

COUR PERMANENTE D'ARBITRAGE



PERMANENT COURT OF ARBITRATION

PCA CASE No. 2016-14

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

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

-and-

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

-between-

**PUBLIC JOINT STOCK COMPANY
“STATE SAVINGS BANK OF UKRAINE”
(JSC OSCHADBANK)
(UKRAINE)**

The Claimant

-and-

THE RUSSIAN FEDERATION

The Respondent

AWARD

The Arbitral Tribunal

Sir David A.R. Williams QC (Presiding Arbitrator)
The Honorable Charles N. Brower
Mr. Hugo Perezcano Díaz

Registry

Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Accession	The change that occurred in the status of the Crimean Peninsula in February-March 2014, without prejudice to its lawfulness or unlawfulness under international law
Accession Law	Federal Constitutional Law of the Russian Federation No. 6-FKZ, “On the Acceptance of the Republic of Crimea into the Russian Federation and Formation within the Composition of the Russian Federation of New Subjects—Republic of Crimea and City of Federal Significance Sevastopol”, dated 21 March 2014
Accession Treaty	“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”, dated 18 March 2014
Appointing Authority	Mr. Michael Hwang, appointing authority designated by the PCA Secretary-General under the UNCITRAL Rules
Bank of Russia	Central Bank of the Russian Federation
Butler Report	Expert report by Professor William E. Butler on Russian law, dated 15 August 2016
Claimant (or Oschadbank)	Public Joint Stock Company “State Savings Bank of Ukraine” (JSC Oschadbank), the claimant in this arbitration
Crimea	The region known as the “Autonomous Republic of Crimea” under the Ukrainian Constitution and the “Republic of Crimea” under the Russian Constitution
Crimean Branch	The branch of Oschadbank with headquarters in Simferopol (Crimea) and local outlets throughout the Crimean Peninsula
Crimean Branch Supervisor	The supervisor appointed by the Management Board of Oschadbank on 30 April 2014 on the basis of the decision of the Operational Risk Management Committee of Oschadbank of 24 April 2014
Crimean Financial System Law	Federal Law of the Russian Federation No. 37-FZ “On Peculiarities of Functioning of Financial System of the Republic of Crimea and the Federal City of Sevastopol within the Transitional Period”, dated 2 April 2014
Crimean Peninsula	Crimea and the city of Sevastopol
Davidson Report	Valuation report by Mr. Jeffrey E. C. Davidson, dated 16 August 2016
DCF	Discounted Cash Flow
Decision on Termination	Decision of the Bank of Russia No. PH-33/II “On the Termination of Activity of Solitary Structural Subdivisions of [Oschadbank], city of Kiev, Ukraine, on the Territory of the Republic of Crimea and City of Federal Significance Sevastopol”, dated 26 May 2014

Depositor Protection Law	Federal Law of the Russian Federation “On the Defense of Interests of Natural Persons Having Deposits in Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance, Sevastopol”, dated 2 April 2014
DPF	Depositor Protection Fund
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , 1950
ECtHR	European Court of Human Rights
FET	Fair and equitable treatment
FPS	Full protection and security
ICCPR	<i>International Covenant on Civil and Political Rights</i> , 1966
ICJ	International Court of Justice
ILC Articles	ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission
Matyukha Statement	Witness Statement by the Head of the Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate of Oschadbank, Mr. Oleksandr Viktorovych Matyukha, dated 12 August 2016
NBU	National Bank of Ukraine
Notice of Arbitration	Claimant’s Notice of Arbitration, dated 18 January 2016
Oschadbank (or Claimant)	Public Joint Stock Company “State Savings Bank of Ukraine” (JSC Oschadbank), the claimant in this arbitration
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
Post-Hearing Submission	Claimant’s Post-Hearing Submission on Wikipedia Publication “Activ Solar”, dated 11 April 2017
Pyshnyy Statement	Witness Statement by the Chairman of the Management Board of Oschadbank, Mr. Andriyy Hryhorovych Pyshnyy, dated 22 August 2016

Repayment Law	Federal Law of the Russian Federation No. 422-FZ “On the Specifics of Repayment and Out-of-Court Settlement of Debt Borrowers Residing in the Territory of the Republic of Crimea or in the Territory of the City of Federal Significance, Sevastopol and on Amending Federal Law ““On the Defense of Interests of Natural Persons Having Deposits in Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance, Sevastopol””, dated 30 December 2015
Resolution No. 260	Resolution of the Board of the National Bank of Ukraine NBU No. 260 “On the Revocation and Cancellation of Bank Licenses and General Licenses for Carrying Out Currency Operations of Certain Banks and the Closure by Banks of Separated Units Located on the Territory of the Autonomous Republic of Crimea and City of Sevastopol”, dated 6 May 2014
Respondent	The Russian Federation, the respondent in this arbitration
RNCB	Russian National Commercial Bank
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
Shaw Report	Expert report by Professor Malcolm N. Shaw QC on international law issues, dated 24 August 2016
Simferopol Court	Kyiv District Court of Simferopol
Statement of Claim	Claimant’s Statement of Claim, dated 26 August 2016
Submission of Ukraine	Submission of Ukraine as Non-Disputing Party to the Treaty, dated 29 November 2016
Submission on Costs	Claimant’s Submission on Costs, dated 5 May 2017
Temporary Regulation	Resolution No. 277 of the Management Board of Oschadbank, Annex 1 “The Temporary Regulation ““On the Special Conditions of Operation of the Branch—Crimean Republican Directorate of JSC “Oschadbank” and Its Local Separated Non-Accounting Outlets””, dated 30 April 2014
Transitional Period	Period from the Accession until 1 January 2015, established by the Accession Treaty and the Accession Law
Treaty	<i>Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments</i> , dated 27 November 1998
UNCITRAL Rules	UNCITRAL Arbitration Rules of the United Nations Commission on International Trade Law, 1976
UNHRC	United Nations Human Rights Committee

VCLT

Vienna Convention on the Law of Treaties, 1969

VCST

Vienna Convention on the Succession of States in Respect of Treaties, 1978

I. INTRODUCTION**A. THE PARTIES**

1. The Claimant in this arbitration is Public Joint Stock Company “State Savings Bank of Ukraine” (also known as JSC Oschadbank), registered at 12G Hospitalna St., Kyiv 01001, Ukraine (“**Oschadbank**” or the “**Claimant**”). The Claimant is represented in these proceedings by Messrs. Stephen Jagusch, Alex Gerbi and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, 90 High Holborn, London WC1V 6LJ, United Kingdom.
2. The Respondent in this arbitration is the Russian Federation, a sovereign State (the “**Respondent**”, and together with the Claimant, the “**Parties**”). The Respondent has not appointed any representatives in these proceedings.

B. THE NON-PARTICIPATION OF THE RESPONDENT

3. The Respondent has not appeared in these proceedings, despite having been (i) notified of every procedural act; (ii) provided a copy of all the pleadings and their supporting documents, as well as all procedural orders and decisions; (iii) afforded an opportunity to appear before the Tribunal at every stage of the process, including at the hearing; and (iv) afforded an opportunity to submit written pleadings in response to those made by the Claimant (as detailed below).
4. All notifications, pleadings and other documents in these proceedings, whether from the Claimant or the Tribunal and the Registry, were delivered to the Respondent at the following offices of the Russian Government:

H.E. Mr. Vladimir Putin

President of the Russian Federation
23, Ilyinka Street
Moscow, 103132
Russian Federation

H.E. Mr. Dmitry Medvedev

Prime Minister of the Russian Federation
Government of the Russian Federation Building
2 Krasnopresnenskaya naberezhnaya, building 2
Moscow, 103274
Russian Federation

H.E. Mr. Anton Siluanov

Finance Minister of the Russian Federation
9, Ilyinka Street
Moscow, 109097
Russian Federation

H.E. Mr. Sergey Lavrov

Minister of Foreign Affairs of the Russian Federation
32/34 Smolenskaya-Sennaya pl.
Moscow, 119200
Russian Federation

H.E. Mr. Mikhail Zurabov

Ambassador of the Russian Federation to Ukraine
27, Vozdukhoflotskiy ave.
Kyiv, 03049
Ukraine

H.E. Mr. Alexander Shulgin

Ambassador of the Russian Federation to the Kingdom of the Netherlands
Andries Bickerweg 2
2517 JP Den Haag
The Netherlands

Following receipt by the Registry on 18 June 2018 of a *Note Verbale* from the Respondent, advising that the Ministry of Justice of the Russian Federation was “henceforth entrusted with representation of the Russian Federation and/or protection of the interests of the Russian Federation in international arbitration bodies” and that the “responsible structural division of the Ministry of Justice of the Russian Federation is the Department of International Law and Cooperation (address: 14 Zhitnaya str., Moscow, GSP-1 119991, Russia; fax: +7 (495 677-06-87; e-mail: legalprotection@minjust.ru),” this address was added to the distribution list.

C. THE NATURE OF THE DISPUTE

5. The arbitration concerns the Claimant’s allegation that the Respondent violated its obligations under Articles 2, 3, 4, 5 and 7 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**”) in respect of the Claimant’s investments in a banking business in the Crimean Peninsula.

6. In this Award, the term “**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. Collectively, Crimea and Sevastopol are referred to as the “**Crimean Peninsula**.” For convenience, the term “**Accession**” is used to refer to the change that occurred in the status of the Crimean Peninsula in February-March 2014, without prejudice to its lawfulness or unlawfulness under international law.
7. Save where otherwise indicated, this Award relies on the translations of original Russian and Ukrainian documents provided by the Claimant.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

8. By letter dated 8 July 2015 and served on the Respondent on 10 July 2015, the Claimant notified the Respondent pursuant to Article 9(1) of the Treaty of the existence of a dispute between the Parties.¹ On 8 October 2015, the Claimant sent a follow-up letter to the Respondent.²
9. By letter dated 24 December 2015, the Respondent replied that, in its view, the Treaty cannot apply to the facts set out in the Claimant’s letter of 8 July 2015.
10. On 20 January 2016, the Claimant commenced these arbitration proceedings by serving a **Notice of Arbitration** dated 18 January 2016 on the Respondent pursuant to Article 9(2)(c) of the Treaty and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “**UNCITRAL Rules**”).

B. CONSTITUTION OF THE TRIBUNAL

11. By its Notice of Arbitration, the Claimant appointed The Honorable Charles N. Brower as the first arbitrator in these proceedings.
12. On 22 February 2016, in light of the Respondent’s failure to appoint a second arbitrator within thirty days of the notification of the appointment of the first arbitrator, the Claimant wrote to the

¹ Letter from Mr. Andriyy Pyshnyy to President Vladimir Putin, Prime Minister Dmitry Medvedev and other officials of the Respondent, 8 July 2015 (Exhibit C-5 to the Notice of Arbitration). Copies of the letter were delivered by courier on 10 and 14 July 2015. *See* Courier Receipts (Exhibit C-6 to the Notice of Arbitration).

² Letter from Mr. Andriyy Pyshnyy to President Vladimir Putin, Prime Minister Dmitry Medvedev and other officials of the Respondent, 8 October 2015 (Exhibit C-7 to the Notice of Arbitration).

Permanent Court of Arbitration (the “PCA”), requesting that the Secretary-General of the PCA designate an appointing authority for the appointment of the second arbitrator pursuant to Article 7(2)(b) of the UNCITRAL Rules.

13. By letter dated 23 February 2016, the PCA invited the Respondent to provide its comments with respect to the Claimant’s request for the designation of an appointing authority by March 7, 2016. The Respondent did not provide any comments.
14. On 8 March 2016, the Secretary-General of the PCA designated Mr. Michael Hwang as the **Appointing Authority** in this matter.
15. On 31 March 2016, the Appointing Authority appointed Mr. Hugo Perezcano Díaz as the second arbitrator in these proceedings.
16. On 2 May 2016, the two co-arbitrators notified the Parties that they had agreed on the choice of the Presiding Arbitrator in this matter pursuant to Article 7(1) of the UNCITRAL Rules and, on 3 May 2016, the PCA informed the Parties that Sir David A.R. Williams KNZM, QC had accepted the appointment.
17. On 19 May 2016, the Tribunal communicated draft Terms of Appointment and a draft Procedural Order No. 1 to the Parties, inviting their comments thereon. The Claimant provided comments by letter dated 9 June 2016. The Respondent did not provide any comments.

C. CORRESPONDENCE FROM THE RESPONDENT

18. On 23 June 2016, the PCA received from H.E. Mr. Alexander Shulgin, Ambassador of the Respondent to the Kingdom of the Netherlands, a letter dated 21 June 2016, enclosing another letter dated 13 May 2016 from Mr. V.I. Lysak, Deputy Director of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation.
19. In the cover letter dated 21 June 2016, Ambassador Shulgin indicated that:

Nothing in the attached letter of the Ministry of Justice of the Russian Federation can be interpreted as consent of the Russian Federation to constitution of an arbitral tribunal, participation in arbitral proceedings, or as procedural actions taken in the framework of the proceedings, mentioned therein, or as a waiver by the Russian Federation of the jurisdictional immunities in respect of itself and its property in relation to any judicial or administrative proceedings or procedures, connected directly or indirectly with these claims, including immunity from court jurisdiction and immunity from any measures of constraint that can be connected directly or indirectly with these claims, regardless of the jurisdiction (national or supranational) under which they are initiated.

20. In the letter dated 13 May 2016, Mr. Lysak stated as follows:

We return you herewith the Notice of Arbitration on the arbitration proceedings initiated under Article 9 of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments before the Permanent Court of Arbitration by the Public Joint Stock Company “State Savings Bank of Ukraine” vs. the Russian Federation (notice dated 22 February 201[6]).

It is manifest that such claims cannot be considered under the Agreement mentioned above and, therefore, the Agreement cannot serve as a basis for composing an arbitral tribunal to settle this claim.

According to Clause 1 of Article 1 of the Agreement, the term “investments” means all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws. The assets being the subject of dispute are located in the territory of the Republic of Crimea and the city of Sevastopol which were earlier part of Ukraine. The Bank’s assets do not constitute investments, since they were not invested in the territory of the Russian Federation, and, even if they occurred, they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in conformity with the legislation of the Russian Federation. These assets have not been earlier subject to taxation under the legislation of the Russian Federation and have not contributed to the development of the economy of the Russian Federation.

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

In addition, on 24 December 2015, a letter from the MinJust of Russia was sent to PJSC “Oschadbank” regarding out-of-court settlement of the dispute (copy attached).

21. A copy of the Respondent’s letter to the Claimant dated 24 December 2015 (mentioned at paragraph 9 above) was enclosed.
22. The PCA provided copies of the Respondent’s correspondence to the Tribunal.
23. On 6 July 2016, the Tribunal provided the Claimant with a copy of the Respondent’s correspondence and invited it to consider how the issues raised therein should be treated during the arbitration and, in particular, whether any of these issues should be addressed in a preliminary manner.
24. By e-mail dated 18 July 2016, the Claimant submitted that the Tribunal should not hear on a preliminary basis the issues raised in the Respondent’s correspondence, given that these issues: (i) did not constitute a properly lodged jurisdictional objection that would trigger the application of Article 21(4) of the UNCITRAL Rules; and (ii) bifurcation would not promote efficiency in these proceedings, given that the Claimant had already undertaken most of the work required for the preparation of its case.

D. FIRST PROCEDURAL CONFERENCE AND FIXING OF THE TIMETABLE

25. On 21 July 2016, the Tribunal circulated a final version of the Terms of Appointment for the Parties' signature. A corrected version was circulated on 28 July 2016. The Terms of Appointment provided, *inter alia*, that the International Bureau of the PCA would act as registry in these proceedings.
26. On 26 July 2016, the Tribunal held a first procedural teleconference, in which the Parties were invited to participate. The Claimant was represented at the teleconference by Messrs. Stephen Jagusch, Alex Gerbi and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP and Ms. Iryna Mudra, Head of Restructuring of Oschadbank. Although invited, the Respondent did not participate in the teleconference. The transcript of the teleconference was circulated to the Parties on 28 July 2016.
27. Subsequent to the procedural teleconference, on 19 August 2016, the Tribunal issued its **Procedural Order No. 1**, in which it fixed Paris, France as the place of arbitration and established a timetable for the proceedings on the basis that all issues of jurisdiction and merits would be heard together. Pursuant to the timetable, the Claimant was to file its Statement of Claim by 26 August 2016, after which the Respondent would have 35 days to indicate its intention to file a Statement of Defence or any objections to jurisdiction or admissibility. If the Respondent failed to communicate to the Tribunal its intention to participate, the Tribunal would provide formal notice to the Respondent that the proceedings would be conducted in accordance with the timetable set out in Annex 1 of Procedural Order No. 1, which did not provide for any additional written pleadings by the Parties and fixed hearing dates from 27 to 29 March 2017. However, if the Respondent indicated its intention to participate, the Tribunal would provide formal notice to the Parties that the proceedings would be conducted in accordance with the timetable set out in Annex 2 of Procedural Order No. 1, which provided for the filing of a reply and a rejoinder by the Claimant and the Respondent respectively, as well as for a hearing.

E. FILING OF THE STATEMENT OF CLAIM AND FAILURE BY THE RESPONDENT TO FILE A STATEMENT OF DEFENCE

28. On 26 August 2016, the Claimant submitted its **Statement of Claim** pursuant to the timetable established in Procedural Order No. 1. In support of its Statement of Claim, the Claimant submitted: (i) a witness statement by the Chairman of the Management Board of Oschadbank, Mr. Andriyy Hryhorovych Pyshnyy (the "**Pyshnyy Statement**"); (ii) a witness statement by the Head of the Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate of Oschadbank, Mr. Oleksandr Viktorovych Matyukha (the "**Matyukha Statement**"); (iii) an expert report by Professor Malcolm N.

Shaw QC on international law issues (the “**Shaw Report**”); (iv) an expert report by Professor William E. Butler on Russian law (the “**Butler Report**”); and (v) a valuation report by Mr. Jeffrey E. C. Davidson (the “**Davidson Report**”).

29. By letters from the PCA dated 29 August and 1 September 2016, the Tribunal corrected certain typographical errors in Procedural Order No. 1.
30. By letter dated 3 October 2016, the Claimant noted that the 35-day time limit granted to the Respondent to indicate its intention to file a Statement of Defence or any objections to jurisdiction or admissibility had lapsed.
31. On 5 October 2016, in view of the Respondent’s failure to indicate its intention to file a Statement of Defence or any objections to jurisdiction or admissibility, the Tribunal gave formal notice to the Respondent that the proceedings would be conducted in accordance with the timetable set out in Annex 1 of Procedural Order No. 1.³
32. By letter from the PCA dated 14 November 2016, the Tribunal informed the Parties that whereas the Claimant had signed the Terms of Appointment circulated by the Tribunal on 28 July 2016, the Respondent had not signed this document. The Tribunal confirmed that, in the absence of the Respondent’s signature, the Terms of Appointment shall have the force of a procedural order issued by the Tribunal.

F. THE NON-DISPUTING PARTY SUBMISSION OF UKRAINE

33. On 1 December 2016, a representative from the Embassy of Ukraine to the Kingdom of the Netherlands delivered to the PCA: (i) a *Note Verbale* from the Embassy to the PCA; (ii) a letter from the Ministry of Foreign Affairs of Ukraine to the Tribunal, requesting the Tribunal’s permission to make a non-disputing party submission in these proceedings; and (iii) a copy of the proposed submission (the “**Submission of Ukraine**”). On the same day, the PCA conveyed copies of items (i) and (ii) to the Tribunal.
34. By letter from the PCA dated 6 December 2016, the Tribunal conveyed copies of items (i) and (ii) to the Parties and invited their comments thereon.
35. By letter dated 15 December 2016, the Claimant informed the Tribunal that it had no objection to the admission of the Submission of Ukraine into the record of these proceedings. The Respondent did not express any views on this question.

³ See *supra*, para. 27.

36. By letter from the PCA dated 22 December 2016, the Tribunal admitted the Submission of Ukraine into the record of these proceedings. The Ambassador of Ukraine to the Kingdom of the Netherlands was notified of this decision. The PCA conveyed copies of the Submission of Ukraine to the Tribunal and the Parties. Although the Parties were invited to comment on the Submission of Ukraine by 16 January 2017, neither Party provided any comments.

G. PRE-HEARING EVENTS, HEARING AND POST-HEARING EVENTS

37. On 27 February 2017, the Tribunal issued its **Procedural Order No. 2**, confirming that the hearing in this matter would be held at the ICC Hearing Center in Paris and resolving other organizational and logistical matters pertaining to the hearing.
38. Also on 27 February 2017, in accordance with the time limit fixed in Annex 1 of Procedural Order No. 1, the Claimant filed a chronology of events and a list of issues.
39. On 14 March 2017, the Claimant sent to the Tribunal a copy of an interim award issued on 24 February 2017 in another arbitration conducted under the Treaty between a Ukrainian bank and the Russian Federation.⁴ Noting that this award is relevant to the issues in the present case, the Claimant requested that the Tribunal admit it into the record of these proceedings.
40. By e-mail from his assistant dated 14 March 2017, the Presiding Arbitrator indicated that he would not read the submitted award pending consideration by the Tribunal of whether to admit it into the record.
41. By letter dated 18 March 2017, the Claimant argued that the Tribunal has discretion to determine the weight to attach to the submitted award, and that the Respondent would not be prejudiced from its admission into the record of these proceedings.
42. By e-mail dated 19 March 2017, the Presiding Arbitrator noted that the Tribunal would not read the submitted award for the time being and invited the Respondent to comment by 24 March 2017 on whether the award should be admitted into the record.
43. A hearing on jurisdiction and merits was held from 27 to 29 March 2017 in Paris, France.
44. The Claimant was represented at the hearing by counsel and representatives of the Claimant were also present. Although invited, the Russian Federation did not attend or otherwise participate in the hearing.

⁴ *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21.

45. The following persons were present:

Tribunal:

Sir David A.R. Williams QC (presiding)
The Hon. Charles N. Brower
Mr. Hugo Perezcano Díaz

PCA:

Ms. Evgeniya Goriatcheva

Claimant:

Mr. Andriyy Pyshnyy
CEO of Oschadbank and witness

Mr. Oleksandr Matyukha
Senior Manager of Oschadbank and witness

Mr. Andriy Pozhidayev
Head of Restructuring and Recovery Department

Ms. Iryna Mudra
Head of Restructuring Unit and in-house Legal Counsel

Ms. Iryna Kireyeva
Deputy Head of Restructuring Unit and in-house Legal Counsel

Mr. Stephen Jagusch QC
Mr. Alex Gerbi
Mr. Epaminontas Triantafilou
Mr. Philip Devenish
Mr. Manthi Wickramasooriya
Ms. Sonal Pandya
Quinn Emanuel Urquhart & Sullivan UK LLP

Ms. Svitlana Chepurna
Ms. Anna Tkachova
Ukrainian local counsel

Professor William E. Butler
Mr. Jeffrey Davidson
Professor Malcolm Shaw QC
Claimant's experts

Court Reporter:

Ms. Margie L. Dauster

Interpreters:

Mr. Oleks Nesnov
Mr. Boris Kovaltchouk

46. In the course of the hearing, Messrs. Stephen Jagusch QC and Epaminontas Triantafilou addressed the Tribunal in opening and closing statements on behalf of the Claimant. The Claimant also presented fact and expert witnesses to the Tribunal for examination, namely:

Mr. Andriyy Pyshnyy, CEO of Oschadbank; Mr. Oleksandr Matyukha, Senior Manager of Oschadbank; Professor Malcolm Shaw QC, its expert on international law; Professor William E. Butler, its expert on Russian law; and Mr. Jeffrey Davidson, its valuation expert. The Tribunal put questions to each of the Claimants' fact and expert witnesses.

47. Additionally, during the hearing, having noted that the Respondent had made no comments within the established time limit, the Tribunal admitted into the record the award submitted by the Claimant on 14 March 2017.⁵ The Tribunal also distributed and sought the Parties' comments on two articles on questions of investment valuation by Aswath Damodaran,⁶ the Wikipedia entry "Activ Solar",⁷ and an excerpt from the treatise on international law by Malcolm N. Shaw.⁸ The Tribunal also admitted into the record five new documents submitted by the Claimant and its experts in hard copy during the hearing.⁹
48. A transcript of the hearing was delivered electronically to the Parties at the end of each hearing day. By letter from the PCA dated 3 April 2017, hard and electronic copies of the complete transcript of the hearing were circulated to the Parties, with an invitation to propose corrections.
49. By the same letter of 3 April 2017, the Tribunal circulated to the Parties on a USB flash drive electronic copies of all the new documents distributed by the Claimant and the Tribunal during the hearing, and invited the Parties to comment on the Wikipedia entry "Activ Solar" and file a submission on costs.
50. On 11 April 2017, the Claimant submitted its proposed corrections to the transcript of the hearing and filed a post-hearing submission on the Wikipedia entry "Activ Solar" (the "**Post-Hearing Submission**"). On the same date, pursuant to certain questions put by the Tribunal to the Claimant during the hearing, the Claimant submitted a certified English translation, together with

⁵ *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21.

⁶ Aswath Damodaran, *Valuing Financial Services Firms*, *New York Stern School of Business Working Paper* (2009) (Tribunal exhibit 1; hearing bundle reference I/1); Aswath Damodaran, *INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET* (John Wiley & Sons, Inc., 3rd ed., 2012), Chapter 21 (Tribunal exhibit 2; hearing bundle reference I/2).

⁷ Tribunal exhibit 3; hearing bundle reference I/3.

⁸ Malcom N. Shaw, *INTERNATIONAL LAW* (5th ed., CUP, 2003), pp. 863-864 (Tribunal exhibit 4).

⁹ Table comparison of bank debt to equity ratio provided to the Tribunal by Mr. Davidson on 28 March 2017 (hearing bundle reference F4/34); Bank cost of capital statistics as at January 2017 provided to the Tribunal by Mr. Davidson on 28 March 2017 (hearing bundle reference F4/35); *Vienna Convention on Succession of States in respect of Treaties*, 1978 (hearing bundle reference D18/82); curriculum vitae of Professor William Butler (Annex 18 to the Expert Report of Professor William Butler dated 15 August 2016; hearing bundle reference E/17); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, entered into force on 3 July 1991 (hearing bundle reference G8/192).

the Russian original, of the *Agreement on Cooperation in the Sphere of Investment Activity* dated 24 December 1993, signed by the countries of the Commonwealth of Independent States including the Russian Federation and Ukraine, and a certification from an independent translator verifying the accuracy of the English translation of the Treaty submitted and relied upon by the Claimant.

51. The Respondent made no comments on the hearing transcript or the Wikipedia entry “Activ Solar”.
52. On 5 May 2017, the Claimant filed its submission on costs (the “**Submission on Costs**”).

III. FACTUAL BACKGROUND

A. THE CRIMEAN EVENTS OF FEBRUARY-MARCH 2014

53. The facts giving rise to these proceedings are linked to the Crimean events of February-March 2014 that culminated in the Accession of the Crimean Peninsula to the Russian Federation. The Claimant has provided a detailed factual narrative of these events in the Statement of Claim.¹⁰ Briefly recounted on the basis of documentary and media sources submitted by the Claimant, the Tribunal finds that these events unfolded as follows.
54. Starting from the last week of February 2014, Russian military forces were present in the Crimean Peninsula.¹¹ On 27 February 2014, an unidentified group was reported to have seized and raised a Russian flag over the building of the Crimean parliament in Simferopol.¹² On the same day, the Crimean parliament 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.¹³

¹⁰ See paras. 15–124.

¹¹ Roger McDermott, *Putin Celebrates First Anniversary of Seizing Crimea* (2015) 12 Eurasia Daily Monitor 49 (CE-243); Crimean News, *Vladimir Konstantinov: During the height of danger, members of Parliament thought that I knew something they didn't and it helped to hold out*, 2 March 2016 (CE-261); Official Website of the President of the Russian Federation, *Direct line with Vladimir Putin*, 17 April 2014 (CE-159): “...Of course, the Russian servicemen did back the Crimean Self-Defense forces. They acted in a civil but a decisive and professional manner, as I've already said.” See also Transcript of the Meeting of the National Security and Defense Council under the Chairmanship of Acting President of Ukraine and Chairman of the Verkhovna Rada of Ukraine O.V. Turchynov, 28 February 2014 (CE-58); Picture of the medal “For the Return of the Crimea” (CE-280) showing the dates of the Russian operation in the Crimean Peninsula to be 20 February – 18 March 2014.

¹² RT, *Crimean parliament sacks regional government, approves referendum*, 27 February 2014 (CE-55).

¹³ RT, *Crimean parliament sacks regional government, approves referendum*, 27 February 2014 (CE-55).

55. On 1 March 2014, the Federation Council of the Russian Federation (that is, the upper chamber of the Russian Parliament) approved President Putin’s request to “use the armed forces of the Russian Federation in the territory of Ukraine until the sociopolitical situation in that country normalizes.”¹⁴
56. On 6 March 2014, the Crimean Parliament resolved “to join the Russian Federation as a subject of the Russian Federation” and scheduled for 16 March 2014 a referendum in which voters in the entire Crimean Peninsula, including Sevastopol, would be asked to decide between the following options: (i) “Do you support the reunification of Crimea with Russia as a subject of the Russian Federation?”; and (ii) “Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of Crimea as part of Ukraine?”¹⁵
57. The referendum was held, as scheduled, on 16 March 2014. It is reported that approximately 96% of the votes cast were in favor of joining the Russian Federation.¹⁶
58. On the following day (17 March 2014), the Crimean Parliament adopted a resolution in which it proclaimed “Crimea to be an independent sovereign State—the Republic Crimea, in which the City of Sevastopol shall have a special status” and decreed that the Republic of Crimea “shall apply to the Russian Federation with a proposal concerning acceptance of the Republic of Crimea into the Russian Federation as a new subject of the Russian Federation with the status of a republic.”¹⁷ The Sevastopol City Council supported this resolution.¹⁸
59. On 18 March 2014, the authorities of the Republic of Crimea and the city of Sevastopol signed 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” (the “**Accession Treaty**”).¹⁹ Article 6 of the Accession Treaty provides as follows:

¹⁴ Decree of the Federation Council of the Federal Assembly of the Russian Federation No. 48-SF “On the Use of Armed Forces of the Russian Federation on the Territory of Ukraine”, 1 March 2014 (CE-66).

¹⁵ Decree of the Supreme Council of the Autonomous Republic of Crimea No. 1702-6/14 “On Holding of All-Crimean Referendum”, 6 March 2014 (CE-79).

¹⁶ Official Website of the State Council of the Republic of Crimea, “Crimean Spring” timeline (CE-278).

¹⁷ Resolution of the State Council of the Republic of Crimea No. 1745-6/14 “On the Independence of Crimea”, 17 March 2014 (CE-94).

¹⁸ Official Website of the State Council of the Republic of Crimea, “Crimean Spring” timeline (CE-278).

¹⁹ 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 (“Accession Treaty”) (CE-101).

A transitional period shall operate from the day of acceptance of the Republic Crimea into the Russian Federation and the formation of new subjects within the composition of the Russian Federation until 1 January 2015 [the “**Transitional Period**”], during which questions shall be settled concerning the integration of the new subjects of the Russian Federation into the economic, financial, credit, and legal system of the Russian Federation, within the system of agencies of State power of the Russian Federation, and also questions of the performance of military duty and performing military service on the territories of the Republic Crimea and City of Federal Significance Sevastopol.

60. On 19 March 2014, upon the request of President Putin, the Constitutional Court of the Russian Federation examined the Accession Treaty and found it to be consistent with the Constitution of the Russian Federation.²⁰
61. On 21 March 2014, the Russian Parliament adopted a federal law ratifying the Accession Treaty, as well as a federal constitutional law providing for the acceptance of the Republic of Crimea and Sevastopol as new subjects of the Russian Federation and implementing the Transitional Period for the integration of the Crimean Peninsula “into the economic, financial, credit, and legal system of the Russian Federation” (the “**Accession Law**”).²¹ Both laws were signed by the President of the Russian Federation on the same day.²²

B. THE CLAIMANT AND ITS BUSINESS IN THE CRIMEAN PENINSULA

62. The evidence establishes that the Claimant is a public joint stock company registered in Ukraine.²³ It is wholly owned by the State of Ukraine, which supervises certain of its activities²⁴ through a Supervisory Board comprised of 15 members appointed in equal proportions by the

²⁰ Constitutional Court of the Russian Federation, Judgment No. 6-P, 18 March 2014 (CE-103).

²¹ Federal Law of the Russian Federation No. 36-FZ “On Ratification of the [Accession Treaty]”, 21 March 2014 (Annex 10 to the Butler Report); Federal Constitutional Law No. 6-FKZ “On the Acceptance of the Republic of Crimea into the Russian Federation and Formation within the Composition of the Russian Federation of New Subjects—the Republic of Crimea and City of Federal Significance Sevastopol”, 21 March 2014, arts. 1, 2, 6 (CE-112).

²² The Kremlin, *Laws on admitting Crimea and Sevastopol to the Russian Federation*, 21 March 2014 (CE-111).

²³ Excerpt from the Unified State Register of Legal Entities and Entrepreneurs of Ukraine, 4 November 2015 (Exhibit C-3 to the Notice of Arbitration).

²⁴ The approval of the Supervisory Board is required, for instance, for the development strategy of the bank’s principal lines of business, its annual dividend statements, and the time and manner of dividend distribution. Pyshnyy Statement, para. 12.

Parliament, the Government and the President of Ukraine.²⁵ The Supervisory Board appoints a Management Board responsible for daily operations.²⁶

63. According to the Claimant, and the Tribunal so finds, it has banking operations throughout Ukraine comprised of 25 local branches.²⁷ Before the Accession, it operated in the Crimean Peninsula through a local branch with headquarters in Simferopol and a network of 294 outlets (the “**Crimean Branch**”).²⁸ Under Ukrainian law, the Crimean Branch was not a separate legal entity. It held the property of Oschadbank.²⁹
64. The Claimant asserted that at the end of 2013, the Crimean Branch had the second largest market share in the Crimean Peninsula in respect of retail individual deposits, with 16.5%.³⁰ It was also the largest lender in the Crimean Peninsula, with a 45% market share.³¹ Most notable among its commercial loans were 16 loan facilities in a total amount of over USD 500 million provided to the ActivSolar Group, which built and operated solar power plants in Crimea.³² Additionally, being State-owned, Oschadbank was permitted to have a security department equipped with weapons and armored vans, which generated additional profits from cash transportation services.³³
65. The Tribunal finds that, prior to the Accession, Oschadbank conducted regular banking activities and provided a range of financial services in the Crimean Peninsula through its Crimean Branch. It operated normally, and there is no evidence that it faced any problems that would prompt the intervention of banking or other financial authorities through their supervisory powers. This is

²⁵ Pyshnyy Statement, para. 10; Charter of Public Joint Stock Company “State Savings Bank of Ukraine”, approved by the National Bank of Ukraine on 29 April 2016, paras. 5, 32 and 33(1) (CE-265); Law of Ukraine No. 1166-VII “On Banks and Banking Activities”, 27 March 2014, art. 7(9-13) (CE-120).

²⁶ Pyshnyy Statement, para. 13; Charter of Public Joint Stock Company “State Savings Bank of Ukraine”, approved by the National Bank of Ukraine on 29 April 2016, para. 34(2) (CE-265).

²⁷ Statement of Claim, para. 100.

²⁸ Statement of Claim, para. 91; Pyshnyy Statement, para. 16.

²⁹ Regulation of the Crimean Republican Directorate of JSC “Oschadbank” No. 484 “On the Branch—Crimean Republican Directorate of Public Joint Stock Company ‘State Savings Bank of Ukraine’”, 31 July 2013, art. 1(1) (CE-18); Statement of Claim, para. 92; Pyshnyy Statement, paras. 15 and 17.

³⁰ Statement of Claim, para. 94; Pyshnyy Statement, para. 19; Davidson Report, para. 3.24; Office memorandum from I. Romanenko to A. Pozhydayev No. 10/2-20/499, re: market position of Crimean Republican Directorate of JSC “Oschadbank”, 11 August 2016, p. 5 (CE-273).

³¹ Pyshnyy Statement, para. 19; Davidson Report, para. 3.24. *See also* Hearing Tr., 27 March 2017 at 28 (Claimant’s opening statement); Office memorandum from I. Romanenko to A. Pozhydayev No. 10/2-20/496, re: the information on lending volumes, 10 August 2016 (CE-272).

³² Pyshnyy Statement, paras. 20-22.

³³ Pyshnyy Statement, para. 27.

an important point because, as established below, the situation in the Crimean Peninsula changed dramatically after the Accession, and it is these circumstances that triggered the intervention of the Russian financial authorities, which ultimately led to the termination of Oschadbank's Crimean Branch's operations and loss of its assets.

C. THE CLAIMANT'S LOSS OF CONTROL OVER ITS CRIMEAN BUSINESS

66. In essence, the Claimant asserted that its Crimean business was destroyed following the Accession as a result of the Respondent's actions, which were part of a "deliberate campaign to replace the Ukrainian banks in Crimea with Russian banks".³⁴ According to the Claimant, it shut down its Crimean Branch in May 2014 and has not operated it since, while its assets in the Crimean Peninsula have been taken by the Respondent.

67. The present section briefly sets out the factual findings of the Tribunal as to the manner in which the Claimant lost control over its Crimean business, addressing each of the following topics in roughly chronological order: (1) the regulatory framework for Ukrainian banks introduced by the Respondent in the Crimean Peninsula; (2) the practical difficulties encountered by the Crimean Branch (March 2014); (3) the measures taken against the employees and assets of the Crimean Branch (April-May 2014); (4) the steps taken by the Claimant to protect its Crimean assets (April 2014); (5) the closure of the Crimean Branch, and the decisions of the National Bank of Ukraine (the "NBU") and the Central Bank of the Russian Federation (the "**Bank of Russia**") prohibiting Oschadbank's Crimean activities (May-June 2014); and (6) the administration of the Claimant's assets by the Depositor Protection Fund (the "**DPF**") (from May 2014).

1. Regulatory framework for Ukrainian banks introduced by the Respondent in the Crimean Peninsula

68. Pursuant to the Accession Law adopted by the Respondent on 21 March 2014, Ukrainian banks having licenses issued by the NBU as of 16 March 2014 were permitted to continue operating in the Crimean Peninsula during the Transitional Period (that is, until 1 January 2015), during which time they could obtain licenses from the Bank of Russia in accordance with Russian legislation.³⁵

69. On 2 April 2014, the Respondent enacted the federal law "On Peculiarities of Functioning of Financial System of the Republic of Crimea and the Federal City of Sevastopol within the

³⁴ Statement of Claim, para. 42.

³⁵ Accession Law, art. 17(2), Annex 11 to the Butler Report.

Transitional Period” (the “**Crimean Financial System Law**”).³⁶ *Inter alia*, this law required Ukrainian banks operating in the Crimean Peninsula during the Transitional Period to: (i) provide services in Russian rubles (“**RUB**”);³⁷ (ii) provide the Bank of Russia with a register of their obligations towards creditors and depositors upon request within 15 calendar days;³⁸ and (iii) provide the Bank of Russia with financial reports and information regarding their registration, ownership structure and management.³⁹ If a Ukrainian bank failed to comply with these requirements, the Bank of Russia was empowered to terminate the operations of its non-complying branches in the Crimean Peninsula.⁴⁰ The Bank of Russia was also empowered to terminate the operations of a Ukrainian bank’s branch if that branch failed to perform its obligations towards its creditors or depositors within one or more days of the day when such obligations should have been performed.⁴¹

70. Also on 2 April 2014, the Respondent enacted the federal law “On the Defense of Interests of Natural Persons Having Deposits in Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance, Sevastopol” (the “**Depositor Protection Law**”).⁴² This law provided for the creation of the DPF, which was empowered to acquire the rights of depositors against financial institutions in the Crimean Peninsula the operations of which were terminated by the Bank of Russia, and to pay compensation to individual depositors equivalent to 100% of their claims against the financial institution, up to a maximum of RUB 700,000 per individual.⁴³ The Depositor Protection Law also empowered the DPF to represent creditors against financial institutions in court proceedings.⁴⁴ The DPF was to be financed by the Russian Deposit Insurance Agency, which received RUB 60 million from the Bank of Russia for this purpose.⁴⁵

³⁶ Federal Law of the Russian Federation No. 37-FZ (“Crimean Financial System Law”) (CE-129).

³⁷ Crimean Financial System Law, art. 3(1)(1) (CE-129).

³⁸ Crimean Financial System Law, art. 3(1)(3) (CE-129).

³⁹ Crimean Financial System Law, art. 3(1)(4) – (6) (CE-129).

⁴⁰ Crimean Financial System Law, art. 7(2) (CE-129).

⁴¹ Crimean Financial System Law, art. 7(2) (CE-129).

⁴² Federal Law of the Russian Federation No. 39-FZ (“Depositor Protection Law”) (CE-130).

⁴³ Depositor Protection Law, art. 8(1) (CE-130).

⁴⁴ Depositor Protection Law, art. 7(3) (CE-130).

⁴⁵ Depositor Protection Law, art. 4(1) (CE-130); The Charter of the Autonomous Non-profit Organization “Depositor Protection Fund”, art. 3.6(1) (CE-126) (in Russian only); Federal Law of the Russian Federation No. 40-FZ “On the Peculiarities of Crediting in 2014 Profit Received by the Central Bank of the Russian Federation for the Results of 2013”, 2 April 2014 (CE-131); Transcript of the Session of the State Duma, 31 March 2014 (CE-123).

71. On 30 December 2015, the Respondent enacted a federal law providing a procedure for the repayment of debts owed by individuals residing in the Crimean Peninsula to banks operating in the Crimean Peninsula in respect of which the NBU had adopted a decision on termination of their activity (the “**Repayment Law**”).⁴⁶

2. Practical difficulties encountered by the Crimean Branch (March 2014)

72. The Claimant asserted, and the Tribunal finds, that, as of March 2014, it faced mass cash withdrawals by Crimean depositors, which “resulted in a serious deterioration in the Crimean Branch’s cash position and profitability”.⁴⁷
73. The Claimant further described a general problem with the safe-keeping and circulation of cash:

Due to security concerns, legal entities [...] transferred large quantities of cash to their bank accounts. In turn, Ukrainian banks [...] resolved to transfer much of the cash kept in their vaults [...] to the Main Directorate of the NBU in [the Crimean Peninsula]. Consequently, the vault of the Main Directorate was overflowing with cash, which could not be transported out of [the Crimean Peninsula] due to the closed border [...].⁴⁸

3. Measures taken against the employees and assets of the Crimean Branch (April-May 2014)

74. The Claimant alleged, and the Tribunal finds, that the new Crimean authorities and the so-called Crimean Self-Defense Forces pressured and threatened the Claimant’s management and employees.⁴⁹ Thus, on 2 April 2014, the Claimant’s CEO, Mr. Pyshnyy, was put on a list of persons whose presence in the Crimean Peninsula was considered “undesirable”.⁵⁰ In April-May 2014, Mr. Oleg Riabtsev, the then Head of the Crimean Branch, was threatened with criminal prosecution if the Crimean Branch’s assets were moved to mainland Ukraine or if he ignored the requests of the Self-Defense Forces to hand over cash and valuables.⁵¹ The Claimant also noted

⁴⁶ Federal Law of the Russian Federation No. 422-FZ “On the Specifics of Repayment and Out-of-Court Settlement of Debt Borrowers Residing in the Territory of the Republic of Crimea or in the Territory of the City of Federal Significance, Sevastopol”, 30 December 2015, art. 1(1) (CE-254).

⁴⁷ Pyshnyy Statement, para. 29. *See also* CNTV News, *Withdrawal Limit Creates Long Queues at Crimea Banks*, 14 March 2014 (CE-90).

⁴⁸ Statement of Claim, paras. 155–157; Pyshnyy Statement, paras. 36–37.

⁴⁹ Statement of Claim, paras. 172–174.

⁵⁰ Statement of Claim, para. 173; State Council of the Republic of Crimea, *List of Individuals whose Presence is Undesirable in the Territory of the Republic of Crimea (UPDATED)*, 2 April 2014 (CE-132).

⁵¹ Statement of Claim, para. 172; E-mail from Mr. O. Riabtsev to Mr. A. Pyshnyy No. 22/1-01/954 dated 10 April 2014 (CE-145); Office memorandum of Mr. Matyukha No. 50-10/1350, “Report on business trip to branch — Crimean Republican Directorate” dated 27 May 2014 (CE-198); Matyukha Statement, para. 21: “I heard that Mr. Riabtsev said a few times that if we did not give the cash voluntarily, they would take it by force”.

that Russian state security agents attempted “to infiltrate and sabotage the Ukrainian banking system through the NBU branch in Crimea” and requested staff of the Crimean Branch to provide them with access to all information systems of the bank.⁵²

75. Furthermore, the Claimant stated that, in April 2014, its lease agreements to 85 banking outlets in the Crimean Peninsula were prematurely terminated under instructions of the Crimean authorities, “on the grounds of implementation of the governmental purpose-oriented program for the development of the banking system of the Republic of Crimea and its swift integration into the banking system of the Russian Federation”.⁵³ Following the termination of the Claimant’s leases, over 80 of its outlets came to be occupied by the Russian National Commercial Bank (the “**RNCB**”).⁵⁴
76. Finally, the Claimant recounted two incidents of allegedly unlawful seizure of cash and valuables, stating that on 16 and 21 May 2014, representatives of the Crimean authorities and the Self-Defense Forces seized over UAH 32 million in cash, as well as jewelry and precious stones with an estimated value of more than RUB 605 million, from the Crimean Branch’s headquarters in Simferopol.⁵⁵ The Claimant emphasized that the Kyiv District Court of Simferopol (the “**Simferopol Court**”) subsequently found one of the perpetrators of the seizures, Mr. Igor Vasilchenko (the Adviser to the Prime Minister of the Republic of Crimea as of the date of the these events) guilty of committing fraud, “i.e., a theft of another’s property by deception in especially big amount”.⁵⁶ At the same time, the Claimant noted that the seized money and valuables were never returned to Oschadbank and that the convicted individuals “served no time”, being “released on conditional sentences”.⁵⁷

4. Steps taken by the Claimant to protect its Crimean assets (April-May 2014)

77. The Claimant asserted, and the Tribunal finds that, in April-May 2014, the Claimant took steps to protect its rights and assets in the Crimean Peninsula. Thus, it performed inventory counts of the assets and liabilities of the Crimean Branch, and adopted special regulations prohibiting the

⁵² Statement of Claim, para. 174; Pyshnyy Statement, paras. 33–34.

⁵³ Letter from Mr. O. Riabtsev to Mr. A. Pyshnyy No. 24-01/070 dated 5 May 2014 (CE-176).

⁵⁴ Statement of Claim, paras. 177–181; Letter from Mr. O. Riabtsev to Mr. A. Pyshnyy No. 24-01/070 dated 5 May 2014 (CE-176); Matyukha Statement, para. 12; Pyshnyy Statement, para. 44.

⁵⁵ Statement of Claim, paras. 182–185.

⁵⁶ Simferopol Court, Case No. 1-483/2015, Sentence, 22 September 2015 (CE-251). *See also* Alla Dobrovolskaya (Kriminform) *Lowest Purity, P.1: “How Temirgaliev Organized Theft of Almost RUB 100 Million*, 4 February 2016 (CE-257).

⁵⁷ Hearing Tr., 27 March 2017 at 74 (Claimant’s opening statement).

Crimean Branch from performing most banking operations and from concluding new contracts with customers.⁵⁸

78. The Claimant also sought out ways to return cash, valuables and sensitive customer information to mainland Ukraine for safekeeping.⁵⁹ However, on most occasions such transfers were unsuccessful due to the fortified checkpoints on the border between the Crimean Peninsula and mainland Ukraine, and “threats to Oschadbank employees from the so-called Crimean Self-Defense Forces”.⁶⁰

5. Closure of the Crimean Branch, and decisions of the NBU and the Bank of Russia prohibiting the Claimant’s Crimean activities (May-June 2014)

79. On 6 May 2014, the NBU issued **Resolution No. 260**, which prohibited Ukrainian banks from conducting banking activities in the Crimean Peninsula as of 6 June 2014.⁶¹ According to its preamble, Resolution No. 260 was intended, *inter alia*, to address the NBU’s inability to regulate banking activities in the Crimean Peninsula after the Accession. In a letter to Oschadbank dated 12 November 2015, the NBU explained that Resolution No. 260 was aimed at “ensuring the stability of the national currency of Ukraine, protection of interests of depositors and other creditors of Ukraine’s banks, and preventing and precluding risks in activities of banks in connection with the occupation of territory of the Autonomous Republic of Crimea and the city of Sevastopol”.⁶² In another letter to Oschadbank dated 3 March 2016, the NBU explained that it had lost the power to regulate banking in the Crimean Peninsula “due to the takeover of the legal and administrative apparatus ... and the physical closing of the border through the installation of armed checkpoints by the so-called Crimean authorities”.⁶³ The NBU also stated that its employees “were intimidated and harassed by armed personnel that appeared to be Russian”.⁶⁴

⁵⁸ Statement of Claim, paras. 196–199; Pyshnyy Statement, para. 47.

⁵⁹ Statement of Claim, para. 190.

⁶⁰ Statement of Claim, paras. 190–193; *see* E-mail from Mr. O. Riabtsev to Mr. A. Pyshnyy No. 22/1-01/954 dated 10 April 2014 (CE-145), stating that Mr. Riabtsev was threatened by the Self-Defense Forces with criminal liability in case of transfer of the Claimant’s assets to mainland Ukraine.

⁶¹ Resolution of the Board of the National Bank of Ukraine No. 260 “On the Revocation and Cancellation of Bank Licenses and General Licenses for Carrying Out Currency Operations of Certain Banks and the Closure by Banks of Separated Units Located on the Territory of the Autonomous Republic of Crimea and City of Sevastopol”, 6 May 2014, sections 3–5 (CE-179).

⁶² Letter No. 18-03012/87200 from the NBU to Oschadbank dated 12 November 2015 (CE-253).

⁶³ Letter from Mr. S. Kubiv to Mr. A. Pyshnyy, re: the Resolution of the Board of the National Bank of Ukraine No. 260 of 6 May 2014 dated 3 March 2016 (CE-262).

⁶⁴ Letter from Mr. S. Kubiv to Mr. A. Pyshnyy, re: Resolution No. 260, dated 3 March 2016 (CE-262).

80. On 19 May 2014, the Claimant notified the NBU of its decision to close the Crimean Branch and the *de facto* termination of its operations in the Crimean Peninsula as of 26 May 2014.⁶⁵
81. On 26 May 2014, pursuant to Article 7 of the Crimean Financial System Law, the Bank of Russia issued a decision prohibiting the banking activities of the Claimant's Crimean Branch on the ground of "non-fulfillment of obligations towards creditors (depositors)" (the "**Decision on Termination**").⁶⁶ On the same day, the Bank of Russia appointed its "plenipotentiary representative" to the Crimean Branch and requested the Respondent's Ministry of Internal Affairs "to ensure security" of the Claimant's assets, databases and documentation.⁶⁷
82. On the same day (26 May 2014), the DPF announced that it would start accepting applications for compensation from the Claimant's depositors starting from 29 May 2014.⁶⁸
83. On 27 May 2014, the NBU struck out the Crimean Branch and its outlets from the Ukrainian State Register of Banks.⁶⁹
84. On 11 June 2014, the Crimean Branch was deleted from the Ukrainian Unified State Register of Legal Entities and Entrepreneurs.⁷⁰

6. Administration of the Claimant's assets by the DPF (from end May 2014)

85. On 29 May 2014, the Crimean Prosecutor's Office instituted proceedings against the Claimant before the Simferopol Court. In its statement of claim, the Prosecutor's Office indicated that it had received "numerous applications (complaints) from physical persons who earlier entered into bank deposit and bank account agreements" with the Claimant, which the Claimant was now

⁶⁵ Letter No. 11/4-16/345-5416-5416 from the Claimant to the NBU dated 19 May 2014 (CE-188); Letter No. 11/4-16/380-5634 from the Claimant to the NBU dated 26 May 2014 (CE-192).

⁶⁶ Decision of the Bank of Russia No. PH-33/II "On the Termination of Activity of Solitary Structural Subdivisions of Public Joint Stock Company 'State Savings Bank of Ukraine', City of Kyiv, Ukraine, on the Territory of the Republic of Crimea and City of Federal Significance Sevastopol", 26 May 2014 (CE-189).

⁶⁷ Order of the Bank of Russia No. OD-II50 "On the Appointment of Plenipotentiary Representatives of the Bank of Russia to Public Joint Stock Company 'State Savings Bank of Ukraine'", 26 May 2014 (CE-190); Letter of the Bank of Russia to the Ministry of Internal Affairs of the Russian Federation No. 04-33/4026, re: Decision of the Bank of Russia dated 26 May 2014 (CE-191).

⁶⁸ DPF's website, *On Compensation Payments and Acquisition of Rights (Claims)*, 26 May 2014 (CE-195).

⁶⁹ Statement of Claim, para. 206; Letter No. 41-114/27302 from the NBU to the Claimant "On Making the Entries to the State Register of Banks", 30 May 2014 (CE-205).

⁷⁰ Letter No. 102/11 from the State Enterprise "Information Resource Centre" of the Ministry of Justice of Ukraine to the Claimant, 25 January 2016 (CE-256).

failing to perform.⁷¹ On this basis, the Prosecutor's Office requested that the Court order the cessation of the Claimant's unlawful actions and grant provisional measures.

86. The Simferopol Court granted provisional measures on the same day (29 May 2014), in the form of the appointment of the DPF as administrator of all of the Claimant's assets in the Crimean Peninsula.⁷²
87. Still on 29 May 2014, in accordance with its prior announcement (see paragraph 82 above), the DPF started accepting applications for compensation from the Claimant's depositors.⁷³ It opened application processing centers in over 50 former outlets of the Crimean Branch,⁷⁴ and engaged the Russian bank, RNCB, as its agent for processing the applications and payments.⁷⁵
88. On 17 September 2014, the Simferopol Court rendered its decision on the merits of the application made by the Crimean Prosecutor's Office on 29 March 2014. The Court found that the Crimean Branch had terminated its operations at the end of April 2014 and had stopped performing its obligations under agreements with depositors. It ordered the Claimant "to cease unlawful actions (inactions) in the form of failure to perform obligations arising out of the concluded deposit agreements."⁷⁶ The decision did not cancel the provisional measures previously granted and the Claimant's Crimean assets remained under DPF administration.⁷⁷
89. According to the DPF's Annual Report of 2014, in that year it compensated 53,399 of the Claimant's depositors in the aggregate amount of approximately RUB 4.6 billion (approximately USD 81.8 million).⁷⁸ As a result, the DPF initiated several court proceedings against the Claimant

⁷¹ Statement of claim brought by the Deputy Prosecutor of the Republic of Crimea acting in the interests of the public against JSC "State Savings Bank of Ukraine" with attachments, 29 May 2014 (CE-203).

⁷² Simferopol Court, Case No. 2-931/14, Order "On Granting Provisional Measures", 29 April 2014 (CE-171).

⁷³ DPF's website, *On Compensation Payments and Acquisition of Rights (Claims)*, 26 May 2014 (CE-195).

⁷⁴ DPF's website, *Information for Depositors*, 29 May 2014 (CE-204).

⁷⁵ Statement of Claim, para. 225; DPF's website, *Information for Depositors*, 29 May 2014 (CE-204).

⁷⁶ Simferopol Court, Case No. 2-931/14, Decision, 17 September 2014 (CE-222).

⁷⁷ Statement of Claim, para. 220.

⁷⁸ DPF Annual Report 2014, p. 34 (CE-40); Website of the Central Bank of the Russian Federation, *Foreign Currency Market* (CE-229) showing the official exchange rate of RUB 56.2584 per USD set by the Bank of Russia as of 31 December 2014.

in the Crimean courts, seeking to recover the sums it paid to the Claimant's depositors.⁷⁹ According to the Claimant, the Crimean courts sustained 99.9% of the DPF's claims.⁸⁰

90. As of 31 December 2015, the DPF reported that the Claimant's debt constituted approximately RUB 4.7 billion (USD 64.5 million),⁸¹ and that the DPF continued to administer the following assets of the Crimean Branch: (i) proprietary rights under 2,033 loans issued to individuals and 66 corporate loans; (ii) 73 real estate properties (with a total area of 15,265.7 sq. m); (iii) movable property (152 ATMs, 774 POS-terminals, 116 vehicles, 19,702 objects of other movable property); (iv) valuables (precious metals and investment coins); and (v) monetary funds.⁸²
91. Moreover, the DPF, purportedly acting on behalf of the Claimant, initiated court proceedings against 12 ActivSolar Group companies under the Claimant's loan agreements.⁸³
92. Finally, as of 23 June 2016, the DPF had received 637 powers of attorney from the Claimant's creditors and filed 634 lawsuits on their behalf for amounts in excess of the compensation of RUB 700,000 guaranteed under the Depositor Protection Law (as to which see paragraph 70 above).⁸⁴

IV. KEY PROVISIONS OF THE TREATY

93. The Treaty was concluded on November 27, 1998 in Russian and Ukrainian, both texts having equal force.⁸⁵ It entered into force on January 27, 2000.
94. Article 9 of the Treaty sets forth the Contracting Parties' offer to arbitrate with investors. It provides:

⁷⁹ Statement of Claim, para. 228; Register of the DPF's Letters to Oschadbank (CE-286). The DPF's right of recourse is based on Articles 4–5 of the Crimean Depositor Protection Law (CE-130) and the Charter of the Autonomous Non-profit Organization "Depositor Protection Fund" (CE-126).

⁸⁰ Statement of Claim, paras. 235–236. DPF's Annual Report for 2015, p. 20 (CE-234).

⁸¹ DPF's Annual Report for 2015, pp. 20-21 (CE-234); Website of the Central Bank of the Russian Federation, *Foreign Currency Market* (CE-255) showing the official exchange rate of RUB 72.8827 per USD set by the Bank of Russia as of 31 December 2015.

⁸² DPF's Annual Report for 2015, pp. 20, 38-39 (CE-234).

⁸³ Register of the court proceedings initiated by the DPF against companies of the ActivSolar Group, 19 August 2016 (CE-275). The cases were pending as of the filing of the Statement of Claim.

⁸⁴ DPF's website, *Information Regarding the Operation of the Fund Related to Representation of the Interests of Depositors in the Recovery of Amounts of the Deposits which Exceed the Amount of Paid Compensations as of 23 June 2016*, 14 July 2016 (CE-267).

⁸⁵ See Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (Moscow, 27 November 1998), in force as of 27 January 2000, last sentence (CLA-1).

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

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

95. Article 12 of the Treaty describes the scope of the Treaty's application:

ARTICLE 12
APPLICATION OF THE AGREEMENT

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

96. Article 1(1) of the Treaty defines the term "investments":

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

- a) movable and immovable property, as well as associated proprietary rights;
- b) money, as well as securities, liabilities, deposits, and other forms of participation;
- c) intellectual property rights, including copyright and related rights, trademarks, the rights to inventions, industrial designs, models, as well as technological processes and know-how;
- d) rights to perform business activity, including rights to search for, cultivate and exploit natural resources.

Alteration of the type of investments, in which the funds will be invested, shall not affect their nature as investments, unless such alteration is contrary to the laws of a Contracting Party, in whose territory the investments were made.

97. Article 1(2) defines the term "investor of a Contracting Party":

The term "investor of a Contracting Party" means:

- a) any natural person, who is a national of the state of a Contracting Party and who is competent in accordance with its laws to make investments in the territory of the other Contracting Party;

- b) any legal entity, constituted under the law in force in the territory of that Contracting Party, provided, that the legal entity is competent under the laws of its Contracting Party to make investments in the territory of the other Contracting Party.

98. Article 1(4) defines the term “territory”:

The term “territory” means the territory of Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law.

99. Articles 2, 3, 4, 5 and 7 of the Treaty set forth the substantive protections allegedly breached by the Respondent:

ARTICLE 2
PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall encourage the investors of the other Contracting Party to make investments in its territory and shall admit such investments subject to its laws.
2. Each Contracting Party shall guarantee in conformity with its laws the full and unconditional legal protection to investments of investors of the other Contracting Party.

ARTICLE 3
NATIONAL TREATMENT AND MOST FAVORED NATION TREATMENT

1. Each Contracting Party shall provide in its territory to the investments made by investors of the other Contracting Party, and the activity associated with such investments treatment no less favorable, than the treatment, accorded to its own investors or investors of any third state, which precludes the application of discriminatory measures that could interfere with the management and disposal of the investments.

[...]

ARTICLE 4
TRANSPARENCY AND ACCESSIBILITY OF LEGISLATION

Each Contracting Party shall with a view to facilitating the comprehension of its legislation, pertaining to or affecting the investments made by investors of the other Contracting Party in its territory, provide for maximum possible transparency and accessibility of the legislation.

ARTICLE 5
EXPROPRIATION

1. The investments of investors of one Contracting Party, made in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to measures, the effect of which is tantamount to expropriation (hereinafter referred to as - expropriation), with the exception of cases, when such measures are adopted in the public interest under due process of law, are not discriminatory and are accompanied by the payment of prompt, adequate and effective compensation.

ARTICLE 7
TRANSFER OF FUNDS

1. Each Contracting Party shall guarantee to the investors of the other Contracting Party after they fulfil all tax obligations in conformity with the laws of either Contracting

Party unimpeded transfer abroad of payments associated with the investments, and in particular of:

- a) funds of initial investments and any extra funds to support and increase the investments;
- b) returns;
- c) funds, in repayment of loans, related to the investments;
- d) funds, received by an investor in connection with partial or total liquidation or sale of the investments;
- e) the compensation, provided for in Article 5 of this Agreement.

2. Transfer of funds shall be effected without delay in freely convertible currency at the exchange rate, applicable on the date of transfer pursuant to the laws on currency regulation of the Contracting Party, in whose territory the investments were made.

100. Key provisions of the 1969 Vienna Convention on the Law of Treaties (the “VCLT”) are set out below:⁸⁶

ARTICLE 29
TERRITORIAL SCOPE OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

ARTICLE 31
GENERAL RULES OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c) Any relevant rules of international law applicable in the relations between the parties.

⁸⁶ UN Doc. A/Conf.39/27; 1155 UNTS 331 (CLA-2). Both the Russian Federation and Ukraine are parties to the VCLT.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32
SUPPLEMENTARY MEANS OF INTERPRETATION

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

- a) Leaves the meaning ambiguous or obscure; or
- b) Leads to a result which is manifestly absurd or unreasonable.

101. For purposes of the discussion that follows, it is also useful to reproduce Article 15 of the 1978 Vienna Convention on the Succession of States in respect of Treaties (the “VCST”):⁸⁷

ARTICLE 15
SUCCESSION IN RESPECT OF PART OF TERRITORY

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

- a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
- b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

V. POSITIONS OF THE PARTIES

A. THE CLAIMANT’S POSITION

1. Jurisdiction

102. The Claimant submitted that the Tribunal has jurisdiction over its claims. Specifically, the Claimant submitted that: (a) the Treaty applies to the Claimant’s investments in the Crimean Peninsula; (b) the Claimant is a qualifying investor that held protected investments in the Crimean Peninsula; and (c) the Tribunal has temporal jurisdiction over the entirety of the Respondent’s conduct that affected the Claimant’s investments.

⁸⁷ 1946 UNTS 3. Ukraine became a party to the VCST on 26 October 1992. The Russian Federation is not a party to the VCST.

(a) The Treaty applies to the Claimant's investments in the Crimean Peninsula

103. The Claimant asserted that although, in its view, “Russian invasion, occupation, and effective control over Crimea ... constitute a breach of fundamental principles of international law”, the Tribunal need not determine the status of the territory of the Crimean Peninsula under international law.⁸⁸
104. According to the Claimant, the Treaty applies to the Claimant's investments in the Crimean Peninsula in any event because: (i) the definition of “territory” provided in Article 1(4) of the Treaty, interpreted pursuant to Articles 31 and 32 of the VCLT and in light of general international law, encompasses territories under a State's effective control; and (ii) the Respondent is barred from claiming that its actions cannot be regulated by the Treaty under such general principles of law as estoppel and preclusion.

i. Interpretation of Article 1(4) of the Treaty

105. **Ordinary meaning.** The Claimant emphasizes that the Treaty does not refer to the notion of sovereignty in its definition of “territory”.⁸⁹ Citing the expert evidence of its international law expert witness, Professor Malcolm Shaw, the Claimant submitted that the inclusion of the exclusive economic zone and the continental shelf in the definition of “territory” in Article 1(4) of the Treaty “demonstrates the clear intention that the [Treaty] is to apply beyond the sovereign land territory of the States concerned so as to include areas over which the State exercises jurisdiction and control, but not sovereignty as such”.⁹⁰
106. During the hearing, Professor Shaw observed that the phrase “in accordance with international law”, when found in bilateral investment treaties (“BITs”) between landlocked States and the Respondent, is used to qualify the Respondent's territory only.⁹¹ It followed, according to Professor Shaw that this phrase applied exclusively to maritime territories.

⁸⁸ Statement of Claim, paras. 12–13.

⁸⁹ Statement of Claim, para. 257.

⁹⁰ Statement of Claim, paras. 260–262, referring to Shaw Report, para. 39; Hearing Tr., 28 March 2017 at 205 (Professor Shaw's presentation).

⁹¹ Hearing Tr., 28 March 2017 at 246–247 (examination of Professor Shaw).

107. Moreover, relying on English, Russian and Ukrainian language dictionaries, the Claimant argued that the ordinary meaning of “territory” was also not constrained by sovereign limitations. Instead, the dictionaries focus on such concepts as “jurisdiction”, “control” and “power”.⁹²
108. **Good faith interpretation.** The Claimant alleged that the non-application of the Treaty to the Claimant’s investments in the Crimean Peninsula would contradict the standard of “reasonableness and fairness” implied in the principle of good faith interpretation.⁹³ Such non-application would create a legal gap⁹⁴ that would allow the Respondent to harm the Claimant’s investments without incurring any liability under the Treaty, which provides the only effective recourse available to Ukrainian investors in the Crimean Peninsula.⁹⁵
109. In support of its position, the Claimant referred to the jurisprudence of the European Court of Human Rights (the “ECtHR”), the UN Human Rights Committee (the “UNHRC”) and the International Court of Justice (the “ICJ”) confirming that the European Convention on Human Rights (the “ECHR”) and the International Covenant on Civil and Political Rights (the “ICCPR”) cannot be interpreted to allow a State to perpetrate on foreign territory the violations it could not perpetrate on its own territory.⁹⁶ According to the Claimant, the Supreme Court of the United States of America reached a similar conclusion regarding the application of statutory and constitutional *habeas corpus* rights to aliens detained at Guantanamo Bay.⁹⁷

⁹² Statement of Claim, paras. 258–259, referring to “Territory” as defined in Oxford Dictionaries Online, (ed. 2016) (CLA-10); Bryan A. Garner (ed.), BLACK’S LAW DICTIONARY (10th ed., Thomson West, 2014) (CLA-11); G.A. Kachevskaya, E.N. Tolikina (eds.), DICTIONARY OF MODERN RUSSIAN LANGUAGE, Volume 15, (Publishing house of the Academy of Sciences of the USSR, 1963) (CLA-13); TERMINOLOGICAL DICTIONARY OF LIBRARIAN OF SOCIAL AND ECONOMIC THEMES BY RUSSIAN NATIONAL LIBRARY (St. Petersburg, 2011) (CLA-14); A.P. Mozol, N.I. Mozol, L.G. DICTIONARY OF LEGAL TERMS, EDUCATIONAL AND SCIENTIFIC EDITION OF THE MINISTRY OF INTERNAL AFFAIRS OF UKRAINE, MINISTRY OF EDUCATION AND SCIENCE OF UKRAINE, NATIONAL ACADEMY OF INTERNAL AFFAIRS (Kyiv, 2014) (CLA-15).

⁹³ Statement of Claim, paras. 263–269, referring to Arnold D. McNair, THE LAW OF TREATIES (Oxford, 1961) p. 465 (CLA-16) and *Europe Cement v. Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 171 (with respect to the principle of good faith interpretation) (CLA-17); J. F. O’Connor, GOOD FAITH IN INTERNATIONAL LAW (Dartmouth, 1991), p. 124 (CLA-18). See also Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge, 1987), p. 115 (CLA-19) (with respect to the standard of “fairness and reasonableness”).

⁹⁴ Hearing Tr., 27 March 2017 at 87 (Claimant’s opening statement).

⁹⁵ Statement of Claim, para. 264.

⁹⁶ Statement of Claim, paras. 265–267, referring to *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment, 16 November 2004, para. 71 (CLA-20); *Solomou v. Turkey*, ECtHR Application No. 36832/97, Judgment, 24 June 2008, para. 45 (CLA-21); *Andreou v. Turkey*, (dec.), Application No. 45653/99, 3 June 2008 (CLA-22); *Isaak v. Turkey* (decision on admissibility), Application No. 44587/98, 28 September 2006 (CLA-23); *Lopez Burgos v. Uruguay*, UNHRC Communication No. R 12/52, 6 June 1979, para. 10.3 (CLA-24); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p. 136, para. 109 (CLA-25).

⁹⁷ *Rasul v. Bush*, 542 U.S. 466 (2004) (CLA-26); *Boumediene v. Bush*, 553 U.S. 723 (2008) (CLA-27).

110. **Context.** Referring to the Shaw Report, the Claimant argued that 17 references to “territory” in the Treaty “adopt an approach which couples territory with the prescriptive or legislative jurisdiction of the State, underlining in practice the importance of control”.⁹⁸ For instance, the definition of “investments” links “territory” with the ability of a Contracting Party to legislate in that area.⁹⁹
111. **Object and purpose.** The Claimant submitted that the proposed broad interpretation of the term “territory” is consistent with the Treaty’s object and purpose, namely, the creation and maintenance of favorable conditions for reciprocal investments, as evinced by the Treaty’s preamble.¹⁰⁰ With respect to the compatibility of the expansion of the territorial scope of a bilateral investment treaty (“BIT”) with the treaty’s object and purpose, the Claimant quoted the tribunal in *Sanum v. Laos*:
- the larger scope the Treaty has, the better fulfilled the purposes of the Treaty are in this case: more investors—who could not otherwise be protected—are internationally protected and the economic cooperation benefits a larger territory that would otherwise not receive such benefit.¹⁰¹
112. **General international law.** The Claimant further asserted that the Treaty must be “interpreted against the background of general principles of international law”.¹⁰² The relevant background comprises analogous situations in which the concept of territory is informed by a State’s effective exercise of jurisdiction beyond its sovereign territory.¹⁰³ As noted below,¹⁰⁴ the Tribunal has come to the unanimous view that no useful purpose is served by analyzing this alternative submission. Nevertheless, for the record, the Tribunal considers it appropriate to record the Claimant’s submission.

⁹⁸ Statement of Claim, paras. 270–275; Shaw Report, para. 40.

⁹⁹ Statement of Claim, para. 272, citing Article 1(1) of the Treaty: “The term “investments” means all kind of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws” (emphasis added).

¹⁰⁰ Statement of Claim, para. 278, referring to Shaw Report, para. 49; Hearing Tr., 27 March 2017 at 88 (Claimant’s opening statement).

¹⁰¹ *Sanum Investments Ltd. v. Lao People’s Democratic Republic*, PCA Case No. 2013-13, UNCITRAL, Award on Jurisdiction, 13 December 2013, para. 240 (CLA-33). See also Shaw Report, para. 50: “any interpretation of the BIT that precluded or hindered the promotion of investments and economic cooperation and the protection of investments would be inconsistent with the object and purpose of the treaty” (emphasis added).

¹⁰² Statement of Claim, paras. 283–325 and, in particular, para. 283, referring to Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (OUP, 2007), para. 1.11 (CLA-34).

¹⁰³ Statement of Claim, para. 284.

¹⁰⁴ *Infra*, at para. 217 below.

113. The Claimant referred to the following “analogous” situations. First, the Claimant referred to the “moving treaty boundaries” rule, which it formulates as follows: “Under international law, when part of the territory of one State becomes part of the territory of another State, the general rule is that the treaties of the former cease to apply to the territory while the treaties of the latter extend to the territory”.¹⁰⁵ According to the Claimant, this rule of a customary nature is codified in Article 15 of the VCST (reproduced in full at paragraph 101 above).¹⁰⁶ The Claimant also referred to Article 29 of the VCLT, which provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.¹⁰⁷ In connection with these two provisions, the Claimant submitted that here the Respondent, having taken steps to incorporate the Crimean Peninsula in its sovereign territory, should be regarded as having voluntarily assumed all obligations under Russian treaties in respect of that territory.
114. At the hearing the Claimant, while noting that pursuant to its Article 6 the VCST applies only to State successions “occurring in conformity with international law”, argued that the rule formulated in Article 15 of the VCST can nevertheless provide useful guidance for the Tribunal.¹⁰⁸ In response to a question from the Tribunal, Professor Shaw explained the relevance of the moving treaty boundaries rule to this case as follows:
- [I]t is the better view that the “moving frontiers doctrine” really referred to consensual changes of sovereignty. It would be difficult to say the rule as such applies here. I use it really to show that international law recognizes that there are certain situations where the territorial application of treaties can change due to particular circumstances.¹⁰⁹
115. Second, the Claimant alleged that investment treaty jurisprudence concerning intangible financial investments supports the broad interpretation of the territorial requirement.¹¹⁰ According to the Claimant, the tribunals in *Fedax v. Argentina*, *Abaclat v. Argentina*, *Deutsche Bank v. Sri Lanka* and *Ambiente v. Argentina* found that in situations where no physical link exists between the investment and the territory, what matters is whether the alleged investment was ultimately made available to the host State and served to finance its economy.¹¹¹ The Claimant submitted that in

¹⁰⁵ Statement of Claim, para. 286.

¹⁰⁶ Statement of Claim, para. 286–287.

¹⁰⁷ Statement of Claim, para. 288.

¹⁰⁸ Hearing Tr., 27 March 2017 at 91–92 (Claimant’s opening statement).

¹⁰⁹ Hearing Tr., 27 March 2017 at 231 (examination of Professor Shaw).

¹¹⁰ Statement of Claim, paras. 292–297.

¹¹¹ *Fedax v. Venezuela*, ICSID Case No. ARB/96/3, Decisions on Objections to Jurisdiction, 11 July 1997 (CLA-43), para. 41; *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 373–378 (CLA-44); *Deutsche Bank v. Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, paras. 288–292 (CLA-45); *Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9,

the present case the Respondent “has clearly received the financial benefits of the Claimant’s investments” in the Crimean Peninsula.¹¹²

116. Third, the Claimant argued that under international law the fact of “effective control” gives rise to State responsibility.¹¹³
117. Fourth, the Claimant referred to the jurisprudence of the ICJ, the ECtHR, the UNHRC and the United Nations Committee Against Torture to demonstrate that human rights treaties are consistently interpreted as extending to the territories over which their contracting parties exercise only effective control or jurisdiction.¹¹⁴ In particular, the Claimant emphasizes that in its *Wall* advisory opinion the ICJ held that Israel’s exercise of jurisdiction over the Occupied Palestinian Territories was sufficient to trigger its obligations under the ICCPR and the International Covenant on Economic Social and Cultural Rights.¹¹⁵
118. Fifth, according to the Claimant, extradition cases decided by national courts demonstrate that the territorial requirement of treaties can be equated with the exercise of effective control or jurisdiction.¹¹⁶ For instance, in the *Schtraks* case, decided by the House of Lords, a reference to “territory” in the extradition agreement between Israel and the United Kingdom was interpreted as a reference to territory “under the State’s effective jurisdiction”.¹¹⁷

Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 498–509 (CLA-46). *See also* Shaw Report, para. 59.

¹¹² Statement of Claim, para. 297.

¹¹³ Statement of Claim, para. 298, referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p. 16, para. 118 (CLA-48). *See also* Shaw Report, para. 78.

¹¹⁴ Statement of Claim, paras. 302–311, referring, *inter alia*, to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p. 136, paras. 108–112 (CLA-25); *Case Concerning Armed Activities on Territory of Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports, 2005, p. 168, para. 216 (CLA-57); UNHRC, General Comment No. 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (CLA-55); *Loizidou v. Turkey* (preliminary objections), ECtHR Application no. 15318/89, Judgment, 23 March 1995, paras. 56–62 (CLA-64); *Ilaşcu and Others v. Moldova and Russia*, ECtHR Application No. 48787/99, Judgment, 8 July 2004 (CLA-67); *Al-Skeini v. United Kingdom*, ECtHR Application No. 55721/07, Judgment, 7 July 2011, para. 138 (CLA-68).

¹¹⁵ Statement of Claim, para. 304, referring to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p. 136, paras. 108–112 (CLA-25).

¹¹⁶ Statement of Claim, paras. 312–318.

¹¹⁷ Statement of Claim, paras. 312–318, referring to *R. Governor of Brixton Prison, ex parte Schtraks (Schtraks)* [1964] A.C. 556; I.L.R. 33, 319, p. 587 (CLA-74). *See also* *R. v. Governor of Brixton Prison, ex parte Minervini* [1959] 1 QB 155; [1958] 3 WLR 559, p. 162 (CLA-76); Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, (6th ed., OUP, 2003), pp. 112–113 (CLA-73).

119. The last analogous situation referred to by the Claimant concerned the situation of belligerent occupation. The Claimant argued that in the present case the Crimean Peninsula constituted territory occupied by the Respondent, and that “Russia’s authority is based in international law upon its actual and effective control”.¹¹⁸ In such circumstances, human rights treaties apply and “it is but a short step to venture the conclusion that treaties that protect the rights of investors may similarly apply”.¹¹⁹
120. **Russia’s exercise of effective control:** Having reviewed analogous situations, the Claimant seeks to show that the Respondent has exercised effective control over the territory of the Crimean Peninsula since 21 March 2014 at the latest by recalling the facts narrated at paragraphs 53–61 above.¹²⁰ In addition to these facts, the Claimant referred to the following events:
- (vi) Upon ratification of the Federal Law on Accession, the Russian Federation formed new administrative authorities (agencies of executive bodies) and courts in Crimea and Sevastopol, in compliance with Russian laws and the Russian centralised governance and judicial system, including, *inter alia*, the so-called:
 - a. Regional prosecutor’s offices;
 - b. Regional bodies of the Russian Ministry of Internal Affairs;
 - c. The Crimean and Sevastopol FBS;
 - d. The Crimean FSS; and
 - e. A new court system that included commercial courts (or “arbitrazh courts”) and courts of general jurisdiction, including courts-martial;
 - (vii) Upon adoption of the Federal Law on Accession, President Putin appointed a range of Crimea and Sevastopol officials, including, *inter alia*, the Acting Crimean Head, Interior Minister of Crimea, Governor of Sevastopol, Crimean and Sevastopol Prosecutors, and the chairmen to purported federal courts in Crimea;
 - (viii) Pursuant to the Federal Law on Accession, so-called Crimean courts began to hear cases under Russian procedural law immediately after Crimea’s annexation;
 - (ix) On 31 March 2014, President Putin established the Federal Ministry on Crimean Affairs that was authorised to draft state programs aimed at Crimea’s development and tasked with controlling the conduct of the Crimean and Sevastopol authorities in exercising the powers delegated to them under Russian legislation;
 - (x) On 11 April 2014, the so-called Crimean Parliament purportedly adopted a new Crimean Constitution, “taking another step to cement the region’s absorption into Russia”;

¹¹⁸ Statement of Claim, paras. 319–321, referring to the *Hague Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, arts. 42–43.

¹¹⁹ Statement of Claim, paras. 319–323, referring to Shaw Report, para. 88; *Hague Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, art. 41 (CLA-77); Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (CUP, 2009), pp. 40 and 42 (CLA-78); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p. 136, paras. 111–112 (CLA-25); *Case Concerning Armed Activities on Territory of Congo (Democratic Republic of Congo v. Uganda)*, ICJ Reports, 2005, p. 168, paras. 216–217 (CLA-57).

¹²⁰ Statement of Claim, paras. 324–325.

- (xi) The new Crimean Constitution was officially published and entered into force on 12 April 2014, and it called for the application of international treaties of the Russian Federation to Crimea;
- (xii) In April 2014, “in order to make the federal, regional and municipal executive authorities’ socioeconomic development efforts in Crimea and Sevastopol more effective”, President Putin established the State Commission for Socioeconomic Development in the Republic of Crimea and Sevastopol;
- (xiii) The Russian Federation established complete control of the banking system in Crimea through the enactment of various pieces of legislation following the March 2014 referendum, including, *inter alia*, the Federal Law on the Crimean Financial System that regulated the operations of Ukrainian banks in Crimea.¹²¹

121. Additionally, argued the Claimant, pursuant to Article 9(1) of the Accession Treaty, “[l]egislative and other normative acts of the Russian Federation shall operate on the territories of the Republic Crimea and City of Federal Significance Sevastopol from the day of acceptance of the Republic Crimea into the Russian Federation...”.¹²² The Constitutional Court of the Russian Federation explained that the purpose of this provision was to ensure “maximum stability of legal regulation and the avoidance of gaps therein”.¹²³ Therefore, according to the Claimant, the Respondent itself has undertaken to eliminate legal gaps by imposing its legal system as a whole, including ratified BITs, on the Crimean Peninsula.¹²⁴

ii. General principles of law: estoppel and preclusion

122. According to the Claimant, the Respondent had tried to “blow hot and cold”¹²⁵ when it declared that the Crimean Peninsula was part of its sovereign territory, while simultaneously denying the jurisdiction of the Tribunal.¹²⁶ Such inconsistent conduct ran against the doctrine of estoppel¹²⁷ and the principle of preclusion reflected in such maxims as *venire contra factum proprium* and *allegans contraria non audiendus est*.¹²⁸

¹²¹ Statement of Claim, paras. 324–325.

¹²² CE-101, referred to by the Claimant, *inter alia*, at Hearing Tr., 27 March 2017 at 45 (Claimant’s opening statement).

¹²³ Constitutional Court of the Russian Federation Judgment No. 6-P, 18 March 2014 (CE-103).

¹²⁴ Hearing Tr., 27 March 2017 at 92–94 (Claimant’s opening statement).

¹²⁵ The expression used by Lord McNair in Arnold D. McNair, *THE LAW OF TREATIES* (Oxford, 1961), p. 485 (CLA-16); *see also* Iain C. MacGibbon, *Estoppel in International Law* (1958) 7 Int’l & Comp. L. Q. 468, p. 469 (CLA-79).

¹²⁶ Statement of Claim, para. 334, referring to the Respondent’s letter to the PCA dated 21 June 2016, reproduced *supra*, para. 19.

¹²⁷ Statement of Claim, paras. 327–333.

¹²⁸ Statement of Claim, paras. 334–344, referring, *inter alia*, to *RSM v. Grenada*, ICSID Case No. ARB/05/14, Decision on Preliminary Objections, 7 December 2009, para. 27 (CLA-80); *SPP (Middle East) Ltd. v. Egypt*,

123. According to the Claimant, estoppel, unlike preclusion, required an element of reliance, which is, in any event, present in this case because Oschadbank remained in the Crimean Peninsula past 21 March 2014 in reliance on the Transitional Period until 1 January 2015 guaranteed by the Accession Treaty and the Accession Law.¹²⁹
124. The Claimant also emphasized that, in occupying the Crimean Peninsula, “the Russian Federation has benefitted enormously from the many assets and resources located in Crimea, while ousting forcibly, treating abusively and otherwise harming the Ukrainian holders of such assets.”¹³⁰ It followed that, in the Claimant’s view, the Respondent must be barred from relying on any interpretation of the term “territory” that was adverse to the Tribunal’s assertion of jurisdiction.¹³¹

(b) The Claimant is a qualifying investor that held protected investments in the Crimean Peninsula

125. The Claimant submitted that it is an investor within the meaning of Article 1(2) of the Treaty. Specifically, it is a company that was duly registered under the laws of Ukraine and held a banking license from the NBU.¹³² As there was no requirement under Ukrainian law to be specifically enabled or competent to make investments in the Crimean Peninsula, the Claimant freely conducted its business in that territory in accordance with Ukrainian law.¹³³
126. The Claimant also submitted that the broad definition of “investments” in Article 1(1) of the Treaty covered all of its Crimean investments, including:

material assets (movable and immovable property), rights to real property (including rights emanating from lease agreements), claims, rights and economic interests arising from the relations of [the Crimean Branch] with its clients (including, inter alia, the right to dispose of and manage deposited funds, as well as claims under loan agreements), goodwill, credit and reputation [and the] Claimant’s extensive and profitable business operations in Crimea, taken as a whole...¹³⁴

ICC Case No. 3493, Award (extract), 11 March 1983, para. 51 (CLA-83); *Argentine-Chile Frontier Case (Argentina v. Chile)*, Award, 9 December 1966, 16 R.I.A.A. 109 (1969), p. 164 (CLA-84); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge, 1987), p. 142 (CLA-19) (emphasis in original, citing *The S.S. Lisman (United States of America v. United Kingdom)*, Award, 5 October 1937, 3 R.I.A.A. 1767, 1790 (1950)); *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 1933 PCIJ, Ser. A/B, No. 53, pp. 68–69 (CLA-87).

¹²⁹ Hearing Tr., 27 March 2017 at 94 (Claimant’s opening statement).

¹³⁰ Statement of Claim, para. 248.

¹³¹ Statement of Claim, para. 248.

¹³² Hearing Tr., 27 March 2017 at 96 (Claimant’s opening statement).

¹³³ Statement of Claim, paras. 345–347; Extract from the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations of Ukraine, 12 August 2016 (CE-274).

¹³⁴ Statement of Claim, paras. 348–349.

127. As regards the timing of the making of the investments, the Claimant alleged that the Treaty connects responsibility with investments “made”, but not “originally made”, in the host State’s territory.¹³⁵ Thus, the Claimant’s assets became investments for purposes of the Treaty once the Treaty took effect in the Crimean Peninsula (on 18 or 21 March 2014, when Russia established its effective control over the peninsula¹³⁶) and that is also the relevant date to verify whether the investments were in compliance with Russian law.¹³⁷
128. With respect to the question of compliance with Russian law, the Claimant alleged that the Accession did not affect the lawfulness of its investments, as pursuant to Article 17 of the Accession Law Ukrainian banks were allowed to continue operating in the Crimean Peninsula under NBU licenses until 1 January 2015.¹³⁸ Moreover, Article 12 of the same law preserved the validity of documents evidencing rights of ownership and use created under Ukrainian law before the Accession.¹³⁹ On these grounds, the Claimant asserted that it was authorized under Russian law to possess investments in the Crimean Peninsula; accordingly, the Respondent should be considered as having “admitted” the Claimant’s investments under its laws in the sense of Article 2(1) of the Treaty (reproduced in full at paragraph 99 above).
129. In response to an argument made in the Respondent’s letter of 13 May 2016,¹⁴⁰ the Claimant contended that taxation should not be regarded as a criterion for determining whether an investment exists, as the application of such a criterion would lead to the absurd result that “companies located in ... tax-free jurisdictions would not constitute investments”.¹⁴¹ In any event, pursuant to Article 15 of the Accession Law, Russian taxation legislation did not apply to the Claimant and its assets in the Crimean Peninsula until 1 January 2015.¹⁴²
130. Finally, the Claimant asserted that it contributed to the economy of the Crimean Peninsula before the Accession, as it was “a fundamental cornerstone of the Crimean banking system”.¹⁴³ The

¹³⁵ Statement of Claim, para. 350.

¹³⁶ Statement of Claim, para. 351.

¹³⁷ Hearing Tr., 27 March 2017 at 140 (Claimant’s opening statement).

¹³⁸ Hearing Tr., 27 March 2017 at 98 (Claimant’s opening statement), referring to the Accession Law (CE-112). See also Article 3(1) of the Crimean Financial System Law (CE-129).

¹³⁹ Hearing Tr., 27 March 2017 at 99 (Claimant’s opening statement), referring to the Accession Law (CE-112).

¹⁴⁰ Reproduced in full *supra*, para. 20.

¹⁴¹ Hearing Tr., 27 March 2017 at 102 (Claimant’s opening statement).

¹⁴² Hearing Tr., 27 March 2017 at 102–103 (Claimant’s opening statement), referring to the Accession Law (CE-112).

¹⁴³ Hearing Tr., 27 March 2017 at 103 (Claimant’s opening statement).

Claimant also contributed to the economy of the Respondent by continuing its operations in the Crimean Peninsula for approximately two months after the Accession.¹⁴⁴

(c) The Tribunal has temporal jurisdiction over the entirety of the Respondent's unlawful conduct

131. The Claimant submitted that the Treaty became effective in respect of its investments, at the latest, on 21 March 2014, when the Respondent established effective control over the Crimean Peninsula.¹⁴⁵ Nevertheless, according to the Claimant, the Tribunal had temporal jurisdiction over the unlawful conduct of the Respondent before that date (as of 1 March 2014)¹⁴⁶ because it can be qualified as either a composite¹⁴⁷ or continuing¹⁴⁸ treaty violation under international law.¹⁴⁹
132. According to the Claimant, the Respondent's unlawful composite measure comprised, but was not limited to, the following acts and omissions:
- (i) the establishment of effective control over the territory of the Crimean Peninsula at least as of 1 March 2014, which compromised the safety and security of the Claimant's activities in Crimea;
 - (ii) the forced takeover of legal and administrative facilities in the Crimean Peninsula and border closures, which deprived the NBU of the power to regulate the banking network

¹⁴⁴ Hearing Tr., 27 March 2017 at 103 (Claimant's opening statement).

¹⁴⁵ Statement of Claim, para. 353.

¹⁴⁶ Hearing Tr., 27 March 2017 at 104 (Claimant's opening statement).

¹⁴⁷ Statement of Claim, paras. 357–376, referring, *inter alia*, to the definition of a composite act in Article 15 of the draft Articles on Responsibility of States for Internationally Wrongful Acts (CLA-51); and citing also; *Mondev International v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paras. 57 and 69–70 (CLA-90); *Technicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 66, 68 and 151 (CLA-9); *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, paras. 49–50 (CLA-91); *Societe Generale v. Dominican Republic*, UNCITRAL, Preliminary Objections to Jurisdictions, 19 September 2008, para. 91 (CLA-92).

¹⁴⁸ Statement of Claim, paras. 377–382, referring, *inter alia*, to Article 14(2) of the draft Articles on Responsibility of States for Internationally Wrongful Acts; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, para. 62 (CLA-98); *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 167 (CLA-99).

¹⁴⁹ Referring to *Walter Bau v. Thailand*, the Claimant submitted that the Tribunal does not need to distinguish between the two categories. It is sufficient to establish that the conduct commenced prior to the Treaty's effectiveness and continues thereafter. See Statement of Claim, para 383, referring to *Walter Bau AG v. Thailand*, Award, UNCITRAL, 1 July 2009, paras. 12.26–12.37 (CLA-93).

and monetary system of the Crimean Peninsula, thereby threatening the financial stability of the Claimant's activities in Crimea;

- (iii) the imposition of restrictions on banking activities by the new Crimean authorities in March 2014;¹⁵⁰
- (iv) the enactment on 2 April 2014 of the Crimean Financial System Law, which imposed onerous and discriminatory obligations on the Claimant;
- (v) the implementation in April 2014 of the governmental program for the integration of the Crimean Peninsula into the Russian banking system;
- (vi) the intimidation of the Claimant's employees and the looting of its premises in April-May 2014 (see paragraphs 74–78 above);
- (vii) the termination of the Claimant's activities by the Bank of Russia; and
- (viii) the DPF administration of the Claimant's assets.¹⁵¹

133. At the same time, the Claimant argued, the Respondent's conduct was continuing "in the sense that it may be seen as consisting of a single course of conduct that has persisted without interruption throughout the occupation period."¹⁵²

134. According to the Claimant, starting from 1 March 2014, the Respondent had full knowledge that the Russian legal system, including its international treaties, would become applicable in the Crimean Peninsula after either 18 or 21 March 2014.¹⁵³ Despite this knowledge, the Respondent deliberately started violating its Treaty obligations before its entry into force and continued doing so thereafter.¹⁵⁴

2. Attribution

135. Invoking the customary rules of attribution codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"), the Claimant submitted that the Respondent was responsible for the acts and omissions of the

¹⁵⁰ Statement of Claim, para. 157.

¹⁵¹ Statement of Claim, para. 386.

¹⁵² Statement of Claim, para. 387.

¹⁵³ Hearing Tr., 27 March 2017 at 106–107 (Claimant's opening statement).

¹⁵⁴ Hearing Tr., 27 March 2017 at 106 (Claimant's opening statement).

following persons and entities: (i) the Russian military; (ii) the Russian Parliament; (ii) the Bank of Russia; (iii) the DPF; (iv) the Crimean authorities, including the Crimean state officials, the Crimean courts, the Crimean Parliament and Sevastopol's Assembly; and (v) the Crimean Self-Defense Forces.¹⁵⁵

136. According to the Claimant, the Respondent was responsible for the conduct of its military, Parliament and the Bank of Russia because they are organs of the State within the meaning of Article 4 of the ILC Articles.¹⁵⁶ With respect to the Bank of Russia, the Claimant argued that it is the highest authority in Russia on monetary regulation, which carries out Russian monetary policy, supervises the commercial banking system, maintains the payment system and channels 75% of its profit into the Russian budget.¹⁵⁷ Alternatively, the actions of the Bank of Russia were attributable to the Respondent under Article 5 of the ILC Articles, as the Bank “is empowered with elements of governmental authority and charged with implementing state monetary policy”.¹⁵⁸
137. The Claimant further asserted that, on the eve of the Accession, the Crimean authorities were acting under the direction and control of the Respondent and that, since 21 March 2014, they have been organs of the Respondent and/or have been authorized to exercise Russian governmental authority.¹⁵⁹
138. The Claimant asserted that actions of the DPF are attributable to the Respondent under Article 8 of the ILC Articles, as the DPF acted under the direction and control of the Russian Government.¹⁶⁰
139. Finally, the Claimant also stated that the Respondent was responsible for the acts of the Crimean Self-Defense Forces (paramilitary units) and other “Russia-backed and/or funded groups and individuals” that were engaged in acts of intimidation of the Claimant’s employees, as well as the misappropriation of cash and valuables from the Crimean Branch.¹⁶¹ According to the

¹⁵⁵ Statement of Claim, para. 389.

¹⁵⁶ Statement of Claim, paras. 404–409.

¹⁵⁷ Hearing Tr., 27 March 2017 at 109 (Claimant’s opening statement), referring to the information published on the Official website of the Bank of Russia, *The Central Bank of the Russian Federation* (CE-285); Federal Law of the Russian Federation No. 86-FZ “On the Central Bank of the Russian Federation (Bank of Russia)”, 10 July 2002 (CE-11).

¹⁵⁸ Statement of Claim, para. 409.

¹⁵⁹ Statement of Claim, paras. 413–415.

¹⁶⁰ Statement of Claim, paras. 410–412.

¹⁶¹ Hearing Tr., 27 March 2017 at 110 (Claimant’s opening statement). *See also* Pyshnyy Statement, paras. 34 and 36; Matyukha Statement, paras. 17–25.

Claimant, the Crimean Self-Defense Forces were acting under the direction or control of the Crimean Ministry of Internal Affairs that subsequently came under the control of the Respondent.¹⁶² Therefore, their conduct is attributable to the Respondent under Article 8 of the ILC Articles.¹⁶³

140. Moreover, and in the alternative, the Claimant argued that the Respondent must be held internationally responsible for its own failure to prevent the unlawful conduct of the Crimean Self-Defense Forces in the period following Russia's assumption of *de facto* control over the Crimean Peninsula.¹⁶⁴

3. Liability under the Treaty

141. The Claimant submitted that the Respondent breached several provisions of the Treaty, including (a) Article 2(2) guaranteeing unconditional legal protection; (b) Article 3(1) guaranteeing non-discriminatory treatment; (c) Article 3(1) guaranteeing most favored nation treatment; (d) Article 4 ensuring transparency and accessibility of legislation; (e) Article 5(1) preventing unlawful expropriation; (f) Article 7 ensuring free transferability of funds; and (g) protection against denial of justice.

(a) Article 2(2): unconditional legal protection

142. The Claimant equates the guarantee of unconditional legal protection set out in Article 2(2) of the Treaty with the “full protection and security” (“FPS”) standard.¹⁶⁵

143. Relying on *National Grid v. Argentina*, *Bogdanov v. Moldova*, *CME v. Czech Republic* and *Siemens v. Argentina*,¹⁶⁶ the Claimant submitted that the Respondent violated the FPS standard

¹⁶² See Statement of Claim, para. 120, referring to the Resolution of the Supreme Council of the Autonomous Republic of Crimea No. 1734- 6/14, “Regulation on People’s Guard of Crimea”, 11 March 2014 (CE-86).

¹⁶³ Statement of Claim, para. 416.

¹⁶⁴ Statement of Claim, paras. 416–423, referring to, *inter alia*, *Congo v. Uganda*, where the ICJ found that Uganda was responsible for “any lack of vigilance in preventing” violations committed on the territory under Uganda’s control by rebel groups. *Case Concerning Armed Activities on Territory of Congo (Democratic Republic of Congo v. Uganda)*, ICJ Reports, 2005, p. 168, para. 179 (CLA-57). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 2007, 26 February 2007, p. 43, paras. 166–167 (CLA-50); *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), para. 172 (CLA-114); *Loizidou v. Turkey*, (preliminary objections), ECtHR Application No. 15318/89, Judgment, 23 March 1995, para. 62 (CLA-64).

¹⁶⁵ Statement of Claim, para. 427.

¹⁶⁶ Statement of Claim, paras. 427–431, referring to *National Grid v. Argentina*, UNCITRAL, Award, 3 November 2008, para. 189, (CLA-118); *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No.

by enacting the following laws that destroyed the traditional banking regulation environment in the Crimean Peninsula: (i) the Crimean Financial System Law, which imposed excessively stringent requirements on Ukrainian banks operating in the Crimean Peninsula and lacked the “most basic due process safeguards”;¹⁶⁷ (ii) the Depositor Protection Law, which “played a key role” in establishing the Respondent’s control over the Crimean banking system;¹⁶⁸ and (iii) the Repayment Law.¹⁶⁹

144. The Claimant submitted that the majority of the requirements of the Crimean Financial System Law could not feasibly be complied with.¹⁷⁰ For example:

- i. The requirement to provide customers with services in Russian rubles disregarded the fact that Ukrainian banks had to comply with Ukrainian foreign currency regulations.¹⁷¹ In particular, a customer intending to make a transaction in a foreign currency was required to obtain a license from the NBU prior to such transaction,¹⁷² which could take up to 25 business days.¹⁷³ Moreover, initially the Accession Law permitted the circulation of the Ukrainian hryvnia in the Crimean Peninsula until 1 January 2016.¹⁷⁴ However, on 27 May 2014, the period was shortened until 1 June 2014.¹⁷⁵
- ii. As regards the requirement of the Bank of Russia to provide it with a register of obligations towards creditors and depositors upon request within 15 calendar days,¹⁷⁶ the Claimant explained that even the Bank of Russia acknowledged on 17 April 2014 that it might be difficult to submit such registers within the prescribed time limit and permitted the Ukrainian banks to file extension requests that would be evaluated on a case by case

V114/2009, Final Award, 30 March 2010, paras. 77–85 (CLA-119); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 303 (CLA-121).

¹⁶⁷ Statement of Claim, para. 433(i).

¹⁶⁸ Statement of Claim, para. 433(ii).

¹⁶⁹ Repayment Law, arts. 1(1), 1(9) (CE-245); Statement of Claim, paras. 240–241, 433(iii).

¹⁷⁰ Statement of Claim, paras. 135–136.

¹⁷¹ Statement of Claim, para. 135(i) (*citing*, Crimean Financial System Law, art. 3(1)(1) (CE-129)).

¹⁷² Decree of the Cabinet of Ministers of Ukraine No. 15-93 “On the System of Currency Regulation and Currency Control”, 19 February 1993, art. 5(4)(d) (CE-3).

¹⁷³ *See* Statement of Claim, p. 42, n. 254.

¹⁷⁴ Accession Law, art. 16(2) (CE-112).

¹⁷⁵ Federal Constitutional Law No. 7-FKZ “On Amending The Federal Constitutional Law ‘On the Acceptance of the Republic of Crimea into the Russian Federation and Formation Within the Composition of the Russian Federation of New Subjects–Republic of Crimea and City of Federal Significance Sevastopol’”, 27 May 2014 (CE-196).

¹⁷⁶ Crimean Financial System Law, art. 3(1)(3) (CE-129).

basis.¹⁷⁷ Moreover, disclosing customer information to the Bank of Russia would violate the banking secrecy guaranteed by Ukrainian law.¹⁷⁸

- iii. With respect to the requirement to provide the Bank of Russia with financial reports and information regarding the registration, ownership structure and management of Oschadbank,¹⁷⁹ the Claimant argued that it was practically impossible to comply with within the established deadlines, taking into account that the information had to be submitted in Russian.¹⁸⁰

145. Furthermore, the Claimant submitted that the Respondent “had calculated that it would be impossible” for Ukrainian banks to comply with the requirements introduced by the Crimean Financial System Law.¹⁸¹ Thus, the Claimant concluded, the Crimean Financial System Law “was deliberately designed ... to foreclose the ability of Ukrainian banks” to operate in the Crimean Peninsula.¹⁸²

146. The Claimant also asserted that the Crimean Financial System Law lacked the most basic due process safeguards, such as an appeal mechanism and an opportunity for the affected banks to present their views on any alleged breaches.¹⁸³ The Crimean Financial System Law also did not require depositors to submit any evidence and lacked any procedure or criteria to verify the

¹⁷⁷ Press Service of the Central Bank of the Russian Federation, Information Notice “On the work of Credit Institutions on the Territory of the Republic of Crimea and City of Federal Significance, Sevastopol”, 17 April 2014 (CE-163).

¹⁷⁸ Statement of Claim, para. 135(ii); referring to the Civil Code of Ukraine (as amended on 19 April 2014), art. 1076 (CE-12); Law of Ukraine No. 2121-III “On Banks and Banking Activities”, 7 December 2000, arts. 60–62 (CE-8).

¹⁷⁹ Crimean Financial System Law (CE-129), art. 3(1)(4)–(6); Butler Report, paras. 99–102; Order of the Bank of Russia No. OD-658 “On the Submission to the Central Bank of the Russian Federation by Banks Registered on the Territory of the Republic Crimea or on the Territory of the City of Federal Significance, Sevastopol of Reports for the Purposes of Supervision”, 11 April 2014 (CE-151); Order of the Bank of Russia No. OD-907 “On Submission of information to the Central Bank of the Russian Federation, by the branches of banks operating within the territory of the Republic of Crimea, or within the territory of the federal city of Sevastopol, for supervisory purposes”, 2 May 2014 (CE-175).

¹⁸⁰ Statement of Claim, para. 135(iii). On the Russian translation requirement *see* Butler Report, paras. 103–105; Information Notice of the Bank of Russia “On Explanations Regarding Provisions of Federal Laws No. 37-FZ and No. 39-FZ dated 2 Apr. 2014”, 7 April 2014 (CE-139); Order of the Bank of Russia No. OD-563, “On Sending to the Bank of Russia by Banks Registered on the Territory of the Republic Crimea and/or Territory of the City of Federal Significance, Sevastopol, and by Banks Operating on the Territory of the Republic Crimea and/or the Territory of the City of Federal Significance, Sevastopol, Information and Documents in Accordance with Paragraph 1(5) of Article 3 of the Federal Law ‘On the Peculiarities of the Functioning of the Financial System of the Republic Crimea and City of Federal Significance, Sevastopol, in the Transition Period’ No. 37- FZ, dated 2 April 2014”, 4 April 2014 (CE-287).

¹⁸¹ Hearing Tr., 27 March 2017 at 19 (Claimant’s opening statement).

¹⁸² Hearing Tr., 27 March 2017 at 60 (Claimant’s opening statement).

¹⁸³ Statement of Claim, para. 433(i); Hearing Tr., 27 March 2017 at 54 (Claimant’s opening statement).

information provided by depositors to prove the Ukrainian bank's failure to fulfil the law's requirements.¹⁸⁴

147. As for the Depositor Protection Law, the Claimant submitted that it “played a key role in facilitating the Russian Federation’s control over the Crimean banking system”.¹⁸⁵ In this connection, the Claimant referred to 30 court proceedings initiated against it by the DPF before the Crimean courts to recover debts in a total amount of RUB 4.6 billion.¹⁸⁶ The Claimant also recalled that “[a]ccording to the DPF website, as of 23 June 2016, the DPF had filed 6,906 statements of claim on behalf of depositors against the Ukrainian banks, including 634 against the Claimant”.¹⁸⁷
148. With respect to the Repayment Law, the Claimant submitted that only entities established under Russian law could be recognized as creditors for the purposes of this law.¹⁸⁸ Therefore, the Claimant’s legitimate claims were frustrated, as it, being a Ukrainian bank, could not benefit from the Repayment Law.

(b) Article 3(1): non-discriminatory treatment

149. Relying on the interpretation of the legal standard in *Siemens v. Argentina* and *Saluka v. Czech Republic*,¹⁸⁹ the Claimant alleged that the Respondent’s conduct was discriminatory as it deliberately treated Russian banks more favorably than Ukrainian banks.¹⁹⁰ The Claimant stated

¹⁸⁴ Hearing Tr., 27 March 2017 at 54 (Claimant’s opening statement).

¹⁸⁵ Statement of Claim, para. 433(ii).

¹⁸⁶ Statement of Claim, para. 433(ii).

¹⁸⁷ Statement of Claim, para. 433(ii).

¹⁸⁸ Statement of Claim, para. 241; para. 71 above.

¹⁸⁹ Statement of Claim, paras. 437–438; referring to *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 321 (CLA-121); *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, UNCITRAL, Partial Award, 17 March 2006, paras. 498–499 (CLA-124).

¹⁹⁰ In support of its assertion that there was “an organized campaign” against Oschadbank, the Claimant quotes the then First Deputy Prime Minister of Crimea, Mr. Rustam Temirgaliev, who stated as follows: “Ukrainian banks are fleeing for shelter ... Of a huge network of Ukrainian banks, only four are now operating, and according to our information, these banks could wrap up operations within two weeks”. He also added: “We are actively building up a network of Russian banks that will work according to Russian laws”. See The Moscow Times, P. Hobson, *Ukrainian Banks Flee Crimea as Little-Known Russian Bank Expands*, 13 April 2014 (CE-154). The then regional Prime Minister, Mr. Sergey Aksyonov also said:

Lately people address to us stating that the representatives of Ukrainian banks call them or send them notifications with claims to repay their loans. Sometimes such claims even contain real threats. In view of this I appeal to the Crimeans: Ukrainian banks do not have any moral right to claim any payments. We have to develop a mechanism for repayment of funds to relevant banks, but the Crimeans do not have to make any repayments as of today.

Segodnya, *Residents of Crimea Do Not Have to Pay Loans to Ukrainian Banks*, 27 October 2014 (CE-224).

that the Bank of Russia focused on “non-resident” (mainly Ukrainian) banks when issuing its decisions on termination for the Crimean Peninsula.¹⁹¹ Between April and December 2014, the Bank of Russia terminated the operations of 45 Ukrainian banks in the Crimean Peninsula.¹⁹² At the same time, Russian banks (*e.g.* RNCB and GenBank), according to the Claimant, “were subject to relaxed banking supervision”¹⁹³:

For example, the Federal Law [of the Russian Federation] “On Banks and Banking Activity” provided that the banking license of a Russian bank could be revoked, *inter alia*, if it: (i) failed to submit a monthly report for more than 15 days; or (ii) was not able to satisfy the demands of creditors for monetary obligations and/or perform the duty with regard to the payment of obligatory payments within 14 days from the ensuing of the date for the satisfaction and/or performance thereof, provided such demands in aggregate comprised no less than 1000-times the amount of minimum amount of payment for labour established by Russian federal law.¹⁹⁴

150. Moreover, this law provided Russian banks with the right to appeal a decision on termination within 30 days.¹⁹⁵
151. Finally, the Claimant submitted that the Respondent “[a]llowed several Russian banks (such as RNCB and GenBank) to commence operations in Crimea by illegally seizing assets of Oschadbank and other Ukrainian banks”.¹⁹⁶

(c) Article 3(1): most favored nation (“MFN”) treatment

152. On the basis of the MFN clause of the Treaty, the Claimant invoked (by incorporation) the FPS and fair and equitable treatment (“FET”) standards provided in “dozens” of other BITs concluded by the Respondent.¹⁹⁷ As regards FET, the Claimant referred to the standard formulated in the Lebanon-Russia BIT.¹⁹⁸ The Claimant further alleged that the FET standard includes

¹⁹¹ Statement of Claim, para. 441, referring to The Economist, *Russia’s Seizure of Ukrainian Banks in Crimea is Still Wreaking Havoc with Locals’ Finances*, 20 November 2014 (CE-225).

¹⁹² Statement of Claim, para. 441, referring to DPF’s Annual Report 2014, pp. 32–33 (CE-40).

¹⁹³ Statement of Claim, para. 442.

¹⁹⁴ Statement of Claim, para. 144.

¹⁹⁵ Statement of Claim, para. 145.

¹⁹⁶ Claimant’s opening PowerPoint presentation, slide 66, item (iii).

¹⁹⁷ Statement of Claim, paras. 444–446.

¹⁹⁸ Bilateral investment treaty between Lebanon and Russia, signed on 7 April 1997, entered into force on 11 March 2003 (CLA-127).

requirements to: (i) safeguard legitimate expectations;¹⁹⁹ (ii) provide a stable legal framework;²⁰⁰ (iii) act for a proper purpose;²⁰¹ (iv) refrain from discriminatory measures;²⁰² and (v) act in good faith.²⁰³

153. The Claimant submitted that the Respondent's conduct in the present case amounted to an FET breach, as it frustrated the Claimant's "legitimate expectation of legal stability" in the Crimean Peninsula. The Claimant's expectation of legal stability was based, *inter alia*, on the Accession Law, which allowed operation of Ukrainian banks in the Crimean Peninsula until 1 January 2015.²⁰⁴ Nevertheless, the Respondent enacted "a series of laws that imposed onerous and discriminatory obligations" on the Crimean Branch, precluding it from the performance of its banking activities.²⁰⁵ The Claimant also alleged that the Respondent "intentionally and in bad faith" destroyed the banking system in the Crimean Peninsula.²⁰⁶
154. With respect to FPS, the Claimant invoked the BIT between Russia and the United Kingdom and explained that the FPS standard required the Respondent, primarily but not exclusively, to ensure the physical security of the Claimant and its investments, so that they "would be unmolested by criminal elements or by ... armed militia acting at the direction of local government officials".²⁰⁷ The FPS standard also requires a State to act with "due diligence" and "vigilance".²⁰⁸

¹⁹⁹ Statement of Claim, paras. 450–451, referring to *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, UNCITRAL, Partial Award, 17 March 2006, para. 302 (CLA-124); *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/002, Award, 29 May 2003, para. 154 (CLA-9); *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 318 (CLA-130).

²⁰⁰ Statement of Claim, paras. 452–453, referring to *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, para. 99 (CLA-132).

²⁰¹ Statement of Claim, paras. 454–457, referring to *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 164 and 166 (CLA-9); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 123 (CLA-135); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.4.19–7.4.41 (CLA-136); *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, para. 68 (CLA-137).

²⁰² Statement of Claim, para. 458.

²⁰³ *Rumeli Telekom AS & Anor. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609 (CLA-142); *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602 (CLA-131).

²⁰⁴ Statement of Claim, para. 462.

²⁰⁵ Statement of Claim, para. 462.

²⁰⁶ Statement of Claim, para. 463.

²⁰⁷ Hearing Tr., 27 March 2017 at 115 (Claimant's opening statement).

²⁰⁸ Statement of Claim, para. 465, referring to *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05 (CLA-145); *Vannessa v. Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, para. 223 (CLA-147).

155. The Claimant then submitted that the Respondent violated these standards of behavior by encouraging “the destruction of the Claimant’s investments by various means”,²⁰⁹ including (i) the premature termination of the Crimean Branch’s lease agreements (see paragraph 75 above); (ii) the seizure of cash and valuables (see paragraph 76 above); (iii) putting Mr. Pyshnyy on the list of persons whose presence in the territory of the Crimean Peninsula was undesirable (see paragraph 74 above); and (iv) threatening the Claimant’s management and employees (see paragraph 74 above).
156. The Claimant explained that “[t]he physical seizures, harassment and other interference with [its] operations caused substantial harm and made it impossible for [the Crimean Branch] to comply with all the requirements of [the Crimean Financial System Law]”.²¹⁰

(d) Article 4: transparency of legislation

157. The Claimant argued that Article 4 of the Treaty is a self-standing provision, which must be interpreted in its own terms and pursuant to the VCLT.²¹¹ Nevertheless, the Claimant drew an analogy with the interpretation of the obligation to ensure transparency of legislation made in *Plama v. Bulgaria* and *Metalclad v. Mexico* in the context of FET claims. In particular, the *Plama* tribunal reasoned that transparency “appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework”.²¹² The *Metalclad* tribunal linked “the requirement of transparency under NAFTA Article 102(1) to the idea that all relevant legal requirements for the purpose of initiating, completing, and successfully operating investments made or intended to be made under the Agreement should be capable of being readily known to all affected investors”.²¹³
158. The Claimant submitted that the Respondent violated this obligation, *inter alia*, when the Bank of Russia referenced in its Decision on Termination a non-public decision of the Banking Supervision Committee, of which the Claimant was never informed.²¹⁴ The Claimant also expressed general concerns regarding the lack of transparency and accessibility of the new Crimean authorities’ legislation immediately after the Accession, as the official information

²⁰⁹ Hearing Tr., 27 March 2017 at 116 (Claimant’s opening statement).

²¹⁰ Statement of Claim, para. 470.

²¹¹ Hearing Tr., 29 March 2017 at 449 (Claimant’s closing statement).

²¹² *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 178 (CLA-149).

²¹³ Hearing Tr., 27 March 2017 at 117 (Claimant’s opening statement), referring to *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76 (CLA-150).

²¹⁴ Statement of Claim, para. 477.

portal of the Crimean Peninsula was only approved on 4 July 2014, after the termination of the Claimant's activities.²¹⁵

159. In his expert report, Professor Butler also noted that while he was unable to find the text of two orders of the Bank of Russia, they are known to exist.²¹⁶

(e) Article 5(1): expropriation

160. As a preliminary matter, the Claimant explained that Article 5(1) of the Treaty covers both direct expropriation and measures “the effect of which is tantamount to expropriation”.²¹⁷ The Claimant further alleged that the Respondent's acts had such an effect, as they “completely devalued the Claimant's investments”²¹⁸ in the Crimean Peninsula, without observing the following cumulative requirements of lawful expropriation.²¹⁹
161. First, the Respondent's actions did not pursue any public interest; rather, they resulted in the destruction of the largest banking network in the Crimean Peninsula.²²⁰ Second, the Respondent's actions lacked both substantive and procedural due process.²²¹ This is evidenced, for example, by the “draconian” sanctions imposed on the Claimant: according to Article 7(2) of the Crimean Financial System Law, for delaying the performance of its obligations towards creditors just by one day, a Ukrainian bank's operations could be terminated by the Bank of Russia. The Claimant also submitted that court proceedings initiated by the Crimean Prosecutor's Office against Oschadbank lacked procedural fairness,²²² as the order of the Simferopol Court to grant

²¹⁵ Statement of Claim, para. 478.

²¹⁶ Butler Report, para. 79, footnote 20, referring to the Order of the Bank of Russia No. OD-521 concerning the appointment of plenipotentiary representatives of the Bank of Russia to Oschadbank, dated 4 April 2014 and the Order of the Bank of Russia No. OD-1614, “On the Interaction of Structural Subdivisions of the Bank of Russia Created on the Territory of the Republic Crimea and/or Territory of the City of Federal Significance Sevastopol, with Structural Subdivisions of the Central Apparatus of the Bank of Russia”.

²¹⁷ Statement of Claim, paras. 483–486, referring, *inter alia*, to *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 263 (CLA-121); Hearing Tr., 27 March 2017 at 117–118 (Claimant's opening statement).

²¹⁸ Hearing Tr., 27 March 2017 at 117–118 (Claimant's opening statement).

²¹⁹ Statement of Claim, p. 147, n. 714, referring to *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v. Argentina*, ICSID Case No. ARB/97/3, Award, 21 November 2000, para. 80 (CLA-155) and to *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 98 (CLA-151) on substantive, and procedural due process respectively.

²²⁰ Statement of Claim, paras. 489–490.

²²¹ Statement of Claim, para. 492, referring to *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 435 (CLA-81).

²²² Statement of Claim, para. 493.

provisional measures prejudged the merits,²²³ and the decision on the merits lacked independent consideration of the case.²²⁴ Third, the Claimant was never compensated for its losses.²²⁵ Fourth, the Respondent's measures were discriminatory (on this issue see paragraphs 149–151 above).²²⁶

(f) Article 7: transfer of funds

162. Replying on the interpretation of this standard in *Continental Casualty v. Argentina*, *Biwater Gauff v. Tanzania*, and *Metalpar v. Argentina*, the Claimant submitted that the Respondent denied it the right to freely transfer funds by blockading the border and prohibiting the transfer of assets to mainland Ukraine.²²⁷

(g) Denial of justice

163. As a preliminary matter, the Claimant stated that the protection against denial of justice is a part of the FET and FPS standards,²²⁸ and more expressly formulated in some of the Respondent's BITs (such as the Russia-China BIT) incorporated into the Treaty by virtue of the MFN clause.²²⁹ The Claimant's main complaint concerns the proceedings before the Simferopol Court described at paragraphs 85–88 above. In particular, the Claimant asserted that the Simferopol Court's order on provisional measures establishing the DPF's administration over the Claimant's assets violated procedural and substantive justice, "including the principle of proportionality enshrined in Article 140(3) of the Civil Procedural Code of the Russian Federation".²³⁰ Moreover, the Simferopol Court's decision on the merits dated 17 September 2014 lacked independent consideration, as it simply repeated the formulation of the Prosecutor's claim.²³¹ The decision

²²³ Statement of Claim, para. 214.

²²⁴ Statement of Claim, para. 219.

²²⁵ Statement of Claim, para. 495.

²²⁶ Statement of Claim, para. 496; see *supra*, para. 149.

²²⁷ Statement of Claim, paras. 497–501, referring to *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 239 (CLA-158); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 735 (CLA-131); *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, para. 179 (CLA-159); Pyshnyy Statement, para. 36.

²²⁸ Statement of Claim, para. 502, referring, *inter alia*, to *Rumeli Telekom & Anor. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 654 (CLA-142).

²²⁹ Statement of Claim, para. 503, referring to the bilateral investment treaty between Russia and China, art. 9(4) (CLA-162).

²³⁰ Statement of Claim, para. 514.

²³¹ Statement of Claim, para. 515.

was enforced with uncommon speed, violating the Claimant's due process rights.²³² Additionally, the Claimant asserted that forged court orders were used to justify the seizure of cash and valuables on 16 and 21 May 2014 (see paragraphs 76 above).²³³

4. Damages

164. The Claimant submitted that, in view of the Respondent's violations of the Treaty, it was entitled to *restitutio in integrum* in the form of monetary compensation, as it is impossible strictly to restore the *status quo ante*.²³⁴
165. Referring to its argument regarding the continuing or composite nature of the Russian Federation's unlawful acts (as to which, see paragraphs 131–133 above), the Claimant submitted that the proper valuation date for its damages is 1 March 2014, when the Federation Council of the Russian Federation authorized military intervention in the Crimean Peninsula.²³⁵ It noted that according to its valuation expert, Mr. Jeffrey Davidson, the preceding day, 28 February 2014, was the last unaffected position of the Crimean Branch prior to any wrongful conduct by the Respondent.²³⁶ In the alternative, the Claimant argued that the valuation date should be 21 March 2014, when President Putin signed the Accession Law formally incorporating Crimea and Sevastopol as subjects of the Russian Federation.²³⁷ Accordingly, the Claimant instructed Mr. Davidson to carry out his valuation exercise on the corresponding accounting dates: 28 February and 31 March 2014.²³⁸
166. Further, the Claimant submitted that, in the present circumstances, the “most equitable valuation of the business of [the Crimean Branch] expresses in monetary terms both the factual position of the business (the assets already built into its balance sheet) and the potential of [the Crimean Branch] to generate profits in the future (essentially goodwill which is not recognized in the balance sheet).”²³⁹ The Claimant submitted that its damages consist of three components.

²³² Statement of Claim, para. 516.

²³³ Statement of Claim, para. 512.

²³⁴ Statement of Claim, para. 519; ILC Articles, art. 36 (CLA-51).

²³⁵ Statement of Claim, paras. 537–538.

²³⁶ Statement of Claim, para. 538, referring to Davidson Report, para. 3.62.

²³⁷ Statement of Claim, para. 539.

²³⁸ Statement of Claim, para. 540; Davidson Report, para. 2.7; Hearing Tr., 28 March 2017 at 306–307 (examination of Mr. Davidson's presentation).

²³⁹ Statement of Claim, para. 532.

167. First, the Claimant claims compensation for lost assets comprising corporate and private loans, real property including buildings and ATMs, cash, and other valuables such as gold deposits and securities.²⁴⁰ In particular, the Claimant explained that, since March 2014, both capital and interest repayments on the loans to the ActivSolar Group (as to which, see paragraph 64 above) have been impaired and that these loans are now irrecoverable, as enforcement is impossible over the assets securing the loans, which are located in the Crimean Peninsula, and as the DPF has sought recovery of the ActivSolar Group's debt purportedly on behalf of the Claimant.²⁴¹ As for its private loans, the Claimant asserted that following the Accession, individual customers refused to honor their commitments.²⁴²
168. With respect to the ActivSolar Group loans, the Tribunal invited the Parties and Mr. Davidson to comment during the hearing on a Wikipedia entry reporting that the ActivSolar Austrian parent company filed for insolvency in 2016.²⁴³ Mr. Davidson noted that according to this Wikipedia entry, the termination of operation of solar power plants was actually caused by the Accession.²⁴⁴ Thus, Mr. Davidson maintained that his valuation was accurate, as it reflected the situation as it was prior to and "but-for" the alleged breaches of the Treaty by the Respondent.²⁴⁵ In its Post-Hearing Submission, the Claimant also stated that the information contained in the Wikipedia entry did not change its position on damages.²⁴⁶
169. In arriving at his valuation of the Claimant's assets, Mr. Davidson opined, as noted above, that on 28 February 2014, the assets were unaffected by any actions of the Russian Federation and were performing well. For the 21 March 2014 valuation date, Mr. Davidson applies a 10 % discount to reflect the impairment of the assets due to actions of the Respondent, such as the outflow of deposits following the referendum of 16 March 2014 and the deterioration of the ActivSolar Group loans.²⁴⁷ Mr. Davidson carried out his valuation of lost assets on the basis of the Claimant's management accounts.²⁴⁸

²⁴⁰ Statement of Claim, paras. 541–550.

²⁴¹ Statement of Claim, para. 545; Post-Hearing Submission, paras. 2–3.

²⁴² Statement of Claim, para. 546, referring to Pyshnyy Statement, para. 57.

²⁴³ Hearing Tr., 29 March 2017 at 414 (examination of Mr. Davidson's presentation) and 453 (Claimant's closing statement), referring to Wikipedia entry "ActivSolar" (Tribunal exhibit 3, hearing bundle reference I/3).

²⁴⁴ Hearing Tr., 29 March 2017 at 424 and 432–433 (examination of Mr. Davidson's presentation).

²⁴⁵ Hearing Tr., 29 March 2017 at 424 and 432–433 (examination of Mr. Davidson's presentation).

²⁴⁶ Post-Hearing Submission, para. 2.

²⁴⁷ Statement of Claim, paras. 554–558; Davidson Report, paras. 5.36–5.47; Hearing Tr., 28 March 2017 at 307–308 (examination of Mr. Davidson's presentation).

²⁴⁸ Hearing Tr., 28 March 2017 at 301 (examination of Mr. Davidson's presentation).

170. Second, the Claimant claimed compensation for the loss of the Crimean Branch as a going concern, calculating a capitalized value of the Crimean Branch's future income streams using a Discounted Cash Flow (“DCF”) model.²⁴⁹ The Claimant submitted that a DCF valuation is appropriate where, as here, the harmed investment was a “present and future income-producing asset” with an operating history.²⁵⁰ Specifically, Mr. Davidson multiplied a projected income stream before tax in the “but for” world (based on a pro forma) by a capitalization rate of about 14%.²⁵¹ For the 21 March 2014 valuation date, Mr. Davidson made an additional provision against income of 25% to reflect impairment due to actions of the Respondent.²⁵²
171. During the hearing, Mr. Davidson explained that there was no double-counting in adding the loss of goodwill to the lost value of the assets, as the Claimant remains liable for the obligations of the Crimean Branch.²⁵³
172. Third, the Claimant claimed compensation for other losses not reflected in its records, but nevertheless “connected to the Russian Federation’s unlawful conduct.”²⁵⁴ These include the loss of gold and cash-in-transit held for third parties, which were seized from the Crimean Branch’s headquarters on 16 and 21 May 2014 (as described at paragraph 76 above), and of assets of a third entity, Brokbiznesbank, located in the Crimean Peninsula, which the Claimant could have seized in enforcement of two arbitral awards, were it not for the “Russian action in Crimea”.²⁵⁵

²⁴⁹ Statement of Claim, paras. 521 and 560.

²⁵⁰ Statement of Claim, paras. 534–535.

²⁵¹ Davidson Report, para. 3.99; Hearing Tr., 29 March 2017 at 363–364 (examination of Mr. Davidson’s presentation).

²⁵² Hearing Tr., 29 March 2017 at 364–365 (examination of Mr. Davidson’s presentation).

²⁵³ Hearing Tr., 28 March 2017 at 378–389 (examination of Mr. Davidson’s presentation).

²⁵⁴ Statement of Claim, para. 567.

²⁵⁵ Statement of Claim, paras. 568–570.

173. The Claimant summarized its claim as follows:²⁵⁶

	28.02.2014	31.03.2014
<u>LOSS OF INVESTMENT IN CRIMEA</u>		
Loss of assets	668,009,137	597,771,793
Loss of goodwill	712,371,214	484,616,757
Total loss of investment	1,380,380,351	1,082,388,550
<u>OTHER LOSSES</u>		
<i>Loss of assets of third parties</i>		
Gold (valued at date of seizure)	17,521,397	17,521,397
Cash in transit (valued at date of seizure)	2,783,984	2,783,984
Total assets of the third parties	20,305,381	20,305,381
<i>Securities lost for the transactions of other branches</i>		
Letter of credit (1) - EUR	183,781	184,721
Letter of credit (2) - USD	8,422,077	8,422,077
Total loss- converted in USD	8,605,858	8,606,798
TOTAL CLAIM (USD)	1,409,291,590	1,111,300,729

174. The Claimant further claims pre-Award interest at a rate between 8.27% and 8.81% (depending on the year) and compound pre-Award interest at a rate of 8.27%, both compounded annually.²⁵⁷

175. With interest, the Claimant's claims are quantified as follows:²⁵⁸

All figures USD	28.02.14	31.03.14
Loss	1,409,291,590	1,111,300,729
Total pre-award interest	510,588,118	392,646,056
Loss at 31.12.2017, including compound interest	1,919,879,708	1,503,946,785
Daily rate applicable as post award interest at 0.0226%	434,816	340,615

5. Costs

176. Relying on Article 40(1) of the UNCITRAL Rules, the Claimant submitted that the Respondent should bear the costs of this arbitration if the Claimant prevails on the merits.²⁵⁹ The Claimant further requests that the Respondent bear the Claimant's costs of legal representation and assistance if the Claimant prevails in any of its claims, because such apportioning would ensure,

²⁵⁶ Statement of Claim, para. 523.

²⁵⁷ Statement of Claim, paras. 574–578, 579(v)–(viii); Davidson Report, paras. 11.4–11.24.

²⁵⁸ Statement of Claim, para. 522; Davidson Report, para. 11.24.

²⁵⁹ Submission on Costs, paras. 5–7, referring, *inter alia*, to *SD Myers Inc. v. Canada*, UNCITRAL, Final Award and Dissenting Opinion, 30 December 2002, para. 15 (CLA-180).

inter alia, the Claimant’s full compensation required by the customary international law of State responsibility.²⁶⁰

177. The Claimant also asserted that it “conducted this arbitration responsibly and professionally” and that its legal costs, “compared to the reported average costs of investment treaty disputes”, have remained low.²⁶¹

178. In total, the Claimant submitted that it is entitled to the reimbursement of costs in the amount of USD 3,635,734.33, comprised of costs of arbitration in the amount of USD 1,357,563.11 (including the costs of the Tribunal, the PCA, the Claimant’s experts and the Claimant’s expenses) and costs of legal representation and assistance in the amount of USD 2,278,171.22.²⁶²

179. The Claimant provides the following specification of its costs:²⁶³

Categories of Costs	Amounts (in USD)
Legal Fees	
Quinn Emanuel	1,928,172.32
Asters	349,998.90
Subtotal:	2,278,171.22
Expert Fees	
Professor Shaw	70,595.69
Professor Butler	102,540.00
Mr. Jeffrey Davidson	295,096.33
Mr. Richard Hoyle (legal assistant to Professor Shaw)	23,964.92
Subtotal:	492,196.94
Expenses	
Fees of Mr. Michael Hwang as Appointing Authority	1,139.34
Tribunal/PCA fees (including Respondent’s share of USD 250,000 paid by the Claimant)	500,826.99

²⁶⁰ Submission on Costs, para. 8.

²⁶¹ Submission on Costs, paras. 11–13.

²⁶² Submission on Costs, para. 14.

²⁶³ Submission on Costs, Annex A.

Travel/accommodation	147,678.26
Copying/printing	148,249.67
Couriers	18,601.43
Asters disbursements	22,005.35
Translations	12,097.45
Other (Includes overtime meals, conference calls, and incidental expenses)	14,767.68
Subtotal	865,366.17
<u>TOTAL:</u>	3,635,734.33

6. Request for relief

180. In its Statement of Claim, the Claimant requests an award:

- (i) confirming that [the Tribunal] has jurisdiction to determine the present dispute;
- (ii) declaring that the Russian Federation has breached the Treaty and international law, and in particular Articles 2(2) (Unconditional Legal Protection); 3(1) (Most Favored Nation treatment); 4 (Transparency of Legislation); 5(1) (Expropriation) and 7 (Transfer of Funds) of the Treaty;
- (iii) ordering the Russian Federation to pay monetary compensation or damages in a total amount of USD 1,409,291,590 as at 28 February 2014 or, in the alternative, USD 1,111,300,729 as at 21 March 2014, on the basis of the value that the Claimant expected to derive from its Crimean investments, in each case excluding interest (pre- and post-award);
- (iv) alternatively, ordering the Russian Federation to pay such other amount to be determined by the Tribunal, in accordance with the Honeycomb Report;
- (v) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at a rate at least between 8.27% and 8.81% or another reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of valuation until the date of the Award;
- (vi) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at an annual rate of at least 8.27% or a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full;
- (vii) ordering the Russian Federation to pay all costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full; and

(viii) granting any other relief as the Tribunal may deem just and proper in the circumstances.²⁶⁴

B. THE RESPONDENT'S POSITION

181. The Respondent has not made any submissions, written or oral, in these proceedings. However, in its letters of 13 May 2016 and 24 December 2015, addressed to the PCA and the Claimant respectively, the Respondent has put forward certain arguments pertaining to the subject matter of these proceedings.
182. In its letter of 13 May 2016 (reproduced in full at paragraph 20 above), the Respondent disputes the jurisdiction of any tribunal constituted in these proceedings, arguing that the Claimant's investments in the Crimean Peninsula do not meet the definition of "investments" set out in Article 1(1) of the Treaty. Specifically, the Respondent asserted that: (i) the Claimant's assets "were not invested in the territory of the Russian Federation"; (ii) even if investments occurred, "they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation"; (iii) even if investments occurred, they were not made in conformity with Russian law; (iv) the Claimant's assets were not subject to taxation under Russian law before the Accession; and (v) the Claimant's assets did not contribute to the development of the economy of the Respondent. Referring to its letter of 24 December 2015, the Respondent also noted that it wrote to the Claimant regarding amicable settlement of the dispute.
183. The letter of 24 December 2015 sets out the same arguments regarding Article 1(1) of the Treaty. In addition, with respect to the merits of the Claimant's complaints, the Respondent stated that "the assets belonging to [Oschadbank] have not been forfeited in favor of the Russian Federation, [but rather] have been subjected to injunctive measures in the form of attachment on the basis of respective decision of courts of the Russian Federation due to the Bank's failure to perform its obligations to depositors and other creditors". Although the Respondent does not identify the court decisions in question, it is possible to surmise that it referred to the provisional measures and final decisions of the Simferopol Court of 29 April and 17 September 2014 described at paragraphs 85–88 above.²⁶⁵ The Respondent further indicates that if the Claimant were to honor its obligations to depositors and other creditors, the issue of the administration of its assets by the DPF "may be resolved" and that, subject to compliance with pertinent Russian legislation, the Claimant may resume its activities in the Crimean Peninsula.

²⁶⁴ Statement of Claim, para. 579.

²⁶⁵ See Simferopol Court, Case No. 2-931/14, Order "On Granting Provisional Measures", 29 April 2014 (CE-171); Simferopol Court, Case No. 2-931/14, Decision, 17 September 2014 (CE-222).

VI. THE NON-DISPUTING PARTY SUBMISSION OF UKRAINE

184. In its non-disputing party submission, Ukraine stated that the Crimean Peninsula continues to form “an inseparable part” of Ukraine.²⁶⁶ Consequently, “any treaty right or obligation pertaining to [Ukraine’s] sovereignty” over the Crimean Peninsula remains in effect.²⁶⁷ At the same time, Ukraine acknowledges that, as a matter of practical reality, the Respondent today exercises jurisdiction and effective control over the Crimean Peninsula.²⁶⁸ On this basis, Ukraine submitted that the Respondent “has by its conduct assumed international obligations in its administration of [the Crimean Peninsula] particularly with respect to treaties benefiting individual rights or other innocent third parties”, including the Treaty invoked in these proceedings.²⁶⁹
185. According to Ukraine, the Treaty creates obligations for the Respondent in the territory of the Crimean Peninsula, since (i) under international law the term “territory” encompasses areas under a State’s effective control²⁷⁰ and (ii) the good faith interpretation of the Treaty itself in its context, in view of its object and purpose, supports this view.²⁷¹
186. With respect to point (ii), Ukraine submitted that Article 1(4) of the Treaty does not expressly limit the definition of the term “territory” to territories under a State’s sovereignty,²⁷² and that “a restrictive definition should not be imposed where the parties to an investment treaty could have chosen to adopt one, but did not”.²⁷³ The context of the Treaty and, in particular, its substantive provisions confirm that effective control (and not valid title or sovereignty) determines the Treaty’s territorial scope, as only the State exercising effective control can comply with these substantive provisions.²⁷⁴ Ukraine also submitted that a good faith reading of the Treaty should not result in the liberation of the Russian Federation from its obligations toward

²⁶⁶ Submission of Ukraine, para. 2.

²⁶⁷ Submission of Ukraine, para. 43.

²⁶⁸ Submission of Ukraine, para. 43.

²⁶⁹ Submission of Ukraine, para. 45.

²⁷⁰ Submission of Ukraine, paras. 8–13, referring, *inter alia*, to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para 112 (CLA-25); Karl Doehring, *The Scope of the Territorial Application of Treaties* (1967) 27 Heidelberg J. Int’l L. 483, p. 488–489 (on the interpretation of Article 29 of the VCLT) (CLA-41); *R. Governor of Brixton Prison, ex parte Schtraks (Schtraks)* [1964] A.C. 556; I.L.R. 33, 319, p. 587 (CLA-74); Yaël Ronen, *TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW* (CUP, 2011), p. 133 (on the USSR’s extension of its treaties to the then occupied Baltic States).

²⁷¹ Submission of Ukraine, paras. 14–29.

²⁷² Submission of Ukraine, para. 14.

²⁷³ Submission of Ukraine, para. 14.

²⁷⁴ Submission of Ukraine, para. 17.

Ukrainian investors simply on the ground that it illegally occupies the Crimean Peninsula.²⁷⁵ The broad interpretation of the term “territory”, according to Ukraine, furthers the Treaty’s objectives and the rule of law, which requires the avoidance of a vacuum of protection within the legal space of the Treaty, and the extension of its reach to territories under the State’s jurisdiction.²⁷⁶ Additionally, Ukraine submitted that the existence of international obligations of the Russian Federation in the Crimean Peninsula under international humanitarian law and the ECHR, as well as the principles of international law formulated by the ICJ in the *Wall* advisory opinion confirm “the propriety of applying the Treaty” to the Crimean Peninsula.²⁷⁷

187. Ukraine further invokes the general principle of law—*allegans contraria non est audiendus*—as a ground for the application of the Treaty to the Crimean Peninsula.²⁷⁸ Noting that this principle is recognized in domestic legal systems, including those of Ukraine and the Respondent,²⁷⁹ as well as in international legal practice, Ukraine concludes that the Respondent, by acting as if it is the lawful sovereign, “is bound to accept application of the Treaty to the Crimean Peninsula”.²⁸⁰
188. As regards the temporal application of the Treaty, Ukraine submitted that Ukrainian investors may avail themselves of the Treaty’s protections “regardless of when such investors initially commenced their investment.”²⁸¹ In particular, Article 12, stating that the Treaty applies to any qualifying investments made after 1 January 1992, evinces a “clear intent” on the part of the Contracting States to “maximize the temporal application of the Treaty” and to “cover investments that were not protected by the Treaty at the time they were initiated.”²⁸²

²⁷⁵ Submission of Ukraine, paras. 19–21.

²⁷⁶ Submission of Ukraine, paras. 22–25, referring to *Al-Skeini v. United Kingdom*, ECtHR Application No. 55721/07, Judgment, 7 July 2011, para. 142 (CLA-68).

²⁷⁷ Submissions of Ukraine, paras. 26–28, referring to *Ilașcu and Others v. Moldova and Russia*, ECtHR Application No. 48787/99, Judgment, 8 July 2004 para. 314 (CLA-67); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, paras. 118 and 122 (CLA-48).

²⁷⁸ Submission of Ukraine, paras. 34–35.

²⁷⁹ Submission of Ukraine, para. 35.

²⁸⁰ Submission of Ukraine, paras. 36–41, referring, *inter alia*, to *The Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, ICJ Reports 1962, p. 6; *Nuclear Tests (New Zealand v. France)*, Judgment, Reports 1974, p. 457 (Shaw Report Exhibit-76); *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, paras. 96–98; *Oil Field of Texas, Inc. v. Iran*, 1 Iran-US Cl. Trib. Rep. 347 and 376, (1982), paras. 24–25 (CLA-86); *Waguih Eli George Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 483 (CLA-141).

²⁸¹ Submission of Ukraine, para. 30.

²⁸² Submission of Ukraine, para. 32.

VII. ANALYSIS OF THE TRIBUNAL**A. ISSUES TO BE DETERMINED**

189. On the basis of the factual evidence outlined above at paragraphs 53 to 92, the Tribunal now turns to address its findings on the issues of (i) jurisdiction; (ii) attribution; (iii) liability; (iv) damages; and (v) interest.
190. Before commencing its analysis, the Tribunal observes that there is disagreement between Ukraine and the Respondent as to which State has *de jure* sovereignty over the Crimean Peninsula. In this Award, the Tribunal finds it is not necessary to make a finding on, and therefore makes no comment about, the current status of the Crimean Peninsula under international law. Further, the Tribunal does not comment on the legality of the actions of the Respondent otherwise than in relation to the Claimant during the relevant time.
191. All quotations from the Treaty in this Award are taken from the certified translation of the Treaty into English provided by the Claimant after the Hearing at the request of the Tribunal.

B. NON-PARTICIPATION OF THE RUSSIAN FEDERATION

192. It is apparent from the Procedural History above that the Respondent was given notice of this arbitration but, aside from its communications on 24 December 2015, 13 May 2016 and 21 June 2016, has declined to participate in these proceedings.
193. The Tribunal proceeds to decide this case, despite the Respondent's election not to participate, on the basis of articles 28(2) and 28(3) of the UNCITRAL Rules, which are set out below.

ARTICLE 28
DEFAULT

[...]

2. If 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.
 3. If 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.
194. The Tribunal recalls that the Russian Federation had been provided with all documents and papers relevant to the arbitration in accordance with paragraph 3.2 of Procedural Order No. 1, which stated:

In accordance with the Terms of Appointment, all communications and other documents generated in connection with these proceedings shall be sent in both hard copy and email form to the Parties, their representatives, the members of the Tribunal and the PCA at the addresses specified at paragraphs 1, 3 and 7.2 of the Terms of Appointment.

195. The Russian Federation was also provided with proper and adequate notice of the time, place and date of the Hearing. On the evening of each hearing day, the Russian Federation was further provided with a transcript of the proceedings that had taken place that day.

C. JURISDICTION – THE MEANING OF TERRITORY

196. To find that it has jurisdiction to hear this dispute, the Tribunal must be satisfied that, from around March 2014, the Respondent assumed responsibilities under the Treaty to Ukrainian investors in the territory of the Crimean Peninsula. In other words, after the Respondent assumed control of the Crimean Peninsula, did it constitute part of the Respondent’s “territory” for the purposes of the Treaty? Determining this issue requires an analysis of the meaning of “territory” in the Treaty.
197. Since the date on which the Treaty entered into force on 27 January 2000,²⁸³ the Crimean Peninsula has fallen within the scope of the territory of one of the Contracting Parties. The issue is which State party is obliged to provide the protections prescribed in the Treaty to foreign investors in the Crimean Peninsula. The Tribunal does not accept that the Crimean Peninsula is no longer covered by the Treaty as a result of the dispute between the Respondent and Ukraine as to which State has *de jure* sovereignty over the region.
198. There is also no dispute that, until sometime in February or March 2014, the region fell within the territory of Ukraine and that it was Ukraine that owed duties under the Treaty to the Respondent’s investors with covered investments in the Crimean Peninsula. The question before this Tribunal is whether, from February or March 2014 onwards, the Crimean Peninsula fell within the “territory” of the Respondent or Ukraine for the purposes of the Treaty. In other words, was it the Respondent or was it Ukraine that owed the duties under the Treaty to foreign investors in the Crimean Peninsula?
199. The Claimant has contended that the Respondent has taken all steps under its own law to annex the Crimean Peninsula – and therefore to assume voluntarily all obligations under Russian treaties with respect to the territory of the Crimean Peninsula.²⁸⁴ Therefore, under the “moving treaty

²⁸³ Statement of Claim, para. 1; Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (Moscow, 27 November 1998), in force as of 27 January 2000, Article 14(1) (CLA-1).

²⁸⁴ Statement of Claim, para. 290.

boundaries” rule codified in Article 15 of the VCST,²⁸⁵ the Crimean Peninsula now forms part of the Respondent and thus the Respondent’s Treaty obligations would necessarily extend to the Crimean Peninsula.

200. While the Claimant contended that the VCST does not strictly apply to the present situation because the annexation of the Crimean Peninsula was not a lawful movement of boundaries, it argued that the VCST provides a useful analogy because it demonstrates that when part of the territory of one State becomes part of the territory of another State, the general rule is that the treaties of the former cease to apply to the territory while the treaties of the latter extend to the territory.²⁸⁶
201. The present situation is not a case of extending a treaty with a third party to a new area acquired by the State in question. Here, the territorial coverage of the Treaty has not changed. It is simply a matter of determining whether there has been a change in the State that owes the duties under the Treaty and a consequent change in the investors to which such duties are owed. For this reason, the Tribunal focuses its analysis on the text of the Treaty.
202. Having set out these basic parameters, the Tribunal now considers the meaning of “territory” within the Treaty itself. Pursuant to Article 1(4), the Treaty defines territory as:
- the territory of the Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law.
203. The Claimant has submitted that the VCLT applies to the interpretation of the word “territory” in the Treaty. The Claimant’s position is supported by its legal expert, Professor Malcolm Shaw, a globally recognized authority on public international law. Both Ukraine and the Respondent are parties to the VCLT. Moreover, it is now well accepted that the rules on treaty interpretation of the VCLT reflect customary international law.²⁸⁷ Therefore, in accordance with Article 31(1) of the VCLT, the Tribunal will interpret the word “territory” “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

²⁸⁵ Under Article 15(b), when part of the territory of a State becomes the territory of another State, the treaties of the successor State are deemed to be in force in respect of that territory from the date of succession, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. VCST, 1946 UNTS 3.

²⁸⁶ Hearing Tr., 27 March 2017 at 91–92 (Claimant’s opening statement).

²⁸⁷ See *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213, para. 47 (Shaw Report Exhibit-8): “In the first place, it is for the Court to interpret the provisions of a treaty ... It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as the Court has stated on several occasions ...”

object and purpose.” Together with the context, Article 31(3)(c) provides that any “relevant rules of international law applicable in the relations between the parties” shall be taken into account.

204. To derive its “ordinary meaning”, the Claimant has proffered various dictionary definitions (in English, Russian and Ukrainian) of the word “territory” in support of its case that territory refers to jurisdiction or control, rather than to legal sovereignty. The definitions in the three languages refer to a geographical area where a State exercises jurisdiction or has the power to exercise authority. The Claimant also cited Black’s Law Dictionary’s definition of “territory” which is more relevant in a legal context, but is not specific to the public international law field. “Territory” is defined by Black’s Law Dictionary as “[a] geographical area included within a particular government’s jurisdiction; the portion of the earth’s surface that is in a state’s exclusive possession and control.” Jurisdiction is defined by Black’s Law Dictionary as “[a] government’s general power to exercise authority over all persons and things within its territory”.
205. Under the VCLT analysis, the Tribunal now considers the context of the term within the clause itself and within the Treaty overall. Within the clause, territory is defined to mean the “territory” of the Contracting States “as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law” (Article 1(4)).
206. The Claimant contended that this text supports the conclusion that “territory” means an area where a State exercises jurisdiction and control. According to Professor Shaw, the exclusive economic zone and continental shelf, which are specifically defined in international law include “areas over which the States exercise jurisdiction and control, but not sovereignty as such” and “[t]his precludes a definition of territory in the BIT which is restricted to territory over which the State has sovereign title”.²⁸⁸
207. An analysis of the context involves consideration of the use of the term “territory” elsewhere in the Treaty, including within the preamble as well as in other articles of the Treaty.²⁸⁹ Professor Shaw drew the Tribunal’s attention to the fact that the term “territory” is used 17 times in the Treaty. He argued that the context in which the term is used supports an interpretation of “prescriptive or legislative jurisdiction” and the “exercise of control”, rather than sovereignty.²⁹⁰ Professor Shaw stated that territory is consistently used in conjunction with reference to a State’s laws. For example:

²⁸⁸ Shaw Report, para. 39.

²⁸⁹ O Dörr “Article 31: General Rule of Interpretation” in O Dörr and K Schmalenbach (eds) *Vienna Convention on the Law of Treaties* (2012, Springer, Berlin), p. 544 (CLA-28).

²⁹⁰ Shaw Report, para. 40.

ARTICLE 2
PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall encourage the investors of the other Contracting Party to make investments in its territory and shall admit such investments subject to its laws.
2. Each Contracting Party shall guarantee in conformity with its laws the full and unconditional legal protection to investments of investors of the other Contracting Party.

ARTICLE 4
TRANSPARENCY AND ACCESSIBILITY OF LEGISLATION

Each Contracting Party shall with a view to facilitating the comprehension of its legislation, pertaining to or affecting the investments made by investors of the other Contracting Party in its territory, provide for maximum possible transparency and accessibility of the legislation.

ARTICLE 7
NATIONAL TREATMENT AND MOST FAVORED NATION TREATMENT

1. Each Contracting Party shall guarantee to the investors of the other Contracting Party after they fulfil all tax obligations in conformity with the laws of either Contracting Party unimpeded transfer abroad of payments associated with the investments ...
2. Transfer of funds shall be effected ... pursuant to the laws on currency regulation of the Contracting Party, in whose territory the investments were made.

208. In all of these provisions, the State's obligations are linked to legislative and administrative control. It would therefore appear that the term "territory" is used generally within the Treaty with a view toward the ability effectively to legislate and to enforce its laws.

209. The Tribunal considers the above analysis in the light of the object and purpose of the Treaty. The Claimant relies on the preambular statements as providing the basis for the Treaty's "object and purpose", which it contended places the focus on investments and economics.²⁹¹

210. The preamble to the Treaty features the following wording:

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

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

²⁹¹ Statement of Claim, para. 279.

211. Article 2 of the Treaty is consistent with the preambular text. It provides:

ARTICLE 2
PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall encourage the investors of the other Contracting Party to make investments in its territory and shall admit such investments subject to its laws.
2. Each Contracting Party shall guarantee in conformity with its laws the full and unconditional legal protection to investments of investors of the other Contracting Party.

212. As noted above, the object and purpose of the Treaty, as expressed in these provisions further supports the conclusion that “territory” means a geographical area over which a Party exercises jurisdiction or control.

213. Having considered the meaning of “territory” within the context of the Treaty and in the light of its object and purpose, the Tribunal now turns to consider any relevant rules of international law applicable in the relations between Ukraine and the Respondent. In this regard, the Tribunal recalls that both the Ukraine and the Respondent are parties to the VCLT. With reference to the territorial scope of treaties, Article 29 of the VCLT contains the rule that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.

214. Applying this rule, the first question for the Tribunal is thus whether the Treaty evidences an intention that it shall not be binding upon each party in respect of their entire territory. If so, the territorial scope of the Treaty’s application may be more limited than the Respondent’s entire territory. Article 1(4) of the Treaty defines “territory” as the “territory of Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law”. This definition supports the view that the Treaty is intended to apply to the entire territory of each contracting State. Having regard to the Treaty as a whole, the Tribunal is unable to discern a different intention with respect to the meaning of “territory”. The Tribunal therefore considers that the Treaty is binding upon the Respondent in respect of the Respondent’s entire territory, in accordance with Article 29 of the VCLT.

215. It follows that the second question to be determined is whether the Crimean Peninsula falls within the scope of the Respondent’s “entire territory”. In this regard, the Tribunal recalls paragraph 290 of the Statement of Claim in which the Claimant argued:

In this case, although the international community expressly has refused to recognise Crimea as part of the Russian Federation, the Russian Federation has taken all steps under its own law to annex Crimea – and therefore to assume voluntarily all obligations under Russian treaties with respect to the territory of Crimea.

216. The Tribunal also agrees with the view of the Claimant's expert, Professor Shaw:²⁹²

What is significant and distinctive in this case is not just the effective control established and maintained by Russia over Crimea, but the claim by the former to have sovereign title to the territory, so that for Russia, the territory is no more and no less than sovereign Russian territory. While this claim is contested by the internationally recognised sovereign (Ukraine) and by the international community (see UN General Assembly resolution 68/262 (see above, para. 20), its maintenance, coupled with the effective control manifested by Russia, cannot be without consequence within the context of the BIT. Russia cannot deny its sovereign claim without contradicting its own constitution and its own stand taken before the UN.

217. At paragraphs 11 to 14 of his report, Professor Shaw identifies actions which, in his view, lead to the conclusion that the Crimean Peninsula forms a part of sovereign Russian territory. In short, these actions included (i) the Declaration on the Independence of the Republic of Crimea on 11 March 2014; (ii) the referendum on 16 March 2014; (iii) the Resolution on the Independence of Crimea on 17 March 2014; (iv) the appeal by the "Republic of Crimea" to the Respondent to be admitted as a new constituent entity with the status of a republic of the Russian Federation on 17 March 2014; (v) the Accession Treaty signed on 18 March 2014; (vi) the decision of the Constitutional Court on 19 March 2014 that the Accession Treaty complies with the Respondent's Constitution; and (vii) the Federal Constitutional Law on Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the new Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol (approved by the State Duma on 20 March 2014 and by the Federation Council on 21 March 2014).

218. The Tribunal finds, for all the reasons set out above,²⁹³ that the Crimean Peninsula falls within the territory of the Respondent for the purposes of the Treaty. Accordingly, there is no need to consider the Claimant's alternative submissions on the meaning of "territory" as it is used more broadly in public international law.²⁹⁴ Indeed, the Tribunal's interpretative exercise is limited to the principles enunciated in Article 31 of the VCLT. The meaning of "territory" as it is used more broadly in public international law does not necessarily constitute relevant rules of international law applicable in the relations between the Ukraine and the Respondent (Article 31(3)(c) of the VCLT).

219. Given its conclusions above, the Tribunal also does not need to consider in depth the Claimant's alternative argument that the Respondent is estopped from denying responsibility under the Treaty.²⁹⁵ However, it is sufficient for present purposes to say that the Tribunal finds that the

²⁹² Shaw Report, para. 102.

²⁹³ See *supra*, paras. 196–217.

²⁹⁴ Statement of Claim, paras. 283–325.

²⁹⁵ Statement of Claim, paras. 248, 291 and 326–344.

Claimant's arguments on estoppel strongly support the Tribunal's conclusion on the meaning of "territory" under the Treaty.

D. IS THERE AN INVESTMENT?

220. As noted above, the Respondent's primary objection to the jurisdiction of this Tribunal appears, from its limited correspondence, to be that there is no "investment" of the Claimant in the Respondent's territory within the meaning of Article 1(1) of the Treaty.

221. The Tribunal begins its analysis with the definition of "investments" in Article 1(1) of the Treaty, recognizing that additional jurisdictional restrictions deriving from the notion of "investment" as defined in other treaties are not applicable to the present arbitration.²⁹⁶ As such, the oft-cited criteria proposed by the ICSID tribunal in *Salini Costruttori S.p.A. v Kingdom of Morocco*,²⁹⁷ are not applicable in the context of the present Treaty.²⁹⁸

222. Article 1(1) of the Treaty contains a broad definition of the term "investments":

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

- a) movable and immovable property, as well as associated proprietary rights;
- b) money, as well as securities, liabilities, deposits, and other forms of participation;
- c) intellectual property rights, including copyright and related rights, trademarks, the rights to inventions, industrial designs, models, as well as technological processes and know-how;
- d) rights to perform business activity, including rights to search for, cultivate and exploit natural resources.

Alteration of the type of investments, in which the funds will be invested, shall not affect their nature as investments, unless such alteration is contrary to the laws of a Contracting Party, in whose territory the investments were made.

223. Under normal circumstances, the establishment of a branch of a Ukrainian bank in the Respondent's territory would constitute an investment under this definition. It meets the criteria

²⁹⁶ *Flemingo DutyFree Shop Private Limited v The Republic of Poland*, Award, 12 August 2016 (PCA), para. 298 ("Article 9 of the Treaty, and not Article 25 of the ICSID Convention, is the jurisdictional basis of the present arbitration. Consequently, jurisdictional restrictions deriving from the notions of 'investment' in Article 25 of the ICSID Convention, as emphasized by various ICSID tribunals such as the *Salini* panel, do not apply to the present arbitration.").

²⁹⁷ *Salini Costruttori S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52. The criteria included (i) a contribution; (ii) an expectation and regularity of profit and return; (iii) a duration; (iv) a risk; and (v) a contribution to the Respondent's development or prosperity.

²⁹⁸ In *Malaysia Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, 16 April 2009, the tribunal held that it is "controversial as to whether it is permissible to refer to the so-called *Salini* criteria at all in cases where the instrument of consent to arbitration is a BIT because a BIT typically (as in this case) supplies a definition of an investment".

set out in the definition above as it includes material assets (including right to property (leases of premises)), as well as rights and economic interests (arising out of loans, deposited funds and other banking instruments).

224. The Respondent disputed the existence of a qualifying investment on several bases in its letter of 13 May 2016:

The Bank's assets do not constitute investments, since they were not invested in the territory of the Russian Federation, and, even if they occurred, they were made before accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in conformity with the legislation of the Russian Federation. These assets have not been earlier subject to taxation under the legislation of the Russian Federation and have not contributed to the development of the economy of the Russian Federation.

225. In the Tribunal's view, the Respondent's arguments appear to be that (i) the Claimant's assets in the Crimean Peninsula were not "invested in the territory of the Russian Federation"; (ii) the investments were made before the accession of the Crimean Peninsula to the Respondent; (iii) the investments were not made in conformity with the Respondent's legislation; (iv) the Claimant's investments were not subject to taxation under the Respondent's legislation; and (v) the Claimant's investments did not contribute to the development of the Respondent's economy. Having already addressed and rejected the first argument, the Tribunal will address each of the remaining arguments in turn.

1. Temporal requirement

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

2. Conformity with the Respondent's legislation

227. Under Article 1(1), the Treaty contains a requirement that the investment be made in conformity with the laws of the other contracting party. In the present circumstances, the investments in the Crimean Peninsula would need to have been made in conformity with the Respondent's legislation. It also has a requirement of admission under Article 2(1) that "[e]ach Contracting Party shall ... admit such investments subject to its laws."
228. In this regard, the Tribunal recalls the following legislation enacted by the Respondent in March and April of 2014:

1. Russian Federal Constitutional Law No. 6 (21 March 2014), which states that “[u]ntil 1 January 2015 ... banks having a license of the National Bank of Ukraine operating as of 16 March 2014 registered and/or effectuating banking activity of these territories may carry on banking operations while taking into account the peculiarities established by legislation of the Russian Federation.”
 2. Russian Federal Law No. 37 (2 April 2014), which states that all banks operating in the region “shall have the right until 1 January 2015 to continue the effectuation of banking activity” in the area.
229. These laws expressly permit the continued operation until 1 January 2015 of Ukrainian banks operating in the Crimean Peninsula as of 16 March 2014. The Tribunal therefore finds that the operations of the Claimant in the region at the time the Crimean Peninsula became part of the territory of the Respondent conformed with the Respondent’s legislation for the purposes of Articles 1(1) and 2(1) of the Treaty.

3. Non-payment of taxes to the Respondent

230. As a further argument, the Respondent alleged that the Claimant did not pay any taxes to the Respondent as a result of its investment. It is unclear how this ground would preclude the Tribunal from finding that there is jurisdiction in relation to the Claimant’s investments in the Crimean Peninsula. Despite being given ample opportunity to do so, the Respondent has never expanded upon the particulars of this argument. The Tribunal finds that this argument cannot oust it of jurisdiction, as there is no evidence that Russian taxes were ever levied during the short time that the Claimant was permitted to continue its operations in the Crimean Peninsula. According to the Claimant, its investment was terminated by the Respondent before taxes could rightfully be assessed, hence no tax payments ever became due.
231. The Claimant has supported this position by reference to Article 15(1) of Russian Federal Constitutional Law No. 6 (21 March 2014), which states that Russian laws on taxation would apply to the Crimean Peninsula from 1 January 2015 and, until then, allowed taxes to be regulated and collected by the local Crimean authorities under Article 15(2):

Until 1 January 2015 on the territories of the Republic Crimea and the City of Federal Significance Sevastopol relations with regard to the establishment, introduction, and recovery of taxes and charges, including the establishment of tax privileges, and also relations arising in the process of the effectuation of tax control and appeal against acts of tax agencies, actions (or failure to act) of officials thereof, and bringing to responsibility for the commission of a tax violation, shall be regulated by normative legal acts respectively of the Autonomous Republic Crimea and the City of Federal Significance Sevastopol.

232. It follows that no taxes could have been owed by Claimant to the Respondent prior to January 2015. Neither party has provided any evidence regarding whether or not local taxes were paid. In any event, the Tribunal considers that the payment of taxes is not a requirement for an investment to be recognized as such under the Treaty, all the more so if no taxes have been assessed, provided that the investment is made in compliance with the Respondent's laws (as discussed above).

4. Claimant's contribution to the development of the Respondent's economy

233. In respect of the contribution to the economic development of the Respondent, the Claimant has countered that it did provide an economic benefit to the Respondent while it operated in the Crimean Peninsula – albeit for a short period. Mr. Triantafilou stated at the hearing that:²⁹⁹

We are a commercial bank. We did continue operating for approximately two months in Crimea. We were an integral part and a fundamental cornerstone of the Crimean banking system. It is absurd to be saying that an institution such as this does not contribute to the economy of Crimea and, by extension, after the 21st of March, to the economy of the Russian Federation...

234. In the Tribunal's view, the fact that the Respondent may have derived limited economic benefit from the investment can only be seen as a product of the withdrawal of the Claimant, which was allegedly due to the breaches of the Treaty by the Respondent. The Tribunal is convinced that had the Claimant continued to operate its Crimean branch, which according to the Claimant was one of its most successful branches,³⁰⁰ the Respondent would have received a pronounced economic benefit. The fact that the Russian Federation received little economic benefit during the short duration of business operations in Respondent's territory does not render invalid treaty protections that otherwise would have existed.

235. Having dismissed each of the Respondent's arguments in opposition, the Tribunal finds that a qualifying investment existed under Article 1(1) of the Treaty.

E. IS THE CLAIMANT AN "INVESTOR"?

236. Having established that the Treaty applies to the Crimean Peninsula at the relevant time and that a qualifying investment existed in relation to the Claimant's Crimean branch, there remains no credible objection to the Claimant being defined as an investor under the Treaty.

²⁹⁹ Hearing Tr., 27 March 2017 at 102 (Claimant's opening statement).

³⁰⁰ Statement of Claim, para. 518.

237. An investor is defined in the Treaty as “any legal entity, constituted under the law in force in the territory of that Contracting Party, provided that the legal entity is competent under the laws of its Contracting Party to make investments in the territory of the other Contracting Party”.
238. The Claimant has produced evidence of its proper incorporation under Ukrainian law.³⁰¹ The Tribunal is not aware of any other issues that would suggest the Claimant does not qualify as an investor under the Treaty. The Tribunal therefore finds that the Claimant was an investor for the purposes of the Treaty.
239. For all of the foregoing reasons, the Tribunal is satisfied that it has jurisdiction under the Treaty to determine the dispute in relation to the Claimant’s investments in the Crimean Peninsula.

F. ATTRIBUTION

1. The Claimant’s position

240. The Claimant’s submissions on attribution of responsibility are contained in Part V(D) of the Statement of Claim at paragraphs 389 to 423, and summarised above at paragraphs 135 to 140.
241. According to the Claimant,³⁰² because the Treaty is silent on attribution of responsibility, the Tribunal is required to apply the customary international law rules of attribution, as codified by the ILC Articles. Applying those rules, the Respondent is responsible for acts and omissions of:
1. the Respondent’s organs, recognised either expressly in law or *de facto* under Article 4 of the ILC Articles (the “structural test”);
 2. entities or persons exercising elements of delegated government authority under Article 5 of the ILC Articles (the “functional test”); and
 3. entities or persons acting in accordance with the instructions, or under the direction or control of, the Respondent in relation to the specific acts in question, in accordance with Article 8 of the ILC Articles (the “effective control test”).
242. On the above basis, the Claimant contended that the Respondent was responsible for the actions and omissions of the persons and entities set out below:³⁰³

³⁰¹ Excerpt from the Unified State Register of Legal Entities and Entrepreneurs of Ukraine, 4 November 2015 (Exhibit C-3 to the Notice of Arbitration).

³⁰² Statement of Claim, para. 390.

³⁰³ Statement of Claim, para. 389.

1. The military and Parliament of the Russian Federation;
2. The Bank of Russia;
3. The DPF;
4. The Crimean authorities; and
5. The Crimean Self-Defense Forces.

2. The Respondent's position

243. The Tribunal has not been afforded the benefit of any submissions on behalf of the Respondent on the issue of attribution.

3. The Tribunal's analysis

244. In this section, the Tribunal will address the following issues:

1. What principles govern attribution of responsibility?
2. Whether the Respondent was responsible for the conduct of its military and Parliament?
3. Whether the Respondent was responsible for the conduct of the Bank of Russia?
4. Whether the Respondent was responsible for the conduct of the DPF?
5. Whether the Respondent was responsible for the conduct of the Crimean authorities?
6. Whether the Respondent was responsible for the conduct of the Crimean Self-Defense Forces?

(a) Summary of the law

245. In the absence of express wording in the Treaty, the Tribunal agrees with the Claimant that it is appropriate to apply the rules of attribution under customary international law. In this regard, the Tribunal accepts that is well established that these rules are codified by the ILC Articles.³⁰⁴

³⁰⁴ See generally *Jan de Nul v. Egypt*, ICSID Case. No. ARB/04/13, Award, 6 November 2008, para. 156 (CLA-101) (where it is noted that the ILC Articles have been embodied in Resolution A/56/83 adopted by the General Assembly of the United Nations on 28 January 2002. That resolution is considered as a statement of customary international law on the question of attribution for the purposes of asserting the responsibility of a State); R.

246. The relevant principles are discussed below.

i. Article 4 – State organs

247. Article 4 of the ILC Articles states the basic rule that the State is responsible for the conduct of its own organs acting in that capacity. It provides as follows:

ARTICLE 4
Conduct of organs of a State

1. The 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.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

248. A State cannot avoid the responsibility for the conduct of a body which acts as one of its organs merely by denying it that status under its own law.³⁰⁵ Customary international law adopts a broad approach in determining whether a person or entity is a State organ, which extends to all organs of government of whatever kind of classification, exercising whatever functions, and at whatever levels in the hierarchy.³⁰⁶ Historically, this has included government departments and government ministers.³⁰⁷

249. The Commentary to the ILC Articles notes that it is irrelevant for the purposes of determining whether a State organ is acting in that capacity that the person concerned may have had ulterior or improper motives or may be abusing public power.³⁰⁸ Moreover, it is not relevant whether the conduct of a State organ is commercial or governmental in nature.³⁰⁹

Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., Oxford, 2012), p. 221 (CLA-103).

³⁰⁵ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 4, para. 11 (CLA-51).

³⁰⁶ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 4, para. 6 (CLA-51).

³⁰⁷ As to the former, see *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case. No. ARB/07/24, Award, 18 June 2010, para. 293 (CLA-105); *Jan Oostergetel & Anor. v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2010, para. 152 (CLA-106). As to the latter, see *Texaco Overseas Petroleum Company & Anor. v. Libya* (1977), ILR, vol. 53, para. 23 (CLA-107); Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., Oxford, 2012), p. 217 (CLA-103).

³⁰⁸ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 4, para. 13 (CLA-51).

³⁰⁹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 4, para. 6 (CLA-51).

ii. Article 5 – Delegated governmental authority

250. Aside from State organs, a State is nonetheless also responsible for the conduct of “parastatal entities”, being persons or entities exercising elements of delegated governmental authority, codified in Article 5 of the ILC Articles:

ARTICLE 5

Conduct of persons or entities exercising elements of governmental authority

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.

251. Although the Claimant noted that the practical application of Article 5 is intended to be flexible,³¹⁰ it divided the test for attribution under this rule into two elements, both of which must be met.³¹¹ First, it must be demonstrated that the person or entity under consideration was authorised to exercise governmental authority. Second, the person or entity must have exercised such governmental authority (as opposed to other private or commercial activity) in carrying out the conduct in question.
252. The Commentary to the ILC Articles observes that what is to be regarded as “governmental” depends on “the particular society, its history and traditions”.³¹² In this regard, relevant factors will include the content of the powers, the way they are conferred on the entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to the government for their exercise.³¹³
253. The Claimant provided several examples in which an arbitral tribunal found that the threshold of “governmental authority” was met in circumstances where the relevant entity was charged with implementing State policy.³¹⁴ The Commentary to the ILC Articles suggests that the threshold

³¹⁰ Statement of Claim, para. 400; *F-W Oil Interests, Inc. v. Trinidad and Tobago*, ICSID Case. No. ARB/01/14, Award, 3 March 2006, para. 203 (CLA-110).

³¹¹ Statement of Claim, para. 397; *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case. No. ARB/08/11, Award, 25 October 2012, paras. 174–175 (CLA-108).

³¹² International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 5, para. 6 (CLA-51).

³¹³ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 5, para. 6 (CLA-51).

³¹⁴ Statement of Claim, paras. 398–399; *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case. No. ARB/08/11, Award, 25 October 2012 (CLA-108); *Helnan International Hotels A/S v. Egypt*, ICSID Case. No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006 (CLA-91). See also *United States – Definitive Anti-dumping and Countervailing Duties on Products from China*, Report of the Appellate Body, 11 March 2011 (CLA-109).

would also be met in circumstances where there is proof that the State has used its ownership interest as a vehicle for directing an entity to carry out certain acts.³¹⁵

iii. Article 8 – Directed or controlled by the State

254. A State may, either by specific directions or by exercising control over a group, in effect assume responsibility for its conduct. Article 8 of the ILC Articles reads as follows:

ARTICLE 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

255. For the sake of attribution under this rule, it is irrelevant that the acts might be “commercial, *jure gestonis*, or contractual” in nature,³¹⁶ provided that the instructions, direction or control by the State relate to the conduct which is said to have amounted to the internationally wrongful act.³¹⁷

256. In relation to the assessment of whether conduct was “under the direction or control” of a State, the Commentary to the ILC Articles provides:³¹⁸

Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.

257. Each case will depend on its own facts. In this regard, the level of control required for attribution under Article 8 in the context of an investment dispute “may differ from the standard applied in other areas of international law, such as in the laws on armed intervention or international criminal responsibility”.³¹⁹

³¹⁵ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 8, para. 6 (CLA-51).

³¹⁶ *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case. No. ARB/03/29, Award, 27 August 2009, para. 129 (CLA-112); International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 8, para. 2 (CLA-51).

³¹⁷ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 8, para. 6 (CLA-51).

³¹⁸ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 8, para. 3 (CLA-51).

³¹⁹ Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., Oxford, 2012), p. 222 (CLA-103); *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case. No. ARB/03/29, Award, 27 August 2009, para. 130 (CLA-112).

(b) Responsibility for the conduct of the Respondent's military and Parliament

258. The Tribunal agrees with the Claimant that the military and Parliament of the Russian Federation are organs of the Respondent.³²⁰ Accordingly, the Tribunal finds that, in accordance with Article 4 of the ILC Articles, the Respondent was responsible for the conduct of its military and Parliament.

(c) Responsibility for the conduct of the Bank of Russia

259. The Claimant submitted that the Bank of Russia is an organ of the Respondent charged with performing public services.³²¹ The Claimant identified an extensive list of characteristics and functions of the Bank of Russia which tell in favour of the finding that it is a State organ for the purposes of Article 4 of the ILC Articles.³²² The Tribunal does not consider that it is necessary to repeat the characteristics and functions identified at paragraph 136 above. However, for present purposes, the Tribunal finds that the characteristics and functions identified strongly tell in favour of concluding that the Bank of Russia is a State organ for the purposes of Article 4.

260. In *Invesmart, B.V. v. Czech Republic*, the tribunal considered that the Czech National Bank was a “state entity” for the purposes of attributing responsibility under international law.³²³ Given its finding above in light of the characteristics and functions of the Bank of Russia, the Tribunal cannot identify any reason to differ in its approach in the present case. Accordingly, the Tribunal finds that the Bank of Russia is structurally a part, and therefore an organ, of the Respondent for the purposes of Article 4 of the ILC Articles.

261. Having already determined that the Bank of Russia is an organ of the Respondent under Article 4, the Tribunal therefore need not find that its conduct can be attributable to the Respondent under Article 5.

(d) Responsibility for the conduct of the Depositor Protection Fund

262. In relation to the DPF, the Tribunal recalls the following considerations raised by the Claimant:³²⁴

³²⁰ *Lemire v Ukraine*, ICSID Case. No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 37 (CLA-29).

³²¹ Statement of Claim, para. 409.

³²² Statement of Claim, paras. 405–408.

³²³ *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 363 (CLA-113).

³²⁴ Statement of Claim, paras. 410–411.

1. The DPF was formed by the Deposit Insurance Agency of the Russian Federation for the purposes of implementing the Federal Law on Crimean Depositor Protection;
2. The DPF is an instrument of the Respondent under the direction and control of the Respondent's Government;
3. The DPF's main objective is to implement provisions of the Federal Law on Crimean Depositor Protection and the Federal Law on the Crimean Financial System; and
4. The DPF played a key role in facilitating the Respondent's control over the Crimean banking system.

263. For the foregoing reasons, the Tribunal finds that the Respondent is responsible under international law and under Article 8 of the ILC Articles for the DPF's actions.

(e) Responsibility for the conduct of the Crimean authorities

264. The Claimant submitted that the Respondent was responsible for the conduct of (i) Crimean State officials; (ii) the Crimean courts; (iii) the Crimean Parliament; and (iv) the Sevastopol's Assembly (together, the "**Crimean authorities**").³²⁵ According to the Claimant, the Crimean authorities were, following the ratification of the Accession Treaty and the adoption of the Accession Law, organs of the Respondent.³²⁶

265. In addition and in the alternative, the Claimant also submitted that the Crimean authorities were authorised to exercise, and were indeed exercising, the Respondent's governmental authority in the territory of the Crimean Peninsula in relation to the Claimant's investment in Crimea.³²⁷

266. As the Claimant noted in its Statement of Claim at paragraph 79, the Accession Treaty provided:

1. that the Republic of Crimea, within its boundaries, was deemed to be accepted into the Russian Federation on 18 March 2014;
2. for the establishment of two new entities, the Republic of Crimea and the Federal City of Sevastopol, within the composition of the Russian Federation on 18 March 2014;

³²⁵ Statement of Claim, para. 413.

³²⁶ Statement of Claim, para. 415.

³²⁷ Statement of Claim, para. 415.

3. for the expansion of the Russian Federation's legislative and other normative acts to the territory of the Crimean Peninsula from the date of Crimea's purported acceptance into the Russian Federation; and
 4. for a transitional period until 1 January 2015 for resolving the issues of integrating the Crimean Peninsula into the Russian Federation's economic, financial, credit and legal systems, the Russian Federation's system of agencies of state power, and matters of fulfilling military responsibilities and military service in Crimea.
267. On 21 March 2014, the Respondent signed the Accession Law which incorporated the Crimean Peninsula into the list of subjects (known as constituent entities) of the Respondent provided for in Article 65 of its Constitution. Thus, from 21 March 2014, under Russian law, the Crimean Peninsula became an integral part of the Respondent with Russian legislation fully applicable in its territory. The Accession Law also:
1. regulated the establishment of prosecutor's offices and courts;
 2. regulated the functioning of State entities and organisations;
 3. provided for the recognition of Ukrainian title documents;
 4. regulated the application of the Russian budget, tax and customs regulations; and
 5. addressed local self-governance and other issues.
268. The Claimant noted that the Accession Law provided (i) that legislative powers in the Crimean Peninsula were to be exercised by the State Council of the Republic of Crimea (previously known as the Supreme Rada of the Autonomous Republic of Crimea);³²⁸ and (ii) for the establishment of new administrative authorities in the Crimean Peninsula in compliance with the Respondent's legislation.³²⁹
269. According to the Claimant, upon ratification of the Accession Treaty and the adoption of the Accession Law, authorities of the Respondent and the purported Crimean authorities promptly commenced actions aimed at integrating the Crimean Peninsula into "the economic, financial, credit and legal systems of the Russian Federation, within the systems of agencies of State power of the Russian Federation".³³⁰ Such actions included the expeditious formation of new authorities

³²⁸ Statement of Claim, para. 102.

³²⁹ Statement of Claim, para. 110.

³³⁰ Statement of Claim, para. 101.

and courts in the Crimean Peninsula in line with Russian laws and Russian centralized governance and judicial systems.

270. The Tribunal recalls that customary international law adopts a broad approach in determining whether a person or entity is a State organ, which extends to all organs of government of whatever kind of classification, exercising whatever functions, and at whatever levels in the hierarchy.³³¹
271. It is clear that the combined effect of the Accession Treaty and Accession Law was to adopt the Crimean Peninsula formally as a constituent entity of the Respondent. As a result, the Tribunal finds that the Crimean authorities effectively became organs of the Respondent from 18 March 2014 onwards.
272. Accordingly, the Tribunal finds that the actions of the Crimean authorities were, at all material times after 18 March 2014, attributable to the Respondent under Article 4 of the ILC Articles.

(f) Responsibility for the conduct of the Crimean Self-Defense Forces

273. Finally, the Claimant submitted that the Respondent was responsible for the conduct of the Crimean Self-Defense Forces (and other Russia-backed individuals and entities) in accordance with Article 8 of the ILC Articles.³³²
274. In the alternative, the Claimant submitted that the Respondent must be held internationally responsible for failing to prevent the unlawful conduct of the Crimean Self-Defense Forces in the period following the Respondent's *de facto* control over the Crimean Peninsula.³³³ In support of its submission, the Claimant referred to authorities which support the view that a lack of vigilance in preventing violations of human rights, international humanitarian law, or genocide by other actors present in the territory entails international responsibility.³³⁴

³³¹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Act, with Commentaries*, Article 4, para. 6 (CLA-51).

³³² Statement of Claim, para. 416.

³³³ Statement of Claim, para. 419.

³³⁴ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports, 2005, para. 179 (CLA-57); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 2007, 26 February 2007, paras. 166–167 (CLA-50); *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, 1988, para. 172 (CLA-114); *Loizidou v Turkey*, Preliminary Objections, European Court of Human Rights (Application No. 15318/89), 23 March 1995, para. 62 (CLA-64).

275. According to the Claimant, the Crimean Self-Defense Forces were paramilitary units acting under the control of the Crimean authorities.³³⁵
276. The Claimant submitted that, by the decree of the Supreme Council of the Autonomous Republic of Crimea dated 11 March 2014, the Crimean Self-Defense Forces were under the supervision and control of the Internal Affairs Ministry of the Autonomous Republic of Crimea.³³⁶ That ministry subsequently came under the direct control of the Respondent and fell under the Russian Federal Ministry of Crimean Affairs.³³⁷
277. The Claimant noted that, in June 2014, the Crimean Parliament fixed the status of the Crimean Self-Defense Forces on the level of law and empowered the Crimean Government to formally establish the Crimean Self-Defense Forces.³³⁸ On 23 July 2014, the Crimean Self-Defense Forces were formally established by the Crimean Government.³³⁹ Its actions were to be generally coordinated by the Crimean Government.³⁴⁰ The legal status of the Crimean Self-Defense Forces as a “state-funded entity” only ended on 26 November 2014.³⁴¹
278. For the foregoing reasons, the Tribunal finds that the Crimean Self-Defense Forces were under the instruction, direction or control of the Crimean authorities at all material times after 11 March 2014. Accordingly, the Tribunal finds that the responsibility of the Crimean Self-Defense Forces were attributable to the Respondent under Article 8 of the ILC Articles. It follows that the Tribunal does not consider it necessary to determine whether the Respondent could be held responsible for failing to prevent the unlawful conduct of the Crimean Self-Defense Forces.

³³⁵ Statement of Claim, para. 417.

³³⁶ Hearing Tr., 27 March 2017 at 109 (Claimant’s opening statement).

³³⁷ Hearing Tr., 27 March 2017 at 109 (Claimant’s opening statement).

³³⁸ Statement of Claim, para. 121.

³³⁹ Resolution of the Crimean Government “On Issues Regarding Activity of People’s Volunteer Corps – People’s Guard of the Republic of Crimea” No. 217 dated 23 July 2014 (CE-212).

³⁴⁰ Crimean Law “On People’s Volunteer Corps – People’s Guard of the Republic of Crimea” No. 22-3PK as of 17 June 2014, Article 4 (CE-209).

³⁴¹ “People’s Volunteer Corps of Crimea have become a non-governmental organization from state-owned entity”, 26 November 2014 (CE-227).

VIII. DECISION ON LIABILITY

A. EXPROPRIATION

1. The Claimant's position

279. According to the Claimant,³⁴² the Respondent has engaged in the unlawful expropriation of the Claimant's investments in breach of Article 5(1) of the Treaty. The Claimant relies upon the facts set out in Section IV of its Statement of Claim as providing the evidential basis giving rise to expropriation through a series of actions motivated by a political and economic agenda on the part of the Respondent. The Claimant submitted that such expropriation was unlawful under the Treaty because the measures were "(1) contrary to the public interest; (2) not in accordance with due process of law; (3) discriminatory; and (4) not compensated at all, much less promptly, adequately or effectively".³⁴³ The Claimant concludes that the Respondent's alleged unlawful expropriation engages its responsibility at international law.

2. The Respondent's position

280. The Tribunal has not been afforded the benefit of any submissions on behalf of the Respondent on the issue of expropriation.

3. The Tribunal's analysis

281. In this section, the Tribunal will consider whether the Respondent's actions constitute unlawful expropriation within the meaning of Article 5(1) of the Treaty by addressing the following issues:

1. What principles govern expropriation?
2. Whether the Respondent's conduct amounted to measures of an expropriatory nature?
3. If the Respondent expropriated the Claimant's investment, was such expropriation lawful under the Treaty?

³⁴² Statement of Claim, paras. 157–158.

³⁴³ Statement of Claim, para. 488.

(a) Summary of the law

282. Article 5(1) of the Treaty expressly addresses the expropriation of an investment by a State Party, as set out below:

ARTICLE 5
EXPROPRIATION

1. The investments of investors of one Contracting Party, made in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to measures, the effect of which is tantamount to expropriation (hereinafter referred to as - expropriation), with the exception of cases, when such measures are adopted in the public interest under due process of law, are not discriminatory and are accompanied by the payment of prompt, adequate and effective compensation.

283. In brief, the Claimant must establish that:

- (i) the Respondent expropriated the Claimant's investment; and
- (ii) such expropriation was unlawful under the Treaty.

i. Whether an expropriation occurred

284. The Tribunal must first determine whether the Respondent expropriated the Claimant's investment. In determining whether an expropriation occurred, the Tribunal will apply the principles set out below, derived from the jurisprudence of tribunals considering expropriation:³⁴⁴

1. Expropriation requires a taking (which may include destruction), by a government-type authority, of an investment made by an investor and covered by the relevant investment treaty;
2. The covered investment may include intangible as well as tangible property;
3. The taking must result in a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiably distinct parts thereof (i.e. it approaches total impairment);
4. The taking must be permanent, and not ephemeral or temporary;

³⁴⁴ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case. No. ARB(AF)/00/2, Award, 29 May 2003, paras. 113–116 (CLA-9); *Compañía de Aguas del Aconquija S.A. v. Vivendi Universal S.A.*, ICSID Case. No. ARB/97/3, Award, 20 August 2007, paras. 7.5.11–7.5.18 (CLA-136); *Eureko B.V. v. Poland*, Ad Hoc, Partial Award, 19 August 2005, para. 241 (CLA-152); *Siemens A.G. v. Argentina*, ICSID Case. No. ARB/02/8, Award, 6 February 2007, paras. 267–270 (CLA-121); *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case. No. ARB(AF)/02/01, Award, 17 July 2006, para. 176.

5. The taking may involve a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so (e.g., total destruction of an investment due to measures by a government authority without transfer of rights);
 6. The effects of the host State's measures, not the underlying intent, are dispositive in determining whether there has been an expropriation;
 7. The taking may be *de jure* or *de facto*;
 8. The taking may be "direct or "indirect";
 9. The taking may have the form of a single measure or a series of related or unrelated measures over a period of time ("creeping" expropriation); and
 10. The investor's reasonable "investment-backed expectations" may be a relevant factor in determining whether an expropriation has occurred.
285. The term "measures" is sufficiently wide in scope to include omissions on behalf of a State and the actions of State entities whose conduct is attributable to that State.³⁴⁵
286. As noted above, indirect expropriation may result from a series of acts or omissions that together amount to expropriation, known as "creeping expropriation". The Tribunal found the United Nations Conference on Trade and Development's (UNCTAD) definition of "creeping expropriation" particularly helpful. It provides, in part:
- Creeping expropriation.** This may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor's rights of use of the property are diminished as a result of the interference by the State.³⁴⁶
287. Similar language has been employed by other Tribunals in Awards referred to by the Claimant.³⁴⁷ Of note, the formulation in *Siemens v Argentina* reads:

By definition, creeping expropriation referred to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred.

³⁴⁵ Statement of Claim, para. 483; *Eureko B.V. v. Poland*, Ad Hoc, Partial Award, 19 August 2005, paras. 185–189 (CLA-152); ILC Articles, Commentary to Article 1, para. 1 (CLA-51).

³⁴⁶ UNCTAD, "Taking of Property", Series on issues in international investment agreements (2000) UNCTAD/ITE/IIT/15, 11–12 (CLA-154).

³⁴⁷ Statement of Claim, para. 484; *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 107 (CLA-153); *Siemens A.G. v Argentina*, ICSID Case. No. ARB/02/8, Award, 6 February 2007, para. 263 (CLA-121).

Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.³⁴⁸

288. This principle is recognized in international law generally, and is incorporated into Article 15(1) of the ILC Articles which provides:

The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

289. It follows that the Tribunal may assess matters cumulatively to determine the overall effect on an investor's investment.

ii. Lawfulness of the expropriation

290. Only if the Tribunal is first satisfied that expropriation has occurred will it then turn to address the question of the lawfulness of such expropriation under the Treaty.

291. As the sole exception to the prohibition on expropriation and in accordance with Article 5(1) of the Treaty, expropriation is only lawful where it meets *all* of the following criteria:

- (i) adopted in the public interest;
- (ii) taken under due process of law;
- (iii) non-discriminatory in nature; and
- (iv) accompanied by prompt, adequate and effective compensation.

292. The Tribunal observes that the conditions enumerated in Article 5(1) are cumulative. As submitted by the Claimant, expropriation is therefore wrongful, and in breach of Article 5(1), if it fails to meet *any* one of the aforementioned conditions.³⁴⁹

(b) Expropriatory measures alleged

293. The Tribunal now turns to evaluate the allegations raised by the Claimant in the light of the foregoing accepted principles. Without unnecessary repetition of the facts,³⁵⁰ the Tribunal briefly

³⁴⁸ *Siemens A.G. v Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 263 (CLA-121).

³⁴⁹ Statement of Claim, paras. 481–482; *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 98 (CLA-151).

³⁵⁰ See *supra*, Section III.

identifies the most significant aspects of the Respondent's conduct which lead to its finding of expropriation.

294. Central to the Claimant's contention, the Respondent "promptly set the scheme of expulsion of the Ukrainian banks from Crimea, which was utilized to take over the Claimant's investments in Crimea".³⁵¹ The Claimant suggests that the Respondent formalized such a scheme through the adoption of a package of federal laws including the Federal Law on the Crimean Financial System Law (or Federal Law No. 37), the Federal Law on Crimean Depositor Protection (or Federal Law No. 39) and the issuance of Order No. OD-561 of the Russian Central Bank.³⁵² The combined effect provided a platform for the Bank of Russia to terminate immediately the activities of the Claimant in the Crimean Peninsula under Article 7(2) of Federal Law No. 37 if the Claimant failed to perform obligations towards creditors or depositors within one or more days of the date such obligations were due; or failed to comply with the requirements provided in Federal Law No. 37.³⁵³
295. As noted above in Section III.B, the Tribunal has found that prior to the Accession, the Claimant's Crimean Branch operated normally. As summarised below, it was the circumstances surrounding the Accession and the legal requirements imposed on the Crimean Branch (and other Ukrainian banks) by the Respondent that triggered the intervention of the Bank of Russia and ultimately led to the latter's decision to terminate the Claimant's activities in the Crimean Peninsula.
296. On 2 April 2014, the Respondent enacted the Crimean Financial System Law.³⁵⁴ This established "peculiarities of the activity for the transition period" in Crimea and Sevastopol of banks and other financial institutions.³⁵⁵ Article 3 stated that banks registered on Crimea or Sevastopol could continue their "banking activity" during the transitional period if they complied with certain conditions.³⁵⁶ These conditions included the proper performance of contractual obligations, the "provision of banking services to clients connected with the use of the ruble as a means of payment", the notification of activity to the Bank of Russia within a fifteen-day period

³⁵¹ Statement of Claim, para. 127.

³⁵² Statement of Claim, para. 128; Crimean Financial System Law (CE-129); Depositor Protection Law (CE-130); Central Bank of the Russian Federation Order No. OD-561 on the Termination of the Activity of Solitary Structural Subdivisions of Banks Operating on the Territory of the Republic of Crimea and/or on the Territory of the City of Federal Significance, Sevastopol (CE-135).

³⁵³ Statement of Claim, paras. 129, 132–136; Butler Report, paras. 73–74.

³⁵⁴ Crimean Financial System Law (CE-129).

³⁵⁵ Crimean Financial System Law, art. 1 (CE-129).

³⁵⁶ Crimean Financial System Law, art. 3 (CE-129).

from the date of entry into force, the submission of a register of obligations to creditors and depositors as required by the Bank of Russia, and submission of other information.³⁵⁷

297. In light of these various obligations, the Claimant expressed the view that the “Respondent knew or ought to have known, or at least calculated that it would be impossible for the Ukrainian banks to comply with the legislation”.³⁵⁸ As explained during the hearing, these were onerous obligations that “would have placed the Ukrainian banks in direct violation of their obligations under Ukrainian law.”³⁵⁹ For example, the compliance with the condition of providing customers with banking services in rubles was not possible, as “any payments in rubles and cash flow in rubles had to be carried out in accordance with Ukrainian foreign exchange regulations”, and these regulations would require customers who transact with a foreign currency (such as rubles) to obtain an individual license from the National Bank of Ukraine before each transaction.³⁶⁰ Furthermore, the requirement to provide a register of depositors and creditors to the Bank of Russia did not take into account the Ukrainian Civil Code and Ukrainian law on banking activities; as such disclosure would have been “a direct breach” of certain provisions.³⁶¹ As emphasised by the Claimant, “access to the Bank’s information systems is strictly limited for many reasons, including to ensure compliance with banking secrecy laws.”³⁶²
298. Providing an illustration of these compliance difficulties, counsel for the Claimant explained during the hearing:

In particular, under Ukrainian law, any payments in rubles and cash flow in rubles had to be carried out in accordance with Ukrainian foreign exchange regulations. The ruble was, of course, a foreign currency insofar as the Ukrainian authorities were concerned. And Ukrainian law mandated that Ukrainian banks ensure that a customer intending to transact in a foreign currency – for example, rubles – with Ukraine would obtain an individual licence from the NBU prior to each such transaction. Moreover, while – initially, the Federal Law on Accession had permitted Ukrainian hryvnia circulation until 1 January 2016, on the 27th of May, 2014, with just three days’ notice, that period was permitted to – was shortened – was shortened until the 1st of June, 2014, just three days later. So the requirement that Ukrainian banks, which were licenced by the NBU, suddenly start providing banking services in another currency was difficult. They simply couldn’t do that, as Russia would have well known.

Moreover and crucially, information disclosure requirements imposed on the Ukrainian banks – the Tribunal will recall that legislation required the banks to provide a register of depositors and creditors to the Bank of Russia – was introduced without any regard to the obligations owed by the Ukrainian banks to their customers to preserve bank secrecy.

³⁵⁷ Crimean Financial System Law, art. 3 (CE-129).

³⁵⁸ Hearing Tr., 27 March 2017 at 18–19 (Claimant’s opening statement).

³⁵⁹ Hearing Tr., 27 March 2017 at 52:12–14 (Claimant’s opening statement).

³⁶⁰ Hearing Tr., 27 March 2017 at 58:2–11 (Claimant’s opening statement).

³⁶¹ Hearing Tr., 27 March 2017 at 58–59 (Claimant’s opening statement).

³⁶² Pyshnyy Statement, para. 33.

Disclosing customer information in this manner to the Bank of Russia would have been a direct breach of provisions of the Ukrainian Civil Code and Ukrainian law on banks and banking activities.

[...]

Further, the requirement to provide an extensive number of documents and information in the Russian language, with translations into the Russian language, to the Bank of Russia within relatively short deadlines that varied from several days to a month was, again, practically impossible to satisfy. So, we say the legislation introduced by Russia was deliberately designed and intended to foreclose the ability of Ukrainian banks to operate in Crimea.³⁶³

299. While the Claimant has argued that Federal Law No. 37 was part of a scheme of expulsion of Ukrainian banks from the Crimean Peninsula, it is not the underlying intent – e.g., the regulation of the financial system in, or the alleged expulsion of banks from, the region – but rather the effects of the measures that are dispositive. In this regard, the Tribunal accepts that the conditions were unduly onerous on the Claimant, which realistically could not comply with them. The conditions were imposed without regard to the already existing Ukrainian law (which governed the Claimant), and without taking into account the practicalities of compliance.³⁶⁴ Thus, notwithstanding that the Federal Constitutional Law and the Law on the Crimean Financial System nominally provided for a transition until January 2015, the requirements that they imposed and their unreasonable deadlines, coupled with the harsh consequences in case of non-compliance (outlined below), in fact prevented an orderly transition from happening.
300. By way of consequences, sanctions were provided in the event of non-compliance with the conditions. As explained by the Claimant’s expert on Russian law, Mr. Butler, Article 7 “provided that the Bank of Russia might terminate activities of the respective solitary structural subdivisions of Ukrainian banks in Crimea if a Ukrainian Bank failed to: (a) perform obligations towards creditors or depositors within one or more days of the date such obligations were due; or (b) comply with other requirements provided in Federal Law No. 37, including those expressly mentioned in Article 3”.³⁶⁵
301. The Bank of Russia issued a formal prohibition against the banking activities of the Claimant in the Crimean Peninsula on 26 May 2014, invoking Article 7 of Federal Law No. 37. The Bank of Russia’s decision to terminate the Claimant’s operations in the Crimean Peninsula triggered compensation payments by the DPF to the depositors of the Claimant’s Crimean Branch. In the Tribunal’s view, two particularly telling events flowed from termination, as detailed below.

³⁶³ Hearing Tr., 27 March 2017 at 58–59 (Claimant’s opening statement).

³⁶⁴ Statement of Claim, para. 135.

³⁶⁵ Crimean Financial System Law, art. 7(2) (CE-129); Butler Report, para. 74.

302. First, proceedings were then commenced against the Claimant in the Kyiv District Court of Simferopol, which granted orders appointing the DPF as administrator of the Claimant's Crimean assets on 29 May 2014, including its movable and immovable property, claims and rights of the Claimant arising out of agreements and other rights or claims of the Claimant and granting the DPF the powers of the executive organs of the Claimant.³⁶⁶ The proceedings related to the Claimant's failure to perform its banking operations in Crimea. However, the Tribunal accepts the point raised by the Claimant that:

... the Simferopol Court did not address how Oschadbank Crimea was to perform any banking operations *at all* if the Bank of Russia's Decision on Termination of Oschadbank Crimea prohibited its operation as of 26 May 2014.³⁶⁷

303. As noted above at paragraph 70, Federal Law No. 39 vested the DPF with the powers to:

Inter alia: (a) make "compensation payments" to depositors and to make recourse claims to the Ukrainian banks; (b) collect demands to the Ukrainian banks from their depositors; (c) represent depositors in court proceedings against the Ukrainian banks; and (d) administer the assets of the Ukrainian banks in cases and in accordance with the procedure, as ordered by courts.³⁶⁸

304. As of 31 December 2015, the Claimant noted that the DPF had reported:

... it had administered the following Oschadbank Crimea assets: (i) proprietary rights under 2,033 loans issued to individuals and 66 corporate loans; (ii) 73 real estate properties (with the total area of 15,265.7 sq. m); (iii) movable property (152 ATMs, 774 POS-terminals, 116 vehicles, 19,702 objects of other movable property); (iv) valuables (precious metals and investment coins); and (v) monetary funds.³⁶⁹

305. Second, the DPF began compensating the Claimant's Crimean customers and subsequently claimed it had obtained the right of recourse towards the Claimant with respect to the compensation that it purportedly paid to the Claimant's customers in the sum of RUB 4.7 billion.³⁷⁰ The DPF stated that it planned to recover this alleged debt by seizing the Claimant's assets through enforcement proceedings.³⁷¹

³⁶⁶ Statement of Claim, paras. 208–221; Pyshnyy Statement, para. 55; Order of the Kyiv District Court of Simferopol on provision measures in case No. 2931/2014 dated 29 May 2014 (CE-171), Decision of the Kyiv District Court of Simferopol in case No. 2-931/2014 dated 17 Sept. 2014 (CE-222).

³⁶⁷ Statement of Claim, para. 220.

³⁶⁸ Statement of Claim, para. 150.

³⁶⁹ Statement of Claim, para. 230; DPF Annual Report 2015, p. 10, 38–39 (CE-234).

³⁷⁰ Statement of Claim, paras. 227–228 and 234.

³⁷¹ Statement of Claim, para. 235.

306. Additional and more direct forms of “taking” were cited by the Claimant in support of its allegations of expropriation by the Respondent, as outlined below.³⁷²
307. Based upon the testimony of Messrs. Pyshnyy and Matyukha, the Tribunal finds that the Claimant was the target of two raids (seizure of cash and valuables) by Crimean authorities on 16 May 2014 and 21 May 2014.³⁷³ These raids were complemented by significant pressure and intimidation from Crimean Self-Defense Forces as well as requests for access to private information systems of the Claimant.³⁷⁴
308. Additionally, in April 2014, operations in 85 of the Claimant’s Crimean outlets were forced to cease due to the premature termination of the Claimant’s lease agreements for the premises without prior written notice and in breach of the relevant lease agreements.³⁷⁵ The Claimant explained during the hearing that:
- ... the contracts are terminated on the grounds of implementation of the government purpose-oriented program for the development of the banking system of the Republic of Crimea and its swift integration into the banking system of the Russian Federation. In this context, the Council of Ministers of the Republic of Crimea instructed the local authorities to ensure conclusion of the contracts of lease for a number of premises with the Russian National Commercial Bank. Currently, these premises house the offices of the Russian National Commercial Bank.³⁷⁶
309. In a similar vein, the Claimant’s movable property from its Crimean outlets was involuntarily transferred to the RNCB.³⁷⁷ The Claimant stated that its employees were also taken over by RNCB.³⁷⁸
310. Considering matters cumulatively, the Tribunal is satisfied that the Claimant has established that the measures have had an effect tantamount to expropriation of the totality of Claimant’s investment in the Crimean Peninsula.

(c) Lawfulness of the expropriation

311. In light of the above finding, the Tribunal now turns to consider whether the circumstances are such that the expropriation was lawful under the Treaty. As noted above, an otherwise

³⁷² Statement of Claim, paras. 176-187

³⁷³ Statement of Claim, paras. 175 and 182–186; Pyshnyy Statement, para. 37; Matyukha Statement, paras. 15–25.

³⁷⁴ Statement of Claim, paras. 172–174.

³⁷⁵ Statement of Claim, para. 177.

³⁷⁶ Hearing Tr., 27 March 2017 at 62–63 (Claimant’s opening statement); Statement of Claim, paras. 178–179.

³⁷⁷ Statement of Claim, para. 180; Pyshnyy Statement, para. 44.

³⁷⁸ Statement of Claim, para. 180.

expropriatory measure might not violate Article 5(1) of the Treaty if it satisfies all of the cumulative criteria outlined at paragraph 290.

312. The Tribunal will first examine whether or not subparagraph (iv), which requires that an expropriation be “accompanied by the payment of prompt, adequate and effective compensation” has been breached. If it arrives at the conclusion that it has, it will not be necessary for it to consider whether, as alleged by the Claimant, the other conditions required for an expropriation to be lawful also have been breached. It has been recognized in many awards that the “lack of payment is sufficient for the expropriation to be deemed unlawful”.³⁷⁹

313. Article 5(2) of the Treaty expands upon the calculation of adequate and effective compensation as follows:

The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the moment of expropriation or before the moment, when the expropriation became officially known, and the compensation shall be paid without delay inclusive of interest, to be accrued as of the date of expropriation until the date of payment at the interest rate for three months’ deposits in US dollars at the London Interbank Market (LIBOR) plus 1% and shall be efficiently realizable and freely transferable.

314. Putting aside the question of the adequacy of compensation, in the present case, the Claimant has recorded that, to date, the Respondent “procures continuing losses to the Claimant and has not provided any compensation”.³⁸⁰ The Tribunal has received no evidence suggesting otherwise and it finds that no compensation has been paid to the Claimant.

315. Accordingly, the Tribunal finds that the lack of any compensation renders the expropriation on the part of the Respondent wrongful. While it is not necessary to reach a conclusion on the other criteria, given the Tribunal’s finding that no compensation has been provided to the Claimant, the Tribunal briefly addresses the failure of the Respondent to satisfy other criteria, in particular, due process and non-discrimination.

316. Due process is defined in the OECD’s Draft Convention on the Protection of Foreign Property, which provides:

In essence, the contents of the notion of due process of law make it akin to the requirements of the “Rule of Law”, an Anglo-Saxon notion, or of “Rechtsstaat”, as understood in continental law. Used in an international agreement, the content of this notion is not

³⁷⁹ *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 543 (CLA-157).

³⁸⁰ Statement of Claim, para. 243.

exhausted by reference to the national law of the parties concerned. The “due process of law” of each of them must correspond to the principles of international law.³⁸¹

317. The Tribunal finds that the legal framework established by the Respondent for the Bank of Russia’s decision on termination of activities of the Ukrainian banks did not even attempt to provide any meaningful assessment process nor any practical means for the Ukrainian banks to defend themselves.³⁸² For example, Federal Law No. 37 did not provide an opportunity for the Claimant to present its case or to be heard in relation to alleged breaches of the regulations. In the view of the Tribunal, such requirements would be expected where a State could impose significant sanctions upon an entity such as the Claimant.

318. The Tribunal refers to evidence that was submitted at the hearing:

This law let the most basic due process safeguards—there was no opportunity, for example, for Oschadbank, or any bank, to present its position to the Bank of Russia. No appeal procedure on any decision of the Bank of Russia. There was also no procedure or criteria to test the information that was provided by so-called depositors to prove a failure to fulfill conditions. It also did not require depositors to submit evidence to prove Ukrainian bank failure to perform obligations. Moreover, additionally, under Article 7(2), in the event that a bank would fail to comply with the applicable conditions, the Bank of Russia was required to terminate the branches' operations. So, this is what the Ukrainian banks, by law, by Russian law, were required to comply with.³⁸³

319. Professor Butler explained that:

... Oschadbank was not invited to the relevant session of the Banking Supervision Committee or provided with any documents or other evidence alleging a failure to perform obligations to creditors or depositors arising from actions of its Crimean solitary subdivisions. So far as I can determine, Russian banking legislation and normative acts of the Central Bank of Russia make no provision for such an invitation to a session of the Banking Supervision Committee or for familiarization with any documents or other evidence being considered by the said Committee in connection with the failure to perform obligations.³⁸⁴

320. Additionally, the Tribunal finds that the Crimean Financial System Law was also discriminatory, in that it imposed more onerous obligations and requirements on the Claimant than on Russian banks.³⁸⁵ The Tribunal wishes to emphasize, in particular, the striking difference in treatment between the Respondent’s banks and Ukrainian banks in relation to the compliance and enforcement of banking legislation. Banks which had licenses from the Bank of Russia were

³⁸¹ As cited in *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 394 (CLA-156).

³⁸² Statement of Claim, paras. 136–142 and 167.

³⁸³ Hearing Tr., 27 March 2017 at 53–54 (Claimant’s opening statement). *See also* Statement of Claim, paras. 140–142.

³⁸⁴ Butler Report, para. 78.

³⁸⁵ *See also* Statement of Claim, paras. 143–145.

“subjected to relaxed banking supervision” under the Federal Law On Banks and Banking Activity.³⁸⁶ Article 20, for example, provided for more generous timeframes with regards to submitting reports and for satisfying creditors’ demands, and also provided for procedural safeguards:

... the Russian banks, on the other hand, were not subject to such sanctions. Russian banks were given 14 days to satisfy the demands of creditors, 15 days to submit monthly reports, and any revocation of their licenses was subject to an appeal procedure. Moreover, in the event that a Russian bank failed to comply with applicable conditions, depending on the severity of the condition that was breached, the Bank of Russia was given a discretion as to whether to revoke the Russian bank’s license.³⁸⁷

(d) Conclusion

321. The Tribunal finds on the evidence that the Respondent has engaged in wrongful expropriation. It follows that the Respondent stands in breach of its obligations under Article 5(1) of the Treaty. Accordingly, having considered all relevant matters extensively, the Tribunal finds that the Respondent’s liability under international law for a breach of the Treaty has been established.

B. OTHER CLAIMS

322. As summarised above,³⁸⁸ the Claimant also has asserted that the Respondent has breached Article 2(2) guaranteeing full and unconditional legal protection, Article 3(1) guaranteeing non-discrimination and most favoured nation treatment, Article 4 guaranteeing transparency of legislation, Article 7 guaranteeing free transferability of funds, and that the Respondent’s conduct towards the Claimant and its investment constitutes a denial of justice.

323. Following the Tribunal’s finding that Respondent breached Article 5 of the Treaty prohibiting unlawful expropriations, and for the same reasons of judicial economy as have been adopted by other tribunals, the Tribunal is of the opinion that it is not necessary to consider these alternative claims, as the resulting damages would not vary from those granted for the finding of an unlawful expropriation.³⁸⁹

³⁸⁶ Federal Law No. 395-1 “On Banks and Banking Activities” (CE-1).

³⁸⁷ Statement of Claim, para. 143; Hearing Tr., 27 March 2017 at 54:2–11 (Claimant’s opening statement).

³⁸⁸ See *supra*, Section V.A.3.

³⁸⁹ UNCITRAL Arbitration Rules, 1976, Rule 32(3). See also *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 220; *Spence v. Costa Rica*, UNCITRAL, Interim Award, 25 October 2016, para. 296, *Chevron v Ecuador*, PCA Case No. 2009-23, UNCITRAL, First Partial Award on Track I, 17 September 2013, para. 36.

IX. DAMAGES

A. THE CLAIMANT'S POSITION ON DAMAGES

324. The Claimant's case on damages and quantum was set out in Part C of its Statement of Claim at paragraphs 518–579. Rather than endeavoring to summarise that submission, it is reproduced in full as part of this Award. This is appropriate in a case where the Respondent has not participated because it will avoid any suggestion that the Tribunal has misread or misunderstood the Claimant's case as to quantum.³⁹⁰

“VII. DAMAGES AND QUANTUM

A. OVERVIEW AND SUMMARY

[518] The Claimant has incurred very substantial damages as a direct and proximate result of the Russian Federation's violations of the Treaty. Oschadbank Crimea was a profitable enterprise with significant value, and contributed significantly to the overall financial success of the Claimant. Indeed, Oschadbank Crimea's profitability had over-performed the rest of the Bank in the years leading up to the Russian action both in terms of profits made as well as return on net assets. There was a marked deterioration in the asset position of the Claimant following the Russian Federation's military occupation of Crimea and the extinguishment of Oschadbank Crimea, which had a significant negative effect on the profitability of the Claimant. Whereas the Claimant was previously profitable with a positive outlook, in 2014 and 2015 it recorded significant losses as a result of the extinguishment of Oschadbank Crimea.

[519] As explained in Part VI of this Memorial, the Russian Federation's measures at issue violated its obligations under the Treaty and resulted in the total deprivation, without compensation, of the value of the Claimant's investment in Crimea. Consequently, the Claimant is entitled to reparation in accordance with the standards prescribed by international law for internationally wrongful acts. As discussed below, the Claimant is entitled to *restitutio in integrum*, i.e. to be restored to the position it would occupy if the Russian Federation's wrongful conduct had not occurred. As it is impossible strictly to restore the *status quo ante*, the Claimant has the right to receive from the Russian Federation monetary compensation that financially puts it in the same position it would be absent the Russian Federation's wrongful acts.

[520] To calculate the quantum of damages in accordance with the applicable legal standards, the Claimant has engaged Jeffrey Davidson of Honeycomb Forensic Accounting. Mr Davidson is an internationally renowned expert in business valuations and damages quantification, and Honeycomb Forensic Accounting is a business advisory firm with special expertise in these areas. Mr Davidson was engaged to perform an independent assessment of the damages that the Claimant has suffered as a result of the Russian Federation's wrongful conduct. Mr Davidson's analysis is described below, and set forth in detail in his report.

[521] The Claimant's damages consist of three components. First, the Claimant is entitled to damages for the lost assets of Oschadbank Crimea. Second, the Claimant is entitled to compensation for the loss of Oschadbank Crimea as a going concern as a consequence of the Russian Federation's wrongful actions (which can be calculated by means of a discounted cash flow (DCF) analysis). Third, the Claimant is entitled

³⁹⁰ Award in Dispute between Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions, 20 I.L.M. 1 (1981) at 15.

to compensation for certain other transactional losses suffered as a consequence of the Russian Federation's wrongful actions.

[522] The Tribunal's Award should also address other aspects of the full reparation required by international law. The Claimant is entitled to pre- and post-Award compounded interest, and to its costs and attorneys' fees associated with this proceeding.

[523] The table below sets forth a summary of the Claimant's damages:

	28.02.2014	31.03.2014
<u>LOSS OF INVESTMENT IN CRIMEA</u>		
Loss of assets	668,009,137	597,771,793
Loss of goodwill	712,371,214	484,616,757
Total loss of investment	1,380,380,351	1,082,388,550
<u>OTHER LOSSES</u>		
<i>Loss of assets of third parties</i>		
Gold (valued at date of seizure)	17,521,397	17,521,397
Cash in transit (valued at date of seizure)	2,783,984	2,783,984
Total assets of the third parties	20,305,381	20,305,381
<i>Securities lost for the transactions of other branches</i>		
Letter of credit (1) - EUR	183,781	184,721
Letter of credit (2) - USD	8,422,077	8,422,077
Total loss- converted in USD	8,605,858	8,606,798
TOTAL CLAIM (USD)	1,409,291,590	1,111,300,729

[524] Adding interest to the claim value would produce the following results:

All figures USD	28.02.14	31.03.14
Loss	1,409,291,590	1,111,300,729
Total pre-award interest	510,588,118	392,646,056
Loss at 31.12.2017, including compound interest	1,919,879,708	1,503,946,785
Daily rate applicable as post award interest at 0.0226%	434,816	340,615

B. LEGAL STANDARD

[525] Allegations of treaty breaches and their consequences are "subjects that belong to the customary law of state responsibility". Thus, the customary international law principles of state responsibility apply to the Russian Federation's breaches of the Treaty. These principles have been codified in the ILC Articles.

[526] Under Article 1 of the ILC Articles, every "internationally wrongful act" of a State entails the "international responsibility" of that State. An "internationally wrongful act" is defined under Article 2 as an act or omission which is: (i) attributable to the State under international law; and (ii) constitutes a breach of an international obligation of that State.

[527] As set out above, the breaches of the Treaty are attributable to the Russian Federation, being the product of the acts and omissions of persons and entities for whom the Russian Federation is internationally responsible.

[528] The governing standard of reparation for internationally wrongful acts is restoration of the *status quo ante*. As the Permanent Court of International Justice held in the *Chorzów Factory* case, the reparation must "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". The same principle was codified in Article 31 of

the ILC Articles: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”. Today this standard enjoys universal recognition.

- [529] As provided in ILC Articles 35 and 36, reparation has two components. The first component is an obligation to provide “restitution”, which requires the State “to re-establish the situation which existed before the wrongful act was committed ... to the extent that restitution is not materially impossible”. Second, “in so far that such damage is not done good by restitution”, the ILC Articles recognise the State’s obligation to provide the investor compensation for the damage caused by the State’s internationally wrongful act. Under this principle, reparation is complete only when the damages award serves to restore the investor to the situation it would have been in but for the State’s wrongful conduct.
- [530] The Claimant is therefore entitled to financial compensation which wipes out all negative consequences of the Russian Federation’s illegal acts. ILC Article 36 confirms that such compensation must cover “any financially assessable damage including loss of profits insofar as it is established”.

C. DAMAGES METHODOLOGY

- [531] The Tribunal has wide discretion to equitably quantify the loss of value of an investment. This principle was recognised by the tribunal in *Rumeli Telekom v. Kazakhstan* among many other decisions and authorities. In *Rumeli Telekom*, the tribunal explained that its basic task with regard to a quantum assessment is to “apply the method or methods of valuation which will most closely reflect the value of the expropriated investment to the investor at the relevant time”.
- [532] In the present circumstances, the most equitable valuation of the business of Oschadbank Crimea expresses in monetary terms both the factual position of the business (the assets already built into its balance sheet) and the potential of Oschadbank Crimea to generate profits in the future (essentially, goodwill which is not recognised in the balance sheet).
- [533] To calculate the loss of individual assets that constitute the business, Mr Davidson has reviewed the asset position of Oschadbank Crimea according to its management accounts for each of the dates of the loss, scrutinised each type of asset (historically and immediately prior to the extinguishment), and assessed the recoverability of each asset individually.
- [534] Mr Davidson has approached the loss of the business “goodwill” of Oschadbank as a valuation exercise. He has conducted a DCF valuation where the loss of business is calculated as future profits capitalised using an appropriate capitalisation rate. This method has been employed frequently by investor-state tribunals in their valuation of harmed investments that have an operating history. Where the loss suffered is an investment in a present or future income-producing asset, a DCF analysis is recognised as the most appropriate valuation methodology.
- [535] The Claimant’s operations in Crimea meet the definition of a present and future income-producing asset under international legal principles. Oschadbank Crimea was well-capitalised, carefully structured, positioned for strong growth, and generated profits. A DCF analysis is the proper methodology for a quantum valuation in these circumstances.

D. VALUATION DATE

- [536] In order to re-establish the situation that existed before the wrongful acts complained of in these proceedings, the Russian Federation must pay a sum that in the words of *Chorzow Factory*, would “wipe out all the consequences of the illegal act and re-

establish the situation which would, in all probability, have existed if that act had not been committed”.

[537] Here, the act triggering or commencing the wrongful acts was the Russian Federation’s assertion of military control over Crimea on 1 March 2014, when the Federation Council of the Russian Federation authorised the military intervention in Crimea. As described above, the harm to the Claimant’s investment ensued thereafter. Where a State’s conduct has involved multiple instances of identifiable wrongful measures, as is the case here, the selection of an early measure, even if less severe or direct than a later measure, will assure both equity and full compensation for the State’s unlawful conduct.

[538] Moreover, where, as in the present case, the conduct complained of constitutes a continuing or composite act and violation, pursuant to the ILC Articles “the breach extends over the entire period *starting with the first of the actions or omissions of the series*”. The Tribunal should accordingly adopt 1 March 2014 as the proper valuation date to assess the Claimant’s lost assets and business, with 28 February 2014 as the accounting date for quantifying the loss. In Mr Davidson’s view, the position at 28 February 2014 is the last unaffected position of Oschadbank Crimea prior to any wrongful conduct of the Russian Federation.

[539] In the alternative, the Tribunal should set the valuation date at the date, according to Russia’s own legislation, the Treaty entered into force with respect to the Claimant’s investment in Crimea (i.e. 21 March 2014). In this alternative scenario the accounting date for quantifying the loss is 31 March 2014. In Mr Davidson’s view, the position at 31 March 2014 is already impaired to some extent by wrongful acts of the Russian Federation. Adopting 31 March 2014 as the valuation date would therefore risk under-compensating the Claimant.

[540] Mr Davidson has carried out his valuation exercise using both dates (the Valuation Dates).

E. THE CLAIMANT LOST ALL ASSETS HELD BY ITS CRIMEAN OPERATIONS

[541] The Claimant has incurred substantial damages as a direct and proximate result of the Russian Federation’s violations of the Treaty and the permanent loss of the Claimant’s assets in Crimea. To put matters in context, Oschadbank Crimea was the largest lender in Crimea between 2011 and 2013 with a market share reaching 44.7% in 2013. It was also the second biggest in the market for deposits, with a market share of 16.5% in 2013. The Crimean branch was also one of the most profitable of the Claimant’s branches, contributing 11% of its overall profits in 2013 (despite representing merely 5% of the Bank’s assets) and with a rapidly growing business. Accordingly, the Claimant’s loss is unsurprisingly substantial. The assets lost by the Claimant included in particular:

- (i) corporate and private loans;
- (ii) amounts owed by other branches of the Bank to Oschadbank Crimea; and
- (iii) real property, cash and other assets.

[542] These heads of loss are briefly described below whilst a more fulsome explanation is set out in Mr Davidson’s report.

1. Corporate and private loans

[543] Oschadbank Crimea’s major income-generating asset was the loan book which represented its largest asset in terms of nominal value and growth.

[544] The vast majority of the corporate/commercial loans given by Oschadbank Crimea represent loans to the Solar Group (discussed above) for development of solar power stations (the Solar Loans). As described by Mr Pyshnyy, Oschadbank Crimea had a unique opportunity to finance, at an interest rate of over 10 percent, the long-term projects for the development of solar power stations located in Crimea for the following reasons:

- (i) The Crimean Peninsula is the most attractive region of Ukraine for solar energy plans because of significant solar activity.
- (ii) There has historically been a constant deficit in energy sources in Crimea and a significant demand for green energy in Crimea and few alternatives. Solar power stations are in great demand given the region's popularity as a tourism and recreation destination which renders high-pollution sources of energy untenable.
- (iii) To stimulate the green energy industry, the government of Ukraine had undertaken to purchase 100% of solar energy from its producers at a favorable fixed price until 1 January 2030. This meant that the risk of borrowers going out of business (and as a result, amounts owed to Oschadbank Crimea becoming irrecoverable) was virtually non-existent.
- (iv) The Solar Loans were intended to be denominated in foreign currency so that Oschadbank Crimea had no foreign currency risk because the borrowing and lending would have been made in the same currency.
- (v) All Solar Loans were secured by the underlying assets (including, *inter alia*, the solar power stations) and, if any problems occurred, the Claimant would have been able to seek recovery and enforce it freely under Ukrainian law.

[545] The Solar Loans performed as expected until March 2014, at which point both capital and interest repayments became impaired. Whilst ordinarily these loans would have been fully recoverable given the security over, *inter alia*, the power stations granted in favor of Oschadbank Crimea, effective enforcement against assets within Crimea was self-evidently not possible following the events in Crimea. To make matters worse, as described above, in July 2015 the DPF initiated court proceedings against 12 of the Solar Group companies seeking to recover debt under loan agreements with Oschadbank. The DPF sought recovery of the debt of over RUB 28 billion in total (equivalent to USD 491 million as of 22 July 2015, *i.e.*, the date of filing of the statements of claim). Therefore, it is clear that the Claimant has no hope of recovery of the Solar Loans assets.

[546] In addition to its corporate loan book, Oschadbank Crimea's portfolio also included retail loans, *i.e.* personal loans and mortgages. The Claimant's retail loans became irrecoverable following the occupation of Crimea. Individual customers refused to honour their commitments and following the events in Crimea, effective enforcement against physical assets located in Crimea was self-evidently impossible.

2. Settlement between bank branches

[547] The Claimant's "settlement between the branches" (*i.e.*, amounts owed by other branches of Oschadbank to Oschadbank Crimea) were a major asset of Oschadbank Crimea. Each branch of the Claimant forms its resource base from the deposits of local customers, and requires specific levels of resources to lend to its local customers. Some branches have resources in excess of the required amount (net lenders) while others have a deficit of particular resources (net borrowers). The Claimant's branches are permitted to trade and reallocate resources internally within the bank. Such

operations of internal transfers of resources are under control of the Treasury of the Bank, which acts as a middleman in the operations between the branches.

[548] Mr Davidson confirms that Oschadbank Crimea had excess resources that it traded within the Treasury. Those resources remain recoverable (as they have been on-lent by the 'borrowing' branch to customers located elsewhere in Ukraine) and therefore have been excluded from Mr Davidson's valuation.

3. Real property, cash and other assets

[549] Oschadbank Crimea held other assets that were lost after and as a result of the Russian Federation's wrongful conduct are now irrecoverable by the Claimant. These assets included:

- (i) financial and capital investments, representing buildings (including 294 branch units, leasehold and freehold), fixtures and fittings, and capitalised expenditure on property, and a physical banking infrastructure (including ATMs, cars, other vehicles, other equipment), none of which was recoverable given their location; and
- (ii) cash and other valuables (gold and cash deposits, securities), which are also not recoverable after the closing down of the head office of Oschadbank Crimea in May 2014.

[550] In March 2014 there was a sharp decline in the cash held by Oschadbank Crimea which is explained by the outflow of the deposits called upon by clients' demands after the referendum to decide on the status of Crimea that was held on 16 March 2014.

F. CALCULATION OF THE CLAIMANT'S DAMAGES

[551] As discussed above, Mr Davidson has approached the value of the Claimant's lost investment on the assessment of two elements: (a) loss of assets; and (b) loss of goodwill.

[552] Mr Davidson assesses the value of the assets based on Oschadbank Crimea's asset position immediately prior to the loss. Mr Davidson uses two Valuation Dates, 28 February 2014 and 31 March 2014, as an assumed date of extinguishment. The value of future profits is determined by applying a multiple, or a discount rate, to the anticipated future profits of the business.

[553] Given that in early 2014 the Ukrainian economic and political situation was unstable, Mr Davidson has, in accordance with established practice, valued the business with hindsight to arrive at a more accurate estimate for the losses at both Valuation Dates.

1. Lost assets

[554] To arrive at his valuation of the Claimant's lost assets in Crimea, Mr Davidson has conducted a detailed analysis of each type of asset that Oschadbank Crimea held, the asset position for each full financial year in the last three unaffected years (2011-2013), how the position changed during the first three months of 2014, and forms a view on what was the correct position of the assets at 28 February 2014 and 31 March 2014. Mr Davidson has scrutinised each type of asset and assessed the recoverability of each asset individually.

[555] The loss of assets includes two elements: assets belonging to the Claimant which were part of the operational and financial structure of both the Claimant and Oschadbank Crimea itself; and assets belonging to customers and depositors as well as assets generally held on behalf of other third parties, including the Prosecutor's office of Crimea.

- [556] Prior to March 2014, Oschadbank Crimea and its assets were performing well without any significant indications of impairment. In Mr Davidson's opinion: "*I have found nothing in the financial information I have reviewed and the explanations provided to me to suggest that at the beginning of 2014, the Crimean Branch was underperforming in relation to any internal or external factors existing at the time. On the contrary, the loan book was healthy, the Crimean Branch attracted good market rates of interest and there was no indication of impairment as at 28 February 2014*". Mr Davidson has made no adjustments to the asset position of Oschadbank Crimea at 28 February 2014 because he has found no indication of damage at that stage. He considers the position at 28 February 2014 to be the last unaffected position of Oschadbank Crimea prior to interference of the Russian Federation.
- [557] As discussed above, during the course of March 2014 most assets were lost, gradually or immediately, given there was no opportunity to exercise control over them in light of ongoing events.
- [558] Accordingly, it is clear that the asset position at 31 March 2014 was already impaired to some extent by the actions of the Russian Federation. One such example is the deterioration in the cash position of Oschadbank Crimea caused by the clients' deposits outflow following the referendum on 16 March 2014. Mr Davidson suggests an adjustment to the asset base for the position at 31 March 2014 of 10% to reflect the impairment of the assets – and in particular the significant deterioration in the Solar Loans during March 2014.
- [559] In sum, Mr Davidson estimates the loss of Oschadbank Crimea's assets at **USD 668,008,976.95** as at 28 February 2014 and **USD 597,771,793.33** as at 31 March 2014.

2. Loss of goodwill

- [560] To value the loss of goodwill, or future profits of Oschadbank Crimea, Mr Davidson has reviewed the past business of Oschadbank Crimea together with its record of revenues and profits in order to gain a thorough understanding of its past and likely future performance. He has also reviewed the past and recent affected performance of the Claimant to understand how Oschadbank Crimea was positioned within the Bank and what the trading conditions have been through 2014-2015 and after Oschadbank Crimea's extinguishment. Mr Davidson has modelled all available results into a pro forma of Oschadbank Crimea's performance which he believes to be the best estimate of the current trading performance of the business. Added to this pro forma he applied a discount rate in order to reach a capitalised value of future income streams.

a. Projected income

- [561] In Mr Davidson's opinion, Oschadbank Crimea had a strong financial outlook and would have generated significant future income but for its extinguishment. Mr Davidson has projected the growth of Oschadbank Crimea's income based on a number of factors. These include the following factors:
- (i) Oschadbank Crimea could offer stability and protection to its customers during a difficult time for the Ukrainian banking industry;
 - (ii) the lending and borrowing structure was mainly denominated in foreign currency made Oschadbank Crimea resistant to foreign exchange risk. Accordingly, unlike other banks that were more vulnerable, Oschadbank Crimea would not have been affected by the depreciating national currency and could build more on its strong market position;
 - (iii) Oschadbank Crimea was an attractive part of the Claimant's business and there were plans to increase its presence in Crimea by increasing

the number of outlets during 2014 – this expansion would have led to better relationships with customers and also attracted new business for Oschadbank Crimea;

- (iv) the Claimant had undergone a strategic makeover under a new Chairman in 2014 – if Oschadbank Crimea had continued to exist, it would have been affected by the strategic reshaping, better management quality and new vision; and
- (v) Oschadbank Crimea had a unique sustainable competitive advantage in cash-in-transit services because of its ownership structure which allowed minimising the cost of security.

[562] Having analysed the totality of available information, Mr Davidson considers UAH 983,550,000 and UAH 737,300,000 to be valid and reliable estimates of the maintainable profits at 28 February and 31 March 2014 which Oschadbank Crimea could have achieved if its activity had not been curtailed by the actions of the Russian Federation.

b. Capitalisation rate

[563] The capitalisation rate for the valuation of a business is a specific factor that evaluates the risks and opportunities of the business and suggests the rate at which the future profits should be capitalised. Mr Davidson has based his capitalisation rate on a consideration of the Claimant's cost of capital, calculated using the Weighted Average Cost of Capital (WACC) model and the Capital Asset Pricing Model (CAPM).

[564] The WACC approach considers a variety of relevant factors and is accepted in the industry as a reasonable and valid approach to calculating a discount rate. The WACC model works well when, as in the present circumstances, there are no immediate comparators. It seeks to identify the entity's overall cost of capital, taking account of both equity and debt, and relies more significantly on the entity's internal information, its internal requirements in terms of return on capital, and its internal measuring of risk. The CAPM, on the other hand, relies on more market formed information and takes its cue from the premium which an investor in the market requires to compensate himself for the additional risk attached to a particular investment in excess of the risk free alternative (government bonds and other securities deemed risk-free).

[565] Mr Davidson concludes that the cost of capital of 14% represents a valid estimate of the capitalisation rate for the valuation of goodwill lost for both Valuation Dates.

[566] Mr Davidson values the loss of goodwill using the relevant projected profits after tax and capitalisation rate as follows: **USD 712,371,214.29** as at 28 February 2014; **USD 484,616,757.14** as at 31 March 2014.

3. Other heads of loss

[567] Mr Davidson has reviewed other transactions that are not reflected in Oschadbank Crimea's records but are nevertheless losses to the Claimant connected to the Russian Federation's unlawful conduct.

a. Seized assets that belong to third parties

[568] Oschadbank Crimea held valuables that belonged to third parties and were seized as a result of the armed takeover of Oschadbank Crimea's head office.

[569] As described above, on 16 May 2014 and 21 May 2014, representatives of the Crimean Self-Defense Forces and purported high ranking Crimean officials seized cash and valuables stored at the head office of Oschadbank Crimea, including 40 bags of gold, jewellery and precious stones. There are two criminal court judgments of the purported Crimean courts against the conspirators and they establish the value of the lost gold, jewellery and precious stones at RUB 605 million (approximately equivalent to USD 17.5 million at the date of seizure, 21 May 2014) and cash at over UAH 32 million (approximately equivalent to USD 2.8 million as at the date of seizure, 16 May 2014). The total loss of these assets is therefore calculated at USD 20.3 million.

b. Securities lost for the transactions of other branches

[570] In December 2013 and January 2014, the Claimant entered into two agreements confirming stand-by letters of credit with a third entity, Brokbiznesbank. For both confirmation agreements, the Bank had honoured its commitments but did not receive the commission that was due and in respect of one, reimbursement of the sums paid under the letters of credit. As a result, the Bank commenced arbitration proceedings before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in September 2014, receiving successful awards in January 2015 for the recovery of debt in the amounts of EUR 125,000 and USD 8,377,778.38 and legal costs in the amount of EUR 9,303.62 and US 44,298.49. The awards are not enforceable as the relevant assets of the counterparty comprises of petrol and diesel which was stored in Crimea and enforcement in Crimea remains impossible due to the Russian action in Crimea. This is a loss to the Claimant caused by the Russian Federation that Mr Davidson has valued at USD 8,605,857.94 as at 28 February 2014 and USD 8,606,798.07 as at 31 March 2014.

G. INTEREST

[571] Interest is an integral part of full reparation under customary international law. The purpose of the payment of interest is “to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive”. The Tribunal has full discretion to determine the most appropriate rate of interest to achieve full reparation. The Claimant notes, in this regard, that the Treaty’s reference to an applicable interest rate in connection with compensation for expropriation does not bind the Tribunal, as that provision concerns only lawful expropriations under the Treaty.

[572] A State’s duty to make reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the compensation to productive ends. Thus, in addition to the principal sum that the Claimant should be awarded, it is entitled under the Treaty to interest from the date of breach until the date that it is paid in full. Moreover, pursuant to established arbitral practice, compound interest should be awarded in order for the amount of compensation to reflect the additional sum that the Claimants would have earned if the money had been reinvested each year at generally prevailing rates of interest.

[573] The provision of interest encompasses both (i) pre-Award interest and (ii) post-Award interest. Since each type of interest may be subject to different considerations, the Claimant addresses them separately.

a. Pre-award interest

[574] The Claimant is entitled to pre-Award interest on all compensation awarded for the expropriation of its investment in Crimea. This interest accrues from the appropriate Valuation Date until the date of the Award.

(i) Rate of interest

[575] As Mr Davidson states in his Expert Report, the appropriate pre-Award interest rate in this case should be the commercial interest rate available to the Claimant in the Ukrainian marketplace, this being the rate most appropriate to compensate the Claimant for the time value of its economic loss until the rendering of an award compensating the Claimant for that loss. Accordingly, and in order to calculate the relevant rate of interest, Mr Davidson has obtained statistics published by the National Bank of Ukraine and opined that for the period under review (March 2014 until 31 December 2017), the applicable interest rate was between 8.27% and 8.81%.

(ii) Compounding of interest

[576] Compound interest is routinely awarded in investment treaty awards because it gives effect to the rule of full reparation. Compound interest ensures that a respondent state is not given a windfall as a result of its breach, as compounding recognises the time value of the claimant's losses. It also "reflects economic reality in modern times" where "the time value of money in free market economies is measured in compound interest". Mr Davidson concurs that interest is often applied to the principal loss sum on a compound basis. Mr Davidson accordingly has calculated interest on a compound basis.

b. Post-award interest

[577] To the extent that the Russian Federation does not immediately satisfy an eventual damages award issued by this Tribunal, the Claimant is entitled to interest accruing from the date of the Tribunal's damages award until such time as payment is made in full. This category of interest, which is "intended to compensate the additional loss incurred from the date of the award to the date of final payment", must be sufficient to deter potential delay in the payment of the amount specified in an award.

[578] As Mr Davidson opined, the same rate of interest, the Ukrainian commercial interest rate, is the appropriate post-Award interest rate as well. On that basis, the daily rate would be the applicable rate at the date of award, taken for present purposes to be 8.27% (as at a hypothetical 31 December 2017 date of award), divided by 365, which amounts to a daily rate of interest of 0.0226%."

1. The summary of the claim for damages, interest and costs

325. Against the background of that detailed claim and the evidence of Mr. Davidson, the Tribunal records that the ultimate claim for damages, interest, and cost by the Claimant, as stated in paragraph 579, is as follows:

"[579] For the reasons stated, the Claimant respectfully requests an Award from the Tribunal:

[...]

(iii) ordering the Russian Federation to pay monetary compensation or damages in a total amount of USD 1,409,291,590 as at 28 February 2014 or, in the alternative, USD 1,111,300,729 as at 31 March 2014, on the basis of the value that the Claimant expected to derive from its Crimean investments, in each case excluding interest (pre and post award);

- (iv) alternatively, ordering the Russian Federation to pay such other amount to be determined by the Tribunal, in accordance with the Honeycomb Report;
- (v) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at a rate at least between 8.27% and 8.81% or another reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of valuation until the date of the Award;
- (vi) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at an annual rate of at least 8.27% or a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full;
- (vii) ordering the Russian Federation to pay all costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full; and
- (viii) granting any other relief as the Tribunal may deem just and proper in the circumstances.”

B. THE CLAIMANT’S EXPERT EVIDENCE

326. In this case, where the Respondent has not participated, the Tribunal felt a heavier than usual obligation to ensure that its Award be soundly based in all respects. For this purpose, members of the Tribunal interrogated at some length the expert evidence of the Claimant’s sole witness on damages, Mr. Jeffrey Davidson. The Tribunal will return to note some of the questions put to Mr. Davidson, but first it is necessary to record briefly Mr. Davidson’s qualifications as an expert.
327. Mr. Davidson is a Fellow of the Institute of Chartered Accountants in England and Wales and a practicing member of the Academy of Experts, having specialized in forensic and investigative accounting since 1992. Currently the managing director of Honeycomb Forensic Accounting, Mr. Davidson has prepared more than 500 expert reports and has appeared as an expert witness on 50 occasions.
328. Taking into account these qualifications, and based on the Tribunal’s evaluation of his written and oral evidence, the Tribunal has no difficulty in finding that Mr. Davidson is an experienced expert and appropriately qualified to give evidence in support of the claim.

1. Mr. Davidson's approach to valuation

329. Mr. Davidson's instructions were to "quantify the loss of the Crimean Branch to the Bank as well as other losses caused which flow from Russia's breach of the Treaty".³⁹¹

330. Mr. Davidson quantified the loss by analyzing three components:³⁹²

- (i) loss of assets;
- (ii) loss of future profits; and
- (iii) other heads of loss.

331. In respect of interest on the sum to be awarded, Mr. Davidson also adopted the Ukrainian commercial interest rate for the purposes of calculating compounded pre-Award interest for the period March 2014 to December 2017 and post-Award interest.

(a) Loss of assets

332. To arrive at a valuation for the loss of assets, Mr. Davidson reviewed the asset position of the Crimean Branch according to its management accounts for each of the possible valuation dates.³⁹³

333. As set out below in the section concerning the valuation date, the Tribunal has adopted Mr. Davidson's valuation of lost assets.³⁹⁴

(b) Loss of future profits

334. To assess the loss of future profits, referred to as goodwill, Mr. Davidson calculated pro forma future profits capitalized at a rate of 14%.³⁹⁵

335. The capitalization rate was calculated using both the Capital Asset Pricing Model and Weighted Average Cost of Capital.³⁹⁶

³⁹¹ Hearing Tr., 28 March 2017 at 308 (examination of Mr. Davidson's presentation).

³⁹² Davidson Report, paras. 3.3 and 3.9.

³⁹³ Davidson Report, para. 3.4.

³⁹⁴ *Infra*, at paras. 359–373.

³⁹⁵ Davidson Report, para. 3.99.

³⁹⁶ Davidson Report, paras. 3.8 and 3.93–3.98.

(c) **Other heads of loss**

336. The other heads of loss are comprised of lost assets of third parties and securities lost for the transactions of other branches.
337. The lost assets of third parties relate to the unrecoverable stolen gold and cash-in-transit amounting to USD 17,521,397 and USD 2,783,984 respectively.
338. The securities lost for transactions of other branches relate to the recovery of commission under two agreements confirming stand-by letters of credit with Brokbiznesbank.³⁹⁷
339. As Mr. Davidson explained:

For both confirmation agreements, the Bank honoured its commitments but did not receive the commission that was due and in respect of one, reimbursement of the sums paid under the letter of credit. As a result, the Bank commenced arbitration proceedings before the Ukrainian Chamber of Commerce and Industry in September 2014, receiving successful awards in January 2015 for the recovery of debt in the amounts of EUR 125,000 and USD 8,377,778.38 and legal costs in the amount of EUR 9,303.62 and USD 44,298.49. However, the awards are not recoverable as the relevant assets of the counterparty comprises of petrol and diesel which was stored at Feodosia, Crimea and enforcement in Crimea is not possible as a result of the Russian annexation of Crimea.³⁹⁸

340. Mr. Davidson opined that the now unrecoverable awards constituted additional loss, totaling USD 8,606,798.07,³⁹⁹ which the Claimant had suffered consequent upon the actions of the Respondent.⁴⁰⁰
341. The Tribunal accepts Mr. Davidson's valuation of these losses and finds that such losses are recoverable from the Respondent.

C. THE TRIBUNAL'S ANALYSIS

1. The Damodaran article

342. For the purposes of testing Mr. Davidson's evidence, the Tribunal put before him an article by Professor Aswath Damodaran ("**the Damodaran Article**").⁴⁰¹ The witness agreed that Prof. Damodaran, a Professor of Finance at the Stern School of Business at New York University, is a

³⁹⁷ Davidson Report, paras. 3.106 and 10.1–10.12.

³⁹⁸ Davidson Report, para. 10.11.

³⁹⁹ Using Mr Davidson's 31 March 2014 accounting date.

⁴⁰⁰ Davidson Report, para. 10.12.

⁴⁰¹ Aswath Damordaran, "Valuing Financial Services Firms" *New York Stern School of Business Working Paper*, April 2009 (Hearing Bundle I-1).

well-known financial expert who has written extensively on the subject of the valuation of banking companies and banking institutions. Mr. Davidson remarked that he had carefully examined the article and commented that he had also referred to the work of Prof. Damodaran in his own expert report.⁴⁰²

343. In brief, the Damodaran Article argued that financial service firms are best valued using equity valuation models, rather than enterprise valuation models, and with actual or potential dividends, rather than free cash flow to equity. Prof. Damodaran added that the two key factors driving value are the cost of equity and the return on equity.
344. Prof. Damodaran identified a number of characteristics which in his view made financial service firms unique for the purpose of valuations. The first is the significance of the regulatory structure that governs financial service firms. Second is the set of accounting rules used to measure earnings and to record book value. Third is that capital is narrowly defined as including only equity capital. Fourth, the definition of what comprises debt is unclear. Fifth, financial service firms tend to use more debt in funding their businesses and thus have higher financial leverage than most other firms. Since equity is a sliver of the overall value of a financial service firm, small changes in the value of the firm's assets can translate into big swings in equity value.
345. Prior to addressing the Tribunal's questions on the article, Mr. Davidson cautioned the Tribunal that:

A considerable amount of his [Prof. Damodaran's] comments are not actually relevant to the present case because of the type of banking institution that we are talking about. We are dealing here with a—without any disrespect to the Bank—a bank of quite a vanilla nature. This is effectively a deposit-taker, and a lender. It, therefore, is very different from the institutions that the author is referring to which are complex financial services/entities with not just different lines of income and different assets, but lines of income and assets that are often in conflict and intention with each other.⁴⁰³

346. The Tribunal understands that it is on the basis of the nature of this particular bank (as compared to more complex financial institutions) that Mr. Davidson suggested that Prof. Damodaran's comments are not relevant. As a result, Mr. Davidson theorized that, had Prof. Damodaran been tasked with valuing the Claimant's Crimean Branch, Prof. Damodaran would have broadly reached the same valuation of this "straight-forward and somewhat vanilla bank" as he had, observing that Prof. Damodaran concluded his article by stating: "The basic principles of valuation apply just as much for financial service firms as they do for other firms."⁴⁰⁴

⁴⁰² Hearing Tr., 28 March 2017 at 313 and Hearing Tr., 29 March 2017 at 347–348 (examination of Mr. Davidson's presentation).

⁴⁰³ Hearing Tr., 28 March 2017 at 314 (examination of Mr. Davidson's presentation).

⁴⁰⁴ Hearing Tr., 28 March 2017 at 316-317 (examination of Mr. Davidson's presentation).

347. The Tribunal accepts the distinction advanced by Mr. Davidson.
348. Aside from the different purposes and dividend-focused methodology which the Damodaran Article suggested would be appropriate for complex financial services firms, Mr. Davidson contended that the Damodaran Article largely aligned with both the principle and approach adopted in his valuation of the Claimant's loss.⁴⁰⁵
349. Mr. Davidson started by expressing his agreement with a conclusion reached by Prof. Damodaran, that the basic principles of valuation apply just as much to financial service firms as they do to other firms.⁴⁰⁶ Valuations are used to convert into a capital sum the present value of future income or cash flows. Mr. Davidson testified that he was "ad idem" with Prof. Damodaran, that the principal behind the valuation is to reach a net present value of future cash or income streams.⁴⁰⁷
350. He then turned to explain how the two approaches broadly would align:
- So, although he's approached it in a somewhat roundabout manner because he wants to emphasize the importance of the dividend, by then saying, well, I better now look at the amount I'm not paying out in dividends and actually add the two together, and then apply a cost of capital to that, he has done exactly what I have done in taking the earnings of the Crimean Branch business and applying a cost of capital to that.⁴⁰⁸
351. During his evidence, Mr. Davidson identified that the two points where his view did not align with Prof. Damodaran's were in relation to the purpose of the valuation and the methodology applied.
352. Starting with the purpose, Mr. Davidson drew a distinction between the present valuation exercise and that described in the Damodaran Article.⁴⁰⁹ As he explained, the exercise in the Damodaran Article is interested in the value to a shareholder of shares in a business,⁴¹⁰ whereas the present assessment is interested in the diminution or effect on the Claimant's bank of the Respondent's actions.⁴¹¹

⁴⁰⁵ Hearing Tr., 28 March 2017 at 324–325 (examination of Mr. Davidson's presentation).

⁴⁰⁶ Hearing Tr., 28 March 2017 at 318 (examination of Mr. Davidson's presentation).

⁴⁰⁷ Hearing Tr., 29 March 2017 at 439 (examination of Mr. Davidson's presentation).

⁴⁰⁸ Hearing Tr., 28 March 2017 at 329 (examination of Mr. Davidson's presentation).

⁴⁰⁹ Hearing Tr., 28 March 2017 at 319–320 (examination of Mr. Davidson's presentation).

⁴¹⁰ Hearing Tr., 28 March 2017 at 319 (examination of Mr. Davidson's presentation).

⁴¹¹ Hearing Tr., 28 March 2017 at 319 (examination of Mr. Davidson's presentation).

353. Mr. Davidson then pointed out that his methodology differed from Prof. Damodaran's in relation to the appropriateness of using dividend streams.⁴¹² Prof. Damodaran had argued that, because of the specific nature of banking institutions, the only real income stream that is quantifiable and observable is dividends.⁴¹³

354. Explaining the different methodologies, Mr. Davidson noted:

[Prof. Damodaran] has preferred separating the stream of return to investors between dividends and what isn't paid out in dividends, which he translates into a growth trajectory in remaining earnings. I prefer to treat all those earnings together.⁴¹⁴

355. Mr. Davidson identified a number of reasons why he did not deem it appropriate to adopt Prof. Damodaran's method with respect to dividends. First, the subject of the present assessment is a sub-entity of an organization which does not derive dividends from the Crimean branch.⁴¹⁵ Additionally, he suggested that dividends did not necessarily relate to earnings.⁴¹⁶ Lastly, he elaborated upon numerous reasons which explain why he considered dividends are generally an unreliable way to measure the future of a business.⁴¹⁷

356. Upon the Tribunal's return to questioning Mr. Davidson on his methodology, he stated as follows:

[It is with respect to] the methodological aspect of it, in terms of using the dividend, that I would not do it the way he does. I understand why he's saying that. And I understand why he separates from the entire stream of flow of profits that which is distributed and that which is not. Because I understand that what you distribute has no future growth impact on the business and what you don't distribute does. His primary position is to ignore what you leave in the business because it's not measurable. He uses the word "observable". It's not observable. I don't necessarily agree with that. Each situation will be different as to what you've got available to you to interpret the numbers. But as his own calculations show, if you ignore that, you must come to the wrong view. Because you're not able correctly to project growth and earnings or, even in his construct, growth in dividend payments because you're not able to building in the impact of the money you leave in the business today and what impact it has on the dividend stream from tomorrow onwards. So, my emphasis on that was to say that because the purpose of our exercise and the purpose of his exercise that he was talking about were different—that's my sort of Level 2 of the—of my hierarchy of valuation aspects, principal then application purpose.⁴¹⁸

⁴¹² Hearing Tr., 29 March 2017 at 439 (examination of Mr. Davidson's presentation).

⁴¹³ Hearing Tr., 28 March 2017 at 326 (examination of Mr. Davidson's presentation).

⁴¹⁴ Hearing Tr., 28 March 2017 at 350 (examination of Mr. Davidson's presentation).

⁴¹⁵ Hearing Tr., 28 March 2017 at 350 (examination of Mr. Davidson's presentation).

⁴¹⁶ Hearing Tr., 28 March 2017 at 351 (examination of Mr. Davidson's presentation).

⁴¹⁷ Hearing Tr., 28 March 2017 at 326–332 (examination of Mr. Davidson's presentation).

⁴¹⁸ Hearing Tr., 29 March 2017 at 439–440 (examination of Mr. Davidson's presentation).

357. Having distinguished his methodology from that described in the Damodaran Article, the Tribunal then questioned Mr. Davidson on a number of aspects in relation to his valuation. Some of the key exchanges are outlined below.
358. Following a question from the Tribunal regarding what conclusion should be drawn from Mr. Davidson's views expressed with respect to the Damodaran Article's criticism of an approach which results in an "unrealistically small" cost of capital of 4 percent, he explained that, in reality, the actual cost of capital for banks was 3.89 percent.⁴¹⁹
359. The Tribunal understands that Mr. Davidson expressed the above view in relation to the cost of capital for banks in order to demonstrate that his methodology, which Prof. Damodaran would criticize as resulting in an unrealistically small cost of capital was, in reality, both accurate and appropriate to use in the present circumstances.
360. In relation to the approach of valuing over a short period of time, the Tribunal asked Mr. Davidson:

[Y]our valuation here on Page 15 is comparing a short period of, basically, one year. Is it not the case that in standard valuations there is an earnings projection over a period of time? And if—if it is, is the reason it isn't—is the impact on the business that's occurred here such that there's no way of looking forward beyond the one year?⁴²⁰

361. In response, Mr. Davidson stated:

I have not actually just adopted one year. What I've done is to create a pro forma of what I think the future profitability—what a lot of people refer to as maintainable profits. I use that as a pro forma of the best picture of what the future profitability of the business will be, based on my understanding of what an unaffected year for 2014 would have been. And I have applied a cost of capital to that. When one is using a cost of capital, other than in a discounted cash flow situation, one can only apply it to a single number because that's how the arithmetic works. There's an income number, and there's a capitalization number. And there are different ways to reach that one number. Sometimes they're based on trend. Sometimes they're based on syntheses of the results of different years. I don't find either of those particularly satisfactory because they produce a number that doesn't actually exist, either in past or in the future. And in my opinion, the best way to find the multiplicand, as it were, for the calculation, the number to which one is going to apply to the cost of capital in order to provide a capitalization value, is a single number which best reflects what one expects to be the performance of a business going forward based on latest data as other data valuation.⁴²¹

⁴¹⁹ Hearing Tr., 29 March 2017 at 346 (examination of Mr. Davidson's presentation).

⁴²⁰ Hearing Tr., 29 March 2017 at 356–357 (examination of Mr. Davidson's presentation).

⁴²¹ Hearing Tr., 29 March 2017 at 357–358 (examination of Mr. Davidson's presentation).

362. Mr. Davidson was also asked to explain what was the reason for taking the approach of adding to the discounted cash flow of the value of the business that has disappeared the value of the assets that would have produced that income.⁴²²

363. In answering the question, Mr. Davidson explained:

Because the Branch in Crimea is not a separate entity with its own assets and liabilities, and technically even not with its own income stream except for accounting purposes so that one can measure how much income has been lost, what the Bank, as the owner of the business, has lost is not the equivalent of the value of the business as though it had separate share capital which was lost; it's what has been extinguished. It's not the net value of the business; i.e., the income less the expenditure, the assets less the liabilities in a net asset position, but almost a separation of the credits and the debits of the business. So what has been lost are assets and income, and the Bank has been left with liabilities and costs, so that to compensate it on the net basis as though it had lost net assets and net income would materially underrepresent the loss.⁴²³

364. Towards the end of the questioning, Mr. Perezcano posed the following further question to Mr. Davidson:

So again, I connect that to my concern over the cost of the illegality. And my—my question was: Do we end up with a different value? Because I'm looking at it from a different perspective and applying a different valuation methodology, and is that connected to the added cost of any illegality that they're claiming? And just the way that you put it, it seemed to me that if we were to follow the traditional valuation,⁴²⁴ independent buyer, independent seller, and so on and so forth, fair market value, and just the traditional formula, we would end up with a different value as the one that you have found, looking at it from the perspective of the impairment of what has been lost. That was my impression. But then in your response earlier on, you said, "No, we seem to arrive at the same place because it's the same valuation." So, if you can provide me with further information or your opinion in this context. And just let me add—because if it made no difference, what was the purpose of your stressing that this is not being looked at as a simple purchase and sale of a company or the Branch, as opposed to looking at it from the losses perspective?⁴²⁵

365. In response, Mr. Davidson repeated that the "only area of significance where I and Damodaran were apart, in the context of what I've done here specifically and his general approach as set out in his article was about the appropriateness of using dividend stream."⁴²⁶

⁴²² Hearing Tr., 29 March 2017 at 380 (examination of Mr. Davidson's presentation).

⁴²³ Hearing Tr., 29 March 2017 at 381–382 (examination of Mr. Davidson's presentation).

⁴²⁴ Traditional valuation as outlined by Professor Damodaran in Aswath Damodaran, *Valuing Financial Services Firms*, *New York Stern School of Business Working Paper* (2009) (Tribunal exhibit 1; hearing bundle reference I/1); Aswath Damodaran, *INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET* (John Wiley & Sons, Inc., 3rd ed., 2012), Chapter 21 (Tribunal exhibit 2; hearing bundle reference I/2).

⁴²⁵ Hearing Tr., 29 March 2017 at 438–439 (examination of Mr. Davidson's presentation).

⁴²⁶ Hearing Tr., 29 March 2017 at 439 (examination of Mr. Davidson's presentation).

366. In summary, the Tribunal is satisfied that Mr. Davidson has provided a comprehensive and persuasive explanation regarding the different concepts of valuation applicable to the types of firms discussed in the Damodaran Article as compared to those concepts which he found suitable and applied in his valuation in the present case.⁴²⁷ The Tribunal accepts as soundly based and appropriate the valuation framework adopted in Mr. Davidson's evidence in relation to the Claimant's Crimean Branch.

2. Valuation date

367. In order to fix the compensation payable by the Respondent to the Claimant, the Tribunal must settle upon a valuation date to be used when calculating the total loss suffered by the Claimant as a result of the Respondent's breaches of the Treaty.

368. The Claimant has proposed two alternative valuation dates, which are set out below:⁴²⁸

[536] In order to re-establish the situation that existed before the wrongful acts complained of in these proceedings, the Russian Federation must pay a sum that in the words of *Chorzow Factory*, would "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".

[537] Here, the act triggering or commencing the wrongful acts was the Russian Federation's assertion of military control over Crimea on 1 March 2014, when the Federation Council of the Russian Federation authorised the military intervention in Crimea. As described above, the harm to the Claimant's investment ensued thereafter. Where a State's conduct has involved multiple instances of identifiable wrongful measures, as is the case here, the selection of an early measure, even if less severe or direct than a later measure, will assure both equity and full compensation for the State's unlawful conduct.

[538] Moreover, where, as in the present case, the conduct complained of constitutes a continuing or composite act and violation, pursuant to the ILC Articles "the breach extends over the entire period *starting with the first of the actions or omissions of the series*". The Tribunal should accordingly adopt 1 March 2014 as the proper valuation date to assess the Claimant's lost assets and business, with 28 February 2014 as the accounting date for quantifying the loss. In Mr Davidson's view, the position at 28 February 2014 is the last unaffected position of Oschadbank Crimea prior to any wrongful conduct of the Russian Federation.

[539] In the alternative, the Tribunal should set the valuation date at the date, according to Russia's own legislation, the Treaty entered into force with respect to the Claimant's investment in Crimea (i.e. 21 March 2014). In this alternative scenario the accounting date for quantifying the loss is 31 March 2014. In Mr Davidson's view, the position at 31 March 2014 is already impaired to some extent by wrongful acts of the Russian Federation. Adopting 31 March 2014 as the valuation date would therefore risk under-compensating the Claimant.

⁴²⁷ *Supra*, para. 338.

⁴²⁸ Statement of Claim, paras. 536–539.

369. Taking the above two dates, Mr. Davidson adopted the corresponding accounting dates of 1 March 2014 and 31 March 2014 respectively, for the purpose of valuing the assets and business prior to any loss being incurred. Mr. Davidson stated:

Date 1, the 1st of March [2014], broadly coincides with the formal authorization by the Russian Parliament for military intervention. And the second date of the 31st of March [2014] is the closest set of financial records following the Federal Law on Accession signed by President Putin.⁴²⁹

370. Mr. Davidson explained that the former represented a date at which point there was no impairment to the assets held by the Claimant. The latter represented a date by which time there was some impairment already observed, by way of the non-payment of interest on the Solar Group loans, non-payment of capital repayments and a decrease in cash relating to individual depositors removing funds throughout Crimea.⁴³⁰

371. Mr. Davidson then explained three ways in which an impairment could be observed by 31 March 2014:

... [The impairment] can be seen in three ways. First of all, there are loans on the corporate loan book, the Solar loans, where interest has not been paid. Again, by the 31st of March 2014, there are loans on the corporate loan book where capital repayments have not been made. And there is a decrease in cash relating to individual depositors removing their funds from branches throughout the Crimean Branch during the course of March, which we have quantified by reference to the underlying financial records as 71 million hryvnia or approximately a little over half of the funds that were held by the Bank in Crimea at that time. The importance of these three notes in relation to the valuation dates of the end of February and the end of March is this: That the—the non-payment of interest instalments and capital instalments in relation to loans necessarily leads to an impairment of income and assets during the course of March.⁴³¹

372. Mr. Davison contended that selecting the latter valuation date would lead to a figure which would undercompensate the Claimant because it would exclude the impairment to the asset base already suffered following the withdrawal of funds by individual depositors:

I have been informed that this decline [in cash held by the Crimean Branch in March 2014] is explained by the outflow of deposits as a result of their being withdrawn by customers following the referendum held on 16 March 2014 to decide on the status of the Crimea. I am instructed that the referendum is connected to the Russian action that is at the heart of this dispute. This outflow of deposits appears to be an indication of damage to the assets of the Crimean Branch during March 2014. Whilst the outflow would not be reflected in the 28 February 2014 Date of Loss, they would be reflected in the asset position at 31 March 2014 and as such, the latter Date of Loss would undercompensate the Bank by excluding the losses that had been caused as a result of Russian action complained of in these proceedings.⁴³²

⁴²⁹ Hearing Tr., 28 March 2017 at 308 (examination of Mr. Davidson's presentation).

⁴³⁰ Hearing Tr., 28 March 2017 at 309 (examination of Mr. Davidson's presentation).

⁴³¹ Hearing Tr., 28 March 2017 at 309–310 (examination of Mr. Davidson's presentation).

⁴³² Davidson Report, para. 3.57.

373. The Tribunal disagrees. The purpose of the valuation exercise is to calculate the appropriate compensation to be paid by the Respondent to the Claimant for the losses suffered as a result of the Respondent's breaches of the Treaty in respect of its investments in the Respondent's territory. While the circumstances in Crimea prior to the Annexation may have affected Oschadbank's Crimean Branch, the Claimant was not an investor of Ukraine that had an investment in the Respondent's territory for purposes of the Treaty. Accordingly, the Tribunal accepts the Claimant's alternative date of valuation —namely 31 March 2014.⁴³³

[536] In the alternative, the Tribunal should set the valuation date at the date, according to Russia's own legislation, the Treaty entered into force with respect to the Claimant's investment in Crimea (i.e. 21 March 2014). In this alternative scenario the accounting date for quantifying the loss is 31 March 2014...

3. Total losses

374. For all of the foregoing reasons, the Tribunal accepts the evidence of Mr. Davidson as set out in his report. The Tribunal finds accordingly that the Claimant is entitled to be compensated for the following losses in the amounts identified by Mr. Davidson and set out below:

1. Loss of assets of **USD 597,771,793**;
2. Loss of future profits of **USD 484,616,757**; and
3. Other heads of loss referred to in paragraphs 336 to 341 of **USD 28,912,179**, being the lost assets of third parties as well as the lost securities for transactions for other branches.

375. In totality, the Tribunal therefore finds that the Claimant is entitled to recover, and the Respondent is obliged to pay, the sum of **USD 1,111,300,729** as compensation for the losses suffered by the Claimant as a result of the Respondent's various breaches of the Treaty.

D. INTEREST

376. One of the elements for consideration in the Tribunal's decision is whether to award the Claimant interest on the amount of compensation it is entitled to recover from the Respondent. Accordingly, the Tribunal will determine the applicable rate of such interest, whether it should be simple or compound and, if compound, the period of compounding.

⁴³³ Statement of Claim, para. 536

1. The Claimant's position

377. The Claimant requests the Tribunal to award pre- and post-award interest.⁴³⁴ The Claimant also seeks interest on any costs awarded.⁴³⁵
378. The Tribunal accepts the submission of the Claimant that “[i]nterest is an integral part of full reparation under customary international law”.⁴³⁶ The Claimant quoted *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, which recognised that the purpose of the payment of interest is “to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he [or she] was supposed to receive”.⁴³⁷ There are many other decisions to the same effect.⁴³⁸
379. The Claimant submitted that the Tribunal has “full discretion to determine the most appropriate rate of interest to achieve full reparation”,⁴³⁹ noting that the Treaty’s reference to an applicable interest rate in connection with compensation for lawful expropriation does not bind the Tribunal where expropriation was unlawful.

(a) Rate of interest

380. In order to determine the appropriate rate of interest, Mr. Davidson noted that the interest on damages, intended to compensate a party for being out of money, is commonly measured as the commercial borrowing rate available in that party’s market place.⁴⁴⁰
381. In Mr. Davidson’s view, the appropriate interest rate should therefore be the commercial interest rate available at the relevant time to the Claimant in the Ukrainian marketplace.⁴⁴¹ Further, Mr. Davidson selected the rate applicable to commercial lending in foreign currency.⁴⁴² According to

⁴³⁴ Statement of Claim, paras. 574 and 577.

⁴³⁵ Statement of Claim, para. 579.

⁴³⁶ Statement of Claim, para. 571.

⁴³⁷ Statement of Claim, para. 571, citing to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, para. 9.2.3 (CLA-136).

⁴³⁸ For example, see *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 Feb. 2000, para. 104 (CLA-185); *Metalclad Corporation v. Mexico*, ICSID Case No. ARB/(AF)/97/1, Award, 30 Aug. 2000, para. 128 (CLA-150); *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 129 (CLA-146).

⁴³⁹ Statement of Claim, para. 571.

⁴⁴⁰ Davidson Report, para. 11.7.

⁴⁴¹ Davidson Report, para. 11.10.

⁴⁴² Davidson Report, para. 11.13.

his observations, the selected rate was far lower than the equivalent for personal borrowers or for borrowing denominated in local currency. Mr. Davidson explained:⁴⁴³

I have adopted the Ukrainian commercial bank lending rate for foreign currency for both pre- [award] and post- award interest. For the whole period under review, the applicable interest rate was between 8.27% and 8.81%.

382. To determine the interest rate, Mr. Davidson used the unweighted mean average daily interest rates at which banks were lending for each whole or part calendar year, as published by the National Bank of Ukraine.⁴⁴⁴

383. The Claimant relied on Mr. Davidson's opinion that the same rate of interest should apply to both pre- and post-Award interest.⁴⁴⁵

(b) Pre-Award interest

384. The Claimant contended that the Tribunal should award pre-Award interest on a compounding basis, pursuant to established arbitral practice, in order for the amount of compensation to reflect the additional sum that the Claimant would have earned if the money had been reinvested each year at generally prevailing rates of interest.⁴⁴⁶

385. Mr. Davidson calculated the pre-Award interest using the 31 March 2014 valuation date (for the period March 2014 to December 2017) as follows:⁴⁴⁷

Year	Damages plus interest to date (USD)	Days	Rate (%)	Interest (USD)
2014	1,111,300,729	275	8.81	73,733,208
2015	1,185,033,937	365	8.25	97,748,489
2016	1,282,782,426	366	8.27	106,332,428
2017	1,389,114,855	365	8.27	114,831,930
Total Pre-Award Interest				392,646,056

⁴⁴³ Davidson Report, para. 3.108.

⁴⁴⁴ Davidson Report, paras. 11.13–11.14.

⁴⁴⁵ Statement of Claim, para. 578.

⁴⁴⁶ Statement of Claim, para. 572.

⁴⁴⁷ Davidson Report, para. 11.18.

(c) Post-Award interest

386. The Claimant submitted that it is entitled to post-Award interest accruing from the date of the Tribunal's Award until such time as payment is made in full, in order to deter potential delay in the payment of the amount specified in the award.⁴⁴⁸

2. The Tribunal's analysis

387. Article 5(2) of the Treaty decrees a payment of interest "at the interest rate for three months' deposits in US dollars at the London Interbank Market (LIBOR) plus 1%" in the case of lawful expropriation. In the Tribunal's view, there can be no doubt that, *a fortiori*, in the case of an unlawful expropriation, as in the present case, the Claimant is entitled to interest from the Respondent in order to ensure full reparation for the injury suffered as a result of the Respondent's measures that the Tribunal has found to be internationally wrongful.

388. In deciding upon how interest should be determined, the Tribunal has a wide margin of discretion to determine the rate of interest applicable and whether it should be awarded on a simple or compounding basis.

(a) Rate of interest

389. The Tribunal is wary of the fact that interest rates may vary significantly depending on the currency to which they are applied. The Tribunal does not think it is appropriate to take an interest rate that refers to loans in the Ukrainian currency and apply it to the damages sought in a different currency (USD). The Tribunal is all the more convinced in this regard by the fact that the Ukrainian Hryvnia declined in value 50% as against the United States Dollar, dropping from approximately 0.086 to 0.041 UAH/USD, from the spring of 2014 to the late winter of 2016. Typically, damages are assessed in one currency, they will be paid in that currency, and the interest rate used shall be derived from market interest rates on that currency's securities.

390. It is common in investment treaty cases to tie the interest rate to LIBOR. It represents an objective, market-oriented rate, well suited to ensuring that the consequences of the breach are wiped out. In this regard, it is common practice in investment arbitration cases to apply the Six-Month USD LIBOR rate. However, to reflect a commercial interest rate and the relative risk associated with different countries, the Tribunal considers that it is appropriate to add a small premium.

⁴⁴⁸ Statement of Claim, para. 577.

According to Ripinsky and Williams, tribunals normally add two percent to LIBOR.⁴⁴⁹ The same premium is appropriate in relation to post-Award interest as well as to pre-Award interest, because one of the purposes of awarding post-Award interest is to incentivise parties to honour their liability under an award in an expedient fashion. The Tribunal finds that, in the exercise of its discretion, it would be appropriate to award to the Claimant pre- and post-Award interest at the average (calculated for the period between the date of valuation, 31 March 2014, and the date of this Award) Six-Month USD LIBOR rate, plus 2%.

(b) Compounding

391. The Tribunal has little difficulty accepting that interest should be compounded. It agrees with the Claimant (and Mr. Davidson) that compound interest is appropriate, commercially sensible, and consistent with modern international practice. It is just and reasonable to award the Claimant both pre-Award and post-Award interest compounded annually, with post-Award interest continuing until the Award has been paid in full.

(c) Interest on costs

392. The Tribunal notes that the Claimant claimed interest on the costs that may be awarded by the Tribunal at the same rate of interest awarded on the damages. The Tribunal agrees that it is appropriate to grant post-Award interest on the costs at the same rate of interest as for pre-Award interest on damages and for post-Award interest.

X. COSTS

393. On 5 May 2017, the Claimant filed its submission on costs, requesting that the Respondent pay all of its arbitration and legal costs. It submitted as follows:

In the event it is successful in its pending claims, the Claimant should be awarded its costs of the arbitration and legal representation in full. An award of the Claimant's costs in prosecuting the arbitration is necessary to return the Claimant to the place it would have occupied but for the breach of the Respondent's obligations under the applicable Bilateral Investment Treaty. This request is based on the principle of full reparation adopted by the Permanent Court of International Justice in the *Chorzów Factory* case, which requires that compensation "include a claimant's reasonable costs, both reasonably incurred and reasonable in amount, in successfully and necessarily asserting its disputed legal rights in arbitration proceedings against an unsuccessful respondent".⁴⁵⁰

⁴⁴⁹ S. Ripinsky and K. Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (British Institute of International and Comparative Law, 2008), p. 370 (CLA-182).

⁴⁵⁰ Claimant's Submission on Costs, para. 2.

394. The Claimant requested an order that the Respondent bear the costs of this arbitration in the amount of USD 1,357,563.11, comprising USD 492,196.94 for the total expert fees, and USD 865,366.17 for the arbitration expenses (including deposits established with the PCA and other expenses related to the arbitration).⁴⁵¹ In addition, it requests that the Claimant's costs for legal representation and assistance in the amount of USD 2,278,171.22 be awarded to it.⁴⁵²
395. Before turning to the Claimant's claim for costs, the Tribunal notes that the Respondent has not filed submissions on costs.

A. RELEVANT PRINCIPLES

396. The Treaty contains no provision as to the allocation of the costs of arbitration in the case of a dispute between a Contracting Party and a national of the other Contracting Party. However, as noted above, according to Article 9(2)(c) of the Treaty, this arbitration is governed by the 1976 UNCITRAL Rules. The Tribunal will therefore fix the costs of the arbitration in accordance with Articles 38 to 40 of the UNCITRAL Rules.

397. Article 38 defines the "costs" of arbitration as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

398. Article 40 of the UNCITRAL Rules 1976 then provides the following guidance as to the allocation of those costs between the parties:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs

⁴⁵¹ Claimant's Submission on Costs, Annex A.

⁴⁵² Claimant's Submission on Costs, para. 14.

between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable [...].

399. In *SD Myers Inc v Government of Canada*, an award under the UNCITRAL Rules cited by the Claimant, the following relevant passage is found:

Although both paragraphs of Article 40 of the UNCITRAL Rules confer wide discretion on an arbitral tribunal in respect of its award on costs, it can be seen that an arbitral tribunal is required to adopt a subtle difference of approach between the “arbitration costs” (the items contained in Articles 38(a), (b), (c), (d) & (f)) and the costs of “legal representation and assistance” (the item referred to in Article 38(e)). Under Article 40.1 the former are to be borne “in principle” by the “unsuccessful party”, under Article 40.2 the latter are to be apportioned by an arbitral tribunal after “taking into account the circumstances of the case”. There is no reference to the “successful” or “unsuccessful” party in Article 40.2.⁴⁵³

B. THE TRIBUNAL’S ANALYSIS

1. Costs of arbitration

400. The Claimant has sought an award for the costs of arbitration, including both its share of the deposits it established with the PCA as advances for arbitration costs, and the Respondent’s share in these deposits, which share the Claimant was compelled to pay because of the Respondent’s refusal to participate in any way in the proceedings.⁴⁵⁴ The Respondent’s refusal was based solely upon its challenge to jurisdiction, which challenge was rejected by the Tribunal. In total, the Claimant deposited a sum of USD 731,400 (that is, USD 365,700 for itself and USD 365,700 for the Respondent).⁴⁵⁵ This sum was fully disbursed to cover the costs of arbitration under Article 38(a), (b) and (c) of the UNCITRAL Rules, comprising: (i) the fees and expenses of The Honorable Charles N. Brower, amounting respectively to USD 198,587.00 and USD 10,491.97; (ii) the fees and expenses of Mr. Hugo Perezcano Díaz, amounting respectively to USD 132,592.50 and USD 10,629.68; (iii) the fees and expenses of Sir David A.R. Williams, the Presiding Arbitrator, amounting respectively to USD 254,059.30 and USD 12,197.22; (iv) the fees and expenses of the PCA, which was appointed as Registry in these proceedings, amounting respectively to USD 45,251.68 and USD 1,143.43; and (v) other arbitration costs paid from the deposit, including the costs of hearing facilities, court reporters, translation and interpretation,

⁴⁵³ *SD Myers Inc v. Canada*, UNCITRAL, Final Award and Dissenting Opinion, ILC 251 (2002), 30 December 2002, para. 10 (CLA-180).

⁴⁵⁴ Claimant’s Submission on Costs, para. 5.

⁴⁵⁵ The Claimant made further payments toward the deposit after the filing of its Submission on Costs, which explains the lower figure of USD 500,826.99 quoted in paragraph 407 below.

IT equipment, bank transactions, and all other expenses relating to the proceedings, amounting to USD 66,447.22.

401. As noted above, Article 40(1) of the applicable UNCITRAL Rules 1976 places emphasis on identification of the successful party. The logical basis appears to be that a “successful” claimant should not be penalized by having to pay for a process that it has been compelled to undertake in order to achieve a successful recovery.⁴⁵⁶ The circumstances of this arbitration are that the Claimant was the successful party and the Respondent was the unsuccessful party.
402. The Tribunal finds that no exceptional circumstances exist which would warrant a departure from the general rule that costs follow the event. In particular, the Tribunal does not find that the Claimant acted inappropriately in any way in its conduct of the arbitration. The Claimant cannot possibly be criticized for commencing arbitration proceedings, as there was a challenge to jurisdiction and no evidence of any meaningful offer of compensation or recognition of liability by the Respondent. Moreover, it is reasonable that the Respondent should meet all of the costs as it refused to participate in the arbitration.
403. The Tribunal therefore proceeds on the basis that the costs of the arbitration should be borne by the Respondent as the unsuccessful party.

2. Costs of legal representation and assistance

404. The Claimant has sought an award for the costs of its legal representation and assistance actually incurred and paid, or due and owing as at the date of its submission.⁴⁵⁷
405. As noted above, the Tribunal has a wide discretion to decide how to allocate the legal costs incurred by the successful party. The Tribunal finds that, compensating the Claimant for the costs of bringing this proceeding is required to wipe out the consequences of the Respondent’s breaches of the Treaty.

⁴⁵⁶ *SD Myers Inc v. Canada*, UNCITRAL, Final Award and Dissenting Opinion, ILC 251 (2002), 30 December 2002, para. 15 (CLA-180).

⁴⁵⁷ Claimant’s Submission on Costs, paras. 8 and 12.

3. Total costs

406. The Claimant's claimed costs were outlined in a detailed summary contained in Annex A to its submission, reproduced below.

Categories of Costs	Amounts (in USD)
Legal Fees	
Quinn Emanuel	1,928,172.32
Asters	349,998.90
Subtotal:	2,278,171.22
Expert Fees	
Professor Shaw (International Law)	70,595.69
Professor Butler (Russian Law)	102,540.00
Mr. Jeffrey Davidson (Damages)	295,096.33
Mr. Richard Hoyle (Legal Assistant to Professor Shaw)	23,964.92
Subtotal:	492,196.94
Expenses	
Fees of Mr. Michael Hwang as Appointing Authority	1,139.34
Tribunal/PCA fees (including Respondent's share of USD 250,000 paid by the Claimant)	500,826.99
Travel/accommodation	147,678.26
Copying/printing	148,249.67
Couriers	18,601.43
Asters disbursements	22,005.35
Translations	12,097.45
Other (Includes overtime meals, conference calls, and incidental expenses)	14,767.68
Subtotal	865,366.17
<u>TOTAL:</u>	3,635,734.33

407. The Tribunal has carefully reviewed the costs requested by the Claimant as set out above. It considers that these costs are reasonable in all respects, including work done by the Claimant's experts and the disbursements charged in relation to photocopying and other incidentals. All of these costs are therefore recoverable.
408. In summary, the Tribunal therefore finds and declares that the Claimant is entitled to be paid by the Respondent a total of **USD 3,134,907.34** for its legal fees (USD 2,278,171.22), the fees of expert witnesses (USD 492,196.94), and related expenses, excluding "Tribunal/PCA fees", which are addressed in the following paragraph (USD 364,539.18).
409. In addition, the Tribunal finds and declares that the Claimant is entitled to be paid by the Respondent a total of **USD 731,400.00** for the expenses of the arbitration, including the administrative fees of the PCA, the fees and expenses of the Members of the Tribunal, and other expenses paid from the deposit established by the Claimant, as described at paragraph 400 above.

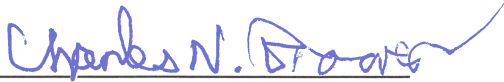
XI. DISPOSITIF

410. For all the foregoing reasons, and rejecting all submissions and contentions to the contrary, the Tribunal DECLARES, AWARDS and ORDERS as follows in respect of the issues arising for determination in these proceedings:
1. The Tribunal has jurisdiction to determine the present dispute;
 2. The Respondent has breached the Treaty of 27 November 1998, namely the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, and in particular Article 5(1) (Expropriation) of the Treaty in engaging in the unlawful expropriation of the Claimant's investments in the Crimean Peninsula;
 3. The Respondent shall pay forthwith damages to the Claimant in the total sum of **USD 1,111,300,729**, on the following basis:
 - (i) Loss of assets of **USD 597,771,793**;
 - (ii) Loss of future profits of **USD 484,616,757**; and
 - (iii) Other heads of loss referred to in paragraphs 336 to 341 of **USD 28,912,179**, being the lost assets of third parties as well as the lost securities for transactions for other branches;

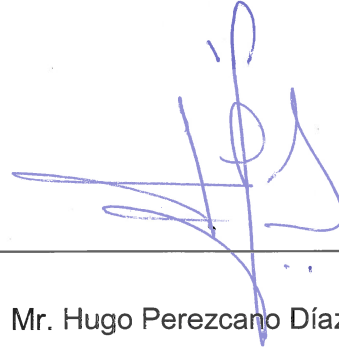
4. The Respondent shall pay forthwith to the Claimant the sum of **USD 731,400.00** constituting the costs of the arbitration proceedings, including the administrative costs of the Permanent Court of Arbitration and the fees and expenses of the Members of the Tribunal;
5. The Respondent shall pay forthwith to the Claimant all of its legal fees, the fees of expert witnesses, and related expenses in a total amount of **USD 3,134,907.34**;
6. The Respondent shall pay forthwith to the Claimant pre-Award interest on the amounts awarded under (3) above, from 31 March 2014 until the date of this Award, at the average (calculated for the period between the date of valuation, 31 March 2014, and the date of this Award) Six-Month USD LIBOR rate, plus 2%, compounded annually; and
7. The Respondent shall pay to the Claimant post-Award interest on the amounts awarded under (3), (4) and (5) above from the date of this Award until it has been paid in full, at the average (calculated for the period between the date of valuation, 31 March 2014, and the date of this Award) Six-Month USD LIBOR rate, plus 2%, compounded annually.

Place of Arbitration: Paris, France

Date: 26 November 2018



The Honorable Charles N. Brower
Arbitrator



Mr. Hugo Perezcano Díaz
Arbitrator



Sir David A.R. Williams KNZM QC
Presiding Arbitrator