TRANSLATION FROM THE DUTCH ORIGINAL

WRIT OF SUMMONS

On this day, the twelfth day of July two thousand and twenty-three, at the request of the public-law legal entity incorporated under foreign law THE RUSSIAN FEDERATION, having its registered office in Moscow, and domiciled at Spanjaardslaan no. 7 in Haarlem, the Netherlands, with an address for service at the office of Hoff Advocaten, Mr. J.M.K.P. Cornegoor, who, pursuant to Section 13 of the Advocatenwet (Dutch Lawyers Act), has been designated by the Dean of the Bar Association of the district of The Hague, the Netherlands, as attorney-at-law for the applicant, and will act as such;

Have I,

SUMMONED:

1. the foreign law company NATIONAL JOINT STOCK COMPANY "NAFTOGAZ OF UKRAINE", having its registered office and place of business at 01601 Kyiv, B. Khmelnitskogo street No. 6, Ukraine;

2. the company under foreign law NATIONAL JOINT STOCK COMPNAY CHORNOMORNAFTOGAZ, having its registered office and place of business at 01030 Kyiv, B. Khmelnitskogo street No. 26, office 505, Ukraine;

3. the company incorporated under foreign law JOINT STOCK COMPANY UKTRANSGAZ, having its registered office and place of business at 01021 Kyiv, Kloskiy Uzviz No. 9/1, Ukraine;

4. the company incorporated under foreign law JOINT STOCK COMPANY UKRGASVYDOBUVANNYA, having its registered office and place of business at 04053 Kiyv, Kudriavska street No. 26/28, Ukraine;

5. the foreign-law company JOINT STOCK COMPANY UKRTRANSNAFTA, having its registered office and place of business at 01133 Kyiv, Kutuzova Street No. 18/7, Ukraine, and

6. the foreign-law company SUBSIDIARY COMPANY GAZ UKRAIINY, having its registered office and place of business at 04116 Kyiv, Sholudenka Street No. 1, Ukraine

Since the defendants do not have a known domicile or residence in the Netherlands but do have a known address abroad, I have, pursuant to Article 7 of the Implementation Act Service Convention 1965 in conjunction with Article 55 (1) and 54 (2) of the Code of Civil Procedure, served my writ on the public prosecutor's office at the Court of Appeal of The Hague at Prinsclauslaan no. 60, (2595 AJ) The Hague, the Netherlands, and - in respect of each of the defendants and each address separately - provided two copies of this writ and a translation of this writ into English to:

employed there, stating that service is requested in accordance with Articles 3 to 6 of the Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters of 15 November 1965, by simple delivery or - if this is not possible - by service in accordance with local law, in either case on delivery of a proof of receipt, while furthermore - in respect of each of the defendants individually - an additional (third) copy of this writ as well as a translation thereof into the English language was promptly sent by me by registered mail to each of the above-mentioned addresses;

TO appear on Tuesday, September 27, 2023 at 10:00 a.m., not in person but represented by a lawyer, at the hearing of the Court of Appeal of The Hague, which will then be held at the Palace of Justice at Prins Clauslaan No. 60 in (2595 AJ) The Hague, The Netherlands;

ADVISED:

(a) that if one or more defendant(s) fail(s) to appear represented by a lawyer or fail(s) to timely pay the court fee hereinafter referred to, and the prescribed formalities and deadlines have been complied with, the Court of Appeals will declare that defendant/those defendants in default and will grant the relief requested, unless it appears to the Court to be unlawful or unfounded;
(b) that if at least one of the defendants appeared in the proceedings represented by a lawyer and paid the court fee in due time, the defendant(s) who did not appear represented by a lawyer or did not pay the court fee in due time shall be declared in default, proceedings will be continued between the plaintiff and the defendant(s) who has (have) appeared and paid the court fee in time, and a single judgment will be rendered among all parties, which, also with regard to the defaulting defendant(s), shall be regarded as a judgment after trial;
(c) that if the defendants do appear in court, they will become liable for a court fee to be paid within four (4) weeks of appearing in court, and that the amount of the court fee is set forth in the most recent appendix pertaining to the Civil Court Fees Act, which is published on the website: www.kbvg.nl/griffierechtentabel, among others;
(d) that a person of limited means will be charged a court fee for indigent persons established by or under the Act, if at the time the court fee is charged he or she has produced: (1^{e}) a copy of the decision to assign counsel as referred to in Article 29 of the Legal Aid Act, or if this is not possible as a result of circumstances that cannot reasonably be attributed to him or her, a copy of the application for assignment of counsel as referred to in Article 24, paragraph 2, of the Legal Aid Act, or (2^{e}) a statement from the Board of the Legal Aid Board, as referred to in Article 7(3)(e) of that Act, showing that his or her income does not exceed the income referred to in the order in council under Article 35(2) of that Act;
(e) That from the defendants appearing represented by the same lawyer and making identical submissions or raising identical defenses, based on Article 15 of the Civil Court Fees Act, a joint court fee is levied only once.

IN ORDER TO:

On behalf of plaintiffs (the "**Russian Federation**") to be heard claim as follows:

A. Introduction

1. This case arises out of the nationalization of gas extraction activities in Crimea that followed the incorporation of Crimea[1] into the Russian Federation in March 2014. The defendants ("**Natftogaz et al.**") claim that prior to the nationalization, they were beneficiaries of those gas extraction activities. They initiated arbitration (the "**Arbitration**") against the Russian Federation on the basis of the investment treaty between the Russian Federation and Ukraine dated November 27, 1998 (the "**Investment Treaty**"; Exhibit 1; the exhibits referred to in this subpoena will be submitted by deed on the first court date). Naftogaz et al. obtained against the Russian Federation a final arbitral award dated April 12, 2023 (Production 2; the "**Quantum Award**"), ordering the Russian Federation to pay damages in the principal amount of USD 4,222,875,858.81, plus interest and costs.

2. The Russian Federation hereby brings an action to set aside the Quantum Award. This is because the arbitral tribunal that issued the Quantum Award (the "**Arbitral Tribunal**") did not have jurisdiction to hear the dispute because the dispute does not fall within the scope of the arbitration provision in the Investment Treaty (art. 1065(1)(a) Code of Civil Procedure) because the investments in question were not made after January 1, 1992. Moreover, the Quantum award is not reasoned in a crucial part because the majority of the Arbitral Tribunal adopted, without any cogent reasoning, that the value of gas extraction concessions should be determined on the basis of total gas reserves, rather than the remaining term of the concession (art. 1065(1)(d) Code of Civil Procedure).

3. The seat of the Arbitration was The Hague, so the Court of Appeal of The Hague has jurisdiction to hear the annulment claim. The Arbitration was commenced after January 1, 2015, so the new Arbitration Act applies. The Russian Federation did not initially appear in the Arbitration and, when it subsequently participated in the Arbitration, immediately invoked the lack of jurisdiction of the Arbitral Tribunal. Therefore, the condition of article 1065(2) Code of Civil Procedure has been satisfied.

4. In the Arbitration, the Arbitral Tribunal issued a partial award on February 22, 2019 (the "**Partial Award**"; Exhibit 3), in which the Arbitral Tribunal held that it had jurisdiction over all of Naftogaz et al.'s claims and further held that the Russian Federation had breached its obligations to Naftogaz et al. under the Investment Treaty. The Quantum Award only the quantum of damages for which the Russian Federation is liable. The Russian Federation brought an action for annulment of the Partial Award before this Court based on Section 1065 Code of Civil Procedure. Pending those proceedings (the "**First Annulment Proceedings**"), the Arbitration continued.

5. The First Annulment Proceedings resulted in a judgment of this Court dated July 19, 2022 (ECLI:NL:GHDHA:2022:1295, the "**Annulment Judgment**")[2]. In the Annulment Judgment,

[1] In this subpoena, "Crimea" refers to the peninsula of that name, including the city of Sevastopol, as well as adjacent territorial waters.

[2] Initially, Livko Limited Liability Company was also a party to the Arbitration as a claimant and that company is therefore named as a party in the Partial Award and in the Annulment Judgment. In the quantum phase of the Arbitration, however, it legally merged with defendant sub (4); see: Quantum Award, marginals 120 and 122.

this Court rejected most of the Russian Federation's arguments as to why the dispute did not fall within the scope of the Investment Treaty. However, the Court accepted the Russian Federation's argument that the majority of the Arbitral Tribunal disregarded Article 12 of the Investment Treaty. Article 12 limits the effect of the treaty to investments made on or after January 1, 1992, the first day of the first month following the breakup of the Soviet Union. On this ground, this Court partially annulled the Partial Award in the Annulment Judgment, viz:

> "(...) insofar as the arbitral tribunal held that it has jurisdiction to adjudicate all claims, since it only has jurisdiction to adjudicate investments made on or after January 1, 1992."

6. In the Quantum Award, the majority of the Arbitral Tribunal took little, if any, notice of the Annulment Judgment. Building on the Partial Award, the majority of the Arbitral Tribunal addressed the substance of all of Naftogaz et al.'s claims and upheld them almost in their entirety, even though it is undisputed that gas production in Crimea commenced long before January 1, 1992, and the necessary investments were made to a significant extent before that date. The majority of the Arbitral Tribunal inserted in sporadic parts of the Quantum Award some occasional arguments to the effect that all investments nationalized in March 2014 would nevertheless date from after December 31, 1991. The essence of the majority's position, however, is that it maintains the view that all investments in Crimea that are Ukrainian-owned fall within the scope of the treaty, regardless of when the investment was made.

7. The Quantum Award and the Partial Award are endorsed only by two of the three arbitrators composing the Arbitral Tribunal. The third arbitrator - Prof. Dr. Maja Stanivuković - issued a dissenting opinion with respect to both awards (included at the end of Exhibit 2 and 3, respectively). For this reason, above and below, reference is made to the opinion of the majority of the Arbitral Tribunal. The dissenting opinion of Prof. Stanivuković with respect to the Qantum Award (the "**Dissenting Opinion**") aptly portrays the numerous shortcomings in the majority's reasoning. By the way, Prof. Stanivuković was not appointed as arbitrator by the Russian Federation (because the Russian Federation did not participate in the Arbitration at the time), but through the Permanent Court of Arbitration, which emphasizes her independence.

8. The Russian Federation has filed a cassation appeal against the Annulment Judgment. The cassation proceedings are currently pending. The summons in cassation will be submitted as Exhibit 4. With a view to the possibility that the cassation appeal succeeds in whole or in part, the Russian Federation in this summons further claims the annulment of the Quantum Award on the grounds that (a) the investments adjudicated by the arbitrators were not made in the (sovereign) territory of the other State Party to the Treaty, so that the Investment Treaty (including the arbitration provision) does not apply to them, and (b) because the Quantum Award lacks reasoning with respect to the liability of the Russian Federation if the pending cassation proceedings were to result in the setting aside of the Partial Award in its entirety or its setting aside to a further extent than pronounced by this Court in the Annulment Judgment.

B. Language versions of treaty; legal framework

9. The authentic treaty languages of the Investment Treaty are Russian and Ukrainian. In this subpoena, the Russian Federation will refer for convenience to an English translation of the

treaty prepared by UNCTAD (Exhibit 5). It does so with the proviso that this translation has no formal status. It is not always possible to completely accurately translate into English a document written in a Slavic language such as Russian or Ukrainian The UNCTAD translation is therefore only an aid and not an independent source of treaty agreements.

10. Since the Russian Federation relies on the absence of a legally valid arbitration agreement, the annulment court must independently and integrally review the existence thereof. The opinion of the Arbitral Tribunal as to its jurisdiction does not have any special status in this regard. (HR 26 September 2014, NJ 2015/318, *Chevron/Ecuador*)

11. The Arbitral Tribunal based its jurisdiction on Article 9 of the Investment Treaty. That provision contains an open offer of arbitration from either treaty state to investors of the other treaty state, provided that the dispute concerns an "investment" to which the treaty applies. It must therefore concern an investment that falls within the definition of that term in Article 1(1) of the treaty and further falls within the scope of the treaty as delineated by Article 12. The substantive question of whether a particular investment enjoys the protection of the treaty thus largely overlaps with the formal question of whether the offer of arbitration also relates to a dispute concerning that investment. To that extent, this Court will also have to consider the treaty's scope of protection in its assessment, and this remains a "full" rather than a reticent review.[3]

C. Investments before December 31, 1991

Introduction

12. Article 12 of the Convention reads as follows:

Russian:

Статья 12

Применение Соглашения

Настоящее Соглашение будет применяться ко всем инвестициям, осуществленным инвесторами одной из Договаривающихся Сторон на территории другой Договаривающейся Стороны начиная с 1 января 1992 года.

Ukrainian:

Стаття 12
Застосування Угоди

Ця Угода буде застосовуватися до усіх інвестицій, здійснених інвесторами однієї з Договірних Сторін на території іншої Договірної Сторони починаючи з 1 січня 1992 року.

[3] Cf. this Court June 18, 2013, ECLI:NL:GHDHA:2013:1940 (*Chevron/Ecuador*), para. 16, as well as the Destruction Judgment, para. 5.3.2.

UNCTAD translation:

ARTICLE 12
APPLICATION OF THE AGREEMENT

> This Agreement shall apply to all investments carried out by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.

13. Thus, the Convention applies only to investments made after December 31, 1991. Investments made before that date do not enjoy treaty protection and therefore the offer of arbitration contained in Article 9 of the Convention does not apply to them either. Incorrect in this regard, of course, is the consideration of the majority of the Arbitral Tribunal that this Court would have held that it is for the Arbitral Tribunal to assess whether or not a particular investment enjoys the protection of the Convention in light of Article 12 of the Convention and that this would concern the *exercise* and not the *limitation* of the jurisdiction of the Arbitral Tribunal.[4] With its pertinent consideration, the majority of the Arbitral Tribunal conspicuously ignored that in the Annulment Judgment this Court partially set aside the Partial Award because the majority had misinterpreted Article 12. In support of said view, the majority of the Arbitral Tribunal refers to the conclusion of consideration 5.7.7 of the Annulment Judgment, but there this Court clearly meant that the Arbitral Tribunal has to rule again on its jurisdiction[5], this time taking into account (the correct interpretation of) Article 12 and not that Article 12 would not limit the jurisdiction of the Arbitral Tribunal.

14. In the Partial Award, the majority of the Arbitral Tribunal took as its starting point that the provisions of Article 12 refer only to the status of holding of an investment and that it is sufficient for the applicability of the Investment Treaty that said status exists at the time when treaty obligations would have been violated. See paragraph 191 of the Partial Award:[6]

> "In support of her position, our colleague Professor Stanvuković point to the words in Article 12:
>
> > Made by investors of one Contracting Party in the territory of the other Contracting Party
>
> as indicative of a requirement for diversity of nationality at the time of the original investment (...), but in the majority view, the verb "made" is merely descriptive of an existing state of affairs on the critical dates of asset seizure and commencement of

[4] Quantum judgment, par. 306: "The Hague Court of Appeal thus confirmed the Tribunal's jurisdiction to determine which assets are 'protected investments' and which are not. Our colleague, Professor Stanivuković, perceives jurisdictional issues at every step of the inquiry into quantum, but the majority view is that what is involved at this stage is the *exercise* of the Tribunal's jurisdiction not its *existence*." (emphasis in original)

[5] Whether such a "reversal" of a jurisdictional issue is possible as a matter of law is the subject of the cassation proceedings.

[6] See also par. 10 of the Partial Award: "The Tribunal by majority is of the view that the crucial date is not the date of the initial investment. The Tribunal's jurisdiction depends upon the facts existing (1) at the date of the alleged breach of the BIT, (2) as well as at the date of the initiation of these proceedings. The Tribunal, by a majority, rules that on these two dates, the Claimants satisfy the requirements of the BIT, properly interpreted, and therefore the Tribunal does have jurisdiction to determine the dispute." ("Claimants" are Naftogaz et al.)

> proceedings. Obviously the investment must have been "made". Otherwise, there would be nothing to complain about. However, for reasons already discussed, the majority does not accept adding the "original date of investment" as an additional limitation on a BIT protection. The majority finds some reinforcement in Article 1(1) of the BIT which defines investments as assts that "are [present tense] invested by an investor," which is also merely descriptive of an existing state of affairs." (text in square brackets in original)

15. This Court rightly rejected this interpretation in the Annulment Judgment. Indeed, among other things, this interpretation results in depriving Article 12 of any useful effect. After all, an investment made prior to January 1, 1992, leads to the status of holding an investment after that date. (This is different only if the investment was also terminated before that date, but Article 12 is not needed to exclude such investments, since the treaty did not enter into force until January 27, 2000.) Thus, the interpretation of the majority of the Arbitral Tribunal inevitably leads to the result that investments made prior to January 1, 1992, also fall within the scope of the Investment Treaty.

16. As already discussed in the introduction, gas extraction[7] in Crimea started well before the collapse of the Soviet Union. By way of pregnant example, the Shtormove gas field was discovered as early as 1983 and development of the field had already begun in 1992.[8] At that time, therefore, the lion's share of all investments related to the field had already been made. It should be recalled here that the largest investments concerning a gas field precede the start of production: first the field must be discovered and mapped (the so-called exploration phase) and then the necessary infrastructure must be built. Once the field is operational, the associated costs are relatively modest. In the case of the Shtormove gas field, the majority nevertheless awarded compensation of USD 834.5 million[9], even though it is undisputed that most of the investments involved were made prior to January 1, 1992.

17. The example of the Shtormove gas field is not an isolated one. It is further established, among other things, that the network of transport pipelines in Crimea, to which the Quantum Award also relates (the so-called "Midstream Assets"), was already largely in place on January 1, 1992.[10] The Hlibovske underground gas storage facility has been operational since 1991.[11] The Odeske gas field - to which the majority of the Arbitral Tribunal assigns a value of USD 1,673 million[12] - was discovered in 1988.[13] Of the total nine production fields covered by the Quantum Award, eight were discovered prior to January 1, 1992, and of these, four were also put into production prior to that date.[14] Of the 143 exploration wells, 125 were drilled prior to 1992 and only 18 were drilled thereafter.[15] The Quantum Award includes two rigs and 15 vessels built prior to 1992. [16]

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[7] Besides extraction of natural gas, there is also extraction of oil and gas condensate. Since the extent of these is of minor importance, this subpoena further refers only to gas extraction.
[8] Dissenting Opinion, par. 65.
[9] See the table in par. 490 of the Quantum Award. The amount mentioned (USD 834.5 million) is the average of the two amounts mentioned in the table for the field of USD 878 and USD 791 million. The majority of the Arbitral Tribunal awarded the average of the totals of the amounts listed for all gas fields, so of the amount awarded (USD 3,231 million), USD 834.5 million is attributable to the Shtormove gas field.
[10] Dissenting Opinion, par. 101 et seq.
[11] Dissenting Opinion, par. 106
[12] See footnote 9. The Odeske field is mentioned twice in the table.
[13] Dissenting Opinion, fn. 66.
[14] Dissenting Opinion, fn. 36.
[15] Ditto.
[16] Dissenting Opinion, fn. 118.

18. For a detailed analysis of the investments related to the gas fields made prior to January 1, 1992, reference is made to Vygon Consulting's expert report that will be submitted as Exhibit 6. With regard to the main extraction area - the northwestern part of the Black Sea[17] - its conclusion is as follows (p. 56):

> "Fields of the Northwestern Shelf of the Black Sea - Key Conclusions:
>
> - The full cycle of the most risky and costly stages of the regional works and prospecting drilling with high uncertainty level were completed by Soviet entities before 01.01.1992. The Bezimenne field is the only exception.
>
> - No reserve evaluation between 1992 and 2014 would have been possible without the exploration activities carried out prior to that period.
>
> - The lengthiest and most risky stages of regional works and preparation of the structure for prospecting drilling were carried out for all of the fields under consideration before 01.01.1992.
>
> - Additional exploration activities at the fields under consideration were very limited in the period from 1992 to 2014. All the production post 1992 was achieved thanks to the works conducted in the Soviet period. In the period between 01.01.1992 and the VD, the reserves booked during the Soviet era declined by 16%, i.e. they were not replenished and the field were only exploited."[18]

It is also established that prior to January 1, 1992, the exploration and gas production activities were carried out by a legal predecessor of Naftogaz et al, namely 'Chornomornaftogaz state production enterprise for oil and gas production, storage and transportation'.

19. With respect to the other assets covered by the Quantum Award, it is not possible for the Russian Federation to also indicate with any degree of exactness when the relevant investments were made. The relevant information is not in the public domain, and Naftogaz et al did not provide any information or take positions in this regard during the course of the Arbitration, even though, in light of Article 12 of the Investment Treaty and the outcome of the First Annulment Proceedings, it would obviously have been incumbent upon them to do so.

20. Thus, although a very substantial part of the investments in the subsequently nationalized gas extraction activities in Crimea had already been made prior to January 1, 1992, the majority of the Arbitral Tribunal considered itself to have jurisdiction with respect to all of Naftogaz et al.'s claims and also upheld those claims almost in their entirety. In essence, the majority of the Arbitral Tribunal adduced four arguments to this effect, namely:

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[17] The fields located in that area represent the lion's share of the compensation awarded by the majority of the Arbitral Tribunal in respect of the nationalization of the gas fields. Moreover, for the other fields - Sea of Azov, Kerch-Taman part of the Black Sea and onshore extraction - the conclusions of Vygon Consulting have the same thrust.

[18] 'VD' stands for 'Valuation Date', the date of nationalization, according to the majority of the Arbitral Tribunal that was March 17/18, 2014.

(i) that none of Naftogaz et al. was established until after Dec. 3, 1991, so they necessarily made the relevant investments after that date;

(ii) that Naftogaz et al. paid for the assets acquired at their incorporation with shares issued at the time, so they made an investment at the time;

(iii) that the market value of the investments at the time of nationalization is independent of the magnitude of the investments made prior to January 1, 1992, and

(iv) With respect to concessions granted to defendants sub (1) and (2) for exploration and gas production and for the use of pipelines and a storage facility: because these were issued after December 31, 1991.

None of these arguments is sound, as will be explained below.

(i) The date of incorporation of Naftogaz et al. is not conclusive

21. The central argument of the majority of the Arbitral Tribunal is that Naftogaz et al. were not incorporated as independent legal entities until after December 31, 1991, so they necessarily acquired the nationalized assets thereafter. See in particular paragraphs 316 and 317 of the Quantum Award:

> "As the Claimants were only created in 1998 and onwards, Dr. Paliashvili expressed the view that their investments could not have been "made" at an earlier date. The Claimants could not have "made" investments before their creation.
>
> > I want to start with the imperative rule of Ukrainian law. Legal capacity of a legal entity arises as of the moment of its establishment. And under Ukrainian law, legal capacity means the capacity of a legal entity to acquire rights and obligations. It doesn't matter through which mechanism the legal capacity was acquired, but it only arises from the moment the company was established.
>
> The majority accepts Dr. Paliashvilli expert evidence. The Claimants were constituted as 'new legal entities' and are not 'part of the same legal entity' as their predecessors in title." (footnote omitted)

22. The error that the majority of the Arbitral Tribunal makes in the quoted paragraphs is that it assumes that holding an investment necessarily means that the holder has *carried out* (or has *made*) an investment within the meaning of Article 12 of the Investment Treaty at some prior point in time. According to the majority of the Arbitral Tribunal, Naftogaz et al. were incorporated after 1991 and in March 2014, Naftogaz et al. were entitled to certain investments, so they necessarily made an investment in the intervening period. However, becoming entitled to an investment is not the same thing as carrying out an investment. The distinction is easily illustrated by the example of a Ukrainian resident who inherits from a Russian testator a factory located within the Russian Federation. (The example is far from imaginary; almost half of Ukrainian residents have close blood relatives within the Russian Federation.) No one will want to argue that that the heir has made an investment in the Russian Federation, but that is the conclusion to which the reasoning of the majority of the Arbitral Tribunal leads. Another (hypothetical) example is a legal entity that built a plant prior to January 1, 1992, and that is split after January 1, 1992, with the investment being allocated

to the split-off legal entity. No one would argue that that an investment was made after January 1, 1992, but that is the conclusion which the reasoning of the majority of the Arbitral Tribunal compels.

23. That making an investment within the meaning of Article 12 of the Investment Treaty requires a particular *action* and that passive acquisition of title is insufficient has already been endorsed by this Court in the Annulment Judgment, para. 5.7.5.2, based on expert reports on the meaning of the original language versions of Article 12:

> "Article 1(1) BIT 1998, in connection with the description of investments, uses the term '*assets which are invested*' or (in another English translation:) '*assets which are put in*' (Tyulenev, para. 9(III)). Here the verb in Russian and in Ukrainian is in the present tense. This verb form indicates a situation, which is not linked to a particular moment. In contrast, Article 12 uses a perfective passive past participle, translated in English as "*investments made*" or "*investments carried out*" (Kurokhtina and Tyulenev) or a tense that expresses an idea of roundedness at a particular moment (Fortuin). Although Kurokthina and Fortuin reach different outcomes, they do agree that the time used does not refer to an action in the past, but to the result and its consequences at the moment we are speaking." (emphasis added)

24. Moreover, the interpretation by the majority of the Arbitral Tribunal of Article 12 of the Investment Treaty is also undermined by the fact that it deprives that provision of any useful effect. After all, until very shortly before January 1, 1992, both Ukraine and the Russian Federation were part of the Soviet Union, and the Soviet Union was a communist state. An essential characteristic of communism is that means of production (investments) are never privately owned. Private business was prohibited by law and punishable in the Soviet Union. Thus, a private owner of an investment made prior to January 1, 1992, always acquired it at some point after that date. However, if that mere acquisition implies that the investment was made after that date, Article 12 does not exclude any investment.

25. Moreover, the view that the term "investment" assumes a certain activity on the part of the investor was endorsed by Ukraine itself, therefore by the other party to the Investment Treaty. This is evident from a ruling of the English High Court of Justice dated July 13, 2018 (Exhibit 7). That ruling also relates to an action to set aside an arbitral award made on the basis of the Investment Treaty. According to the ruling, Ukraine took the following position (paragraph 67):[19]

> "The second and third strands of Ukraine's argument are closely intertwined. The first of the two is, as Mr. Edey QC put it, 'the investor must actually do something'. It can also be put as an argument that there must be an active relationship between the investor and the investment: the investor must actively invest, or put in resources."

Ukraine was ruled against in the said judgment because it concerned an investor who had bought shares in a Ukrainian company after January 1, 1992, so there was the necessary

[19] See also par. 58: " Guidance as to the concept of making an investment is provided by the decision of Teare J in Gold Reserve. Ukraine contends that that decision shows that:
(i) making an investment requires the input of resources by the investor into the relevant asset in return for an interest in that asset;
(ii) mere passive ownership of an asset is insufficient: what is required is an active relationship between the investor and the investment." (emphasis in original, footnotes omitted)

'action'. Thus, that outcome of the English case does not alter the fact that also according to Ukraine, the passive acquisition of an investment without any sacrifice being made does not count as making of an investment.

26. Finally, that only investments based on active acquisition fall within the scope of the treaty is evident from the use of the term "investment" in Article 12, in conjunction with the definition of that term in Article 1(1) of the Investment Treaty:

> "Investments denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation and in particular:" (etc.)

The word translated as "are put in" in the quote reads in Russian "***вкладываются***" (phonetically: ' vkladyvayutsia '). That word in Russian has the meaning of an active, ongoing action or its result. An investment obtained passively is not 'vkladyvayutsia'. This Court held in the Annulment Judgment (para. 5.8.8.3 and 4) that the inflection used of this verb indicates or may indicate a certain status. However, the current issue is not the inflection, but the meaning of the inflected verb. In addition, the word "**осуществленным**" in Article 12 (translated above as "carried out") also implies an active involvement of the investor.

27. The majority of the Arbitral Tribunal argues that its interpretation of Article 12 of the Investment Treaty would find support in paragraph 5.7.5.8 of the Annulment Judgment, where this Court considered that "Naftogaz et al. cannot obtain protection under the 1998 BIT if they made their investments before that date."[20] The majority of the Arbitral Tribunal is thereby guilty of selective quoting, for immediately following the passage to which the majority refers, this Court states:

> "It should be borne in mind, however, that investments may count as made after January 1, 1992, if Naftogaz et al. after January 1, 1992, purchased (parts of) investments made by others, or if they made an extension to investments made by others after January 1, 1992. In the latter case, the 1998 BIT applies only to the extension made after January 1, 1992."

This Court has thus (correctly) kept open the possibility that an investment made prior to January 1, 1992, may thereafter become the subject of a new investment, namely, if that investment is *purchased*. This, of course, does not mean that any other way of acquiring the status of a rights holder counts as making an investment. Moreover, this Court's quoted words expressly take into account the possibility that Naftogaz et al. made an extension with respect to an investment made by *another person*. Thus, also in the Court's view, it is possible for Naftogaz et al. to have extended investments that they did not make themselves. The quoted words were therefore, in the eyes of the Russian Federation, an invitation to the Arbitral Tribunal to carefully review the genesis and acquisition history of the assets that are the subject of the claims of Naftogaz et al. in accordance with Article 12. However, the majority of the Arbitral Tribunal has ignored that invitation and persists in an interpretation of Article 12 that, on balance, amounts to that provision being devoid of any meaning.

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[20] Quantum judgment, par. 303: "It is significant in the majority view, that The Hague Court of Appeal said "Naftogaz cannot obtain protection under the BIT if **they** made **their** investments before that date." The focus is on acquisition by the Claimants (none of which were incorporated before 1998), not the preceding history of owners and licenses." (emphasis in original, footnote omitted)

28. In addition to the foregoing, this Court was obviously perfectly aware that Naftogaz et al. were all incorporated after December 31, 1991, for Naftogaz et al. also explicitly invoked this in the First Annulment Proceedings, and this was not disputed by the Russian Federation in the First Annulment Proceedings. The annulment court may base its decision that an arbitral tribunal has jurisdiction on other grounds and, if necessary, on a different treaty interpretation than the arbitral tribunal itself has done.[21] Thus, had the Court considered that the very fact that Naftogaz et al. were incorporated after December 31, 1991, implies that the investments were also made after that date, it would not have pronounced the partial annulment of the Partial Award.

(ii) Receipt of a contribution on shares is not an investment

29. The majority of the Arbitral Tribunal further held that to the extent Naftogaz et al. acquired assets at the time of their incorporation, there was an investment within the meaning of Article 12 of the Investment Treaty because they then "purchased" those assets with the shares in their own capital concurrently issued to the Ukrainian government. See in particular paragraph 318 of the Quantum Award:

> "The Claimants acquired assets (including Special Permits) from the State and other sources from 1998 until 2014. In part, State assets were acquired at the outset as part of the Claimants' "Charter Capital" for which they paid the Government in shares. The investment was "made" within the meaning of Article 12 of the BIT when the Claimants paid for the assets with their shares."

As well as paragraph 332:

> "In the majority view, the Claimants did not simply 'receive' property from the State. The property was purchased with the Treasury Shares - a common feature of many incorporations."

30. The quoted contentions of the majority of the Arbitral Tribunal are factually simply incorrect where defendant sub (2) (**"Chornomornaftogaz"**) is concerned. Chornomornaftogaz was not formed by incorporation and simultaneous issuance of shares, but by "transformation", a legal concept under Ukrainian law whereby a company succeeds by universal title to the rights and obligations of a state-owned enterprise. Accordingly, Chornomornaftogaz's bylaws explicitly provide that it is the legal successor to the state-owned company of the same name.[22] In this regard, reference is further made to Resolution No. 184 of the State Committee of Ukraine for Oil, Gas and Refining dated August 18, 1998 (Exhibit 8: "I HEREBY ORDER: to form Chornomornaftogaz State Joint-Stock Company on the basis of Chornomornaftogaz State Production Enterprise for the Extraction, Storage and Transportation of Oil and Gas"). The defendants also did not dispute in the Arbitration that Chornomornaftogaz was created by way of transformation and merely argued that the current Chornomornaftogaz is nevertheless a new legal entity.[23] The issue, however, is that legal succession by way of universal title is not the making an investment within the meaning of Article 12 of the Investment Treaty.

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[21] HR Nov. 5, 2021, NJ 2022/102 (*Yukos*); see also paragraph 5.3.11 of the Annulment Judgment.
[22] See the quote in par. 334 of the Quantum Award.
[23] See Dissenting Opinion, par. 57 and 58.

31. Furthermore, the factual contentions of the majority of the Arbitral Tribunal cited above are at least in part incorrect with respect to defendant sub (1) ("**NJSC Naftogaz**"). Indeed, NJSC Naftogaz also received assets by virtue of the fact that it was designated as the legal successor under universal title of JSC Ukrgazprom, in turn the legal successor under universal title of the state-owned enterprise of the same name, by decision of the Council of Ministers of Ukraine of May 31, 1999 (Exhibit 9).

32. Even to the extent that defendants did acquire assets at the time of their incorporation against the issuance of shares, it cannot be accepted that this would constitute the making of an investment. First, the defendants themselves had no involvement in that issuance. They were created by decisions of the Council of Ministers of Ukraine, which also provided for the transfer of certain assets by way of "charter capital," but to which they themselves were not parties. (See, e.g., Exhibit 10 decision dated May 25, 1998 establishing NJSC Naftogaz). It is difficult to maintain that a legal act to which the defendants themselves were not even parties nevertheless constituted the making of an investment by the defendants. In addition, the transfer of assets against the issuance of shares cannot be seen as the making of an investment because economically this merely amounts to an internal restructuring and thus lacks the economic character of an investment: Ukraine was first the direct holder of the assets in question and then it was the sole shareholder of a capital company owning the same assets. That constitutes an internal rearrangement, not an investment. (If the shares are subsequently sold, the buyer in principle makes an investment, but such a situation is not at issue). This is all the more compelling since Ukraine had far-reaching control over the form of corporatization of former state-owned enterprises - 'transformation' or contribution on shares. It has already been shown above that 'transformation' in any case does not involve the making an investment. It can hardly be maintained that an asset is elevated to post-Soviet investment merely because a different figure was chosen, which in practice amounts to the same thing.

33. The view of the majority of the Arbitral Tribunal that the defendants "paid" for the assets acquired at incorporation with the simultaneously issued shares must, of course, be rejected. Issuance of shares is not a form of payment and the company does not make any sacrifice by issuing shares. From the company's perspective, the number of shares it issues is indeed neutral. If, after incorporation, an asset is transferred to the company by the sole shareholder, this can be done by way of share premium payment or against the issuance of new shares, which is also neutral from the company's perspective. No one will want to argue that receipt of a share premium payment is an investment, and so the same must apply to receipt of a contribution on new shares and the issuance of new shares.

(iii) The impact of pre-1992 investments on current value is irrelevant

34. In the Quantum Award, the majority of the Arbitral Tribunal argued at length that the size of the pre-1992 investments is immaterial, because it does not affect the market value of the expropriated assets. Indeed, that market value is determined by the future cash flows that could have been generated from those assets, according to the majority. See, for example, paragraphs 355 and 356 of the Quantum Award, both included in the chapter entitled 'The Tribunal Majority on Compliance with Article 12 of the Treaty'.

> "The Tribunal accepts as accurate the Respondent's explanation of the intent of Article 12 of the BIT. However, in the majority view, Article 12 does not require an artificial disaggregation of the asset's present day value into slices of various past contributions to the underlying recourses. The Russian Federation's own expert, Dr. Vygon, testified that in the real world, oil and gas assets are valued for **what they are worth at the time of acquisition** without regard to their cost history:
>
> (...)
>
> In the view of the Tribunal Majority, FMV requires a *hypothetical* transaction under "market conditions." The question is how much would a Willing Buyer pay for the assets (*e.g.,* for the Special "Use" Permits) to a Willing Seller in an "open and unrestricted market," which is the "hypothetical" situation contemplated by the Tribunal's question and Dr. Vygon's answer. The Claimants' investment in the Upstream Assets must be valued 'without the history' in accordance with orthodox methodology and the acknowledgment of Dr. Vygon." (emphasis and italics in original; footnotes omitted; "FMV" stands for 'Fair Market Value')

35. It is of course true that the value of a given asset is only indirectly affected by the cost of its creation. In principle, the value is determined by future revenues and a buyer will not be influenced by the magnitude of costs incurred by the seller in the past. However, the majority of the Arbitral Tribunal completely misses the point with the quoted considerations because it fails to recognize that investments made prior to January 1, 1992 are outside the scope of protection of the Investment Convention. Thus, if investments in a particular asset were made both before and after January 1, 1992, then the genesis history will have to be carefully examined, even if that genesis history is immaterial from the point of view of a hypothetical purchaser. Thus, in referring to the possibility of an "extension" of an investment originally made by third parties prior to January 1, 1992, this Court called upon the Arbitral Tribunal to make such an inquiry.

36. Nor is it important in this context that the amount of investment in a particular asset does not translate one-to-one into the market value of that asset. An asset can (indeed) be worth much more and much less than the costs spent on it. This is certainly true for investments in gas production, as its size is largely dependent on the success of the exploration phase, which by its nature is highly uncertain.[24] The absence of that one-to-one relationship does not change the fact that the Arbitral Tribunal should have examined to what extent expenditures before and after January 1, 1992 contributed to the value of the assets at the time of the nationalization. That doing so is complicated and that the correct allocation key would undoubtedly be matter for debate, is no excuse for omitting such an examination in defiance of Article 12 of the Convention.

(iv) No investment has been made in respect of permits and rights of use

37. By far the largest part of the compensation ordered by the majority of the Arbitral Tribunal relates to the reserves present in the gas fields as of March 17/18, 2014, namely USD 3.231 billion in principal amount. That amount relates to the entire future proceeds of those reserves. In this regard, however, Naftogaz et al. never owned those reserves and, therefore,

[24] Quantum Award, par. 346, and Dissenting Opinion, par. 27, both citing the fact that British Petroleum spent more than a billion dollars exploring a geologic formation in Alaska in 1983 without ever finding a drop of oil.

those reserves were not nationalized at the expense of Naftogaz et al. Those gas reserves were the property of the Ukrainian people according to the Constitution of Ukraine, as is recognized in the Quantum Award.[25] In order to get around that problem, Naftogaz et al. relied in the Arbitration on 18 licenses granted during the period 1999 - 2013 by the Ukrainian government to SJSC Naftogaz and to Chornomornaftogaz for exploration and extraction of natural gas in Crimea and the adjacent continental shelf. The relevant permits (as submitted by Naftogaz in the Arbitration) will be submitted as Exhibit 11 (the "**Permits**"). Annex A to this Subpoena contains a summary of the relevant data from these permits and the compensation awarded in respect thereof by the majority of the Arbitral Tribunal. The fact that the claim was based on the Permits and not on the reserves themselves, however, did according to Naftogaz et al. not prevent the value of those Permits from being equal to the value of the reserves, nor did it prevent the majority of the Arbitral Tribunal from following that approach.

38. With respect to the Permits, the majority of the Arbitral Tribunal devotes an additional consideration to the impact of Article 12 of the Investment Treaty, namely (i) that the Licenses were granted after January 1, 1992 and (ii) that the Permits gave rise to payment obligations to the Ukrainian government. The combination of these circumstances leads to the conclusion that SJSC Naftogaz and Chornomornaftogaz carried out investments after January 1, 1992, according to the majority.[26]

39. The reasoning of the majority of the Arbitral Tribunal outlined above is subject to much the same objections as the theory that the receipt of a contribution on shares necessarily implies the making of an investment. A license may according to Article 1(1)(d) of the treaty qualify as an investment, but that does not mean that being issued a license always constitutes the making an investment within the meaning of Article 12 of the Investment Treaty. Whether it is must be judged on the basis of the economic context of the issuance. For example, if a concession has been the subject of an auction, then the issuance will in principle qualify as the making of an investment. However, an auction of the Licenses apparently did not take place, while Naftogaz c.s. remained silent during the course of the Arbitration with respect to the circumstances under which they obtained the Permits. It is clear, however, that the gas fields were also operated by Chornomornaftogaz prior to the granting of the Licenses. Furthermore, it is clear that its legal predecessor already had the necessary permits for its operations in Soviet times. Thus, the presumption arises that these are not novel permits, but merely extensions or renewals of previous permits or other types of authorizations. If Naftogaz et al. were to take the position in these annulment proceedings that they made an investment by receipt of the Permits, they will have to clarify this and its economic context.

40. Added to the above is that the Licenses have always been granted by the government of Ukraine, therefore by the own (ultimate) shareholder of SJSC Naftogaz and Chornomornaftogaz. Also for this reason it is a priori implausible that the conditions of the issuance of the Licenses were such that the issuance can be seen as the making of an investment.

41. With respect to the payment obligations to which the Permits allegedly gave rise, the majority of the Arbitral Tribunal relied solely on a loose remark made by Naftogaz et al.'s legal expert (Dr. Paliashvili) at a hearing of the Arbitral Tribunal on February 22, 2022. The thrust of her

[25] Quantum Award, par. 340/1.
[26] Quantum Award, par. 352.

argument was not that the Permits were elevated to investments as a result of those payment obligations. The hearing also took place prior to the rendering of the Annulment Judgment and at that time, in accordance with the Partial Award, Naftogaz et al. still assumed that Article 12 of the Investment Treaty does not provide for a meaningful temporal limitation. The thrust of Dr. Paliashvili's argument was only that Naftogaz et al. had acquired actual ownership of the assets transferred to them upon their incorporation and that legal ownership had not been retained by the Ukrainian government (as had been argued on behalf of the Russian Federation). In this regard, the Russian Federation refers to the transcript of the relevant hearing (Exhibit 12).

42. Neither did Naftogaz et al. in the course of the Arbitration ever invoke payment obligations in connection with the Permits to the effect that they elevated the Permits to the level of investments, nor did they provide information in the course of the Arbitration about the nature and extent of those payment obligations. It can be determined, however, that in any event those payment obligations were not of a substantial magnitude, since the calculation of the value of the Permits presented by Naftogaz et al. - which the majority of the Arbitral Tribunal followed almost entirely - did not take such payment obligations into account. Should SJSC Naftogaz and Chornomornaftogaz still rely on the financial terms of the Permits in these annulment proceedings, they will also have to clarify their nature, extent and basis.

43. In the Quantum Award (pp. 78-80), the majority of the Arbitral Tribunal also provided a list of the Permits, to which, however, an agreement between Chornomornaftogaz and defendant sub (4) dated October 24, 2000 was added. The purport of that addition is not clear. The order for compensation is based on the Permits, not that agreement. Nor was that agreement nationalized. Thus, neither does that addition contribute to the majority of the Arbitral Tribunal's finding of an investment carried out after December 31, 1991.

44. Continuing the theory challenged above that receipt of a permit to which a payment obligation is attached qualifies as the making of an investment, the majority of the Arbitral Tribunal makes a comparison to a lease. In doing so, they stray to the consideration that the value of the lease does not depend on the costs involved in establishing the subject of the lease.[27] It has already been shown above that this is irrelevant in the context of Article 12 of the Investment Treaty. Nor does the analogy to a lease agreement shed any further light on the matter. Entering into a long term lease agreement could perhaps and depending on the terms of the agreement qualify as making an investment, but merely receiving permission to use another's asset is not the making of an investment, especially if that permission is granted among affiliated parties.

45. The Arbitral Tribunal adopted a similar approach with respect to pipelines and a gas storage facility in Crimea that were never owned by Naftogaz et al. but which Naftogaz et al. were allowed to use.[28] The relevant pipelines and storage facility already existed on December 31, 1991. The foregoing applies mutatis mutandis to the relevant rights of use: the acquisition of a right of use is not the making of an investment, at least not always. The Quantum judgment makes no further mention of the nature of these rights of use, and generally Naftogaz et al. have not even been able to say when they allegedly received the rights in question. (See the repeated mention of "Sometime after February 4, 1999"). Therefore, there is no basis for the

[27] Quantum Award, par. 358.
[28] Quantum Award, par. 504; see the second part of the list therein, at pp. 142 and 143.

view that the receipt of the usage rights in question would qualify as the carrying out of an investment.

Conclusion

46. In Soviet times, gas was extracted in Crimea by "Chornomornaftogaz", and on March 17/18, 2014, this was still the case. The nature and extent of gas extraction had obviously not remain unchanged in the twenty-four years that had passed since the collapse of the Soviet Union, but the activities as they were on March 17/18, 2014, were a logical extension of gas extraction as they were on December 31, 1991. The other changes since December 31, 1991 were of a formal nature. 'Chornomornaftogaz' is no longer a state company, but a separate legal entity, and some of the activities were carried out by its group companies, but the state is still the sole beneficiary. The applicable licenses are no longer the same, but the required licenses were in place on both December 31, 1991 and March 17/18, 2014. Thus, the gas extraction in Crimea is not a new investment, but an investment that for the most part already existed on December 31, 1991. Therefore, the offer of arbitration in Article 9 of the Investment Treaty does not cover that investment, but only the additions since December 31, 1991.

D. Lack of reasons

47. As discussed above, the bulk of the compensation which the Russian Federation was ordered to pay consists of the value attributed to the Permits, with that value determined on the basis of the total remaining revenues from the relevant gas fields. In doing so, the Arbitral Tribunal relied on a projection of future gas production, predicting that following nationalization, gas production would first have increased, peaked around 2025 and then declined. [29]

48. The approach described above is illogical because the Permits do not have a perpetual term. The end date of the Permit is mentioned on each Permit (Exhibit 11 and see Annex A). In some cases, that end date is in the distant future, but in most cases, the Permit would have expired prior to 2025. The Permits related to the two main fields - Odeske and Shtormove - have end dates in 2018 and 2023 respectively. Assuming not the remaining lifespan of the fields themselves but the remaining period of the Permits has a far-reaching effect on the size of the compensation due, in the range of several billion dollars.

49. Naftogaz et al. did not explain in the course of the Arbitration why the calculation of damages should be based on the remaining lifespan of the fields, instead of the remaining term of the Permits. The latter method of calculating damages is indeed the logical consequence of Naftogaz et al.'s own argument that the issue is not the expropriation of the gas reserves (which never belonged to Naftogaz et al.), but the expropriation of the Permits.

50. The defense outlined above - involving an interest of several billions - was disposed of by the majority of the Arbitral Tribunal as follows:[30]

> "**In the view of the Tribunal majority**, the Russian Federation would be concerned about instability in the production and distribution of gas if permit renewals were refused to a Willing Buyer. No one but the Willing Buyer would posses the

[29] See the chart in par. 481 of the Quantum Award.
[30] Quantum Award, par. 414.

> infrastructure to mobilize in a reasonable time production for Crimea users and continued exploration. In the view of the Tribunal majority, the Willing Buyer would have had no difficulty in securing renewal of the licenses through the Transition Period and beyond. No discount is justified in respect of permit renewal risk." (emphasis in original; the "Willing Buyer" is a hypothetical buyer used as a gauge to determine the market value of the Permits)

This passage is profoundly incomprehensible. The majority of the Arbitral Tribunal seems to consider that the Russian Federation would have been under some time pressure and, for the sake of security of supply in Crimea, would always have chosen to renew expiring Permits. What would have caused that time pressure is not explained. Of the Permits, only one would have expired within a year, namely the permit relating to the marginal Kerchenske fields. With respect to all other fields, the Russian Federation would still have at least until January 6, 2017, to prepare for the transition to a new operator. It is impossible that the majority of the Arbitral Tribunal had a different view of the dates on which the Permits would expire, as this is expressly drawn to their attention in the Dissenting Opinion,[31] whilst the Quantum Award shows that the majority of the Arbitral Tribunal took careful note of that opinion prior to the issuance of that award.[32] From the words quoted above, moreover, it appears that the majority of the Arbitral Tribunal is indeed of the opinion that replacement of (the hypothetical successor of) Naftogaz et al. by other operators would have been impossible even in the medium term, because it believes that renewal of the Licenses would have been self-evident even after the 'Transition Period'. By the "Transition Period," the majority refers to the period up to January 1, 2015. [33]

51. Why replacement of (the successor of) Naftogaz et al. by another operator would have been impossible even in the term of some years (so that the Russian Federation would have necessarily opted for renewal of expiring licenses) does not appear from the Quantum Award. It says that only the "Willing Buyer" (i.e.: the hypothetical buyer of the investment) would have had the necessary infrastructure to mobilize for users in Crimea and for continued exploration within a reasonable period of time, but what is meant by those words is a mystery. What needs to be mobilized and why would someone else not be able to do that within a multi-year time frame? (While the reality is that gas production was taken over on a term of a few *days* in 2014.) What is meant by the infrastructure? (Conceivably it refers to the pipelines and storage facility in Crimea, but for the most part, these were not owned by Naftogaz et al, as is expressly recognized in the Quantum Award. Moreover, if necessary, the Russian authorities could have nationalized the said infrastructure as part of the transition to a new operator, as only nationalization without compensation is prohibited.) Does the majority maybe mean that the grantor is actually always compelled to renew a concession? (Which is nonsense.) We can only guess at the intended meaning of the quoted justification, and any possible interpretation of those words immediately conflicts with the established facts.

52. To avoid any misunderstanding, it is noted that the majority of the Arbitral Tribunal cannot have meant that without the annexation/incorporation, the renewal of the Permits would have been unproblematic. The Arbitral Tribunal correctly assumed that only the nationalization is before it for review and that the reality of the annexation/incorporation as a historical fact

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[31] Dissenting Opinion, par. 89 - 91.
[32] See, e.g., Quantum Award, para. 344 et seq., 347 et seq. and 505 et seq., in each case commenting on the Dissenting Opinion.
[33] Quantum Award, par. 286(e)(i).

must be the starting point for the calculation of damages.[34] Thus, the majority's verdict amounts to saying that permits that had been granted by Ukrainian authorities would be renewed by Russian authorities in the years following 2014 as a matter of course (even though these are permits that, according to Naftogaz et al., are extremely lucrative for their holders). All this is a fool's errand.

53. Reasons were given for the decision that the damage calculation was to be based on the remaining lifespan of the gas fields instead of the remaining term of the Licenses, but only with the passage discussed above. It has been shown above that those reasons - also in light of the financial interest involved in the damage calculation methodology - is so flawed that it must be equated with a complete lack of reason.[35] The conditions for setting aside the Quantum Award on the ground mentioned in article 1065 paragraph 1 under (d) Rv have therefore been satisfied.

54. Finally, attention is drawn to the striking discrepancy in the Quantum Award between, on the one hand, the application of the test of Article 12 and, on the other hand, the damage calculation methodology. Where Article 12 is concerned, in the view of the majority of the Arbitral Tribunal, the issuance of permits by Naftogaz c.s.'s own shareholder is an event of such importance that it should be considered as the carrying out of an investment within the meaning of Article 12. However, where the damage calculation methodology is concerned, the renewal of expiring licenses by a foreign power is a matter of course to which hardly any words need be wasted.

E. Grounds for annulment in connection with the cassation appeal

55. As discussed in the introduction, the Russian Federation has lodged an appeal in cassation against the Annulment Judgment. This chapter provides grounds for annulment that will apply if the cassation appeal should succeed and the Partial Award is annulled in its entirety or to a greater extent than pronounced in the Annulment Judgment, possibly after referral by the Supreme Court. In that case, the Quantum Award cannot stand either, since it builds on the part of the Partial Award (or the part of it that remained intact after the Annulment Judgment).

(a) Territory

56. The Investment Treaty - and thus the offer of arbitration in Article 9 - applies only to investments made by an investor of one contracting party in the territory of the other contracting party. This follows both from the definition of "investment" in Article 1(1) and Article 12 of the treaty. With respect to Naftogaz et al.'s alleged investments, this condition is not met. To the extent that Naftogaz et al. made any investments at all, they made them when Crimea was (still) Ukrainian territory, making it a domestic investment and not a cross-border investment as required by the treaty. Moreover, current Russian sovereignty over Crimea is not recognized by Ukraine (nor by the Netherlands), while such (recognized) sovereignty is required in order to speak of the territory of the Russian Federation within the meaning of the treaty (and whilst neither the Arbitral Tribunal nor the Dutch state courts have the authority to rule on the territorial conflict between Ukraine and the Russian Federation).

[34] Quantum judgment margins 367-370.
[35] HR December 22, 2006, NJ 2008/4 (*Kers/Rijpma*).

(b) Lack of reasons

57. If, as the outcome of the cassation appeal, the Partial Award is annulled in its entirety or beyond what was pronounced in the Annulment Judgment, the Quantum Award will be up in the air. After all, the Quantum Award concerns only the extent of the Russian Federation's liability and it contains nothing about the grounds for liability. The relevant grounds are provided in the Partial Award, but if the Partial Award is (further) set aside, that award no longer exists in law. In that case, the situation to which Article 1065(1)(d) Code of Civil Procedure refers pre-eminently arises, namely that the arbitral award is not supported by reasons. In that case, therefore, the Quantum Award should also be set aside.

F. Grounds for annulment in connection with interpretation of the Annulment Judgment

58. In the appeal in cassation, the Russian Federation lodged a cassation complaint based on the interpretation of the Annulment Judgment that, as far as the operative part of the Partial Award is concerned, only part (a) is affected, in which the Arbitral Tribunal declared itself to have jurisdiction over all claims of Naftogaz et al., but that part (b), in which it was held that the Russian Federation had violated its obligations under Articles 2, 3 and 5 of the Investment Treaty, remained intact. In case that reading is incorrect and part (b) of the operative part has also been set aside, the situation described above already arises that the Quantum Award lacks a statement of reasons regarding the liability of the Russian Federation, so that it must be set aside on the ground mentioned in Article 1065(1)(d) Code of Civil Procedure. Moreover, the manner in which the Quantum Award was made is in that case contrary to public policy. After all, the Arbitral Tribunal did not give the Russian Federation any more opportunity to put forward a substantive defence following the issuance of the Annulment Judgment, whereas at that time and in this reading of the Annulment Judgment, the Arbitral Tribunal still had to rule on liability. Such a fundamental violation of the adversarial principle necessitates annulment of the Quantum Award pursuant to Article 1065(1)(e) of the Code of Civil Procedure.[36] [footnote referring to the tribunal's refusal to reopen proceedings in respect of matters resolved in the Partial Award in procedural order No. 8]."

FOR THESE REASONS: may it please the Court of Appeal of The Hague to set aside by judgment, enforceable to the fullest extent permitted by law, the arbitral award of April 12, 2023 rendered between the parties in PCA Case No. 2017-16, jointly and severally ordering the defendants to pay the costs of the proceedings.

Bailiff

[36] Bye mans of its 'procedural order No. 8' of 6 October 2019, the Arbitral Tribunal had already expressly refused to allow for debate in respect of the topics resolved in the Partial Award; See Quantum Award, par. 84.