



**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 -

JSC CB PRIVATBANK

The Claimant

- and -

THE RUSSIAN FEDERATION

The Respondent

PROCEDURAL ORDER NO. 22

The Arbitral Tribunal

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

Registry

Permanent Court of Arbitration

23 March 2022

1. Procedural Background

- 1.1 These proceedings were commenced by [REDACTED] pursuant to Article 9 of the 1998 *Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* (the “Treaty”) and the 1976 UNCITRAL Arbitration Rules (the “UNCITRAL Rules”). The UNCITRAL Rules are supplemented, *inter alia*, by procedural rules set out in the Tribunal’s Procedural Order No.1 and Rules of Procedure, both dated 18 August 2015.
- 1.2 By an Interim Award dated 24 February 2017, the Tribunal affirmed its jurisdiction under the Treaty having regard to three heads of potential jurisdictional objection and joined other issues of jurisdiction and admissibility to the merits phase of the proceedings. A corrected version of the Interim Award was issued on 27 March 2017. The Russian Federation did not participate in this initial phase of the proceedings.
- 1.3 By a Partial Award dated 4 February 2019, the Tribunal affirmed its jurisdiction over the Claimant’s claims under the Treaty as of 21 March 2014, and that the claims were admissible, and found that the Russian Federation had breached Article 5 of the Treaty in respect of PrivatBank’s investments in the Crimean Peninsula. The issue of compensation, in the light of the Tribunal’s finding of liability, was deferred to a subsequent phase of the proceedings. The Russian Federation did not participate in this second phase of the proceedings.
- 1.4 [REDACTED] The scope of the Respondent’s submissions was thereafter addressed in Procedural Order No. 7, dated 12 September 2019. The procedural calendar applicable to the quantum phase of the proceedings was laid down in Procedural Order No. 8, dated 7 October 2019. In accordance with this calendar, the two rounds of written submissions were scheduled to have been completed on 29 March 2021.
- 1.5 With extensions subsequently granted by the Tribunal, the written phase on damages was concluded on 16 December 2021 [REDACTED]
- 1.6 The hearing in the damages phase was initially scheduled to take place from 17-21 January 2022. On 2 November 2021, the Tribunal issued Procedural Order No. 21, vacating those hearing dates, given that, as a result of certain extensions granted to both Parties, insufficient time would have remained after the close of the written phase to prepare for the hearing. By letter dated 10 November 2022, having consulted the Parties as to their availabilities, the Tribunal rescheduled the hearing to take place from 11-17 May 2022 (including the intervening week-end).
- 1.7 [REDACTED]
- 1.8 By letter of the same date (24 February 2022), the Tribunal indicated that it was following the current events closely and was mindful of the possible implications for the forthcoming hearing.

The Tribunal noted that it would consult with the Parties in due course and that it remained open to considering the format of the hearing as well as other modalities that would facilitate a fair and efficient hearing, having regard to all the circumstances.

1.9 By letter dated 4 March 2022, the Tribunal indicated that, circumstances permitting, it anticipated proceeding with the hearing as scheduled, to take place at the Peace Palace in The Hague, with attendance in person at least by lead counsel for each Party and the members of the Tribunal. At the same time, in light of current events, the Tribunal noted its intention to make the necessary arrangements to enable counsel, witnesses and Party representatives who might be unable to attend the hearing in person, or prefer not to do so, to participate by videoconference. The Tribunal invited the Parties to comment on the proposed hearing format by 16 March 2022.

1.10 [REDACTED]

1.11 By letter dated 10 March 2022, the Tribunal invited the Respondent to provide, by 14 March 2022, its comments on the consequences of its counsel's resignation for these proceedings and, in particular, to indicate what is the reasonable amount of time which it requires to retain new external counsel. The Claimant was further allowed to comment on these developments by 17 March 2022.

1.12 [REDACTED]

1.13 [REDACTED]

1.14 [REDACTED]

[REDACTED]

1.15 [REDACTED]

2. The Tribunal’s Decision

2.1 Having regard to the current circumstances, the Tribunal has given the most urgent and serious consideration to the Parties’ submissions, including the [REDACTED]

[REDACTED] In doing so, the Tribunal has had careful regard to the relevant procedural rules governing this arbitration, notably, the UNCITRAL Rules as supplemented by the provisions of Procedural Order No. 1 and the Tribunal’s bespoke Rules of Procedure. In this regard, the Tribunal recalls in particular Article 15(1) of the UNCITRAL Rules, which provides as follows: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.” The Tribunal also recalls Article 4 of the UNCITRAL Rules, which provides, in operative part, as follows: “The parties may be represented or assisted by persons of their choice.”

2.2 Having regard to these provisions, and the Tribunal’s wider responsibility to ensure a fair, efficient and effective arbitral process, the Tribunal recalls that these proceedings have been on-going for approaching seven years. The right to a fair, efficient and effective arbitral process is a right that is afforded to both parties, not to one party alone. Just as a respondent is entitled to a full opportunity to present its case, so is a claimant entitled to a proceeding that is not unduly delayed, to its actual or potential disadvantage.

2.3 The right of a party to be represented by persons of their choice is a cardinal right. It cannot, however, be used as a basis for unwarranted delay in the proceedings. In this regard, the Tribunal observes that while many courts and tribunals will endeavour to accommodate the availability of counsel when scheduling a hearing, the unavailability of counsel will not of itself dictate the scheduling of a hearing. The settled practice of the International Court of Justice, the principal judicial organ of the United Nations, is the best exemplar of this principle.

2.4 [REDACTED]
[REDACTED] the Tribunal understands that the Respondent will have been put on notice of the resignation of its external counsel on or before 3 March 2022. This is some nine-and-a-half weeks from the scheduled commencement of the hearing on 11 May 2022.

2.5 The Tribunal notes that the quantum phase of this case has been fully pleaded by the Parties in writing since the end of 2021. At this stage of the proceedings no further evidence may be submitted by the Parties absent leave of the Tribunal (or party agreement). The purpose of the hearing is to allow the arguments and evidence already advanced to be refined and tested.


- 2.6 The submissions and evidential docket before the Tribunal in respect of this phase of the proceedings is, even if complex in some of its detail, relatively narrow in its reach. The issues to be addressed are those going to quantum and those closely related elements in respect of which leave was given by the Tribunal in Procedural Order No. 7. Having regard to their fully pleaded character, these are issues that the Tribunal considers could be fully and properly addressed in oral argument, whether by internal or external counsel and representatives, within the timescale available to the Respondent and its representatives, counsel and advisers, from the point at which it was notified about the resignation of Houthoff to the point of the scheduled hearing commencing on 11 May 2022. In this regard, the Tribunal notes the Respondent has given no indication that those responsible for the preparation of its case within the government of the Russian Federation are not, and could not be, fully engaged in the continued preparation of its oral submissions.
- 2.7 In its correspondence to the Tribunal, [REDACTED] [REDACTED] In this respect, the Tribunal notes that, pursuant to Article 25(5) of the UNCITRAL Rules and Article 5(5) of the IBA Rules on the Taking of Evidence in International Arbitration, in exceptional circumstances and where a valid reason is given for the failure to present an expert for examination at a hearing, that expert's written report may nevertheless be taken as testimony. The Tribunal considers that the current circumstances justify taking [REDACTED] as testimony in this arbitration.
- 2.8 Having regard to all the above considerations, and weighing carefully in the balance the rights of both the Respondent and the Claimant, the Tribunal considers that a short further postponement of the hearing would be warranted to assist the Respondent in the preparations of its oral case, but not of an order that would risk prejudice, and perhaps highly materially so, to the Claimant. The Tribunal notes, further, that, for reasons of the unavailability of all the members of the Tribunal, it would not be in a position to accommodate any further delay in the hearing beyond that hereinafter indicated until late 2022, a delay that the Tribunal considers would risk significant prejudice to the Claimant in terms that would not be consistent with the Tribunal's responsibilities as regards the fair, efficient and effective conduct of the proceedings.
- 2.9 The Tribunal accordingly hereby directs that the hearing will be held by videoconference from **6-12 June 2022** (or during such shorter period commencing 6 June as may be appropriate). The previously scheduled hearing dates of 11-17 May 2022 are vacated.
- 2.10 The Tribunal considers that the 13½ week period between the resignation of the Respondent's external counsel in early March 2022 and the commencement of the hearing on the newly-fixed dates will properly and sufficiently allow the Respondent to organize its representation and prepare to present its case at the hearing. The Tribunal is also of the view that a videoconference hearing will provide the Tribunal, both Parties and their witnesses and experts with the flexibility that is needed in the circumstances.
- 2.11 After the hearing, the Tribunal will evaluate what additional steps, if any, may be required to ensure that the Parties have been treated with equality and have had a full opportunity to present their respective cases in accordance with Article 15(1) of the UNCITRAL Rules. Such additional steps will likely include post-hearing briefs and may include the appointment of tribunal experts.
- 2.12 Finally, in order to ensure the smooth progression of the case, the Tribunal hereby convenes a procedural conference with the Parties to take place by Zoom videoconference on **Wednesday, 30 March 2022 at 14:00 CEST**. The Tribunal wishes to discuss, *inter alia*, the following matters:
(i) the Parties' notifications of witnesses and experts they wish to call for cross-examination at

the hearing; (ii) the ability of the Party's witnesses and experts to attend the hearing and the consequences of any inability (or unwillingness) to attend; (iii) the modalities for the examination of witnesses and experts; (iv) whether the Claimant anticipates any difficulties for its counsel to receiving instructions either in advance of or during the hearing, or in due course; and (iv) any other matters that the Parties may wish to raise at this stage.

2.13 The Parties remain at liberty to apply for a modification of this order.

Date: 23 March 2022

Place of Arbitration: The Hague, the Netherlands



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