PrivatBank against, *inter alios*, its former shareholder Mr. Kolomoisky. The Tribunal invited the Parties to comment on the relevance, if any, of the English proceedings and judgment for these proceedings. The Tribunal also invited the Claimants to confirm that counsel named above at paragraph 1 continued to represent the Claimants in these proceedings.

62. [REDACTED]

63. By letter from the PCA dated 3 December 2018, the Tribunal requested the Parties to introduce into the record of these proceedings a copy of Federal Law of the Russian Federation No. 86-FZ “On the Central Bank of the Russian Federation (Bank of Russia),” 10 July 2002, and at the same time invited the Parties to comment on the currency and relevance of this law regarding the status and functions of the Central Bank of the Russian Federation. [REDACTED]
[REDACTED] The Respondent did not make any submissions in this regard.

III. FACTUAL BACKGROUND

64. In this Section, the Tribunal sets out in outline the facts giving rise to this arbitration. Where relevant to this Award, the facts are discussed in greater detail in the Tribunal’s analysis below.

65. As in the Interim Award, in this Award “**Crimea**” refers to the region known as the “Autonomous Republic of Crimea” under the Ukrainian Constitution and the “Republic of Crimea” under the Russian Constitution. “**Sevastopol**” or the “**city of Sevastopol**” refers to the city known as the “city of special status Sevastopol” under the Ukrainian Constitution and the “city of federal significance Sevastopol” under the Russian Constitution. Crimea and Sevastopol together are referred to as the “**Crimean Peninsula**.” Save where otherwise indicated, the Tribunal uses the translations of original Russian and Ukrainian documents provided by the Claimants. The Tribunal’s use of the Claimants’ translations should not be taken as an acceptance of the correctness of these translations, even if the Tribunal has raised a number of material issues arising from these translations in the course of the proceedings and addressed them as necessary in both the Interim Award and this Partial Award.

A. THE CLAIMANTS AND THEIR BUSINESS IN THE CRIMEAN PENINSULA

66. As noted in paragraph 1 above, the first claimant, PrivatBank, is a commercial banking institution registered in Dnipropetrovsk, Ukraine.⁶ [REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]

⁶ Extract from the Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations of Ukraine, 1 April 2016 (CE-187).

⁷ [REDACTED].

⁸ [REDACTED]

[REDACTED]

68. The second claimant, Finilon, was registered as a company on 1 October 2013 and as a financial institution (other than a bank) on 24 October 2013.¹¹ [REDACTED]

[REDACTED]

B. THE CRIMEAN EVENTS OF FEBRUARY-MARCH 2014

69. These proceedings arise, in the first instance, out of the events in the Crimean Peninsula of February-March 2014. A detailed exposition of these events, with specific references to the Claimants' submissions and publicly available information, is set out in Section III of the Interim Award. Below, the Tribunal briefly recalls key developments.

70. On 22 February 2014, the President of Ukraine, Mr. Viktor Yanukovich, was removed from office by the Ukrainian Parliament.¹⁴ In the following days, there were reports of pro-Russian rallies held in the Crimean Peninsula, *inter alia* installing a Russian citizen as the *de facto* mayor

⁹ [REDACTED]

¹⁰ [REDACTED]

¹¹ Extract from the Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations of Ukraine, 1 April 2016 (CE-188); Finilon Extract from the Financial Institutions Register [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ New York Times, *Archrival is freed as Ukraine Leader Flees*, 22 February 2014, http://www.nytimes.com/2014/02/23/world/europe/ukraine.html?_r=0, website last visited on 1 February 2019; New York Times, *Ukraine Rushes to Shift Power and Mend Rifts*, 23 February 2014, https://www.nytimes.com/2014/02/24/world/europe/ukraine.html?_r=0, website last visited on 1 February 2019; TASS, *Speaker of the Rada: We Recognize the Importance of Ties with the Russian Federation and are ready for a Dialogue with its Leadership*, 23 February 2014, <http://tass.ru/mezhdunarodnaya-panorama/998011> (in Russian), website last visited on 1 February 2019; BBC, *Putin: Russia helped Yanukovich to flee Ukraine*, 24 October 2014 (CE-174).

of Sevastopol, and of the formation of “people’s patrols” for the defence of “the interests of Crimeans and Russian Crimeans.”¹⁵

71. On 27 February 2014, armed men in fatigues but without identification were reported to have taken control of the building of the Supreme Council of Crimea in Simferopol, flying from it the Russian flag;¹⁶ established checkpoints between the Crimean Peninsula and the Ukrainian mainland;¹⁷ and surrounded Ukrainian airports in the Crimean Peninsula.¹⁸ On the same day, the Supreme Council of Crimea held an emergency session in which it elected the leader of the pro-Russian Crimean parliamentary party, Mr. Sergei Aksyonov, as the new regional Prime Minister, and decided to hold a referendum on the status of Crimea.¹⁹
72. On 16 March 2014, the Supreme Council of Crimea held the planned referendum, asking voters to choose between supporting (i) “Crimea’s reunification with Russia as its constituent member” or (ii) “the restoration of the Constitution of the Republic of Crimea of 1992 and the status of Crimea as part of Ukraine.”²⁰ According to the organisers, a majority of the votes cast supported the reunification with the Russian Federation.²¹

¹⁵ Wall Street Journal, *In Crimea, Backlash to Uprising Lifts Pro-Russia Leader*, 25 February 2014 (CE-141); Center for Journalistic Investigations, *Aksyonov: Rally of volunteer patrols in Simferopol is a celebration of February 23*, 23 February 2014 (CE-140).

¹⁶ The Guardian, *Crimean parliament seized by unknown pro-Russian gunmen*, 27 February 2014 (CE-19).

¹⁷ Wall Street Journal, *Crimea Checkpoints Raise Secession Fears*, 28 February 2014 (CE-22).

¹⁸ UPI, *Ukrainian Interior Minister: Russian troops patrolling Ukrainian airport constitutes “armed invasion”*, 28 February 2014 (reporting on patrolling of unidentified armed men outside Simferopol airport) (CE-23).

¹⁹ Supreme Council of Crimea, Resolution No. 1630-6/14 “Regarding Organization and Holding of a Republican/Local Referendum on Matters of Enhancing the Status and Powers of the Autonomous Republic of Crimea,” 27 February 2014 (CE-203), in Russian at <http://crimea.gov.ru/act/11610>, website last visited on 1 February 2019; TASS, *Crimean parliament elects Aksyonov new premier*, 27 February 2014 (CE-20); RT, *Crimean parliament sacks regional government, approves referendum*, 27 February 2014, <https://www.rt.com/news/ukraine-crimea-parliament-government-056/>, website last visited on 1 February 2019; The Guardian, *Crimean parliament seizure inflames Russian-Ukrainian tensions—live*, 27 February 2014, <https://www.theguardian.com/world/2014/feb/27/ukraine-pro-russian-gunmen-seize-crimea-parliament-live-updates>, website last visited on 1 February 2019.

²⁰ TASS, *Mikhail Malyshev: Crimea’s prosperity in unity turns into prosperity in unity with Russia*, 17 March 2014, <http://tass.ru/en/world/724023>, website last visited on 1 February 2019; New York Times, *2 Choices in Crimea Referendum, but Neither is ‘No’*, 14 March 2014 (CE-34); BBC, *Crimea referendum: What does the ballot paper say?*, 10 March 2014, <http://www.bbc.com/news/world-europe-26514797>, website last visited on 1 February 2019.

²¹ Commission of the Autonomous Republic of Crimea for Holding the Crimea-Wide Referendum, “Public Declaration of the Results of the Crimea-Wide Referendum, Held in the Autonomous Republic of Crimea on 16 March 2014” (CE-206); Media Relations Section of the Sevastopol City Council, “City Council Session Approves Results of Crimea-Wide Referendum Held on 16 March 2014,” 17 March 2014 (CE-207).

73. On 17 March 2014, the Supreme Council of Crimea adopted a resolution declaring the independence of the Crimean Peninsula.²² On the same day, the Sevastopol City Council issued a resolution supporting the declaration of independence.²³ Also, by presidential edict of the same date, the Russian Federation recognized the “Republic of Crimea, in which the city of Sevastopol has special status, as a sovereign and independent state.”²⁴
74. On 18 March 2014, the “Agreement between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation” (the “**Incorporation Agreement**”) was signed in Moscow.²⁵
75. On 21 March 2014, the Federal Assembly of the Russian Federation (that is, the Russian Parliament) enacted a law ratifying the Incorporation Agreement,²⁶ as well as a constitutional law “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol” (the “**Incorporation Law**”).²⁷ On the same day, the Incorporation Law was signed by the President of the Russian Federation, Mr. Vladimir Putin,²⁸ with retroactive effect from 18 March 2014.²⁹

C. THE MEASURES ALLEGEDLY TAKEN BY THE RESPONDENT AGAINST THE CLAIMANTS’ BUSINESS IN THE CRIMEAN PENINSULA

76. [REDACTED]

²² State Council of the Republic of Crimea, Resolution No. 1745-6/14 “On the Independence of Crimea,” 17 March 2014 (CE-162).

²³ Sevastopol City Council Resolution No. 7156 “On the Status of Hero-City Sevastopol,” 17 March 2014 [REDACTED]

²⁴ President of the Russian Federation, Decree No. 147 “On Recognizing the Republic of Crimea,” 17 March 2014 [REDACTED]

²⁵ CE-43.

²⁶ Federal Law of the Russian Federation No. 36-FZ “On Ratification of the Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Parts within the Russian Federation,” 21 March 2014 (CE-49).

²⁷ Federal Constitutional Law of the Russian Federation No. 6-FKZ, 21 March 2014 (CE-47).

²⁸ Official Website of the President of the Russian Federation, *Ceremony signing the laws on admitting Crimea and Sevastopol to the Russian Federation*, 21 March 2014 (CE-48).

²⁹ See Incorporation Law, Art. 1(3).

[REDACTED]

77. [REDACTED]

78. [REDACTED]

79. [REDACTED]

80. On 2 April 2014, the Russian Federation enacted a federal law “On the Special Features of the Functioning of the Financial System of the Republic of Crimea and the City of Federal Significance of Sevastopol during the Transition Period” (the “**Crimean Banking Law**”), which allowed the Russian Central Bank to terminate the activities of Crimean banks if they defaulted on their obligations to depositors for at least one day or failed to perform other specific obligations, such as providing a registry of their liabilities to creditors and depositors to the Russian Central Bank upon its request.³⁷

30 [REDACTED]

31 [REDACTED]

32 [REDACTED]

33 [REDACTED]

34 [REDACTED]

35 [REDACTED]

36 [REDACTED]

³⁷ Federal Law of the Russian Federation No. 37-FZ “On Special Features of the Functioning of the Financial System in the Republic of Crimea and the Federal city Sevastopol during the Transition Period,” 2 April 2014 (CE-52). [REDACTED]

81. Also on 2 April 2014, the Russian Federation enacted a federal law “On the Protection of the Interests of Natural Persons Having Deposits in Banks and Standalone Business Units Registered and/or Operating in the Republic of Crimea and in the Federal City of Sevastopol” (the “**FZV Law**”), creating the Depositor Protection Fund (or “**FZV**”, an abbreviation of the Russian name *Fond Zashiti Vkladchikov*), which was empowered to acquire the rights of depositors against financial institutions in the Crimean Peninsula the operations of which were terminated by the Central Bank of Russia, and to pay compensation to individual depositors equivalent to 100 percent of their claims against the financial institution, up to a maximum of RUB 700,000 per individual.³⁸

82. On 17 April 2014, during his annual “direct line” call-in show, the President of the Russian Federation, President Putin, addressed questions concerning banking in the Crimean Peninsula. Responding to questions from Crimean residents, President Putin stated:

Here is an interesting question about the Crimean economy and banking system. The first part of the question concerns certain difficulties, including economic issues. The second part is as follows: “I hired a car on lease from Privatbank. It will take me only two years to repay the loan. The car officially belongs to Avtoprivat Group in Kiev. Privatbank no longer operates in Crimea. What am I supposed to do?”

Please use the car and don’t worry. If Mr Kolomoisky and Mr Finkelstein don’t want your money, it’s their problem.

But another and more important question concerns private bank accounts, which is very serious. I would like to note that we have a database of Privatbank and Oshadbank depositors. We will of course act according to the data we have. But the decision is almost made, so if people lose any money they have in their accounts we will repay them up to 700,000 roubles in line with Russian laws.³⁹

83. On 18 April 2014, the Banking Oversight Committee of the Russian Central Bank decided to terminate PrivatBank’s activities in the Crimean Peninsula.⁴⁰

84. Also on 18 April 2014, armed men seized PrivatBank’s main offices for the Crimean Peninsula in Sevastopol and Simferopol, as well as its VIP Center in Simferopol.⁴¹ [REDACTED]

³⁸ Federal Law of the Russian Federation No. 39-FZ “On the Protection of the Interests of Natural Persons Having Deposits in Banks and Standalone Business Units Registered and/or Operating in the Republic of Crimea and in the Federal City of Sevastopol,” 2 April 2014 (CE-258).

³⁹ President of the Russian Federation Official Website, *Direct Line with Vladimir Putin*, 17 April 2014 (CE-58).

⁴⁰ See Central Bank of the Russian Federation, Resolution No. PH-33-1 “On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance,” 21 April 2014 (CE-60).

⁴¹ [REDACTED]

[REDACTED]
[REDACTED]³

85. [REDACTED]
[REDACTED]
[REDACTED]

86. On 21 April 2014, the Russian Central Bank issued a resolution “terminating the activities of [PrivatBank] on the territory of the Republic of Crimea and the City of Sevastopol” (the “**21 April 2014 Central Bank Resolution**” or “**21 April 2014 Resolution**”).⁴⁵ The 21 April 2014 Central Bank Resolution provided:

Pursuant to Article 7 of [the Crimean Banking Law] and in view of the failure to perform obligations to creditors (depositors) arising out of the actions of standalone business units located on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance, the Central Bank of the Russian Federation, in accordance with the decision made by the Bank of Russia’s Banking Oversight Committee (minutes No. 15 of the meeting of the Bank of Russia’s Banking Oversight Committee of April 18, 2014) hereby terminates, as of April 21, 2014, the activities of standalone business units of the PUBLIC JOINT-STOCK COMPANY PRIVATBANK COMMERCIAL BANK of Dnepropetrovsk, Ukraine, EGRPOU identification code No. 14360570) on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance (as per the annex hereto).

Activities of the standalone business units will be terminated subject to the provisions of part 4 of Article 7 of [the Crimean Banking Law].

[signature] A. Yu. Simanovskiy

First Deputy Chairman
of the Bank of Russia

87. By letter of the same date, the Russian Central Bank forwarded the 21 April 2014 Resolution to PrivatBank’s headquarters in Dnipropetrovsk and invited PrivatBank to notify it of any intention to transfer its assets and liabilities to another bank.⁴⁶ The letter stated:

Should the bank intend to transfer assets and liabilities as set forth in Article 7 of [the Crimean Banking Law], please inform the Bank of Russia of same, indicating the name and address of the person to whom such assets and liabilities may be intended to be transferred and the proposed timeframe for the transfer.

⁴² [REDACTED]

⁴³ [REDACTED]

⁴⁴ [REDACTED]

⁴⁵ Central Bank of the Russian Federation, Resolution No. PH-33-1 “On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance,” 21 April 2014 (CE-60).

⁴⁶ Letter No. 04-33/2931 from the Central Bank of the Russian Federation to PrivatBank, 21 April 2014 (CE-59).

88. Also on 21 April 2014, the Simferopol Central District Court issued a “Ruling on imposition of measures of protection” requiring PrivatBank to transfer all of its Crimean assets to a trust controlled by the FZV (the “**21 April 2014 Court Decision**” or “**21 April 2014 Decision**”).⁴⁷ PrivatBank did not participate in these proceedings,⁴⁸ having received no notice of the hearing date and deemed that “participation in these proceedings would have been futile, and possibly even dangerous.”⁴⁹ The 21 April 2014 Decision stated, in relevant part:

Deputy Prosecutor of the Republic of Crimea S.B. Chernevich filed with the court a claim, which included as a third party the Central Bank of the Russian Federation and was in defense of the interests of the general public, against the Commercial Bank Privatbank Public Joint-Stock Company, which has a National Bank of Ukraine license valid as of March 16, 2014, and performs banking in the territories of the Republic of Crimea and the federal city of Sevastopol, concerning the termination of unlawful acts involving the failure to fulfill obligations arising from bank deposit agreements, concerning the fulfillment of obligations arising from the bank deposit agreements entered into.

At the same time, the prosecutor filed with the court an application to grant injunctive relief as follows: compel the Commercial Bank Privatbank PAO, represented by the Crimea regional branch, to transfer the property complex consisting of movable and immovable property belonging to the Commercial Bank Privatbank Public Joint-Stock Company by right of ownership, as well as other rights arising from agreements (such as leasing agreements and other rights [including rights of claim]), to a trust office (based on a list of bank divisions) that operates until the conditions underlying the failure to fulfill the obligations of the bank to the depositors (creditors) no longer exist; name as trust manager of the property of the Commercial Bank Privatbank Public Joint-Stock Company in the Republic of Crimea and the federal city of Sevastopol (based on a list of bank divisions) the ANO [Autonomous Non-Profit Organization] Depositor Protection Fund (295000, Simferopol, 44-a U1. Rubtsova), which operates pursuant to [the FZV Law].

The court, after reviewing that application, feels that it should be allowed.

In accordance with Article 23 of [the Incorporation Law], the legislative and other regulatory acts of the Russian Federation are operative in the territories of the Republic of Crimea and the Federal City of Sevastopol as of the date of admission to the Russian Federation of the Republic of Crimea and the formation as part of the Russian Federation of the new entities, unless otherwise specified by this federal constitutional law.

Understood as injunctive relief is the aggregate of measures guaranteeing the implementation of the court’s decision in the event that the stated claims are satisfied, that is, the purpose of the measures is to protect the rights of the claimant in the event that the respondent acts in bad faith or that the failure to impose such measures could hinder or render impossible the execution of the court’s decision, that is, the purpose is to prevent potential difficulties that could rise in connection with the execution of the decision.

In justification of the requested measures, the applicant cites that the Commercial Bank Privatbank Public Joint-Stock Company, which has been operating in the territory of the Republic of Crimea and the federal city of Sevastopol for a long time, is failing to fulfill its obligations arising from bank deposit agreements entered into, and the refusal of the bank to fulfill its obligations provides grounds to assume that it could act in bad faith, primarily by means of alienating the property complex consisting of movable and immovable property belonging to the Bank by right of ownership, as well as rights arising from agreements and other rights (including rights of claim).

In addition, the applicant feels that if the court hands down a decision to allow the claim the applicant has filed, compliance by the Respondent with such a decision without the imposition of protective measures will be problematic.

⁴⁷ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

⁴⁸ [REDACTED]

⁴⁹ [REDACTED]

In accordance with Article 139 of the RF Code of Civil Procedure, upon the statement of claim by parties participating in the case, the judge or the court may grant injunctive relief. Injunctive relief is allowed at any juncture if the failure to grant injunctive relief measures could hinder or render impossible execution of the decision of the court. [. . .]

Based on the above, guided by Article 23 of [the Incorporation Law], as well as articles 139, 140, and 141 of the RF Code of Civil Procedure, the court

RULES:

The application filed by Deputy Prosecutor of the Republic of Crimea S.B. Chernevich for injunctive relief is satisfied. The Commercial Bank Privatbank Public Joint-Stock Company (49094, Dnepropetrovsk Oblast, Dnepropetrovsk, 50 U1. Naberezhnaya Pobedy), represented by the Crimea regional branch (295000, Simferopol, 1 U1. Geroyev Adzhimushkaya), shall (1) transfer the property complex consisting of movable and immovable property belonging to the Commercial Bank Privatbank Public Joint-Stock Company by right of ownership, as well as other rights arising from agreements (such as leasing agreements and other rights, including rights of claim), to a trust office (based on a list of bank divisions) that operates until the conditions underlying the failure to fulfill the obligations of the bank to the depositors (creditors) no longer exist.

The ANO Depositor Protection Fund (295000, Simferopol, 44-a U1. Rubtsova), which operates pursuant to [the FZV Law] shall be named as trust manager of the property of the Commercial Bank Privatbank Public Joint-Stock Company in the Republic of Crimea and the federal city of Sevastopol (based on a list of bank divisions).

The ruling may be appealed by the parties in the Appellate Court of the Republic of Crimea by means of filing an appeal through the Central District Court of the City of Simferopol within 15 days after the ruling.

The ruling of the court on injunctive relief shall be immediately enforced in the manner prescribed for the execution of court decrees.⁵⁰

89. [REDACTED]

90. [REDACTED]

⁵⁰ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

⁵¹ [REDACTED]

⁵² [REDACTED]

⁵³ [REDACTED]

91. [REDACTED]
[REDACTED]
[REDACTED]

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

92. On 30 April 2014, the State Council of the Republic of Crimea issued a decree nationalising all state property of Ukraine and all abandoned property located in Crimea (the “**Nationalisation Decree**”).⁵⁶

93. On 6 May 2014, the National Bank of Ukraine issued a resolution mandating Ukrainian banks to terminate the operations of their Crimean branches within a month after the date of its entry into force (“**Resolution No. 260**”).⁵⁷

94. On 4 June 2014, the Simferopol Central District Court issued a “Ruling on replacing interim measures,” granting the application of the Deputy Prosecutor of the Republic of Crimea to replace the 21 April 2014 Decision, which transferred PrivatBank’s assets in “trust” to the FZV, by an order specifically laying out the conditions under which the FZV would hold these assets.⁵⁸

95. On 3 July 2014, the Simferopol Central District Court terminated enforcement proceedings of the 21 April 2014 Decision against PrivatBank.⁵⁹

96. [REDACTED]
[REDACTED]
[REDACTED]

⁵⁴ [REDACTED]

⁵⁵ [REDACTED]

⁵⁶ State Council of the Republic of Crimea, Decree No. 2085-6/14 “On Issues of Managing Property of the Republic of Crimea,” 30 April 2014 (CE-88-R-001).

⁵⁷ National Bank of Ukraine Regulation No. 260 “On Revocation and Cancellation of Banking Licenses and General Licenses for Conducting Operations with Foreign Currency of Certain Banks and Termination of Branches Located in the Autonomous Republic of Crimea and City of Sevastopol,” 6 May 2014 ([REDACTED])

⁵⁸ Decision of the Simferopol Central District Court, Case No. 2-311/14, 4 June 2014 (CE-275).

⁵⁹ Decision of the Simferopol Central District Court, Case No. 2-311/14, 3 July 2014 (CE-281). [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] A press release of the State Council of Crimea dated 3 September 2014 addressed these amendments:

A resolution was passed at an extraordinary session of the State Council of the Republic of Crimea, concerning questions of managing of the republic's property. While presenting the document to the deputies, acting Head of the Republic of Crimea, Chairman of the Crimean Government, Sergey Aksenov noted that the owner of PrivatBank, Igor Kolomoisky, has not fulfilled his obligations to the Crimeans in terms of returning funds from personal accounts and deposits. "We promised Crimeans that all debts that cannot be paid off through the depositors' protection fund, we will pay off at the expense of the property of the founders of PrivatBank, in particular, Mr. Kolomoisky," S. Aksenov stressed, adding that I. Kolomoisky is one of the initiators and financiers of the ATO [Anti-Terror Operation] measures in the South-East of Ukraine, where our fellow citizens are being killed. "I believe that it is our moral right and our moral duty to carry out such nationalization," said the Head of the Republic.— After that, the property belonging to Mr. Kolomoisky will be sold, and these funds will go towards repaying the accounts of "PrivatBank" depositors exceeding 700 thousand rubles, which do not fall under the law "On the return of deposits of the Russian Federation."⁶¹

97. On 16 September 2014, the Simferopol Central District Court issued an order compelling PrivatBank to perform its "obligations under bank deposit agreements and bank account agreements totalling RUB [10.9 billion]."⁶² [REDACTED]

98. [REDACTED]

⁶⁰ [REDACTED]

⁶¹ State Council of the Republic of Crimea Press Release, *Property Belonging to the Ukrainian Oligarch Kolomoisky will be Nationalized in Crimea*, 3 September 2014 (CE-334).

⁶² Decision of the Simferopol Central District Court, Case No. 2-311/14, 16 September 2014 (CE-89).

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ [REDACTED]

⁶⁷ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 69

99. On 27 January 2015, the FZV filed an action against PrivatBank before the Arbitrazh Court of the Republic of Crimea to recover sums paid to Crimean residents in compensation for their deposits in PrivatBank. On 29 October 2015, the Arbitrazh Court of the Republic of Crimea found in favour of the FZV, ordering PrivatBank to pay RUB 12,057,853,985.97 plus costs and expert fees.⁷⁰

IV. KEY TREATY PROVISIONS

100. It is useful to set out in full the text of provisions of the Treaty relevant to this phase of the proceedings.
101. The Treaty was concluded on 27 November 1998 in Russian and Ukrainian, both texts having equal force.⁷¹ It entered into force on 27 January 2000. In its Interim Award, the Tribunal found that the Treaty became opposable to the Russian Federation as regards Ukrainian investors in the Crimean Peninsula as of 21 March 2014.⁷²
102. Article 9 of the Treaty sets out the Contracting Parties' offer to arbitrate with investors. It provides:

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

1. Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to

⁶⁸ [REDACTED]

⁶⁹ [REDACTED]

⁷⁰ Decision of the Arbitrazh Court of the Republic of Crimea, Case No. A83-16/2015, 30 October 2015 (CE-363); Post-Hearing Brief on the Merits, p. 42, n.162.

⁷¹ See Treaty, last sentence. The Claimants have submitted to the Tribunal two translations from the Russian original (exhibits CE-1-R and CA-137) and one translation from the Ukrainian original (CE-1-U). The Claimants explain that the second translation from Russian (CA-137) was produced by using the controlling English translations of other BITs entered into by the Russian Federation (Letter from the Claimants dated 9 March 2016). This is the translation referred to in this Partial Award unless indicated otherwise. Other translations are referred to when discussing specific questions of interpretation of the Treaty.

⁷² Interim Award, para. 195.

a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.

2. If the dispute cannot be resolved in this manner within six months after the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to:
 - a) a competent court or arbitration court of the Contracting Party in the territory of which the investments were made;
 - b) the Arbitration Institute of the Stockholm Chamber of Commerce;
 - c) an “ad hoc” arbitration tribunal, in accordance with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).
3. The arbitral award shall be final and binding upon both parties to the dispute. Each Contracting Party agrees to execute such award in conformity with its respective legislation.

103. The following definitions set out in Article 1 of the Treaty are also relevant to the outstanding questions of jurisdiction and admissibility addressed in this Award:

1. The term “investments” means any kind of tangible and intangible assets [which are] invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, including:
 - a) movable and immovable property, as well as any other related property rights;
 - b) monetary funds, as well as securities, commitments, stock and other forms of participation;
 - c) intellectual property rights, including copyrights and related rights, trademarks, rights to inventions, industrial designs, models, as well as technical processes and know-how;
 - d) rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources.

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

2. The term “investor of a Contracting Party” means:
 - i. any natural person having the citizenship of the state of that Contracting Party and who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party;
 - ii. any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party, to make investments in the territory of the other Contracting Party.

104. The following provisions of the Treaty are relevant to the question of the Respondent's liability:

ARTICLE 2
ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

1. Each Contracting Party will encourage the investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its legislation.
2. Each Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party.

ARTICLE 3
NATIONAL TREATMENT AND MOST FAVORED NATION TREATMENT

1. Each Contracting Party shall ensure in its territory for the investments made by investors of the other Contracting Party, and activities in connection with such investments, treatment no less favorable than that which it accords to its own investors or to investors of any third state, which precludes the use of measures discriminatory in nature that could interfere with the management and disposal of the investments.
2. Each Contracting Party reserves the right to determine sectors and spheres of activity in which the activity of foreign investors shall be excluded or restricted.
3. The most favored nation treatment granted in accordance with paragraph 1 of this Article shall not apply to benefits which the Contracting Party is providing or will provide in the future:
 - a) in connection with participation in a free trade area, customs or economic union, monetary union or international treaty establishing similar associations, or other forms of regional cooperation in which any Contracting Party is or may become a participant;
 - b) on the basis of an agreement regarding the avoidance of double taxation or other arrangements on matters of taxation.

ARTICLE 5
EXPROPRIATION

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subject to other measures equivalent in effect to expropriation (hereinafter referred to as "expropriation"), except in cases where such measures are taken in the public interest under due process of law, are not discriminatory and are accompanied by prompt, adequate and effective compensation.
2. The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable.

V. THE PARTIES' ARGUMENTS

A. THE CLAIMANTS' POSITION

105. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

106. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

107. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

73 [REDACTED]

74 [REDACTED]

108. [REDACTED]

109. [REDACTED]

110. [REDACTED]

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

78 [REDACTED]

79 [REDACTED]

80 [REDACTED]

81 [REDACTED]

82 [REDACTED]

[REDACTED]

1. Outstanding issues of jurisdiction and admissibility

111. [REDACTED]

(a) Whether the Claimants are “investors of a Contracting Party”

112. [REDACTED]

113. [REDACTED]

114. [REDACTED]

83 [REDACTED]

84 [REDACTED]

85 [REDACTED]

86 [REDACTED]

[REDACTED]

115. [REDACTED]

116. [REDACTED]

87 [REDACTED]

88 [REDACTED]

89 [REDACTED]

90 [REDACTED]

91 [REDACTED]

92 [REDACTED]

93 [REDACTED]

94 [REDACTED]

95 [REDACTED]

96 [REDACTED]

[REDACTED]

117. [REDACTED]

(b) Whether the Claimants' "investments" fall within the definition of that term in Article 1(1) of the Treaty

118. [REDACTED]

i. Nature of the investment

119. [REDACTED]

97 [REDACTED]

98 [REDACTED]

99 [REDACTED]

100 [REDACTED]

101 [REDACTED]

120. [REDACTED]

121. [REDACTED]

122. [REDACTED]

102 [REDACTED]

103 [REDACTED]

104 [REDACTED]

105 [REDACTED]

106 [REDACTED]

107 [REDACTED]

108 [REDACTED]

[Redacted text block]

ii. Situs of the investment

123. [Redacted text block]

124. [Redacted text block]

iii. Legality of the investment

125. [Redacted text block]

126. [Redacted text block]

109 [Redacted text block]

110 [Redacted text block]

111 [Redacted text block]

112 [Redacted text block]

113 [Redacted text block]

114 [Redacted text block]

115 [Redacted text block]

116 [Redacted text block]

[REDACTED]

127. [REDACTED]

128. [REDACTED]

117 [REDACTED]

118 [REDACTED]

119 [REDACTED]

120 [REDACTED]

121 [REDACTED]

122 [REDACTED]

123 [REDACTED]

124 [REDACTED]

125 [REDACTED]

126 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted text block]

129. [Redacted text block]

130. [Redacted text block]

[Redacted text block]

127 [Redacted text block]

128 [Redacted text block]

129 [Redacted text block]

130 [Redacted text block]

131 [Redacted text block]

[REDACTED]

131. [REDACTED]

132. [REDACTED]

133. [REDACTED]

132 [REDACTED]

133 [REDACTED]

134 [REDACTED]

135 [REDACTED]

136 [REDACTED]

137 [REDACTED]

138 [REDACTED]

139 [REDACTED]

[REDACTED]

[REDACTED]

(c) Whether the dispute between the Parties arose “in connection with” the Claimants’ investments

134. [REDACTED]

2. Attribution

135. [REDACTED]

136. [REDACTED]

137. [REDACTED]

140. [REDACTED]
141. [REDACTED]
142. [REDACTED]
143. [REDACTED]
144. [REDACTED]
145. [REDACTED]

[Redacted text block]

138. [Redacted text block]

139. [Redacted text block]

3. Alleged breaches of the Treaty

140. [Redacted text block]

146 [Redacted text block]

147 [Redacted text block]

148 [Redacted text block]

149 [Redacted text block]

150 [Redacted text block]

151 [Redacted text block]

152 [Redacted text block]

[REDACTED]

(a) Article 5 of the Treaty

141. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

142. [REDACTED]

153 [REDACTED]
154 [REDACTED]
155 [REDACTED]
156 [REDACTED]

143. [REDACTED]

144. [REDACTED]

157 [REDACTED]
158 [REDACTED]
159 [REDACTED]
160 [REDACTED]
161 [REDACTED]
162 [REDACTED]
163 [REDACTED]
164 [REDACTED]

145. [REDACTED]

146. [REDACTED]

147. [REDACTED]

165 [REDACTED]

166 [REDACTED]

167 [REDACTED]

168 [REDACTED]

169 [REDACTED]

170 [REDACTED]

171 [REDACTED]

[REDACTED]

148. [REDACTED]

149. [REDACTED]

150. [REDACTED]

172 [REDACTED]

173 [REDACTED]

174 [REDACTED]

175 [REDACTED]

176 [REDACTED]

177 [REDACTED]

178 [REDACTED]

[Redacted]

151. [Redacted]

152. [Redacted]

153. [Redacted]

179 [Redacted]

180 [Redacted]

181 [Redacted]

182 [Redacted]

183 [Redacted]

184 [Redacted]

185 [Redacted]

[REDACTED]

154. [REDACTED]

155. [REDACTED]

156. [REDACTED]

186 [REDACTED]

187 [REDACTED]

188 [REDACTED]

189 [REDACTED]

190 [REDACTED]

191 [REDACTED]

[REDACTED]

192 [REDACTED]

[REDACTED]

[REDACTED]

193 [REDACTED]

[REDACTED]

194 [REDACTED]

[REDACTED]

(b) Article 3 of the Treaty

157. [REDACTED]

158. [REDACTED]

159. [REDACTED]

195 [REDACTED]

196 [REDACTED]

197 [REDACTED]

198 [REDACTED]

199 [REDACTED]

200 [REDACTED]

201 [REDACTED]

202 [REDACTED]

203 [REDACTED]

[Redacted]

160. [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

161. [Redacted]
[Redacted]
[Redacted]

162. [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

163. [Redacted]
[Redacted]

204 [Redacted]

205 [Redacted]

206 [Redacted]
[Redacted]
[Redacted]

207 [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

208 [Redacted]

209 [Redacted]

210 [Redacted]

211 [Redacted]

[Redacted]

164. [Redacted]

(c) Article 2 of the Treaty

165. [Redacted]

166. [Redacted]

212 [Redacted]

213 [Redacted]

214 [Redacted]

215 [Redacted]

216 [Redacted]

217 [Redacted]

B. THE RESPONDENT'S POSITION

167. As noted in its Interim Award, the Tribunal has interpreted the Respondent's Letters, which remain its sole communication in the context of these proceedings, as an objection to its jurisdiction and to the admissibility of the Claimants' claims. The Respondent's Letters are reproduced in full at paragraphs 12-13 above.
168. The Respondent has made no submissions on the merits of the Claimants' claims. The Tribunal's approach, having regard to the Respondent's failure to participate, is addressed at paragraphs 173-181 below.

VI. THE TRIBUNAL'S CONSIDERATIONS

A. PRELIMINARY CONSIDERATIONS

1. Introduction

169. This Partial Award follows the Tribunal's Interim Award of 24 February 2017, in which it decided that:
1. the Russian Federation has assumed obligations under the Treaty in respect of the Claimants and their claimed investments in the Crimean Peninsula as of 21 March 2014;
 2. there is a dispute between the Parties arising in connection with what the Claimants allege to constitute "investments" under the Treaty; and
 3. the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty.
170. The Tribunal joined the consideration of all other issues of jurisdiction and admissibility to the second phase of the proceedings. Those issues are addressed in this Partial Award alongside the alleged breaches of the Treaty. The assessment of compensation due for these breaches has been deferred to a further phase of the arbitration.
171. As it noted in its Interim Award, the Tribunal wishes to emphasize once again that its mandate is defined and circumscribed by the Treaty. Although the issues in dispute in this case are in many instances linked to broader questions of public international law and inter-State relations, particularly those between the two Contracting Parties to the Treaty, the Tribunal is not called

upon to decide such broader questions except insofar as authorized to do so by Article 9 of the Treaty and as may be necessary in order to decide the concrete claim that the Treaty has been breached by the Respondent entitling the Claimants to relief. The Tribunal notes therefore that this Partial Award does not reach any view on the legality or illegality under international law of the incorporation of the Crimean Peninsula by the Russian Federation or on the sovereignty claims of Ukraine and the Russian Federation in respect of the Crimean Peninsula. None of the findings contained in this Partial Award or the Interim Award that has preceded it are intended to take any position on such matters.

2. Applicable law

172. As also noted in the Tribunal’s Interim Award, the Treaty is the primary source of law that the Tribunal is called upon to apply. As the Treaty contains no express provisions on applicable law or its own interpretation and application, the Tribunal is called upon to interpret the Treaty in accordance with the general rules of treaty interpretation set out in Articles 31-33 of the *Vienna Convention on the Law of Treaties* (the “VCLT”), to which both the Russian Federation and Ukraine are party and which in any event, so far as is material for present purposes, reflect customary international law. The Tribunal must also have regard to general international law, other relevant rules of international law applicable in the relations between the Contracting Parties, and any relevant and applicable national law insofar as the provisions of the Treaty direct the Tribunal to do so or where this is necessary to decide the dispute before the Tribunal.

3. The Respondent’s non-participation

173. The Respondent has continued not to participate in these proceedings in this second phase of the arbitration. [REDACTED]

174. Article 28 of the UNCITRAL Rules addresses some of the consequences of non-participation by a party. Article 28(1) provides that “[i]f, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.” Article

28(2) provides that, “[i]f one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.” Pursuant to these provisions, after affording the Parties an opportunity to present their views, the Tribunal ordered that these proceedings continue, notwithstanding the Respondent’s failure to file a statement of defence within the relevant time period, and proceeded with the arbitration despite the Respondent’s failure to participate in the hearing on jurisdiction and admissibility. The Tribunal thereafter proceeded to render its Interim Award.

175. In its Interim Award, the Tribunal noted that it remained open to the Russian Federation to participate in the second phase of these proceedings. The Respondent has not done so. The Tribunal has therefore proceeded with the arbitration despite the Respondent’s failure to participate in the arbitration, including in either of the hearings held by the Tribunal.
176. At the same time, the Tribunal has continued to give the Russian Federation every opportunity to participate in these proceedings, and taken every measure to safeguard the Russian Federation’s procedural rights notwithstanding its non-participation. As with the first phase of the arbitration, the Tribunal has, *inter alia*, in this phase of the proceedings:
- (i) ensured that all communications and materials submitted in the proceedings have been promptly delivered, both electronically and physically, to the Ambassador of the Russian Federation to the Netherlands in The Hague [REDACTED], also to the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation;
 - (ii) afforded the Russian Federation, as with the Claimants, an opportunity to express its views on each proposed procedural step throughout the proceedings;
 - (iii) granted the Russian Federation equal and sufficient time to submit responses to the written pleadings and other communications from the Claimants;
 - (iv) invited the Russian Federation, as with the Claimants, to comment on the proposed candidates and terms of reference for the independent experts on Russian and Ukrainian law subsequently appointed by the Tribunal;
 - (v) provided the Russian Federation adequate notice of the hearings it has held;
 - (vi) provided the Russian Federation, in a timely manner, with the transcripts and all other documents submitted in the course of these hearings; and

(vii) provided an opportunity for, and invited, the Russian Federation to comment on anything said during these hearings.

177. Given the seriousness of the issues engaged in these proceedings, the Tribunal regrets that the Russian Federation has chosen not to participate in the proceedings to this point. Participation in the proceedings would have afforded the Russian Federation an opportunity to advance such arguments as it considered appropriate for consideration and evaluation by the Tribunal. Particularly having regard to the challenges that the Russian Federation has brought to set aside the awards of various other tribunals considering claims made by Ukrainian investors against the Russian Federation under the same Treaty, non-participation by the Russian Federation in these proceedings warrants particular note.

4. Burden of proof

178. Article 28(3) of the UNCITRAL Rules provides that, “[i]f one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.” According to Article 24(1) of the UNCITRAL Rules, “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.” Article 25(6) of the UNCITRAL Rules further provides that “[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” The combined effect of these provisions is that, as opposed to many national systems of law, the Tribunal may not simply accept a party’s case by default, even where the opposing party does not participate in the proceedings, as has been the case here. As already expressed in its Interim Award, the Tribunal must rigorously examine and decide the claims before it in the light of all the available information, regardless of the non-participation of any party. A claimant cannot therefore prevail without meeting a minimum standard of proof, even if the burden shifts to the respondent at some point to establish that its conduct was permitted under the treaty or under international law more generally. In respect of the remaining questions of jurisdiction and admissibility, the Tribunal likewise reiterates that it must satisfy itself of its own competence to decide the claims put before it. As already decided in its Interim Award, the Tribunal considers that it is required to determine its jurisdiction and the admissibility of the claims, *proprio motu* if necessary, whether or not objections have been raised by the Respondent.²¹⁹

²¹⁹ See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 ICJ Reports 3, para. 33 (“... in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case.”); *South China Sea*

179. This said, the Tribunal must also take care to avoid prejudice to the Claimants from the non-participation of the Respondent. While the non-participation of the Respondent unavoidably gives rise to evidential and related issues for the proceedings, the Tribunal must in the first instance proceed on the basis that, absent a reason to doubt this, the Claimants' evidence is presented in good faith and that, subject to enquiry and scrutiny by the Tribunal going to admissibility, relevance and materiality, it can properly be accorded appropriate weight.
180. In this regard, the Tribunal notes that it has not simply accepted without more the allegations, arguments and evidence of the Claimants. On the contrary, it has taken every available opportunity and measure to test the Claimants' case and to ensure that it has the information necessary to reach the findings contained in this Partial Award. These have included:
- (i) putting a series of 25 written questions to the Parties in advance of the jurisdictional and admissibility hearing on matters of both fact and law that the Tribunal considered not to have been sufficiently canvassed in the Claimants' submissions;
 - (ii) the appointment of independent experts to report on issues of Ukrainian and Russian law, which had previously been addressed only by experts appointed by the Claimants;
 - (iii) putting numerous questions to the Claimants' counsel as well as to the Claimants' and the Tribunal-appointed experts during the jurisdictional and admissibility hearing;
 - (iv) inviting both Parties to address questions arising from the jurisdictional and admissibility hearing in post-hearing briefs;
 - (v) deferring a decision on certain issues of jurisdiction and admissibility for further consideration in the second phase of the arbitration;
 - (vi) further bifurcating the proceedings between a phase in which it would address the remaining questions of jurisdiction and admissibility, as well as questions of liability, and, in the event that liability is established, a phase in which it would address questions of quantum of damages;

Arbitration (Philippines v. China), PCA Case No. 2013-19, Award on Jurisdiction of 29 October 2015, para. 123 (“... the Tribunal also stated that it would not confine itself to addressing only those issues raised in China’s Position Paper and that, in line with its duty to satisfy itself of its jurisdiction, the Tribunal would consider other issues that might potentially pose an obstacle to the continuation of these proceedings.”); *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of 25 October 2016, para. 225. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, para. 29; *ICS Inspection and Control Services v. Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction of 10 February 2012, para. 280; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 175.

- (vii) putting a series of 15 further written questions to the Parties in advance of the merits hearing on matters of both fact and law that the Tribunal considered not to have been sufficiently canvassed in the Claimants' submissions;
- (viii) expanding upon the terms of reference of the Tribunal's independent expert to report on further issues of Russian law;
- (ix) putting numerous questions to the Claimants' counsel, to the Claimants' and the Tribunal-appointed experts on Russian law, and to the three witnesses of fact during the merits hearing (including 34 written questions to counsel);
- (x) inviting both Parties to address questions arising from the merits hearing in post-hearing briefs; and
- (xi) requesting copies of further documents discovered to be potentially relevant in the course of deliberations.

181. In sum, the Tribunal has made broad use of its procedural powers under Articles 15, 17(2), 21(4), 22, 24(3) and 27 of the UNCITRAL Rules in order to scrutinize the Claimants' case, while at the same time providing the Claimants with a proper opportunity to meet their burden of proof. Having tested the evidence presented by the Claimants, the Tribunal is in a position to decide the extent to which such evidence may be relied upon and the weight to be accorded to it.

B. OUTSTANDING ISSUES OF JURISDICTION AND ADMISSIBILITY

182. Article 9(1) of the Treaty defines the scope of the disputes that may be submitted to an arbitral tribunal constituted under its terms, namely those "between one Contracting Party and an investor of the other Contracting Party arising in connection with investments." In order to fall within the ambit of that phrase, the Claimants are required to establish three predicates to the Tribunal's jurisdiction that the Tribunal joined to the merits in its Interim Award: (i) that the Claimants' "investments" fall within the definition of that term in Article 1(1) of the Treaty; (ii) that the Claimants are "investors of a Contracting Party" within the meaning of Article 1(2) of the Treaty; and (iii) that the dispute between the Parties arose "in connection with" those investments.²²⁰

²²⁰ Interim Award, paras. 142, 207-208.

1. Whether the Claimants’ “investments” fall within the definition of that term in Article 1(1) of the Treaty

183. Three conditions for the application of the Treaty arise from Article 1(1) of the Treaty, which is reproduced at paragraph 103 above. First, the “investments” from which the dispute arises must constitute tangible or intangible assets such as those categories of investments expressly enumerated in the sub-paragraphs to Article 1(1). Second, those “investments” must be “invested . . . in the territory of the other Contracting Party.” Third, they must be investments “in accordance with [the other Contracting Party’s] legislation.” These requirements are taken by the Tribunal in turn.

(a) Nature of the investment

184. [REDACTED]

185. [REDACTED] the Tribunal agrees, that each of the abovementioned items is covered under the categories set forth in the sub-paragraphs of Article 1(1) of the Treaty. PrivatBank’s fixed assets fall within Article 1(1)(a) as “movable and immovable property, as well as any other related property rights.” PrivatBank’s financial assets fall within Article 1(1)(b) as “monetary funds, as well as securities, commitments, stock and other forms of participation.” Finally, PrivatBank’s banking licence falls within Article 1(1)(d) as a “right to engage in commercial activity.” The Tribunal thus concludes that PrivatBank holds investments falling within the kinds of assets covered by Article 1(1) as “investments”.

186. [REDACTED]

221 [REDACTED]

[REDACTED]. Unless the Tribunal should find it necessary in order to uphold its jurisdiction to decide the claims of PrivatBank, [REDACTED]

[REDACTED]
Finilon’s investments, if any, are purely derivative of PrivatBank’s.

187.

[REDACTED]
[REDACTED] As the Tribunal concludes below, the Russian Federation had indeed expropriated PrivatBank’s investment by the time [REDACTED]
[REDACTED] Accordingly, PrivatBank’s investment had already been taken [REDACTED]
[REDACTED]
[REDACTED]. Therefore, Finilon’s claims fall outside the Tribunal’s jurisdiction. As a result, the remainder of this Award analyses only PrivatBank’s investments under the Treaty and the breaches which are alleged to have affected those investments.

(b) Situs of the investment

188. Even if the nature of PrivatBank’s investments is clearly encompassed by Article 1(1), it is not necessarily evident that all of those investments can be considered to have been “invested . . . in the territory of the [Russian Federation].” PrivatBank’s fixed assets are physically located in the Crimean Peninsula, and its banking license is given effect in the Crimean Peninsula through the combined operation of Russian and Ukrainian laws. However, determining the situs of PrivatBank’s financial assets is more complex.

189.

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

222

223

224

225

[REDACTED]

190. While, in its Interim Award, the Tribunal found that, as of 21 March 2014, the Crimean Peninsula “is to be treated for purposes of the application of the provisions of the Treaty as part of ‘the territory of the Russian Federation,’”²²⁷ there remains a question as to whether PrivatBank’s loans should be considered to be located in the Crimean Peninsula.

191. The Tribunal raised this issue with the Claimants at the merits hearing:

[W]hen we look at the definition of “investment” in Article 1(1), if there was a loan due to PrivatBank in Crimea to a branch in Crimea, why was—after the 21st of March, why was that a loan due to PrivatBank in Crimea rather than PrivatBank wherever?

[...]

[W]hen a loan was taken out, Individual X goes into a branch in Crimea and takes out a loan for the purchase of a car, why is that loan a—if I can put it in these terms—a Crimean loan rather than a Ukrainian loan which still rests with PrivatBank? In other words, it goes to the language of Article 1(1), “invested by an investor of one Contracting Party in the territory of the other Contracting Party.” Why is it a Crimean loan?²²⁸

192. [REDACTED]

[REDACTED]

193. [REDACTED]

[REDACTED]²³⁰ *Abacat*, however, concerned sovereign bonds rather than retail banking loans.

²²⁶ [REDACTED]

²²⁷ Interim Award, para. 195.

²²⁸ [REDACTED]

²²⁹ [REDACTED]

²³⁰ [REDACTED]

Given this, the Tribunal considers that the *Abaclat* reasoning is inapposite for purposes of its present analysis.²³¹

194. The critical consideration in this case is that the evidence of personal or corporate residence or the location of collateral for PrivatBank’s loans provides a clear and sufficient connection to the territory of the Crimean Peninsula. The astonishingly high level of default on the loans by Crimean borrowers after 21 April 2014, and PrivatBank’s inability to collect on the loans, is further evidence of the situs of the loans.²³² The Tribunal accordingly concludes that PrivatBank’s loans, along with its other investments, constitute investments “in the territory of” the Crimean Peninsula under Article 1(1) of the Treaty.
195. Although this is not a matter that requires decision in this Partial Award, a question that arises from the preceding analysis is how, if at all, this impacts upon the situs of PrivatBank’s *deposits*. This issue will be relevant to the assessment in the next phase of the proceedings of the quantum of compensation due to the Claimants.

(c) Legality of the investment

196. Part of the definition under Article 1(1) of the Treaty is that “investments” are “any kind of tangible and intangible assets invested by an investor of one Contracting Party in the territory of the other Contracting in accordance with its legislation.”²³³
197. The Tribunal understands this “in accordance with . . . legislation” or “legality” clause as requiring compliance with the law of the host State at the time when the investment is made. This reading is consistent with the view taken of this clause of the Treaty by the *Ukrnafta* and *Stabil* tribunals,²³⁴ as well as with the interpretation consistently given to such clauses in investment treaty jurisprudence (noting however that each interpretation is necessarily conditioned on the specific phrasing of the legality clause at hand).²³⁵

²³¹ Although the Tribunal is aware of another case involving private loans, *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, the parties to that case appear to have both accepted the *Abaclat* majority’s approach to locating the *situs* of the investment, but simply disagreed on its application to their case. *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, Award of 19 December 2014, para. 206.

²³² See paragraph 89 above. [REDACTED] Reuters, *Crimean savers ask: Where’s our money?*, 20 November 2014 (CE-100).

²³³ Emphasis added.

²³⁴ *Ukrnafta*, Award on Jurisdiction of 26 June 2017, para. 218; *Stabil*, Award on Jurisdiction of 26 June 2017, para. 214.

²³⁵ See e.g. *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, paras. 123-124; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case

198. In its Interim Award, the Tribunal found that the Treaty became opposable to the Russian Federation as regards Ukrainian investors in the Crimean Peninsula on 21 March 2014 and that, as of that date, the Crimean Peninsula is to be treated for purposes of the application of the provisions of the Treaty as part of the “territory of the Russian Federation.”²³⁶ Accordingly, for purposes of Article 1(1), PrivatBank’s investments are deemed to have been made in the territory of the Russian Federation as of 21 March 2014, such that the question for determination by the Tribunal with respect to the legality requirement is whether PrivatBank’s investments were in accordance with Russian law as at that date.²³⁷
199. From the perspective of Russian law, on 21 March 2014, PrivatBank’s Crimean investments were situated on Russian territory and were therefore subject to the entire body of Russian law.²³⁸ At the same time, in the very same federal constitutional law by which it incorporated the Crimean Peninsula into the Russian Federation (the Incorporation Law), the Russian Federation made specific provision for the integration of the new constituent entities into the Russian Federation.
200. For present purposes, Articles 6, 10, 12 and 17 of the Incorporation Law are of particular relevance:

Article 6. Transition period

As of the day the Republic of Crimea is accepted into the Russian Federation and new constituent entities are established in the Russian Federation and through January 1, 2015, a transitional period shall be in effect, during which issues shall be resolved regarding the integration of the new constituent entities of the Russian Federation into the economic, financial, credit and legal systems of the Russian Federation and into the system of state agencies of the Russian Federation.

[. . .]

Article 10. Functioning of State and Local Agencies, Enterprises and Organizations in the Republic of Crimea and the Federal city of Sevastopol

No. ARB(AF)04/6, Award of 16 January 2013, para. 167; *ECE Projektmanagement Int’l GmbH v. Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, paras. 3.165-3.166; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, paras. 185-193; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award of 10 December 2014, para. 331; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of 28 July 2015, para. 420; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award of 15 March 2016, paras. 5.54-5.56; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction of 8 March 2017, paras. 17, 373-377.

²³⁶ Interim Award, para. 195.

²³⁷ The Tribunal’s approach is consistent with that adopted in *Ukrnafta*, Award on Jurisdiction of 26 June 2017, para. 222; *Stabil*, Award on Jurisdiction of 26 June 2017, para. 218.

²³⁸ See also Federal Constitutional Law of the Russian Federation No. 6-FKZ, “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol,” 21 March 2014, Art. 23 (CE-230).

State and local agencies, enterprises and organizations functioning in the Republic of Crimea and the federal city of Sevastopol as of the day the Republic of Crimea is accepted into the Russian Federation and new constituent entities are established in the Russian Federation shall continue to operate without changes to their previous form of incorporation until their legal status is decided under Russian Federation legislation.

[. . .]

Article 12. Validity of Documents Issued by State and other Official Agencies of Ukraine and by State and other Official Agencies of the Republic of Crimea and the City of Sevastopol

Documents issued by state and other official agencies of Ukraine, state and other official agencies of the Autonomous Republic of Crimea, and state and other official agencies of the city of Sevastopol shall remain valid in the Republic of Crimea and federal city of Sevastopol, including documents confirming civil status, education, title, right of use, right to receive pensions, benefits, compensation and other forms of social payments, right to obtain medical care, and permit documents (licenses, except licenses to perform banking transactions and licenses (permits) for the operation of non-credit financial organizations). There is no limitation on the period of validity of such documents and no confirmation by state agencies of the Russian Federation, state agencies of the Republic of Crimea, or state agencies of the federal city of Sevastopol is required, unless otherwise required by the documents in question or the nature of the relationship.²³⁹

[. . .]

Article 17. Organization of Banking in the Republic of Crimea and the Federal city of Sevastopol

1. As of the day the Republic of Crimea is accepted into the Russian Federation and new constituent entities are established in the Russian Federation, banking transactions in the Republic of Crimea and the federal city of Sevastopol shall be performed by banks holding licenses from the Bank of Russia, except for the instance provided for in Part 2 of this Article.

2. Prior to January 1, 2015, banks registered and/or engaging in banking activity in the Republic of Crimea and the federal city of Sevastopol with licenses issued by the National Bank of Ukraine that were valid as of March 16, 2014 may perform banking transactions with consideration for specific issues established by Russian Federation legislation. Such banks may, prior to January 1, 2015, obtain Bank of Russia licenses using the procedure and on the terms established in Russian Federation legislation.

[. . .]

201. These provisions show an intention on the part of the Russian Federation explicitly to regularize the situation of Ukrainian entities and rights-holders under Ukrainian law, at least until the expiration of the transition period or until further legislation by the Russian Federation. The Incorporation Law thus appears to have been intended to avoid the potential for a “legal vacuum” in the period following 21 March 2014.

²³⁹ Federal Constitutional Law of the Russian Federation No. 6-FKZ, “On Accepting the Republic of Crimea into the Russian Federation and Establishing New Constituent Entities in the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol,” 21 March 2014 (CE-230). While this law was repeatedly amended after 21 March 2014, its initial version is quoted here, being the only version relevant to a consideration of the legality requirement under Article 1(1) of the Treaty. The Tribunal also notes that the Claimants have provided two translations of the Incorporation Law (CE-47 and CE-230), but does not consider the differences between the translations to be material for this case.

206. As for the second condition, the Tribunal is unaware of any limitation on PrivatBank's rights to its investments under Russian law as at 21 March 2014 that would have prevailed over the Incorporation Law and Russian conflict of laws rules.
207. The Tribunal asked its Russian law expert, Professor Skvortsov, to analyse "the status under Russian law of investments by Ukrainian nationals in Crimea and/or the Russian Federation in the period February 1, 2014 to April 15, 2015."²⁴⁵ In response, Professor Skvortsov raised two issues, which are addressed in turn below.
208. First, Professor Skvortsov opined that PrivatBank could not exercise its rights to its investment as of 1 January 2015, as the Crimean Banking Law of 2 April 2014 required that, to continue with their activities, Ukrainian banks register and obtain banking licences in Russia by 1 January 2015.²⁴⁶ The Tribunal notes that, according to Professor Skvortsov himself, these requirements entered into force only on 1 January 2015. Accordingly, just as any requirement of Russian law that arose after PrivatBank's investments are deemed to have been made in the Russian Federation on 21 March 2014, it is irrelevant to an assessment of legality under Article 1(1) of the Treaty. In any event, as will be seen below, 1 January 2015 is subsequent to the events invoked by the Claimants as the basis of their claim for expropriation.
209. Second, in his first report, Professor Skvortsov opined that:

In order for [assets invested in the Crimean Peninsula by Ukrainian investors before 1 February 2014] to be qualified as "investments" in the meaning of the [Treaty] and the [Russian Foreign Investment Law], they have to be reinvested (taken out the Russian Federation's economy and jurisdiction) and newly invested into the Russian Federation's economy subject to completing the admittance procedures established by the Russian law.²⁴⁷

210. At the jurisdictional hearing, Professor Skvortsov further explained that, to be properly characterized as "investments" in the Russian Federation, PrivatBank's assets should have been taken out of and "reinvested" in the Crimean Peninsula, because "investments is something that we put into" through a "fresh investment of money."²⁴⁸
211. To the extent that Professor Skvortsov's comment was informed by a view of the meaning of "investments" under the Treaty, it does not address a question of Russian law and can have no impact on the Tribunal's assessment of whether PrivatBank's investments were "in accordance with . . . legislation" of the Russian Federation under Article 1(1) of the Treaty. Moreover, it

²⁴⁵ Professor Skvortsov's Expert Terms of Reference, 23 May 2016, para. 3.1.1.

²⁴⁶ First Skvortsov Report, paras. 137-152; Second Skvortsov Report, pp. 6-8. [REDACTED]

²⁴⁷ First Skvortsov Report, para. 133.

²⁴⁸ Hearing Tr., 13 July 2016 at 255-256 (cross-examination of Professor Skvortsov).

would conflict with the findings already made by the Tribunal in its Interim Award regarding the proper interpretation of the Treaty under the VCLT.

212. As for Russian law, during the jurisdictional hearing, when questioned by the Claimants' counsel, Professor Skvortsov was unable to refer to any provision of Russian law in support of such a requirement.²⁴⁹ At the merits hearing, Professor Skvortsov explained that there was no mandatory requirement under Russian law for PrivatBank to "re-invest" its assets in the Russian Federation.²⁵⁰ He clarified that the re-investment was mentioned in previous testimony not as a requirement for compliance with Russian law but as one of the options open to PrivatBank to transform itself into a foreign investor "in legal terms"; that is, to give it the legal status of foreign investor under the Foreign Investment Law.²⁵¹
213. As the Claimants in the present proceedings have neither made any claim under the Foreign Investment Law nor otherwise relied on that law, the Tribunal considers it irrelevant whether or not PrivatBank qualifies as a foreign investor under that law. The Tribunal therefore concludes that Professor Skvortsov's comment regarding the need for "re-investment" of PrivatBank's assets in the Crimean Peninsula has no bearing on its determination of whether PrivatBank's investments were in accordance with Russian law as at 21 March 2014.
214. In view of the above considerations, the Tribunal finds that PrivatBank's investments were "in accordance with . . . legislation" of the Russian Federation as at 21 March 2014 and thus met the legality requirement set forth in Article 1(1) of the Treaty.

2. Whether PrivatBank is an "investor of a Contracting Party" within the meaning of Article 1(2) of the Treaty

215. Article 1(2) of the Treaty, reproduced in full at paragraph 103 above, sets out the Treaty's definition of the phrase "investor of a Contracting Party." As noted in the Interim Award, the questions for the Tribunal pursuant to this provision are whether Privatbank is (i) a "legal entity constituted in accordance with the legislation in force in the territory of [Ukraine]"; and

²⁴⁹ Hearing Tr., 13 July 2016 at 252-253 (cross-examination of Professor Skvortsov). *See also* Hearing Tr., 2 November 2017 at 268:11-12 (examination of Professor Skvortsov) ("This imperative requirement is not contained in the Russian legislation.").

²⁵⁰ Hearing Tr., 2 November 2017 at 268:11-21. *See also* Second Skvortsov Report, p. 9, [REDACTED]

²⁵¹ Hearing Tr., 2 November 2017 at 269:2-7, 270:4-15. *See also* Hearing Tr., 13 July 2016 at 277 (cross-examination of Professor Skvortsov).

(ii) “competent in accordance with the legislation of [Ukraine], to make investments in the territory of the [Russian Federation].”²⁵²

216. Having reviewed the documents submitted by the Claimants and the evidence of the experts on Ukrainian law, ██████████ and Dr. Tsirat, the Tribunal is satisfied that PrivatBank is a legal entity constituted in accordance with Ukrainian law. The Claimants have shown that PrivatBank has been registered in Ukraine’s Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations since 27 January 2005.²⁵³ The Tribunal notes that, according to the Ukrainian law experts, all records introduced in this register may be treated as reliable.²⁵⁴ The Claimants have also shown that PrivatBank was registered in Ukraine’s State Register of Banks, in addition to holding a banking license issued by the National Bank of Ukraine.²⁵⁵
217. The Tribunal also finds that PrivatBank’s nationalisation by Ukraine in 2016, and its recent reorganization, have no impact on its status as an “investor” under the Treaty, as these events took place after both the Treaty breaches (as will be seen below) and the commencement of these proceedings.
218. Moreover, the Tribunal considers, as also supported by jurisprudence,²⁵⁶ that, even if PrivatBank had been a State-owned entity at any of the times relevant to a jurisdictional assessment, this circumstance would not have affected the Tribunal’s jurisdiction, as there is nothing in the Treaty that would deprive State-owned enterprises acting in their commercial capacity of access to investor-State arbitration under Article 9 of the Treaty. On the contrary, as held by the Paris Court of Appeal in review of an award in favour of a State-owned claimant under the same Treaty at issue in these proceedings, “[i]t results neither from [Article 31 of the VCLT], nor from any principles of interpretation, that it is appropriate to make a distinction where the text does not; therefore, there is no basis to add to Article 1.2 of the [Treaty] a requirement, which this provision does not contain, regarding the ‘private’ character of the investor.”²⁵⁷ The Tribunal accepts this

²⁵² Interim Award, para. 198.

²⁵³ Extract from the Unified State Register of Legal Entities, Sole Proprietorships and Civic Organizations, 1 April 2016 (CE-187). ██████████

²⁵⁴ ██████████

²⁵⁵ National Bank of Ukraine, Banking License No. 22 issued on 19 March 1992, later re-issued on 5 October 2011 (CE-16); Extract from the State Register of Banks ██████████

²⁵⁶ See *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 17; *The State of Ukraine v. OAO Tatneft*, Paris Court of Appeal, Case No. 14/17964 (joined with Case No. 14/20245), Judgment of 29 November 2016, paras. 15-17.

²⁵⁷ *The State of Ukraine v. OAO Tatneft*, Paris Court of Appeal, Case No. 14/17964 (joined with Case No. 14/20245), Judgment of 29 November 2016, para. 15.

analysis. After its nationalisation, PrivatBank remained a Ukrainian legal entity and its charter, approved by the Ministry of Finance of Ukraine, stated that it was a “commercial bank” and a “legal entity under private law, formed in accordance with the laws of Ukraine.”²⁵⁸

219. As for the requirement under Article 1(2) of the Treaty that PrivatBank be “competent in accordance with the legislation of [its] Contracting Party, to make investments in the territory of the other Contracting Party,” the Tribunal found in its Interim Award that it is a requirement of capacity to enter into certain legal relations, which PrivatBank has met at all relevant times.²⁵⁹
220. At the same time, the Tribunal observed that its understanding of the “competency” requirement is based on the revised translation of the Treaty provided by the Claimants, while their first translation, which refers to investors being “legally authorized”, rather than “competent”, to make investments, might suggest that, beyond the question of capacity, the Tribunal should also investigate whether any restrictions applied under Ukrainian law to the making of investments by PrivatBank in the Crimean Peninsula. In the Interim Award, some aspects of this question were deferred to the next stage of the proceedings.²⁶⁰ Having now fully considered this question, the Tribunal is in a position to conclude that PrivatBank was legally authorized to make investments in the Crimean Peninsula at all relevant times.
221. Similarly to its finding in the Interim Award in respect of Finilon, the Tribunal accepts the expert evidence that Ukrainian law did not contain any prohibition on PrivatBank making or maintaining investments in the Crimean Peninsula.²⁶¹ Further, having considered the experts’ evidence concerning two specific resolutions of the National Bank of Ukraine (Resolution No. 699 dated 3 November 2014 and Resolution No. 260 dated 6 May 2014),²⁶² the Tribunal finds that neither of these resolutions deprives the Tribunal of jurisdiction over PrivatBank.
222. The Tribunal has already found in its Interim Award, on the basis of expert evidence, that Resolution No. 699 “should be understood as prohibiting only monetary transfers to the Crimean

²⁵⁸ Charter of PrivatBank, 19 April 2017, as approved by Order of the Ministry of Finance of Ukraine No. 409 dated 3 April 2017, title and Art. 2.1 (CE-327).

²⁵⁹ Interim Award, para. 201.

²⁶⁰ Interim Award, para. 202.

²⁶¹ [REDACTED]

²⁶² Resolution of the National Bank of Ukraine No. 699 “On Application of Certain Rules of Currency Legislation during Temporary Occupation in the Territory of the Free Economic Zone ‘Crimea’,” 3 November 2014 [REDACTED] National Bank of Ukraine Regulation No. 260 “On Revocation and Cancellation of Banking Licenses and General Licenses for Conducting Operations with Foreign Currency of Certain Banks and Termination of Branches Located in the Autonomous Republic of Crimea and City of Sevastopol,” 6 May 2014 [REDACTED]

Peninsula and only those made after the Resolution came into force.”²⁶³ It is therefore plain that PrivatBank was not in breach of this resolution, as its investments in the Crimean Peninsula (monetary or otherwise) were all made (and, as will be seen below, expropriated) before the resolution came into force.

223. Similarly, Resolution No. 260, which mandated Ukrainian banks to terminate the operations of their Crimean branches within a month of its entry into force on 6 May 2014,²⁶⁴ is irrelevant to a determination of PrivatBank’s status as an “investor.” As will be seen below, Resolution No. 260 also came into force only after the expropriation of PrivatBank’s investments and the resulting cessation of its banking operations in the Crimean Peninsula.

224. In summary, the Tribunal finds that PrivatBank is an “investor of a Contracting Party” within the meaning of Article 1(2) of the Treaty.

3. Whether the dispute between the Parties arose “in connection with” PrivatBank’s investments

225. In its Interim Award, the Tribunal found that there exists a dispute between the Parties within the meaning of Article 9 of the Treaty, arising in connection with what the Claimants consider to be their protected investments under the Treaty.²⁶⁵ [REDACTED]

[REDACTED]

²⁶³ Interim Award, para. 203.

²⁶⁴ National Bank of Ukraine Regulation No. 260 “On Revocation and Cancellation of Banking Licenses and General Licenses for Conducting Operations with Foreign Currency of Certain Banks and Termination of Branches Located in the Autonomous Republic of Crimea and City of Sevastopol,” 6 May 2014 [REDACTED], para. 5.

²⁶⁵ Interim Award, para. 210.

²⁶⁶ [REDACTED]

²⁶⁷ [REDACTED]

226. The Tribunal has now also found that PrivatBank’s claimed “investments” fall within the definition of that term in Article 1(1). It follows that there exists a dispute between the Parties within the meaning of Article 9 of the Treaty, arising in connection with PrivatBank’s investments.

4. Conclusion

227. In its Interim Award, the Tribunal found that: (i) the Russian Federation has assumed obligations under the Treaty in respect of Ukrainian investors and their investments in the Crimean Peninsula as of 21 March 2014; (ii) there is a dispute between the Parties arising in connection with what the Claimants allege to constitute “investments” under the Treaty; and (iii) the Claimants have satisfied the notice and negotiation requirements under Article 9 of the Treaty.²⁶⁸

228. In the preceding sections of this Award, the Tribunal, while finding that Finilon’s claims fall outside the Tribunal’s jurisdiction, has further concluded that: (i) PrivatBank’s “investments” fall within the definition of that term in Article 1(1); (ii) PrivatBank is an “investor of a Contracting Party” for the purposes of Article 1(2) of the Treaty; and (iii) the dispute between the Parties arose “in connection with” PrivatBank’s investments.

229. The Tribunal is conscious that some investment treaty tribunals have considered that, in order to qualify as protected investments, invested assets must also meet criteria arising from an inherent or objective meaning of the term “investment”, such as risk, duration and an allocation of resources to the host State.²⁶⁹ The definition of “investment” under Article 1(1) of the Treaty, addressed above, leaves little room for a conclusion that any further conditions for the application of the Treaty were intended by the Contracting Parties. For the avoidance of doubt, the Tribunal confirms that, to the extent that any such criteria are relevant under the Treaty, the Tribunal finds that they are fully met by PrivatBank’s investment.

230. The Tribunal notes that there remains a residual jurisdictional issue that arises in connection with PrivatBank’s resort to local remedies. The Tribunal addresses that issue at paragraphs 299-300 below. In the light of the preceding analysis, and subject to its further conclusion on that particular issue below, the Tribunal finds that it has jurisdiction over all of PrivatBank’s claims and that all of PrivatBank’s claims are admissible.

²⁶⁸ Interim Award, p. 75.

²⁶⁹ Regarding the inherent meaning of the term “investment” in a non-ICSID case see, for example, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07, Award of 26 November 2009, para. 207.

C. ALLEGED BREACHES OF THE BIT

231. The Tribunal now turns to the merits of PrivatBank’s claims under the Treaty. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In view of this submission, the Tribunal addresses the Article 5 claim first, before turning to the claims under Articles 2 and 3.

1. Article 5 of the Treaty

232. Article 5 of the Treaty, reproduced in full at paragraph 104 above, prohibits the expropriation of investments made by investors of one Contracting Party in the territory of the other Contracting Party, except in compliance with the conditions enumerated in that article.

233. As an initial matter, the Tribunal notes that it considers PrivatBank’s investments in the Crimean Peninsula, as identified at paragraph 184 above, to constitute, as of 21 March 2014, “investments made by investors of one Contracting Party in the territory of the other Contracting Party” within the meaning of Article 5 of the Treaty. The Tribunal has queried whether the specific phrasing of this article imposes an additional temporal requirement for its application beyond those already canvassed under Article 1.²⁷¹ In the Tribunal’s view, it does not. In its Interim Award, the Tribunal has already held that “the context of the Treaty as a whole discloses an overall intention to cover all qualifying investments, without regard to when or how such investments may have become qualifying investments under the Treaty.”²⁷² In these circumstances, it would be highly unusual for Article 5 to protect only a subset of the investments covered by the Treaty as a whole. Having found that PrivatBank and its investments fall within the scope of the application of the

²⁷⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁷¹ [REDACTED]

²⁷² Interim Award, para. 230.

Treaty under Article 1 thereof, it follows, in the view of the Tribunal, that PrivatBank is entitled to the Treaty's protections in respect of its Crimean investments, including under Article 5.

234. In order to determine whether there has been a breach of Article 5 in respect of PrivatBank's investments, the Tribunal must determine whether these investments were expropriated and, if they were expropriated, whether the expropriation complied with the conditions set out in Article 5. Before addressing these questions in turn below, the Tribunal will also consider whether the alleged expropriatory measures were attributable to the Russian Federation. Finally, if the answer to these three questions is in the affirmative, the Tribunal will consider the question of local remedies.

(a) Whether the alleged expropriatory conduct is attributable to the Russian Federation

235. [REDACTED]

[REDACTED] The Tribunal examines the character of the individuals who seized PrivatBank's offices and cash vaults (referred to in item (i) above) in detail below, as this requires some elaboration. First, however, the Tribunal addresses the conduct of the actors under items (ii), (iii) and (iv).

236. In the Tribunal's view, the conduct of each of the actors listed under items (ii), (iii) and (iv) in the immediately preceding paragraph is undeniably attributable to the Russian Federation. Under customary international law, as reflected in Article 4 of the ILC Articles, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." Moreover, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State."
237. The Central Bank of the Russian Federation qualifies without a doubt as a State organ under this definition. It is the highest authority in the Russian Federation on monetary regulation, carries out Russian monetary policy, supervises the commercial banking and national payment systems,

and channels 75 percent of its profit into the Russian budget.²⁷³ Accordingly, its conduct in issuing the 21 April 2014 Central Bank Resolution is attributable to the Russian Federation.

238. As regards the Crimean authorities—*i.e.*, the Simferopol Central District Court and the State Council of the Republic of Crimea—they became State organs of the Russian Federation at the latest on 21 March 2014, when the Russian Federation enacted the Incorporation Law providing for the admittance into the Russian Federation of two new constituent entities—the Republic of Crimea and the federal city Sevastopol.²⁷⁴ With respect to State agencies and courts in the new constituent entities, the Incorporation Law (as amended on 27 May 2014 and in force during the remainder of 2014)²⁷⁵ provided:

Article 7. Creation of state agencies of the Republic of Crimea and the federal city Sevastopol.

1. Elections to the State Council of the Republic of Crimea (the parliament of the Republic of Crimea) and the Legislative Assembly of the city of Sevastopol shall be held on the second Sunday in September 2014. [...]

2. Prior to the election of state agencies in the Republic of Crimea and in the federal city of Sevastopol, such functions shall be performed, respectively, by the State Council of the Republic of Crimea (parliament of the Republic of Crimea), the Council Of Ministers of the Republic of Crimea, and the Legislative Assembly of the city of Sevastopol.

[...]

Article 9. Establishment of Russian Federation Courts in the Republic of Crimea and the Federal city of Sevastopol. Administration of Justice during the Transition Period

1. During the transition period, Russian Federation courts (federal courts) shall be established in accordance with Russian Federation court system legislation in the Republic of Crimea and the federal city of Sevastopol, with regard for the administrative and territorial division established by the legislative (representative) state authority of the Republic of Crimea and the legislative (representative) state authority of the federal city of Sevastopol, respectively.

[...]

5. Prior to the creation of Russian Federation courts in the Republic of Crimea and the federal city of Sevastopol, justice shall be administered in these regions on behalf of the Russian Federation by the courts in existence on the day the Republic of Crimea is accepted into the Russian Federation and new constituent entities are established in the Russian Federation.

[...]

²⁷³ Constitution of the Russian Federation, Art. 75, as reprinted in Peter B. Maggs, Olga Schwartz, and William Burnham, “Constitution” in *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* (6th ed. 2015) (CE-107); Federal Law of the Russian Federation No. 86-FZ “On the Central Bank of the Russian Federation (Bank of Russia),” 10 July 2002, Arts. 4, 26 (CE-379).

²⁷⁴ Incorporation Law, Arts. 1, 2 (CE-253).

²⁷⁵ Between 21 March and 21 May 2014, the only difference with the provision quoted here was that Article 7(1) provided: “Elections to the governing bodies of the Republic of Crimea and the governing bodies of the federal city of Sevastopol shall be held on the second Sunday of September 2015.”

239. On this basis, the Tribunal has no difficulty concluding that the conduct of the Simferopol Central District Court in issuing the 21 April 2014 Court Decision and of the State Council of the Republic of Crimea in issuing the amendments of 3 September and 9 October 2014 to the Nationalisation Decree is attributable to the Russian Federation.

240. As regards item (i) in paragraph 235 above, the question of whether the conduct of the individuals who seized PrivatBank's offices and cash vaults in Sevastopol and Simferopol on 18 and 19 April 2014 is less straightforward. [REDACTED]

241. In the Tribunal's view, the conduct in question is attributable to the Russian Federation under the customary international law tests reflected in Articles 5 and 11 of the ILC Articles. Article 5 of the ILC Articles provides:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

242. Article 5 sets two conditions for attribution—that the person or entity at issue be “empowered by the law of that State to exercise elements of the governmental authority” and be “acting in that capacity in the particular instance.” The commentary to Article 5 mentions “police powers” as an “element of governmental authority.”²⁷⁸

243. Although the individuals carrying out the seizures of 18 and 19 April 2014 did not introduce themselves or specifically state on whose authority they were acting, the Tribunal considers that there is sufficient evidence, as described below, to conclude that these individuals were empowered by Russian law to exercise elements of the governmental authority and were acting in that capacity in these particular instances.

244. [REDACTED]

²⁷⁶ [REDACTED]

²⁷⁷ [REDACTED]

²⁷⁸ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, included in the Report of the International Law Commission to the General Assembly, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), pp. 42-43.

[REDACTED]

245. The circumstances surrounding the seizures of the offices and vaults are also telling. The seizures began on the very day when the oversight committee of the Russian Central Bank took the internal decision (which prompted the 21 April 2014 Central Bank Resolution) to prohibit any further operations in the Crimean Peninsula by PrivatBank.²⁸⁴ Moreover, on 21 April 2014, the mid-management employees of PrivatBank were asked to gather at the main office in Simferopol, which had been sealed off on 18 April, to meet with representatives of the FZV, a fund created pursuant to a federal law of the Russian Federation (the FZV Law) principally to acquire the rights of, and pay compensation to, depositors of Crimean banks the operations of which were terminated by the Russian Central Bank.²⁸⁵ [REDACTED]

[REDACTED]

279 [REDACTED]
280 [REDACTED]
281 [REDACTED]
282 [REDACTED]
283 [REDACTED]

²⁸⁴ Resolution of the Central Bank of the Russian Federation No. PH-33-1 “On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance,” 21 April 2014 (CE-60).

²⁸⁵ Federal Law of the Russian Federation No. 39-FZ “On the Protection of the Interests of Natural Persons Having Deposits in Banks and Bank Standalone Business Units Registered and (or) Operating in the Republic of Crimea and in the Federal City of Sevastopol,” 2 April 2014, Arts. 4, 6-8 (CE-258).

[. . .]

delivering offenders to internal-affairs authorities.²⁸⁹

248. The Ministry of Internal Affairs of the Autonomous Republic of Crimea was in charge of financing and oversight in respect of the People’s Militia.²⁹⁰
249. The above circumstances suffice for the Tribunal to conclude that the individuals carrying out the seizures of 18 and 19 April 2014 were empowered by Russian law to exercise elements of the governmental authority and were acting in that capacity in these particular instances, as required by Article 5 of the ILC Articles.
250. Moreover, under the test reflected in Article 11 of the ILC Articles, “[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.” In the present case, the Tribunal considers that the Russian Federation has acknowledged and adopted as its own the acts of the individuals who seized PrivatBank’s offices and vaults on 18 and 19 April 2014 when: (i) the FZV took physical control of PrivatBank’s premises (as described at paragraph 245 above); and (ii) the Simferopol Central District Court (through its decisions of 21 April, 4 June and 16 September 2014) ordered the transfer of all of PrivatBank’s assets to the FZV (as described at paragraphs 88, 94 and 97 above and 262-263 below).²⁹¹ Thus, to the extent that there may be any doubt remaining as to the identity and role of these individuals under Article 5 of the ILC Articles, the Tribunal concludes that their conduct remains attributable to the Russian Federation under Article 11 of the ILC Articles.

(b) Whether PrivatBank’s investments in the Crimean Peninsula were expropriated

251. Article 5(1) of the Treaty provides that investments of foreign investors “shall not be expropriated, nationalized or subject to other measures equivalent in effect to expropriation.” In the Tribunal’s view, this language encompasses both the deprivation of title to property and any other measures having an effect equivalent to deprivation of title, such as those which render title

²⁸⁹ Supreme Council of the Autonomous Republic of Crimea, Order No. 1734-6/14 “Statute on the People’s Militia of Crimea,” 11 March 2014, Section II, Arts. 2-3 (CE-257).

²⁹⁰ Supreme Council of the Autonomous Republic of Crimea, Order No. 1734-6/14 “Statute on the People’s Militia of Crimea,” 11 March 2014, Section IV and V (CE-257).

²⁹¹ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62); Decision of the Simferopol Central District Court, Case No. 2-311/14, 4 June 2014 (CE-275); Decision of the Simferopol Central District Court, Case No. 2-311/14, 3 July 2014 (CE-281).

useless or deprive the owner of the benefit and economic use of the property. This conclusion follows from the plain language of Article 5 and is consistent with long-settled jurisprudence addressing the question of expropriation, ranging from *Starrett Housing*²⁹² to *Santa Elena*²⁹³ and more recent investment treaty jurisprudence.

252. Thus, in a frequently cited passage from *Starrett Housing*, the Iran-United States Claims Tribunal held that

it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.²⁹⁴

253. In similar fashion, the tribunal in *Santa Elena* stated that “a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.”²⁹⁵

254. Tribunals in subsequent investment treaty arbitrations, while using slightly different formulations from case to case, have also consistently held that an expropriation arises, even if the owner is not deprived of title, when the interference with the investment is such as “substantially to deprive the investor of the economic value, use or enjoyment of its investment.”²⁹⁶ These have included

²⁹² *Starrett Housing Corporation, Starrett Systems, Inc. and Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran and Bank Mellat*, IUSCT Case No. 24, Interlocutory Award of 19 December 1983.

²⁹³ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000.

²⁹⁴ *Starrett Housing Corporation, Starrett Systems, Inc. and Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran and Bank Mellat*, IUSCT Case No. 24, Interlocutory Award of 19 December 1983, pp. 19-20 (emphasis added).

²⁹⁵ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 77.

²⁹⁶ *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 65. See also *Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 102 (“under international law, expropriation requires a ‘substantial deprivation’”); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 103 (“... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007, para. 210 (“Art. 5 of the BIT is applicable only if there was a substantial deprivation of the entire investment or a substantial part of the investment.”); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009, para. 279, quoting *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 116 (“For present purposes, it may be useful to refer to the formulation of this standard that is found in the *Tecmed v. Mexico* award: ‘... It is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that ‘... any form of exploitation thereof...’ has disappeared; i.e. the economic value of the use, enjoyment or

cases interpreting and applying provisions of investment treaties containing definitions of expropriation similar (if not identical) to the definition found in Article 5(1) of the Treaty. For example, some of these tribunals interpreted and applied Article 13 of the Energy Charter Treaty, which refers to “measures having effect equivalent to nationalisation or expropriation,”²⁹⁷ while others interpreted and applied Article 1110 of the North American Free Trade Agreement, which refers to “measures tantamount to nationalization or expropriation,”²⁹⁸ with the word “tantamount” having been consistently understood to have the same meaning as “equivalent”.²⁹⁹

255. Article 5(1) thus encompasses not only a deprivation of title but also a deprivation of use. Moreover, for a deprivation of use to amount to an expropriation, the deprivation must not be “merely ephemeral.”³⁰⁰

256. [REDACTED]

disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed . . . Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effect.”); *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, para. 14.3.1 (“For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.”).

²⁹⁷ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009; *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010.

²⁹⁸ *Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

²⁹⁹ *Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 104; *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, para. 285.

³⁰⁰ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, paras. 77-81, referring to *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of The Islamic Republic Of Iran, Civil Aviation Organization, Plan And Budget Organization, Iranian Air Force, Ministry Of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank Of Iran And Holland*, IUSCT Case No. 7 (141-7-2), Award of 22 June 1984, p. 225 (“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.” (emphasis in *Santa Elena*)). See also *International Technical Products Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 302 (196-302-3), Award of 28 October 1985, pp. 344-345; *Phillips Petroleum Company Iran v. Islamic Republic of Iran and the National Iranian Oil Company*, IUSCT Case No. 39 (425-39-2), Award of 29 June 1989, para. 101; *S.D. Myers Inc. v. Government of Canada*, Partial Award of 13 November 2000, para. 283; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 193.

[REDACTED]

257. Having considered the full narrative as it emerges from the record of this arbitration, the Tribunal considers that PrivatBank’s investment was expropriated through a series of physical and regulatory measures in the period of 18-21 April 2014.³⁰³ [REDACTED]

[REDACTED]

[REDACTED] On 21 April 2014, the Central Bank of the Russian Federation issued its 21 April 2014 Resolution (reproduced in full at paragraph 86above) “terminating the activities of [PrivatBank] on the territory of the Republic of Crimea and the City of Sevastopol.”³⁰⁵

258. These actions of 18-21 April 2014 were clearly interconnected, given that, by 21 April 2014, the FZV had taken possession of PrivatBank’s main office in Simferopol and that, pursuant to the FZV’s enabling legislation, a decision by the Russian Central Bank was the first step of the process that would allow the FZV to acquire the rights (or claims) of depositors of that bank, which it could then seek to enforce.³⁰⁶ Indeed, in its annual report for 2014, the FZV stated that,

³⁰¹ [REDACTED]

³⁰² [REDACTED]

³⁰³ While the evidence, as described at paragraphs 76-77 above, shows that PrivatBank’s operations were to some extent already disrupted from late February to mid-April 2014, those disruptions appeared to be temporary and did not rise to the level of an expropriation.

³⁰⁴ [REDACTED]

³⁰⁵ Central Bank of the Russian Federation, Resolution No. PH-33-1 “On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance,” 21 April 2014 (CE-60).

³⁰⁶ Federal Law of the Russian Federation No. 39-FZ “On the Protection of the Interests of Natural Persons Having Deposits in Banks and Standalone Business Units Registered and/or Operating in the Republic of Crimea and in the Federal City of Sevastopol,” 2 April 2014, Arts. 6-7 (CE-258); FZV Annual Report 2014, p. 3 (CE-251 (expanded)).

on 21 April 2014, “[t]he Bank of Russia adopt[ed] the first decisions to close branches of Ukrainian lending institutions in the [Crimean Federal District], which became the basis for the Fund to acquire rights (or claims) on deposits and to make compensation payments.”³⁰⁷

259. [REDACTED]

The Tribunal agrees that this approach, which is supported by investment treaty jurisprudence,³⁰⁹ is appropriate in the present case, as all of the components of the business go to its value as a going concern and PrivatBank’s loss as a result of breaches of the Treaty.

260. PrivatBank’s investments consisted, in essence, of a banking business. Without the ability to manage its Crimean business, which was lost upon the seizure of its main offices in Sevastopol and Simferopol on 18-19 April 2014, and without the right to pursue its activities in the Crimean Peninsula, of which it was deprived by the 21 April 2014 Central Bank Resolution, PrivatBank was, in the words of the *Santa Elena* tribunal, substantially deprived of “access to the benefit and economic use”³¹⁰ of its entire investment. As of the issuance of the 21 April 2014 Central Bank Resolution, although PrivatBank may have nominally retained title to real estate and contractual rights under its loan agreements, this property had little residual value to it.

261. [REDACTED]

[REDACTED] The 21 April 2014 Court Decision (reproduced in relevant part in paragraph 88 above), transferred “the property complex consisting of movable and immovable property belonging to [Privatbank] by right of ownership, as well as other rights arising from agreements (such as leasing agreements and other rights, including rights of claim)” to the FZV as a “trust manager”.³¹¹

262. On its face, the 21 April 2014 Court Decision granted “injunctive relief”, which it explained is available when “the failure to impose such measures could hinder or render impossible the

³⁰⁷ FZV Annual Report 2014, p. 4 (CE-251 (expanded)).

³⁰⁸ [REDACTED]

³⁰⁹ See e.g. *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 141; *Telenor Mobile Communications v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 67; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 6.58; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, para. 257; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 283.

³¹⁰ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 77.

³¹¹ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

execution of the court's decision, that is, the purpose is to prevent potential difficulties that could rise in connection with the execution of the decision."³¹² The Tribunal's expert on Russian law opined that such decisions "do not decide a case on the merits" and are "always of a temporary nature," as they "cease upon completion of the legal proceedings."³¹³ Nevertheless, the Tribunal observes that, in the present case: (i) the 21 April 2014 Court Decision stated that the injunctive relief would continue "until the conditions underlying the failure to fulfill the obligations of the bank to the depositors (creditors) no longer exist," thus apparently prejudging the outcome of the case;³¹⁴ (ii) the final decision on the merits rendered in this case on 16 September 2014,³¹⁵ did not either terminate the injunctive relief or transform it into a permanent order,³¹⁶ and (iii) no assets were in fact returned to PrivatBank. The FZV's annual report for 2014 thus stated that it continued to "manage" the property complex of PrivatBank, from which, as at 1 January 2015, it leased to other banks: (i) 36 items of real property; (ii) personal property at 131 branches; (iii) 28 vehicles; (iv) 481 ATMs; and (v) 769 self-service terminals.³¹⁷ For these reasons, the 21 April 2014 Court Decision could indeed be seen as an expropriatory measure with respect to PrivatBank's "property complex", as identified in that decision. However, as the Tribunal has concluded that PrivatBank's entire business was already expropriated through the combined effect of the physical seizures of PrivatBank's main offices and the 21 April 2014 Central Bank Resolution, the Tribunal need not finally resolve whether the 21 April 2014 Court Decision constituted an expropriation under the Treaty.

263. Other subsequent measures taken by the Russian Federation also did little more than confirm an expropriation that had already occurred. Insofar as the amendments to the Nationalisation Decree of 3 September and 9 October 2014 specifically provided that a number of immovable properties belonging to PrivatBank "shall be considered the property of the Republic of Crimea," these acts built on measures equivalent in effect to expropriation that had already taken place in the period

³¹² Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

³¹³ Second Skvortsov Report, pp. 21-22.

³¹⁴ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

³¹⁵ The only copy of the 21 April 2014 Decision made available to the Tribunal does not identify the reference number of the case. It can be inferred, however, that the 21 April 2014 Decision and the decision of 16 September 2014 pertained to the same matter, as they were rendered by the same judge, and as another decision, of 4 June 2014, also by the same judge, provides the missing link. The case reference number of the decisions of 4 June and 16 September 2014 is clearly stated as "2-311/2014", and the decision of 4 June 2014 states that it grants an application for the replacement of interim measures under "a ruling dated 04/21/2014 in Case No. 2-311/2014"—a clear reference to the 21 April 2014 Decision.

³¹⁶ Decision of the Simferopol Central District Court, Case No. 2-311/14, 16 September 2014 (CE-89).

³¹⁷ FZV Annual Report 2014, pp. 11-13 (CE-251 (expanded)).

of 18-21 April 2014.³¹⁸ The same is true of the 16 December 2014 decision of the Simferopol Central District Court, to the extent that it rendered permanent a taking that had been only provisional pursuant to its 21 April 2014 Decision.

(c) Whether the expropriation complied with the conditions set forth in Article 5

264. Pursuant to Article 5(1) of the Treaty, expropriation is unlawful “except in cases where such [expropriatory] measures are taken in the public interest under due process of law, are not discriminatory and are accompanied by prompt, adequate and effective compensation.” As is apparent from its phrasing, the conditions set out in this article are cumulative, such that, for an expropriation to be considered lawful, it must meet each of the enumerated conditions.³¹⁹

265. It is convenient to begin the analysis with a discussion of the public interest and non-discrimination requirements as these elements are closely connected, as a factual matter, in the circumstances of the case.

266. [REDACTED]

267. [REDACTED]

³¹⁸ Nationalisation Decree and Amendments dated 3 September 2015 to 27 February 2015 (CE-88); Statement of Claim, Annex A.

³¹⁹ This conclusion is consistent with investment treaty jurisprudence. *See e.g. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.5.21 (“If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid.”); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award of 22 April 2009, para. 98 (“The Tribunal observes that the conditions enumerated in Article 6 [the expropriation clause of the Netherlands-Zimbabwe BIT] are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6.”); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010, para. 390 (“It is unnecessary for the Tribunal to decide whether the Respondent’s argument is valid since its conduct also fails to meet another criterion set out in Article 13(1) of the ECT, namely the requirement that any expropriation be carried out in accordance with due process of law. Such a failure, the Respondent concedes, would in any event render the expropriation unlawful.”).

³²⁰ [REDACTED]

³²¹ [REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

268. [REDACTED]

[REDACTED]

322 [REDACTED]

323 [REDACTED]

324 [REDACTED]

325 [REDACTED]

326 [REDACTED]

327 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

269. This evidence notwithstanding, it is apparent from the documents on the record that the Russian Federation made certain statements that might be said to constitute an invocation of public interest.³³²

270. The seizures of 18 and 19 April 2014, as may be expected, given the manner in which they were carried out, were not accompanied by any justification. In contrast, the 21 April 2014 Central Bank Resolution, 21 April 2014 Court Decision and the amendments to the Nationalisation Decree of 3 September and 9 October 2014 either contained or were accompanied by reasons.

328 [REDACTED]

329 [REDACTED]

330 [REDACTED]

331 [REDACTED]

³³² In this connection, the Tribunal has not only considered documents initially submitted by the Claimants, but has also requested that the Claimants search for and provide the Tribunal with additional documents. *See e.g.* paragraph 56 above regarding the Tribunal's request for a copy of Moscow City Court Decision No. 10-13158/2014 (CE-376).

271. The 21 April 2014 Central Bank Resolution stated that it was issued on the basis of Article 7 of the Crimean Banking Law in view of PrivatBank's "failure to perform obligations to creditors (depositors)."³³³
272. In the 21 April 2014 Decision, the Simferopol Central District Court indicated that it was granting injunctive relief requested in the context of a claim filed by the Deputy Prosecutor of the Republic of Crimea "in defense of the interests of the general public . . . concerning the termination of unlawful acts involving the failure to fulfill obligations arising from bank deposit agreements."³³⁴ The Russian Central Bank was "included as third party."³³⁵ In its final decision in this case of 16 September 2014, the Court granted the claim and ruled "[t]o compel [PrivatBank] . . . to cease its unlawful actions (failure to act), expressed as failure to perform with respect to individuals living in the Crimean Federal District obligations under bank deposit agreements and bank account agreements totaling RUB 10,925,222,445.85."³³⁶
273. Additionally, [REDACTED] the statement addressing the 3 September 2014 amendment to the Nationalisation Decree by Mr. Aksyonov, the Acting Head of the Crimean administration, [REDACTED], this statement could also be seen as an invocation of public interest. As reported in the 3 September 2014 press release of the State Council of the Republic of Crimea:

A resolution was passed at an extraordinary session of the State Council of the Republic of Crimea, concerning questions of managing of the republic's property. While presenting the document to the deputies, acting Head of the Republic of Crimea, Chairman of the Crimean Government, Sergey Aksenov noted that the owner of PrivatBank, Igor Kolomoisky, has not fulfilled his obligations to the Crimeans in terms of returning funds from personal accounts and deposits. "We promised Crimeans that all debts that cannot be paid off through the depositors' protection fund, we will pay off at the expense of the property of the founders of PrivatBank, in particular, Mr. Kolomoisky," S. Aksenov stressed, adding that I. Kolomoisky is one of the initiators and financiers of the ATO [Anti-Terror Operation] measures in the South-East of Ukraine, where our fellow citizens are being killed. "I believe that it is our moral right and our moral duty to carry out such nationalization," said the Head of the Republic.— After that, the property belonging to Mr. Kolomoisky will be sold, and these funds will go towards repaying the accounts of "PrivatBank" depositors exceeding 700

³³³ Central Bank of the Russian Federation, Resolution No. PH-33-1 "On Terminating the Activities of Standalone Business Units of the Public Joint Stock Company PrivatBank Commercial Bank of Dnepropetrovsk, Ukraine on the territory of the Republic of Crimea and the City of Sevastopol, a City of Federal Significance," 21 April 2014 (CE-60). Article 7 of the Crimean Banking Law provides: "2. If banks operating in the Republic of Crimea and/or the federal city Sevastopol fail to perform obligations to creditors (depositors) arising from the actions of the structural subdivisions of such banks for a period of one or more days after the day when such obligations should have been performed, or if they fail to perform other conditions specified in Article 3(1) of this Federal Law, the Bank of Russia shall terminate the activity of such structural subdivisions of banks." Federal Law of the Russian Federation No. 37-FZ, "On special features of functioning of the financial system in the Republic of Crimea and the federal city of Sevastopol during the transition period," 2 April 2014, Art. 7(2) (CE-52).

³³⁴ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

³³⁵ Decision of the Simferopol Central District Court, 21 April 2014 (CE-62).

³³⁶ Decision of the Simferopol Central District Court, Case No. 2-311/2014, 16 September 2014 (CE-89).

thousand rubles, which do not fall under the law “On the return of deposits of the Russian Federation.”³³⁷

274. These statements were consistent with views expressed by President Putin in the 17 April 2014 interview referred to by the Claimants:

But another and more important question concerns private bank accounts, which is very serious. I would like to note that we have a database of Privatbank and Oschadbank depositors. We will of course act according to the data we have. But the decision is almost made, so if people lose any money they have in their accounts we will repay them up to 700,000 roubles in line with Russian laws.³³⁸

275. The materials cited above point to two potential public interests: (i) to hinder Mr. Kolomoisky’s alleged aggressive activities in Eastern Ukraine; and (ii) to protect and compensate depositors towards whom PrivatBank allegedly failed to fulfil its obligations.

276. Overall, what is clear from the evidentiary record is that the Respondent and the administering authorities and agencies had an animus toward Mr. Kolomoisky. That animus evidently affected the Respondent’s attitude toward PrivatBank and, perhaps, although this is ultimately a matter of speculation, led to the expropriation of PrivatBank’s investment. This said, the Tribunal is not in a position to reach such a conclusion—that is, that such animus led to the expropriation of PrivatBank’s investment—on the evidence before it. The evidence of animus on the record is therefore insufficient to sustain a conclusion that the expropriation was not in the public interest or discriminatory.

277. [REDACTED]

³³⁷ State Council of the Republic of Crimea Press Release, *Property Belonging to the Ukrainian Oligarch Kolomoisky will be Nationalized in Crimea*, 3 September 2014 (CE-334). The allegations regarding Mr. Kolomoisky’s activities in Eastern Ukraine were described in detail in a decision of the Moscow City Court, ordering the seizure of a building associated with Mr. Kolomoisky because “the profit derived from leasing the spaces in this building can be used by I.V. Kolomoisky [and certain others] to finance terrorist and subversive activity by the Ukrainian military groups Aidar, Dnepr and others, controlled by I.V. Kolomoisky, whose fighters were involved in the murder of Russian journalists in Ukraine.” Moscow City Court Decision No. 10-13158/2014, 22 September 2014 (CE-376).

³³⁸ Official Website of the President of the Russian Federation, *Direct Line with Vladimir Putin*, 17 April 2014 (CE-58).

³³⁹ [REDACTED]

³⁴⁰ [REDACTED]

[REDACTED]

[REDACTED] have made a case regarding differential treatment, they have not made submissions to show, let alone demonstrated, that PrivatBank and the non-Ukrainian banks were similarly placed, other than to assert that all of these banks operated in the Crimean Peninsula. This, in the Tribunal's view, is insufficient. As noted above, the justification invoked for the 21 April 2014 Central Bank Resolution was that PrivatBank had failed to honour its obligations toward depositors. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly, on the evidence in the record, the Tribunal is unable to make a finding that the Russian Federation treated PrivatBank less favourably than Russian and third State banks operating in the Crimean Peninsula. The Tribunal is aware that there is other material in the public domain that suggests that there was generalized discrimination against Ukrainian nationals, and in particular banks, in the Crimean Peninsula after the events of February-March 2014. As, however, this material is not on the record in these proceedings, and has not been addressed by the Parties, the Tribunal has not had regard to any such information for purposes of its analysis of this issue in these proceedings.

278. Turning to the remaining requirements of Article 5(1), namely due process of law and the payment of prompt, adequate and effective compensation, it is again useful to consider these issues together.
279. It is indisputable in this case that prompt, adequate and effective compensation was not paid. Furthermore, even if the Tribunal were to countenance that the Respondent might have implicitly invoked a set off of PrivatBank's liabilities towards its depositors taken up by the FZV against any compensation due for PrivatBank's assets, the failure of the Respondent to make any offer

[REDACTED]

³⁴¹ *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04, Partial Award of 17 March 2006, para. 313.

³⁴² The sum total of the evidence that the Tribunal has been able to identify is found in Exhibit CE-269, an online report stating that Raiffeisen Bank "branches in Crimea ceased operation on April 15," and that depositors can only withdraw funds on deposit at branches in mainland Ukraine or "by means of a written request from the depositor for the funds to be transferred to the depositor's account opened at another bank." There is absolutely no evidence that the Tribunal has been able to identify regarding the situation of Russian banks in the Crimean Peninsula.

of compensation or even provide an accounting of such set off is, in the Tribunal's view, sufficient to establish a violation of the requirement to provide compensation.³⁴³

280. Beyond this, however, for the reasons that follow, the Tribunal concludes that the Respondent also falls at the hurdle of due process of law for the reason, *inter alia*, that whether assessed by reference to international law or Russian law,³⁴⁴ the Respondent failed to provide any meaningful avenue through which PrivatBank could be heard or pursue a claim in respect of its dispossessed investment. These developments are elaborated in the following paragraphs. It follows from this analysis that the expropriation of PrivatBank's investment was in breach of due process of law, and accordingly, in breach of this requirement in Article 1(1) of the Treaty.

281. The requirement of due process under international law is aptly summarized in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*:

“[D]ue process of law”, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.³⁴⁵

282. In the present case, given the manner in which the seizure of PrivatBank's offices and vaults on 18 and 19 April 2014 was carried out, there was no question of due process. The individuals carrying out the seizures did not so much as identify themselves, let alone put forward a legal basis for their actions or how PrivatBank might challenge them. Notably, the seizures preceded both the 21 April 2014 Central Bank Resolution and the 21 April 2014 Court Decision, and hence cannot have been justified on their basis.

³⁴³ To the extent that the Tribunal has seen any evidence of PrivatBank's liabilities towards its depositors in Crimea, in the Arbitrazh Court of Crimea's judgment of 29 October 2015 or in Mr. Croft's expert report on quantum on behalf of the Claimants, their amount is inferior to the face value of the outstanding loans issued by PrivatBank's branches in the Crimean Peninsula. See Decision of the Arbitrazh Court of the Republic of Crimea, Case No. A83-16/2015, 30 October 2015 (CE-363); Post-Hearing Brief on the Merits, p. 42, n.162; Croft Report, p. 17, Figure 4.

³⁴⁴ The Tribunal observes that there is a difference between the two translations of the Treaty submitted by the Claimants in these proceedings in respect of this requirement for a lawful expropriation. In the first translation (CE-1), the requirement is that expropriatory measures be taken “according to the procedures established by law,” while the second translation refers to measures taken “under due process of law” (CA-137). These differing translations raise the possibility that what is required is not only compliance with internationally recognized norms of due process, but also specific compliance with the procedures established under the law of the host State. While noting that the two translations of the Treaty are open to different interpretations, the Tribunal considers it unnecessary to resolve this difference here, given its view that, in the present case, the Russian Federation failed to afford the Claimants due process under both international and Russian law.

³⁴⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, para. 435.

283. In any event, the Russian Federation did not recognize that the effect of the 21 April 2014 Central Bank Resolution would be to expropriate PrivatBank, giving rise to a right to compensation. Notably, under the general federal legislation regulating banks in the Russian Federation, “[d]ecisions and actions (inaction) of the Bank of Russia or its officials may be appealed by a credit institution in a court of law or a court of arbitration in compliance with the procedures established by federal laws.”³⁴⁶ However, in respect of Ukrainian banks operating in the Crimean Peninsula, special legislation was enacted on 2 April 2014 (the Crimean Banking Law),³⁴⁷ which empowered the Russian Central Bank to terminate immediately the operations of any bank in the Crimean Peninsula which did not meet its obligations to its depositors for a single day and formed the basis of the 21 April 2014 Resolution. In contrast to the general banking legislation, the Crimean Banking Law did not provide any mechanism for challenging the decision of the Central Bank.³⁴⁸ Moreover, PrivatBank did not receive advance notice of the 21 April 2014 Central Bank Resolution³⁴⁹ and was therefore not given any opportunity to either demonstrate that it was in compliance with the Crimean Banking Law or to bring itself in compliance with relevant requirements.
284. The 21 April 2014 Court Decision also did not remedy any of the lacuna of earlier acts. PrivatBank was not given notice of the proceedings that led to the 21 April 2014 Court Decision, only learning of them “through private channels.”³⁵⁰ When PrivatBank appealed the 21 April 2014 Court Decision, it was neither given an opportunity to be heard,³⁵¹ nor even formally notified of the outcome of its appeal.³⁵²

³⁴⁶ Federal Law of the Russian Federation No. 395-1, “On Banks and Banking Activities,” 2 December 1990, Art. 21 (CE-246).

³⁴⁷ Federal Law of the Russian Federation No. 37-FZ, “On special features of functioning of the financial system in the Republic of Crimea and the federal city of Sevastopol during the transition period,” 2 April 2014 (CE-52); [REDACTED] Second Skvortsov Report, p. 10.

³⁴⁸ Federal Law of the Russian Federation No. 37-FZ, “On special features of functioning of the financial system in the Republic of Crimea and the federal city of Sevastopol during the transition period,” 2 April 2014, Art. 7(2) (CE-52): “2. If banks operating in the Republic of Crimea and/or the federal city Sevastopol fail to perform obligations to creditors (depositors) arising from the actions of the structural subdivisions of such banks for a period of one or more days after the day when such obligations should have been performed, or if they fail to perform other conditions specified in Article 3(1) of this Federal Law, the Bank of Russia shall terminate the activity of such structural subdivisions of banks.”

³⁴⁹ [REDACTED]

³⁵⁰ [REDACTED]

³⁵¹ [REDACTED]

³⁵² [REDACTED] For subsequent hearings in the same case (reference number 2-311/2014), summons to attend were sent to the Dnipropetrovsk headquarters of PrivatBank, but in two out of four cases, they were received only after the date of the hearing. Judicial Summons to Respondent in Civil Case 2-311/2014 (received by PrivatBank on 27 June 2014, as per the stamp on the

285. In expropriating the Claimants, the Russian Federation also failed to follow the procedures established under Russian law. As confirmed by both Russian law experts, Russian law authorizes the State to take private property in two general circumstances: (i) to sanction the property owner for violating a legal obligation, in which case a court order authorizing the taking is required, or (ii) to fulfil another public need, in which case payment of compensation to the owner is required.³⁵³

286. Thus, Article 35(3) of the Russian Constitution provides:

No one may be deprived of his property except pursuant to a judicial decision. Property can be forcibly taken for state needs only on condition of prior and equal compensation.³⁵⁴

287. Articles 235-243 of the Civil Code of the Russian Federation list nine specific circumstances in which an ownership right may be terminated, in each case requiring either a court order or the payment of compensation.³⁵⁵

288. The seizure of PrivatBank's offices of 18 and 19 April 2014 violated the prohibition under Russian law against uncompensated and extrajudicial deprivation of property, as did the 21 April 2014 Central Bank Resolution. Although the 21 April 2014 Court Decision was a court order, in the opinion of the Russian law experts, it itself violated Russian law. Thus, Professor Skvortsov opined that "a judicial error was made," as under Russian law assets cannot be turned over into "trust administration" by court decision.³⁵⁶ While on 4 June 2014 the interim measures were replaced, in Professor Skvortsov's view, in order to correct the previous error, the court again ordered interim measures of an unprecedented nature.³⁵⁷

document); Judicial Summons to Respondent in Civil Case 2-311/14 (received by PrivatBank on 20 August 2014 as per the stamp on the document).

³⁵³ [REDACTED]

³⁵⁴ Constitution of the Russian Federation, Art. 35, as reprinted in Peter B. Maggs, Olga Schwartz, and William Burnham, "Constitution" in *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* (6th ed. 2015) (CE-107).

³⁵⁵ Civil Code of the Russian Federation, Arts. 235-243, as reprinted in Peter B. Maggs and Alexei Zhiltsov, *CIVIL CODE OF THE RUSSIAN FEDERATION, FIRST PART* (2nd ed. 2010) (Expanded CE-15).

³⁵⁶ Second Skvortsov Report, pp. 12-19.

³⁵⁷ Second Skvortsov Report, p. 17.

obstacle” for the claimant’s construction project,³⁶¹ the tribunal suggested that the claimant’s failure to attempt to overturn this administrative omission before local courts could constitute an act of negligence barring its right to compensation. The tribunal stated:

The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.³⁶²

295. On this basis, the tribunal found that the Kyiv City State Administration’s administrative fault, which was unchallenged before domestic courts, did not amount to an expropriation.³⁶³
296. The *Generation Ukraine* tribunal endorsed the finding in *Feldman v. Mexico* that the claimant’s failure to seek “formal, binding rulings” on an administrative action it deemed unlawful precluded such action from being considered tantamount to an expropriation.³⁶⁴ Subsequently, the tribunal in *Helnan International Hotels A/S v. The Arab Republic of Egypt* held that an unchallenged ministerial decision to downgrade the claimant’s hotel did not constitute a breach of the Egypt-Denmark BIT as “[i]t needs more to become an international delict”³⁶⁵
297. This jurisprudence shows that, even where a strict requirement of exhaustion of local remedies does not apply, local remedies may still be relevant where the factual matrix of a case is such that the failure of resort to local remedies breaks the chain of causation, making the failure to resort to local remedies the proximate cause of the investor’s loss.³⁶⁶

³⁶¹ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, paras. 20.1, 20.6.

³⁶² *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, para. 20.30 (emphasis added).

³⁶³ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, paras. 20.32-20.38.

³⁶⁴ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, para. 20.35, referring to *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002.

³⁶⁵ *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of 3 July 2008, para. 148.

³⁶⁶ See *Chevron Corporation and Texaco Petroleum Company v. The Republic Ecuador*, PCA Case No. 2007-02, Partial Award on the Merits of 30 March 2010, paras. 326, 330-332 (“While reiterating its view that strict exhaustion of local remedies is not necessary, the Tribunal agrees with the Respondent that a claimant is required to make use of all remedies that are available and might have rectified the wrong complained of . . .”).

298. The Tribunal does not consider that to be case here. Given that the measures in question did not purport to be expropriatory in nature, and did not recognize a right to compensation, it was not for PrivatBank to establish that nature before local courts in order to be able to claim before this Tribunal. [REDACTED]

[REDACTED]

[REDACTED] In any event, the Tribunal finds that PrivatBank did protest and pursue reasonable challenges, in particular by way of the appeal of the 21 April 2014 Court Decision described at paragraph 90 above. Its failure to pursue further local recourse against the Respondent's measures is not, in the circumstances, the proximate cause of its loss and, thus, does not bar its claim for indirect expropriation.

299. Second, a closely related issue arises from the foregoing discussion of local remedies. [REDACTED]

[REDACTED]

[REDACTED] Given the appeal that PrivatBank filed against the 21 April 2014 Court Decision, this begs the question of whether PrivatBank has triggered this purported fork-in-the-road clause and thereby lost its right to pursue arbitration under Article 9. As this raises a question of jurisdiction, for the reasons already set forth at paragraph 178 above, the Tribunal must satisfy itself that this issue does not deprive it of competence to decide the claims put before it.

300. The Tribunal concludes that it does not. The Tribunal notes that the text of Article 9(2) is unclear on the issue of whether it established a fork-in-the-road. The Tribunal does not need to resolve this question, however, as a fork-in-the-road clause would not in any event have been triggered. While the Claimants described the process in terms that suggest that the Simferopol Central District Court was seized of their appeal and then "summarily dismissed" it, [REDACTED]

[REDACTED] Further,

367 [REDACTED]

368 [REDACTED]

369 [REDACTED]

and in any event, the Tribunal reiterates that the injunction proceedings before the Simferopol Central District Court did not purport to be expropriatory in nature and did not recognize a right to compensation. As such, they self-evidently did not concern the same question as is at issue in this arbitration, namely the compensation due to PrivatBank on account of the unlawful and permanent taking of its investment.

2. Articles 2 and 3 of the Treaty

301. [REDACTED]

[REDACTED]

302. Given the Tribunal's finding above that PrivatBank's entire investment was expropriated in the period of 18-21 April 2014, and the corollary that PrivatBank is therefore entitled to full compensation for its investment, the Tribunal considers it unnecessary to make a determination on the Claimants' claims under Articles 2 and 3 of the Treaty.

D. COMPENSATION

303. The Tribunal recalls that it bifurcated the proceedings in Procedural Order No. 3, wherein it postponed the assessment of any damages to a further phase of the arbitration. The Tribunal has concluded that PrivatBank's investment was expropriated through a series of physical and regulatory measures in the period of 18-21 April 2014. In the next phase of the proceedings, the Tribunal will address the issue of compensation due in the light of this finding of liability.

[REDACTED]

370 [REDACTED]

371 [REDACTED]

VII. DECISION

For the foregoing reasons, the Tribunal finds that:

1. the Tribunal has jurisdiction over PrivatBank's claims under the Treaty;
2. PrivatBank's claims are admissible; and
3. the Russian Federation has breached Article 5 of the Treaty in respect of PrivatBank's investments.

The issue of compensation due in the light of this finding of liability and any decision on the costs of arbitration are deferred to the next phase of the arbitration.

Place of arbitration: The Hague, the Netherlands

Date: 4 February 2019



Sir Daniel Bethlehem QC



Dr. Václav Mikulka



Professor Pierre-Marie Dupuy
(Presiding Arbitrator)