IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joint Stock Company State Savings Bank of Ukraine (a/k/a JSC Oschadbank), Petitioner, v. The Russian Federation, Respondent.	CIVIL ACTION NO. 1:23-cv-00764 (ACR)

PROFESSOR YVES NOUVEL
INTERNATIONAL LAW EXPERT REPORT
ON THE 1998 AGREEMENT BETWEEN THE CABINET OF MINISTERS OF UKRAINE AND THE GOVERNMENT OF THE RUSSIAN FEDERATION ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

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INTRODUCTION

1. I have been asked by Marks & Sokolov, LLC, on behalf of the Russian Federation, to opine on whether the Russian Federation ("**RF**") offered to arbitrate and whether the Tribunal had jurisdiction over the claims addressed by the Arbitral Award, dated November 16, 2018, in *JSC Oschadbank v. Russian Federation*, PCA Case No. 2016-14, under the 1998 Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Reciprocal Protection of Investments ("**BIT**" or "**Treaty**"), ECF 1-3.

QUALIFICATIONS

2. I am a professor of law at Panthéon-Assas University in Paris, France, where I teach International Economic Law, International Investment Law and International Trade Law. I have been a full professor for 25 years and a member of the Paris Bar since 2005. My areas of expertise include International Law and Arbitration Law. My native language is French, and I am fluent in English.

3. I have an "Agrégation" in Public Law (qualification required to be certified to teach in French universities), a Diploma for Advanced Studies in Philosophy from Sorbonne University, a Bachelor's Degree in International Economic Law, and a Ph.D. in International Law from the Sorbonne Law School. I have been a counsel in ICSID and UNCITRAL arbitration proceedings and an expert in international proceedings under UNCITRAL Rules before French, British, Dutch and Swedish courts. I have also been a member of tribunals in international arbitration proceedings, including investment treaty arbitrations. I have written numerous articles on international law. A copy of my Curriculum Vitae is attached.

4. I certify that the translations of the excerpts of the authorities attached to the present opinion as Exhibits YN 110 and YN 164, described in "Annex 1/List of Exhibits" to the opinion, are true and accurate translations from French into English.

SUMMARY OF OPINION

5. Based on the BIT and international law, including the principles of interpretation under the Vienna Convention on the Law of Treaties, my opinion is:

6. ***First***, the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because Crimea was not considered territory of the RF under Article 1(4) and other BIT Articles when the BIT was executed in 1998 and entered into force in 2000 (No jurisdiction *Ratione Voluntatis*).

7. ***Second,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because Oschadbank rejected the RF's offer to arbitrate under Article 9 (No jurisdiction *Ratione Materiae, Ratione Voluntatis*).

8. ***Third,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims to the extent Oschadbank's investment in Crimea was made before January 1, 1992 under Article 12 (No jurisdiction *Ratione Temporis*).

9. ***Fourth,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because Oschadbank's investment in Crimea was not in conformity with the RF banking law under Article 1(1) (No jurisdiction *Ratione Materiae*).

10. ***Fifth,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because there was no mutual understanding that Crimea was the territory of the RF under Article 1(4) and other BIT Articles (No jurisdiction *Ratione Loci*).

11. ***Sixth,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because Oschadbank's investment was not cross-border when made under Articles 1(1), 1(2), and 12 (No jurisdiction *Ratione Materiae, Ratione Personae*).

12. ***Seventh,*** the RF did not offer to arbitrate and the Tribunal lacked jurisdiction over the claims because there was no mutual agreement that Crimea was the territory of the Russian

Federation, as evidenced by the *Notes Verbales* interpreting similar BITs by 13 countries and the European Union.

MATERIALS REVIEWED

13. In addition to the authorities referenced in this report, I reviewed the following documents:

a. Petition of Joint Stock Company State Savings Bank of Ukraine (JSC Oschadbank) ("**Oschadbank**" or "**Petitioner**") to confirm November 26, 2018 arbitral award ("**Award**") against the Russian Federation ("**RF**") in arbitration proceeding *JSC Oschadbank v. The Russian Federation*, PCA No. 2016-14 ("**Petition**") (ECF 1), and the Award itself (ECF 1-2).

b. Pleadings in set-aside proceedings between the RF (Claimant) and Oschadbank (Respondent) before the Paris Court of Appeal, Case No. 19/04161, and French Court of Cassation, Case No. 21-15.390.

c. English translation of the RF-Ukraine BIT set forth in Exhibit B to the Petition (ECF 1-3).

d. *Travaux Préparatoire*s of the BIT set forth in Exhibits YN 135, 136, 138.

e. *Notes Verbales* sent by the RF to 13 countries and the European Union and *Notes Verbales* received in response, attached as Exhibits 21-35 to Declaration of Thomas C. Sullivan filed contemporaneously, and Summary Chart of these responses, attached as Exhibit 20 thereto.

f. The Russian Federation BITs with Armenia; Azerbaijan; Lithuania; Moldova; Kazakhstan; Tajikistan; Turkmenistan; Uzbekistan; 2014 Eurasian Economic Union Treaty among the RF, Belarus, and Kazakhstan (in English translations).

ASSUMPTIONS

14. I reviewed and was instructed to assume that the conclusions in the banking expert report of Professor Elizaveta Lauts, Ph.D. are correct.

15. I reviewed and was instructed to assume that the translation of the BIT terms from the Russian and Ukrainian languages into the English language as forth in the translation expert report of Alexandre Ponomarev is accurate.

SOURCES OF CUSTOMARY INTERNATIONAL LAW

16. I have been advised that the below reflects the position of United States courts on sources of customary international law. In drafting my opinion, I have taken these sources into account because they are applicable to both international and American legal orders.

17. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), the U.S. Supreme Court observed "the law of nations … may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 160-61. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("[T]rustworthy evidence of what [international] law really is" can be found in "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.") (quoting *The Paquete Habana,* 175 U.S. 677, 700 (1900)).

18. United States courts look to the "current state of international law by consulting sources identified by Article 38 of the Statute of the International Court of Justice ('ICJ Statute'), to which the United States and all members of the United Nations are parties." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 175 (2d Cir. 2009) (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003) ("Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law.").

19. "These sources consist of:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations; and
>
> (d) …judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Abdullahi, 562 F.3d at 175 (quoting ICJ Statute, Art. 38(1)).

20. In preparing my opinion, I have sought sources of this nature in order to provide answers in international law to the questions on which I have been asked to opine.

VIENNA CONVENTION ON THE LAW OF TREATIES

21. The Vienna Convention on the Law of Treaties ("**VCLT**") codifies the rules that guide treaty relations between States and provides an international legal framework for these relations in times of peace. This framework includes the rules on the conclusion and entry into force of treaties, their observance, application, interpretation, amendment and modification, and rules on the invalidity, termination and suspension of the operation of treaties.

OPINION

22. Article 12, entitled "Application of the Agreement," stipulates: "This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party [starting from] 1 January 1992".[1] Article 12 circumscribes the application of the BIT, including its arbitration provision in Article 9, and, therefore, the scope of the offer to arbitrate (jurisdictional consent) under the BIT.

23. Provisions in an investment treaty which define the application of the treaty establish the limits of the offer to arbitrate. "A treaty may also include a separate article entitled 'scope of application.' A person, organization, transaction, or asset that falls outside of one of the

[1] This opinion uses the translation of the BIT applied in the arbitration and the French annulment proceedings, submitted as Exhibit B (ECF 1-3) to the Petition in this action, as corrected by the expert report of translation expert Ponomarev. According to Ponomarev, Article 12 states that the BIT applies to investments made "*starting from*" January 1, 1992, whereas the translation "as of" January 1, 1992 is incorrect. *See* Ponomarev Translation Report, ¶¶6-8, filed contemporaneously. Emphasis is added unless otherwise noted. The exhibits to this Report are labeled beginning with "YN 100" to distinguish them from exhibits to my Service Report. "Article" refers to articles of the BIT unless otherwise noted.

treaty's terms of the scope of the treaty's application is not entitled to benefit from its provisions." J.W. Salacuse, *The Law of Investment Treaties* (3rd ed. 2021), Ex. YN 100, at 206. As Salacuse explains, "The treaty's definitions and scope of application affect ***the jurisdiction of any international arbitral tribunal*** adjudicating a dispute brought under its provisions." *Id*., at 205.

24. As reflected in treatises and commentaries by prominent scholars, international law treats limitations on the application of an investment treaty as jurisdictional.[2] These limitations are conditions for an arbitration tribunal's jurisdiction under international law, as also reflected by arbitral decisions.[3]

25. Article 12 determines the critical date for making an investment (*ratione temporis*) – starting from January 1, 1992 – and its territoriality based on definitions in Articles 1(1), 1(2), and 1(4) (*ratione loci*) – the territory of the other Contracting Party in which the investment is made by an eligible investor. These criteria govern all concrete legal rules deriving from the

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[2] *See*, *e.g.*, E. De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (2014), Ex. YN 101, at 132 ("[I]nvestment agreements contain provisions delimiting the scope of application of the treaty, and thus ***the jurisdiction of tribunals*** established under that treaty."); Y. Radi, *Rules and Practices of International Investment Law and Arbitration* (2020), Ex. YN 102, at 30 ("Whether persons and their assets fall within the scope of application of IIAs [International Investment Agreements] … plays a pivotal role with regard to the benefit of the procedural protection conferred by the agreements, namely investor-State arbitration and the establishment of the ***jurisdiction of arbitration tribunals***."); I. Chankseliani, *Notion of direct investment in non-ICSID investment treaty arbitration*, Law and World, No. 17, April 2021, Ex. YN 103, at 39 ("The scope of an investment treaty's application has at least two important legal ramifications. First, a contracting state owes obligations under the treaty only to those investors and investments that fall within the treaty's scope of application or treaty definitions. Second, the treaty's definitions and scope of application affect ***the jurisdiction of any international arbitral tribunal*** adjudicating a dispute brought under its provisions.").

[3] *See*, *e.g.*, *Rafat Ali Rizvi v. Indonesia*, ICSID No. ARB/11/13 (2013), Ex. YN 104, ¶222 ("[The UK-Indonesia] BIT Article 2 is entitled 'Scope of the Agreement'. It sets out conditions that need to be fulfilled in order for the BIT to apply to an investment (as defined in Article 1). ***Both the definition of investment and the admission requirement clearly have a jurisdictional dimension***; if there is no investment, or ***if the investment has not [met the specified conditions], there is no jurisdiction.***") (declining jurisdiction where conditions were not satisfied).

Treaty, including the offer of arbitration in Article 9. Accordingly, Article 9 arbitration provision applies to investments in the territory of the RF only if the following conditions are met: (i) the investment was made on or after January 1, 1992, and (ii) "investment", "investor", and "territory of the RF" meet the definitions in Articles 1(1), 1(2), and 1(4), incorporated in Article 12. These limitations are jurisdictional.[4]

I. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Over Investments In Crimea Because Crimea Was Contemporaneously Considered Ukrainian Territory Under Article 1(4) And Other Articles When The BIT Was Executed And Came Into Force

26. The BIT was executed in 1998, entering into force in 2000. At that time, the RF and Ukraine both considered Crimea as Ukrainian territory and not within the "territory of the Russian Federation" under Article 1(4) and other BIT Articles related to "territory". Ukraine unequivocally continues to hold this position.

27. Consent is the cornerstone of all treaty commitments. In *Daimler Financial Services AG v. Argentina*, ICSID No. ARB/05/1 (2012), Ex. YN 106, the Tribunal stated:

> In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent of the contracting parties as expressed in the text. To go beyond those bounds would be to act *ultra vires*. … The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. … [I]t is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established … Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence.

[4] *See, e.g., Mesa Power Group LLC v. Canada*, PCA No. 2012-17 (2016), Ex. YN 105, ¶¶324-326 ("[NAFTA] Article 1101 circumscribes the scope of application of the treaty, and Article 1116(1) gives indications about the relevant breaches… ***The scope of application so defined limits the Tribunal's jurisdiction*** for the obvious reason that the latter derives from the dispute settlement provisions embodied in Chapter 11.") (declining jurisdiction because there was no foreign investment at the relevant time).

Id. ¶¶172-175 (holding Tribunal could not interpret the "German-Argentine BIT in an evolutive way so as to achieve the enlarged meaning desired by the Claimant," *id*. ¶278).

28. "The ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty... termed the 'principle of contemporaneity.'" I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), Ex. YN 107, at 124. "The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in light of current linguistic usage, at the time when the treaty was originally concluded." G. Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BYIL 203 (1957), Ex. YN 108, at 212.[5]

29. This principle is well recognized and followed. For example, in *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 25 Rep. of Intl. Arb. Awards (2002), Ex. YN 112, the tribunal agreed that "in interpreting the Treaties it should apply the doctrine of 'contemporaneity.' …***a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time.*** The [Tribunal] agrees with this approach and has borne it in mind in construing the Treaties." *Id.* ¶3.5. In *Rights of Nationals of*

[5] *See, e.g.,* J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), Ex. YN 109, at 367 ("[T]he language of the treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion, and also in the light of the contemporaneous meaning of terms."); M. K. Yasseen, *L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, Collected Courses of the Hague Academy of International Law, 1976-III, vol. 151, Ex. YN 110, at 26-27, ¶7 ("[T]he ordinary meaning must be that of the time of conclusion of the treaty. … It would be artificial to impute to the parties the intention to have, from a linguistic point of view, employed the words in an evolutionary manner."); Richard A. Lord, 11 Williston on Contracts § 32:7 (4th ed. 1999), Ex. YN 111, at 434-35 ("In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution.").

the United States of America in Morocco (France v. United States of America), Judgment, I.C.J. Reports 1952, p. 176, Ex. YN 113, the court resolved differing interpretations of the word "dispute" in the Treaty of 1836 between France and the United States, based upon "***the meaning of the word 'dispute' at the times when the two treaties were concluded***" in 1836, which covered both civil and criminal disputes at that time. *Id.* at 188, 189, 212.[6]

30. ***First,*** based on the principle of contemporaneity, the "territory of the Russian Federation" did not include Crimea under Article 1(4) and other BIT Articles related to territory. To the contrary, when the BIT was executed in 1998 and came into force in 2000, the RF and Ukraine considered Crimea to be Ukrainian territory. If the RF and Ukraine wished to change the "territory of the Russian Federation" to include investments made by Ukrainian investors in Crimea after Accession based on mutual consent, they must at least agree on the new meaning of the term "territory of the Russian Federation." They never did.

31. ***Second***, no principle of customary international law or the VCLT permits approaches to interpreting a bilateral investment treaty that are expansionist, revisionist, or based upon fictitious "***as if***" assumptions, which are contrary to the contemporaneous understanding of a treaty. Simply, "it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." *Yearbook of the International Law Commission*, 1964, vol. II, Ex. YN 116, at 202, ¶9.[7]

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[6] *See also Kasikili/Sedudu Island (Botswana/Namibia),* Judgment, I.C.J. Reports 1999, p. 1045, Ex. YN 114, ¶25 (interpreting phrases as of the time when the Anglo-German Agreement of 1890 was concluded); *The Czech Republic v. European Media Ventures SA*, [2007] EWHC 2851 (Comm), Ex. YN 115, ¶36 ("[T]he 'ordinary meaning' is the meaning attributed to those terms at the time the treaty is concluded.").

[7] *See*, *e.g.*, *Oppenheim's International Law, Vol I: Peace* (R. Jennings & A. Watts eds., 9th ed. 2008), Ex. YN 117, at 1271-72 (same); *Planet Mining Pty Ltd v. Indonesia*, ICSID No. ARB/12/14 and 12/40 (2014), Ex. YN 118, ¶169 ("Tribunal cannot change the text").

32. Accordingly, the RF never offered to arbitrate claims based on investments made by Oschadbank in Crimea, which when the BIT was executed was not in the "territory of the Russian Federation" under Article 1(4) and other Articles in the BIT. Without such an offer by the RF, the Tribunal lacked jurisdiction over such claims.

II. No Agreement To Arbitrate Was Formed Under Article 9 Because Oschadbank Rejected The RF's Offer

33. An investment treaty (like the BIT) constitutes a state's standing offer to arbitrate, which the investor may accept by submitting a notice of arbitration which accepts the state's offer. Numerous well known United States cases explain this, such as *BG Group, PLC v. Argentine Republic*, 572 U.S. 25 (2014) and *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015). Here, assuming RF's offer to arbitrate applied to Crimea, no agreement to arbitrate was formed because Oschadbank's Notice of Arbitration rejected the RF's offer to arbitrate.

34. "It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer *as made*." *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID No. ARB/10/1 (2013), Ex. YN 119, ¶6.2.1. "Any qualification of, or departure from, those terms, invalidates the offer…" *Eliason v. Henshaw,* 17 U.S. 225, 228 (1819). This principle applies fully to international arbitration agreements formed under investment treaties. *See* Salacuse, *Investment Treaties,* Ex. YN 100, at 532 ("Arbitral jurisdiction requires the consent of the parties."); C. Schreuer, *Chapter 21: Consent to Arbitration, in* The Oxford Handbook of International Investment Law (P. Muchlinski, F. Ortino & C. Schreuer eds. 2008), Ex. YN 120, at 836-837 ("A provision on consent to arbitration in a BIT is merely an offer by the respective States that requires acceptance by the other party.").

35. The State is entitled to "shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an 'offer to arbitrate' is

made to the foreign investors." *ST-AD GmbH v. Bulgaria*, PCA No. 2011-06 (2013), Ex. YN 121, ¶337. On the other hand, the investor cannot use acceptance to redefine the state's offer. The offer alone defines the scope of acceptance. In this respect, "the investment treaty presents a 'take it or leave it' situation." *ICS Inspection and Control Services Limited v. Argentina*, PCA No. 2010-9 (2012), Ex. YN 122, ¶272. "If the terms of acceptance do not correspond with the terms of the offer, there is no perfected consent." C. Schreuer, *Consent to Arbitration, in* UNCTAD Course on Dispute Settlement, ICSID, Module 2.3, Ex. YN 123, at 30.

36. In the BIT, the RF offered to arbitrate claims arising from investments that were mutually agreed to be in its territory. *See* Article 1 ("in the territory of") (three times); Arts. 2(1), 3, 4 ("in its territory"); Arts. 5(1), 6, 8 ("in the territory of"); Art. 9(2) ("in whose territory"); Art. 12 ("in the territory of"). However, Oschadbank did not accept that offer.

37. Instead, its Notice of Arbitration attached explicit objections to the territorial condition of the investment: "Oschadbank ... rejects entirely the grounds, legal or otherwise, on which the RF purports to have annexed Crimea and proclaimed it to be part of its sovereign territory." Notice of Arbitration, Ex. YN 124, ¶16. Oschadbank recognized, however, that the RF only offered to arbitrate investments in its territory, and that its rejection that Crimea was the territory of the RF was a rejection of the RF's offer to arbitrate.

38. In an attempt to circumvent this, Oschadbank stated that "[c]laimant's investments ***must be treated as if they were located in Russian territory for purposes of the Treaty***." *Id.*, ¶18. However, the RF did not offer to arbitrate claims arising from investments "as if" they were "in Russian territory for purposes of the Treaty," but not for other purposes.

39. Arbitral tribunals make a clear distinction between "an acceptance of the offer to arbitrate on the terms on which the offer was made" and a "counter-offer on different terms."

Hochtief AG v. Argentina, ICSID No. ARB/07/31 (2011), Ex. YN 125, ¶25. The investor "could only accept the offer of arbitration as it was presented and not as it would have liked to receive it." *Guaracachi America, Inc., and Rurelec PLC v. Bolivia*, PCA No. 2011-17 (2014), Ex. YN 126, ¶392.

40. Oschadbank's response to the RF's offer constitutes a rejection of the offer, and a counter-offer by Oschadbank to arbitrate claims arising from investments which are only deemed to be made in RF territory for arbitration purposes of the BIT and none other. RF did not accept this counter-offer, and therefore, no agreement to arbitrate was formed.

III. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Under Article 12 Over Investments Made Prior to January 1, 1992, Which Fall Outside The Temporal Application of The BIT (Jurisdiction *Ratione Temporis*)

41. Article 12 reads: "This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party ***[starting from] 1 January 1992.***"[8] Under international law, based on Article 12, the RF only offered to arbitrate investments made on or after ("starting from") January 1, 1992, and the Tribunal lacked jurisdiction over investments made before that date.

A. *Ratione Temporis* Limitations In Investment Treaties Are Jurisdictional

42. Under international law, a temporal restriction clause governing the application of an investment treaty creates a limitation on the offer to arbitrate and the jurisdiction of the tribunal. Specifically, "application of [a treaty] in terms of time defines … the jurisdiction of the Tribunal *ratione temporis*." *Marvin Roy Feldman Karpa v. Mexico*, ICSID No. ARB(AF)/99/1 (2000), Ex. YN 127, ¶62.

43. In *Mesa Power Group LLC v. Canada*, PCA No. 2012-17 (2016), Ex. YN 105, the

[8] See note 1 *supra* concerning the translation "starting from" January 1, 1992.

tribunal analyzed jurisdiction *ratione temporis* under Article 1101 of the NAFTA, which limited its application to "Investments of Investors of another Party in the territory of the Party." The tribunal concluded that its "jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an 'investor' holding an 'investment,'" observing that "***[i]nvestment arbitration tribunals have repeatedly found that they do not have jurisdiction ratione temporis unless the claimant can establish that it had an [eligible] investment*** at the time the challenged measure was adopted." *Id.* ¶¶324-327. *See also*, *e.g.*, *Westmoreland Mining Holdings, LLC v. Canada*, ICSID No. UNCT/20/3 (2022), Ex. YN 130, ¶204 (same).

B. Article 12 Is Jurisdictional Based On Principles Of Treaty Interpretation And International Law Under VCLT Article 31(1) and (2)

44. "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." VCLT Art. 31(1).

45. ***First,*** the ordinary meaning of this language is clear: the BIT only applies to investments made starting from January 1, 1992, to the exclusion of any investments made prior to that date. As explained *supra*, at 5-7, this limitation applies to the entire BIT and all substantive and procedural provisions, including the arbitration clause. In another Crimea case brought by a Ukrainian claimant against the RF under the BIT, the tribunal clearly identified the jurisdictional impact of Article 12: "The Tribunal noted in … the Partial Award that the Treaty itself is not without temporal limitations. Article 12 restricts protection to investments made 'on or after January 1, 1992.' […] The Tribunal accepts, of course, … that it ***only ha[s] jurisdiction to adjudicate investments made on or after 1 January 1992.***" *NJSC Naftogaz of Ukraine v. The Russian Federation*, PCA No. 2017-16 (2023), Ex. YN 131, ¶¶2, 6. In the same case, the Dutch court that reviewed the Partial Award confirmed that the arbitral tribunal "***has jurisdiction only***

to rule on investments made on or after January 1, 1992." *The Russian Federation v. NJSC Naftogaz of Ukraine*, Court of Appeal at The Hague, Civil Law Div., Case No. 200.274.564/01, Judgment (2022), Ex. YN 132, ¶5.7.6.

46. ***Second,*** the choice of January 1, 1992 as a backstop date is not random or arbitrary: the intention of the Parties was to protect only those investments made after the dissolution of the USSR on December 31, 1991. The *ratio legis* of this special provision was to place outside the protection of the BIT preexisting operations that were created in the USSR.

47. ***Third***, this special provision became a standard feature of the RF's investment treaties with other countries of the former USSR. All of those treaties excluded investments from the Soviet period and, with two exceptions, the treaties include the same language, "starting from January 1, 1992." [9] This provides important supporting context to the interpretation of Article 12.

48. ***Accordingly***, Article 12 is jurisdictional based on the ordinary meaning of its terms, object, purpose, and relevant context, pursuant to VCLT Articles 31(1) and (2).

C. Ukraine Agrees Article 12 Is Jurisdictional

49. In the arbitration proceedings, Ukraine filed a non-disputing party submission, which agreed that the BIT applies only to investments made after the dissolution of the USSR: "[T]he Treaty was written to protect pre-existing investments (***covering the period from 1992, shortly after the dissolution of the USSR***, to 1998, when the treaty was concluded)." ... ***[S]o long as the investment was made after January 1, 1992***, it is irrelevant whether the Treaty applied at that time." Submission of Ukraine, Ex. YN 133, ¶32.

[9] *See* RF Former USSR Member BIT Chart, Ex. YN 134, showing BITs with Azerbaijan (2014), Art. 12; Lithuania (1999), Art. 13; Moldova (1998), Art. 13; Tajikistan (1999), Art. 13; Turkmenistan (2009), Art. 2; Uzbekistan BIT (2013), Art. 11. BITs with Armenia (2001), Art. 10 ("after the entry into force") and Kazakhstan (1998), Art. 13 ("starting from December 16, 1991") (same clause in the 2014 Eurasian Economic Union Treaty among the RF, Belarus, and Kazakhstan) use different language, but also exclude investments made before the USSR's dissolution.

D. The *Travaux Préparatoires* Confirm Article 12 Is Jurisdictional

50. Pursuant to VCLT Art. 32, the preparatory work (*travaux préparatoires*) and the drafts of the BIT confirm that Article 12 is jurisdictional. The *travaux préparatoire*s reflect that the RF and Ukraine negotiated the temporal scope of the Treaty. They show that Ukraine proposed at least three times a very broad scope of temporal application of the BIT, seeking to extend its protection to all investments, irrespective of when they were made.

51. Thus, in a 1994 draft of the BIT prepared by the Ministry of Economy of Ukraine, Ukraine proposed wording that encompassed all investments, including those made during the Soviet period:

> This Treaty shall apply to the ***investments carried out*** on the territory and in accordance with the laws of one Contracting Party by investors of the other Contracting Party ***both prior to and after the effective date*** of this Treaty.[10]

52. In a revised 1997 draft, the same wording extending coverage to investments made during the Soviet period was again suggested by the Ukrainian side:

> The terms and conditions of this Treaty shall be applied to ***investments carried out*** by investors of each Contracting Party ***both before and after this Treaty comes into effect*** and be applied with effect from its coming into effect.[11]

53. By the January 19-21, 1998 negotiation meeting, the parties' differing positions on the draft BIT's temporal application had not been reconciled. The BIT draft prepared as a result of the meeting still included two alternative formulations, with the language proposed by the RF appearing in parentheses and the language proposed by Ukraine in square brackets:

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[10] Letter No. AS-419 from the Administrative Control Department of the Ministry of Finance of the Russian Federation to the Acting Minister of Finance of the Russian Federation, September 8, 1994 (Ex. YN 135), 1994 Draft BIT, Art. 10.

[11] Letter No. 23-06/168 from the Ministry of Foreign Economic Relations and Trade of Ukraine to the Ministry of Economy of the Russian Federation, April 4, 1997 (Ex. YN 136), 1997 Draft BIT, Art. 12.

> This Treaty shall be applied to all ***investments carried out*** by investors of either Contracting Party on the territory of the other Contracting Party (***since 1 January 1992***) [***both before and after this Treaty comes into effect and be applied with effect from its coming into effect***].[12]

54. The RF's proposed backstop date was designed to include only foreign cross-border investments made between the RF and Ukraine as newly independent sovereign States, which was not possible prior to 1992 while the USSR was still in existence. In the end, Ukraine accepted this proposal and the final executed version of Article 12 contains the backstop date of January 1, 1992.

55. Accordingly, under VCLT Article 32, based on the BIT's *travaux préparatoires*, the RF's offer to arbitrate and the Tribunal's jurisdiction *ratione temporis* was limited to investments starting from January 1, 1992. Any consideration of Oschadbank's investments made prior to January 1, 1992 was outside the RF's offer and the Tribunal's jurisdiction *ratione temporis*.

IV. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Under Article 1(1) Because Oschadbank's Investment In Crimea Was Not "Invested in Conformity With" The RF Banking Law (Jurisdiction *Ratione Materiae* or *Ratione Voluntatis*)

56. Article 1(1) defines "investments" as "all kinds of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party ***in conformity with its laws*** …" The requirement that investments conform with the law of the host state is pervasive throughout the BIT.[13] Many BITs have similar provisions, which are known as "legality" or "conformity" clauses. A leading treatise on investment arbitration observes that it is "[t]he practice of most, but not all investment treaties [to] condition coverage of an

[12] Minutes of an Experts' Working Meeting on January 19-21, 1998, regarding the negotiation of the Russia-Ukraine Bilateral Investment Treaty (Ex. YN 138), 1998 Draft BIT, Art. 13.

[13] For example, Article 2(1) provides that host states only need "to admit such investments subject to its laws"; Article 2(2) provides for host states to protect investments made "in conformity with its laws"; Article 3(2) allows host states to determine "sectors and spheres of activity, in which the activity of foreign investors is excluded or restricted" based on its laws.

investment on its compliance with local laws." Salacuse, *Investment Treaties*, Ex. YN 100, at 220, ¶7.6(a).

57. Even if Oschadbank's investments in Crimea were somehow deemed to be investments in the RF after Crimea's accession, they would still not be subject to the BIT because they did not comply with the RF law and banking regulations.

A. International Law Recognizes That Investments Which Do Not Conform With Host State Law Lose Investment Treaty Protection

58. International law sources recognize that the purpose of "conformity" clauses is to limit the application of investment treaties to legal investments. For example, Professor Salacuse states that "the inclusion of the qualification 'in accordance with the law and regulations of the host State' in the definition of 'investment' . . . ***is designed to prevent the treaty from protecting investments that were not made in compliance with the host state's national legislation***." Salacuse, *Investment Treaties,* Ex. YN 100, at 223.

59. The purpose of "in accordance with host State law" provisions is to prevent BITs from protecting illegal investments. U. Kriebaum, *Chapter V: Investment Arbitration – Illegal Investments, in* Austrian Yearbook on International Arbitration 2010 (G. Zeiler, I. Welser, et al. eds. 2010), Ex. YN 140, at 307. "Investors do not have a general right to entry and establishment in foreign states under international law: within very broad limits, states are free to prescribe conditions as they see fit. This is why BITs and other investment treaties provide that host states can admit investments in their territory in accordance with their legislation." R. Yotova, *Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?*, Paper No. 43/2018, Legal Studies Research Paper Series, University of Cambridge (June 2018), Ex. YN 141, at 12.

60. Investors must "scrupulously respect host country law in all matters concerning the investment or risk the loss of treaty protection should a tribunal find that the investment was made in violation of that law." Salacuse, *Investment Treaties*, Ex. YN 100, at 265. Failure to comply with "in accordance with host State law" clauses results in the loss of BIT protection. Kriebaum, *Illegal Investments*, Ex. YN 140, at 309. *See generally* S. W. Schill, *Illegal Investments in International Arbitration*, Ex. YN 139, at 21-28 (2012) (discussing cases).

61. Arbitral decisions are in accord. "[A state has] a fundamental interest in securing respect for its law." *Alasdair Ross Anderson et al v. Costa Rica*, ICSID No. ARB(AF)/07/3 (2010), Ex. YN 142, ¶¶58, 61 (declining to exercise jurisdiction over claim where investment did not comply with host country laws). Denying protection to illegally obtained investments "reflects both sound public policy and sound investment practice." *Id*. "The assurance of legality with respect to investment has important, indeed crucial, consequences" in the field of international investment law. *Id*. ¶53.

B. Tribunals Lack Jurisdiction To Decide Disputes When Investments Do Not Conform With Host State Law

62. "A treaty's reference in an admission clause to the phrase 'in accordance with laws and regulations' may serve as a limitation on a treaty's scope of protection and ***the host state's consent to arbitral jurisdiction over related investment disputes.***" Salacuse, *Investment Treaties*, Ex. YN 100, at 263. Similarly, where a BIT "include[s] the formula 'investments made in accordance with host State law' or similar formula in their definitions of the term 'investment' … an illegality in the making of the investment means that there is no investment for purposes of the BIT and ***consequently no consent to arbitrate***." R. Dolzer, U. Kriebaum & C. Schreuer, *Principles of International Investment Law* (3d ed. 2022), Ex. YN 143, at 108. "Thus, if a treaty protects only investments made in accordance with host country law and an investment in an arbitration

case is shown not to have been made in accordance with such law, ***a tribunal may conclude that it has no jurisdiction to hear the dispute***." Salacuse, *Investment Treaties*, Ex. YN 100, at 263.

63. "Including the requirement for compliance with domestic law in the definition of investment clause qualifies the consent of the host state with respect to what constitutes a covered investment" and, as a result, "***the consequences of non-compliance with such legality clauses pertain to the jurisdiction of investment tribunals***." Yotova, *Compliance with Domestic Law,* Ex. YN 141, at 11; *accord* Schill, *Illegal Investments,* Ex. YN 139, at 5 ("For most arbitral tribunals faced with the interpretation of explicit 'in accordance with host State law'-clauses, the issue is one of jurisdiction *ratione materiae.*").

64. Many tribunals have characterized this as lack of jurisdiction *ratione materiae* because non-conforming investments fall outside the subject matter jurisdiction of the treaty. *See* Schill, *Illegal Investments,* Ex. YN 139, at 5. For example, in *Alasdair*, *supra*, a group of investors unwittingly invested in a Ponzi scheme, and then initiated an arbitration for damages in connection with their investments. *Id.* ¶¶26-28. The tribunal concluded: "it is clear that that the transaction by which the Claimants obtained ownership of their assets … did not comply with the requirements of the Organic Law of the Central Bank of Costa Rica … That being the case, the obligations of the Villalobos brother held by the Claimants do not constitute 'investments' under the Canada-Costa Rica BIT and ***therefore this Tribunal lacks jurisdiction to hear the Claimants' claims against Costa Rica under the BIT***." *Id.* ¶57. Notably, the tribunal reached this conclusion even though the investors did not knowingly violate Costa Rican law. *Id.* ¶27.[14]

[14] *Accord Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID No. ARB/03/25 (2007), Ex. YN 144, ¶¶402, 404 (tribunal lacked jurisdiction *ratione materiae* because subject investment which did not comply with Philippine law did not fall under the definition of "investments" in the BIT); *Cortec Mining Kenya Ltd et al., v. Kenya*, ICSID No. ARB/15/29

65. Other tribunals have characterized this as lack of jurisdiction *ratione voluntatis, i.e.*, that the host state has not agreed to arbitrate disputes over non-conforming investments. Schill, *Illegal Investments,* Ex. YN 139, at 6. For example, in *Anglo-Adriatic Group Ltd. v. Albania*, ICSID No. ARB/17/6 (2019), Ex. YN 146, the tribunal concluded that it did not have jurisdiction to hear a claim involving an investment fund that borrowed money in violation of Albanian law. *Id.* ¶¶283-285. The tribunal held "only investments made in accordance with Albanian law can enjoy the protection granted under the [Law on Foreign Investments, providing for investor-state arbitration]. The subject-matter of a dispute arising out of an illegal investment falls ***outside the scope of Albania's consent to arbitrate***." *Id.* ¶287.

66. Under either theory, where the investor did not comply with the host state law, the State has not offered to arbitrate the claims, and the tribunal lacks jurisdiction to hear the dispute.

C. Oschadbank's Investment In Crimea Was Not In Conformity With Russian Banking Law Following The Accession Of Crimea To The RF

67. Oschadbank claims that its assets in Crimea became investments under the BIT in March 2014 as a result of an external event – the incorporation of Crimea into the RF – not because of a decision to make an investment in the RF. Assuming Oschadbank's purported investment was made in 2014 (which it was not), it was required under Article 1(1) to conform with the law of the host state, the RF.

68. On March 16, 2014, a referendum was held in Crimea on the issue of Crimea's accession to the RF. *See* Lauts Banking Report, ¶40. On March 17, 2014, the Declaration of Crimean Independence was adopted, and on March 18, 2014, the Russian Federation, the Crimean Republic and the Federal City of Sevastopol signed the Treaty on the Accession of Crimea to the

(2021), Ex. YN 145, ¶¶261-268 (investment was not subject to arbitration under the BIT where claimant failed to comply with Kenyan environmental regulations).

Russian Federation ("**Accession Treaty**"). *Id*. On March 21, 2014, the RF adopted the Federal Constitutional Statute No. 6-FKZ, which ratified the Accession Treaty and regulated the accession of Crimea to the RF ("**Accession Statute**"). The Accession Statute set forth, *inter alia,* application of RF law to Crimea. *Id.* ¶¶41-42, EL Ex. 22.

69. ***First,*** after Crimea's accession to the RF, Oschadbank's operations in Crimea became governed by the RF banking law and regulations. While Oschadbank's investments in Crimea did not comport with RF law immediately following the accession – *see* Lauts Banking Report, ¶¶64-67 – the Accession Statute provided a transition period for banks in Crimea to comply with RF banking laws, subject to certain interim requirements. *Id*. ¶¶42, 45, 68.

70. ***Second,*** specifically, Article 17(2) of the Accession Statute provided that Ukrainian banks which operated in Crimea and held Ukrainian banking licenses prior to the accession could continue to operate in Crimea if they comported with RF law. The Accession Statute also required banking transactions in Crimea to be performed in rubles but allowed circulation of the national currency of Ukraine for a certain period of time. Under Russian law transactions in foreign currencies require a separate license. *See* Lauts Banking Report, ¶27, 43. Oschadbank's offices in Crimea, however, only conducted transactions in hryvnia, the Ukrainian currency. *Id.* ¶71. The transitional law adopted to provide Ukrainian banks such as Oschadbank with opportunity to comport with Russian banking legislation further required Ukrainian banks that wanted to continue operating in Crimea to notify the regulator – the Bank of Russia by April 17, 2014 of their intention to apply for a RF banking license prior to January 1, 2015. *See* Lauts Banking Report, ¶51. Oschadbank never gave notice of intent to apply for a RF banking license, and never applied for one. *Id.* ¶¶72-73. Banks operating in Crimea were also required to submit their corporate formation documents, information about bank management and major investors, and a report of

banking activities to the Bank of Russia by May 2, 2014. *Id.* ¶51. Oschadbank did not comply with these requirements. *Id.* ¶¶74-76. Moreover, banking offices in Crimea which were owned by Ukrainian banks based in mainland Ukraine, such as Oschadbank, had until January 1, 2015, to reorganize as separate subsidiaries owned by the mainland bank but governed by the law of the RF. *Id.* ¶¶53, 77. Oschadbank did not comply with this requirement. *Id.* ¶78.

71. ***Third,*** equally important, starting from April 15, 2014, Ukraine passed laws prohibiting Crimean offices of Ukrainian banks from complying with RF law in Crimea. *See* Lauts Banking Report, ¶¶60-63. Thus, Oschadbank's offices in Crimea never complied with RF law as required under Article 1(1). As a result of the Ukrainian laws, Oschadbank decided to cease its operations in Crimea on May 26, 2014. *Id.* ¶80-82.

72. Accordingly, the RF did not agree to arbitrate and the Tribunal lacked jurisdiction over Oschadbank's investments that were not "***in conformity with its laws*** …" under Article 1(1). There was no valid agreement to arbitrate Oschadbank's claims.

V. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Over Claims Related To Crimea Under Article 1(4) And Other Articles Because Ukraine Disputes That Crimea Is RF Territory (*Ratione Loci*)

73. The RF only offered to arbitrate, and therefore the Tribunal only has jurisdiction over investments made by Ukrainian investors who agree that Crimea is the "territory of the Russian Federation." Article 1(4). Because Ukraine and Oschadbank (owned by Ukraine) dispute that Crimea is RF territory, the RF did not agree to arbitrate this dispute and the Tribunal lacked jurisdiction over it.

A. Phrases Such As "Territory Of," "Its Territory," and "Whose Territory" Mean Territory Belonging To One or the Other Contracting Party

74. Article 12 defines the scope of the BIT's jurisdiction *ratione loci*, stating that "[t]his Agreement shall apply to all investments, made by the investors of one Contracting Party

in the territory of the other Contracting Party [starting from] 1 January 1992." Article 1(4), in turn, defines "Territory" as: "***the territory of*** Ukraine or ***the territory of*** the Russian Federation, as well as their respective exclusive economic zone ["EEZ"] and continental shelf ["CS"], as determined in conformity with international law."

75. In the BIT, the word "territory" is most frequently used after "investment," and refers to territory belonging to a party, *i.e.* "territory ***of***" a Party, or "***its*** territory" or "***whose*** territory." *See, e.g.,* Art. 2(1), 3(1), 4(1) ("in its territory"); Art. 9(2) ("in whose territory"). Further, Article 1(4) use of the disjunctive conjunction ***"or"*** – "territory of Ukraine ***or*** the territory of the Russian Federation" – demonstrates the BIT parties' understanding that territory can be either in Ukraine or in Russia, but not in both. It would be absurd in the context of a bilateral investment treaty to read "territory" to be "the territory of" the RF and "the territory of" Ukraine at the same time. *See, e.g.*, L. Oppenheim, *International Law: A Treatise* (2nd ed. 1912), Ex. YN 147, at 231-232, ¶171 ("The supreme authority which a State exercises over its territory makes it apparent that on one and the same territory can exist one full Sovereign State only. Two or more full-Sovereign States on one and the same territory are an impossibility.").

B. The Ordinary Meaning Of "The Territory Of" A State Under International Law Means Sovereign Territory

76. The BIT's definition of "territory" as the territory "of the Russian Federation" "***or***" "of Ukraine" can only reasonably be understood to be coextensive with each state's exercise of sovereignty over its own territory because each sovereign is granting rights on its territory to investors from the other sovereign. *See, e.g., Island of Palmas Case,* PCA Award (1928), Ex. YN 148, at 838-840 ("[S]overeignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State."). This understanding is "essential if contracting States are to have any certainty and security as to the

territorial scope of each other's undertakings." H. Waldock, *Third Report on the Law of Treaties*, 1964 (2) ILC Y.B. 5, Ex. YN 149, ¶4. As such, under international law, "there seems to be complete agreement that in entering into a treaty a State is to be presumed to intend to engage its responsibility with respect to all the 'metropolitan' territories ***over which it has sovereignty***." *Id.* ¶3. The converse is also true: it is "***difficult to support the position that a treaty applies to territories escaping the State's sovereignty.***" S. Karagiannis, *The Vienna Conventions on the Law of Treaties* (2011), Ex. YN 150, at 752, fn. 90.

77. That "territory" means "sovereign territory" is also reflected in VCLT Article 29, which sets out the default rule for territorial application of treaties under customary international law: "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." M. Kennedy, *Overseas Territories in the WTO* (2016), Ex. YN 151, at 747. "While "[t]he [VCLT] does not define the 'entire territory,' … [t]he idea was to refer to all territories under the sovereignty of a party." *Id.* at 748. As noted in the Report of the International Law Commission ("**ILC**"), 1974(2) ILC Y.B., Ex. YN 152, at 208, ¶3, "the principle embodied in Article 29 of the [VCLT]" is that "unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. ***This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign***." *See also* D. Costelloe, *Treaty Succession in Annexed Territory* (2016), Ex. YN 153, at 358 ("The use of the term 'territory of each party' in Article 29 [of the VLCT] seems to reflect the understanding that ***only territory which is de jure part of a State is included***.").

78. Further, in the context of investment treaties, it is well established that "the territory of" a state means sovereign territory. *See*, *e.g.*, R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed. 2008), Ex. YN 117, at 563, §168 ("State territory is that defined portion

of the globe which is subjected to the sovereignty of a state."); S. Hall, *Principles of International Law* (3rd ed. 2011), Ex. YN 155, at 343 ("State territory is that portion of the Earth which is subject to the sovereign authority of a State.").

79. Here, of course, Ukraine denies that the RF exercises sovereignty, *i.e. de jure* control over Crimea, and therefore, investments in Crimea would not be deemed to be investments in the RF territory based on lack of mutual understanding for purposes of the BIT.

C. The BIT's Inclusion of the Exclusive Economic Zone and the Continental Shelf Confirms The Mutual Understanding That "Territory" Means *De Jure* Sovereign Territory, Not *De Facto* Areas Of Control

80. In Article 1(4), RF and Ukraine added to the BIT's definition of "Territory" the geographic areas of the exclusive economic zone ("**EEZ**") and the coastal shelf ("**CS**") because, although RF or Ukraine has jurisdictional or *de facto* control of these areas, they are understood not to be sovereign territories of the Parties. Thus, they needed to be expressly added to the definition of "Territory" in order to be covered by the BIT, precisely because the term "Territory" only encompasses sovereign territory.

81. International law acknowledges the possibility of jurisdictional control over non-sovereign territories, such as over coastal maritime zones extending beyond a State's sovereign territorial sea. The UN Convention on the Law of the Sea ("**UNCLOS**"), to which the RF and Ukraine have acceded, provides that the "sovereignty of a coastal State extends, beyond its land territory and internal waters … to an adjacent belt of sea, described as the territorial sea … not exceeding 12 nautical miles" from shore. UNCLOS, Arts. 2(1), 3. Beyond this sovereign territory, UNCLOS provides that an "exclusive economic zone is an area beyond and adjacent to the territorial sea [up to 200 nautical miles]… under the rights and ***jurisdiction of the coastal State*** and the rights and freedoms of other States are governed by the relevant provisions of" the treaty. *Id*. Arts. 55, 57. The treaty further provides that the "continental shelf of a coastal State comprises

the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles … State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." *Id.* Arts. 76, 77. Notably, these rights do not confer full sovereignty over the CS.

82. In the context of the BIT, the RF and Ukraine recognized that Article 1(4)'s definition of "territory of" a state referred only to its sovereign territory, and did not encompass areas where each Party only exercised *de facto* or jurisdictional control, unless explicitly stated. Accordingly, the Parties expressly extended the geographic scope of the BIT to include EEZ and CS: "[T]he term 'territory' means the territory of Ukraine or the territory of the Russian Federation as well as ***their respective exclusive economic zone and the continental shelf***…" Article 1(4). This confirms their mutual understanding that areas of mere jurisdictional or *de facto* control were not covered by the BIT's *ratione loci*. Otherwise, there would have been no need to expressly include their EEZ and CS within the geographic scope of the BIT under Article 1(4).

83. Conversely, interpreting "territory" broadly to include other areas of jurisdictional and *de facto* control would render Article 1(4)'s express inclusion of the EEZ and CS zones superfluous, which is contrary to VCLT Article 31, which requires that "the ordinary meaning [must] be given to the terms of the treaty in their context and in the light of its object and purpose." *See also Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Rep. 1994, p. 6, Ex. YN 157, ¶41 ("Interpretation must be based above all upon the text of the treaty.").

84. Thus, the express inclusion in Article 1(4) of the EEZ and CS zones confirms that the word "territory" does not include jurisdictional or *de facto* areas of control.

D. The BIT Can Only Apply To Investments In Non-Disputed Territories Based On Its Object and Purpose and Subsequent Practice

85. VLCT Article 31(3) permits taking into account "any subsequent practice in the application of the [BIT] which establishes the agreement of the parties regarding its interpretation." Here, the positions of the RF and Ukraine have diverged since March 18, 2014.

86. ***First,*** applying the BIT to disputed territories is contrary to the purpose of the BIT. The BIT's title "Agreement … on the Encouragement and Reciprocal Protection of Investments" demonstrates that, first and foremost, the purpose of the BIT is to promote and protect investments of nationals of the other party. The preamble then refers to two primary goals: (a) "intention to create and maintain favorable conditions for reciprocal investments," and (b) the desire "to create favorable conditions for the promotion of economic cooperation between the Contracting Parties." BIT, Preamble. Such objective can only be achieved in geographic areas that are uncontested by the parties. As evidenced by Crimea, states contesting each other's sovereignty over an area cannot cooperate in that area's economic development. For this reason, the RF and Ukraine could not have intended the BIT to protect investments in disputed territory such as Crimea.

87. ***Second,*** for the BIT to apply to Crimea, there must be a mutual agreement between the RF and Ukraine regarding the BIT's territorial scope, namely whether Crimea is the "territory of the Russian Federation"; otherwise, there is no jurisdiction *ratione loci* under the BIT. This is because the BIT only functions based on each state granting rights in its sovereign territory to investors of the other contracting state.

88. ***Third,*** Ukraine's legislation rejects the RF's assertion that Crimea is RF territory. Law of Ukraine No. 1207-VII, *On Ensuring Civil Rights and Freedoms, and the Legal Regime on*

the Temporarily Occupied Territory of Ukraine, dated April 15, 2014, Ex. YN 158[15], provides:

> **Article 1. Legal Status of the Temporarily Occupied Territory of Ukraine**
>
> 1. The temporarily occupied territory of Ukraine (here and after - temporarily occupied territory) is an integral part of the territory of Ukraine. The application of the Constitution and the laws of Ukraine shall extend to such territory. […]
>
> **Article 3. Temporarily Occupied Territory**
>
> 1. For the purposes of this Law, the temporarily occupied territory of Ukraine shall be defined as follows:
>
> 1) The land territory of the Autonomous Republic of Crimea and of the city of Sevastopol and the inland waters of Ukraine adjacent to these territories…

89. ***Fourth,*** BITs only operate to the extent the contracting parties have conferred protections in their respective territories to investors from the other state and can only function if the contracting parties mutually agree on what constitutes their respective territories. Otherwise, BITs cannot facilitate investing in each other's territory. Many provisions of the BIT cannot be implemented with respect to a disputed territory. For example, Article 1(1) requires investments to be made in conformity with the host state's law, but if sovereignty is disputed, there would be conflict over which law would apply. Similarly, Article 1(2) requires the investor to be a national of either Ukraine or RF with the legal ability to invest in the other state's territory. Again, there would be a conflict over which law would apply to an investor located in Crimea, post accession. Moreover, Ukraine does not offer protections to RF investors based in Crimea who invest in Ukraine, which is yet another conflict.

90. Thus, the RF did not offer to arbitrate, and the Tribunal lacked jurisdiction *ratione loci* over investments in Crimea because it is a disputed territory.

[15] Official English translation is taken from the web-site of the Verkhovna Rada of Ukraine, at: https://zakon.rada.gov.ua/laws/show/en/1207-18#Text; last accessed on February 28, 2024.

VI. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Over Oschadbank's Investment In Crimea Under Articles 1(1) And 1(2) Because It Was Not Cross-Border When Made (Jurisdiction *Ratione Materiae* and *Ratione Personae*)

91. The RF's offer to arbitrate and, thus, jurisdictional consent under the BIT extends only to adjudication of "any dispute between either Contracting Party and an ***investor of the other Contracting Party*** that arises ***in connection with the investments***." Article 9(1). Article 1(1) defines "investments" as assets which "are ***invested*** by an investor of one Contracting Party ***in the territory of the other Contracting Party*** in conformity with its laws," which defines the scope of jurisdiction *ratione materiae*. Article 1(2) defines "investor of a Contracting Party" with respect to entities as those which "***make investments in the territory of the other Contracting Party***," which defines the scope of jurisdiction *ratione personae*.

92. The common element of Articles 1(1) and 1(2) is that any "investments" must be "***invested***" or "***made***" (an activity requirement) in "***the territory of the other Contracting Party***" (territorial requirement). In other words, there must be (a) an ***action*** of investing or making of an investment, (b) a territorial ***cross-border*** element of investment, and (c) a ***nexus between the two,*** i.e., the action itself must be cross-border (invested or made "***in***" the territory of the other party). The requirements must be met together at the same time to satisfy the definitions of "investment" and "investor" in Articles 1(1) and 1(2). Since an act of investing is required, the only time these requirements can be met concurrently is when such act takes place. Accordingly, an investment must be ***cross-border when made***.

93. In international law, "[t]he act of making a qualified investment is also controlling for the scope of the arbitral tribunal's adjudicative power in several respects." Z. Douglas, *The International Law of Investment Claims* (2009), Ex. YN 159, at 145, ¶303. In this case, there is neither jurisdiction *ratione materiae* based on Oschadbank's ownership of the banking branches in Crimea, nor *ratione personae* based on Oschadbank itself, because the investment was made by

a Ukrainian entity in Ukraine before Crimea's accession, and the change of borders did not transform this domestic investment into a foreign one under the BIT.

A. Oschadbank Did Not Make An Eligible Investment In The RF Based On Articles 1(1) and 1(2) Under VCLT Article 31(1), 31(3)(b) And 31(3)(c)

1. The Ordinary Meaning Of Articles 1(1) And 1(2) Means Cross-Border Investments

94. ***First***, Article 1(1) applies to investments that "***are invested***" in the territory of the other Contracting Party. This term conveys an ***act*** of investing. In comparing the official texts of Article 1(1) in Russian and Ukrainian to their English translation, translation expert Ponomarev confirms that the original languages' single word translated to English as "are invested" denotes an ***act of making an investment*** rather than mere passive holding of an investment. *See* Ponomarev Translation Report, ¶¶13-15, filed contemporaneously. This interpretation is confirmed by the language of Article 1(2), which applies to "investors of a Contracting Party" who "***make***" investments "in the territory of the other Contracting Party."

95. ***Second,*** Article 1(1) applies to investments which "are invested" in the "***territory of the other*** Contracting Party," and Article 1(2) applies to investors who "make" investments in the "***territory of the other*** Contracting Party." This language represents the transnational (from one State to the other), i.e., cross-border, element of investments.

96. ***Third***, the text of both provisions creates a nexus between these two requirements (investments must be invested or made "***in***" the territory of the other Contracting Party), which can only happen when the act of investing takes place. The ordinary meaning of this language is clear: an investor must ***transfer*** something into the territory of the other Contracting Party, which gives rise to an investment when such transfer is made.

97. ***Accordingly***, investment must be cross-border when made based on the ordinary meaning of the language of Articles 1(1) and 1(2) under VCLT Article 31(1).

2. The Ordinary Meaning Is Supported By The BIT Parties' Agreement That Terms "Are Invested" and "To Make" Require A Cross-Border Act Of "Investing" Under VCLT Article 31(3)(b)

98. Ukraine's interpretation of the BIT demonstrates that the RF and Ukraine agree that the meaning of the term "invested" in Article 1(1) and, by extension, "to make" in Article 1(2), requires an act of "investing" or "making" of an investment which is cross-border "in the territory of the other Contracting Party."

99. In *PAO Tatneft v. Ukraine*, [2018] EWHC 1797 (Comm), 13 July 2018, Ex. YN 160, under this same BIT, Ukraine argued that "***mere passive ownership of an asset is insufficient:*** what is required is an active relationship between the investor and the investment." *Id.* ¶58. Specifically, "the investor must actually do something… [it] ***must actively invest, or put in resources***, [and] the investment must be made, or the resources put in, ***within the territory of Ukraine***." *Id.* ¶67. Ukraine explained, "[t]hese two aspects flow … from the words 'are invested by an investor of one Contracting State within the territory of the other Contracting State.'" *Id.* (underlined in original).[16]

100. I agree: an investment must be "made" in the territory of the other state.

3. International Law Also Supports This Interpretation Of Articles 1(1) And 1(2) Under VCLT Article 31(3)(c)

101. Many other courts and tribunals came to the same conclusion in analyzing similar provisions in other investment treaties.

102. In *Berschader & Berschader v. Russian Federation*, SCC No. 080/2004 (2006), Ex. YN 161, under the RF-Belgium BIT, the tribunal analyzed a provision which defined "investment"

[16] While the Court did not accept Ukraine's interpretation of "making of an investment," it found that Tatneft, a Russian investor, satisfied that requirement by purchasing shares of a company that owned assets in Ukraine, which was an investment "within the territory of the other Contracting State." *Id.* ¶¶81-80. Unlike Tatneft, Oschadbank invested assets within the territory of its own state.

as "any kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party." *Id*. ¶47. The tribunal concluded this required an investor ***to actively make an investment*** and mere ownership of an asset was not sufficient to qualify for protection, finding no jurisdiction. *Id*. ¶¶137, 150, 217.

103. In *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL (2020), Ex. YN 162, under the RF-France BIT, the tribunal reached the same conclusion: "[T]he Treaty clearly refers to investments made … and not to investments held… Nothing in the BIT – or for that matter in the French language or in the English language to which the BIT was translated … – would allow the Tribunal to conclude that the terms 'made' … and the term 'held' … are synonymous or have the same meaning." *Id*. ¶413. ***"[An] investment is made, according to the BIT, when the investor acquires … any of the assets and rights listed in Article 1 of the BIT and a transfer of capital takes place.***" *Id*. ¶418. In dismissing for lack of jurisdiction, the tribunal held "an investment … must be … ***transnational (cross-border) from inception***." *Id*. ¶¶417, 511.[17]

[17] Many other international court and arbitral decisions provide further support. For example, in *Standard Chartered Bank v. Tanzania*, ICSID No. ARB/10/12 (2012), Ex. YN 163, analyzing the UK-Tanzania BIT, the tribunal held that "the verb 'made' implies ***some action in bringing about the investment, rather than purely passive ownership***." *Id*. ¶222. "By contrast, the BIT [same as the RF-Ukraine BIT] nowhere uses the verb 'own' or 'hold' in connection with an investment by or of an investor." *Id*. ¶223. Noting that "some activity of investing is needed," the tribunal concluded that claimant failed to establish an eligible investment to "justify a finding of jurisdiction." *Id*. ¶¶232, 265, 277. Further, in *Venezuela v. Garcia Armas*, Paris Court of Appeal, Judgment 19/03588, 3 June 2020, Ex. YN 164, French Court annulled an award under the Spain-Venezuela BIT, which defined "investments" as "assets ***invested***", *id*. ¶51, concluding that the "jurisdictional criteria established by the BIT are ***cumulative*** and ***indivisible***," and the tribunal, "which failed to examine its jurisdiction ratione materiae in accordance with the terms of the Treaty and offer to arbitrate … ***on the day the investments were made***, wrongly declared that it had jurisdiction." *Id*. ¶56. In *Gold Reserve Inc. v. Venezuela*, [2016] EWHC 153 (Comm), Ex. YN 165, under the Canada-Venezuela BIT, the English High Court found that the "ordinary meaning of 'making' an investment includes the exchange of resources, usually capital resources, in return for an interest in an asset. … What is required is an ***active relationship*** between the investor and the investment. … ***Passive holding of an asset by itself would not amount to making the investment***." *Id*. ¶¶35, 37.

104. In *Littop Enterprises, Ltd. v. Ukraine*, SCC No. V 2015/092 (2021), Ex. YN 166, under the ECT, the tribunal found that claimants, whose ultimate beneficial owners were nationals of the host State (Ukraine) at the time of making the investments and only subsequently acquired nationality of another ECT State, were not eligible investors because they were not "Investors of ***another*** Contracting Party" under ECT Article 26(1). *Id.* ¶¶611, 613, 614. Thus, the tribunal held that an eligible investor must be foreign to the host State at the time of making the investment. *Id.* ¶614 ("ECT was not designed to protect the interest of ***domestic investors***").[18]

105. Under Articles 1(1) and 1(2), an investment must be "invested" or "made" in the territory of the other contracting State (RF) ***at the time of its creation***. Oschadbank's investment was made in Ukraine long before Crimea acceded to the RF. Therefore, the RF did not offer to arbitrate, and the Tribunal lacked jurisdiction *ratione materiae* based on a domestic investment and *ratione personae* based on Oschadbank as a domestic investor. The accession of Crimea to the RF does not reflect any action by Oschadbank. An investment requires making an investment in the territory of the other State, which Oschadbank never did.

B. The Object And Purpose Of The BIT Is To Protect Foreign (Cross-Border), Not Domestic, Investments And Investors

106. Under VCLT Article 31(1), the BIT's "object and purpose" are stated in its Preamble as "the promotion of economic cooperation" between Ukraine and the RF by "creat[ing] and maintain[ing] favorable conditions for reciprocal investments".[19] Such object and purpose are achieved when investors of each Contracting Party invest assets ***cross-border*** in the territory of

[18] *See also*, *e.g.*, *Cem Cengiz Uzan v. Turkey*, SCC No. V 2014/023 (2016), Ex. YN 167, ¶¶146, 147 (finding no jurisdiction *ratione personae* because the claimant was a national of the host State (Turkey) at the time of making the investment).

[19] *See Saluka Investments BV v. Czech Republic*, UNCITRAL (2006), Ex. YN 169, ¶299 ("The 'object and purpose' of the Treaty may be discerned from its title and preamble.").

the other Contracting Party, and eligible investors must be ***foreign*** to the territory of the other Contracting Party at the time of investment.

107. ***First,*** investment treaties are special agreements used by States to attract foreign capital and resources to their territories. In exchange for eligible ***foreign*** investments, States offer special protections to ***foreign*** investors. *See*, *generally*, R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2nd ed. 2012), Ex. YN 168, at 22. "BITs are reciprocal bilateral treaties negotiated between two sovereign State parties. The general purpose of BITs is of course primarily to protect and promote foreign investment; but it is to do so within the framework acceptable to both of the State parties." *Daimler Financial Services*, Ex. YN 106, ¶161. It would be inconsistent with the BIT's object and purpose to protect an investment which was domestic when made, and, specifically, not made in the territory of the other state, which could not regulate the investment when made.

108. ***Second,*** courts and arbitration tribunals uniformly hold that domestic investments and investors are not protected under investment treaties. For example, in *Pugachev v. RF*, *supra*, Ex. YN 162, the tribunal held that the investor was not protected under the Russia-France BIT because he was not foreign to the territory of the host State at the time of investment. "The preamble of the Treaty is clear in that its aim was the promotion of foreign investment by nationals of one State into the other State… [It] can only be accomplished if … the investor of one of the State parties to the BIT makes – not simply holds – an investment in the territory of the other … in the interest of their economic development." *Id.* ¶¶415, 416. "***It is a necessary consequence*** of the references to investments 'made' rather than investments 'held', that the nationality condition must be fulfilled ***at the time of the making of the investment***." *Id.* ¶418.

109. In *Bayview Irrigation District v. Mexico*, ICSID No. ARB(AF)/05/1 (2007), Ex.

YN 170, the U.S. Government stated: "The aim of international investment agreements is the protection of foreign investments, and the investor who make them. … One of the objectives of the NAFTA … is to 'increase substantially investment *opportunities* in the territories of the Parties' which refers to, and can only sensibly be considered as referring to, opportunities for *foreign* investment in the territory of each Party made by investors of another Party." *Id*. ¶100 (italics in original). "[A]ny other conclusion would be absurd." *Id*. ¶71. The tribunal agreed, finding no jurisdiction where claimants' investments were "wholly confined to their own [State]" (*ratione materiae*) and claimants were not "foreign investors in Mexico [but] domestic investors in Texas" (*ratione personae*). *Id*. ¶¶103, 104, 112, 113, 124. "[I]t is not enough that the United States' Claimants have made an investment in the United States. They must demonstrate that they were seeking to make, were making, or had made, an investment in Mexico." *Id*. ¶108.

110. Similarly, in *The Canadian Cattlemen for Fair Trade v. USA*, UNCITRAL (2008), Ex. YN 171, the tribunal explained: "[I]t is clear from the text … that the only 'investments' covered by [NAFTA] Chapter Eleven are those that are made … in the territory of another NAFTA Party by qualifying persons of one NAFTA Party – *i.e.*, ***foreign*** investments – and … ***it is therefore clear as well that purely domestic investments do not fall within the scope of [protection]***… [W]e find it illogical and inconsistent … that the scope of its protection for ***investors*** should be different." *Id*. ¶112. The tribunal found that there was no jurisdiction "where all of the Claimants' investments at issue are located in [Canada] [*ratione materiae*] and the Claimants [same as in this case] do not seek to make, are not making and have not made any investments in the territory of the United States [*ratione personae*]." *Id*. ¶233.

111. A change in borders does not *ipso facto* transform a domestic investment into an international one, subject to the BIT's jurisdiction. *See ST-AD GmbH*, *supra*, Ex. YN 121, ¶423

("BIT mechanism does not protect investments that it was not designed to protect, that is, ***domestic investments disguised as international investments***."). The BIT's jurisdiction similarly does not extend to investors who were domestic at the time when they made their investment.[20] Therefore, the change in Crimea's territorial status in mid-March 2014 does not create jurisdiction under Article 1(1) or 1(2).

C. The BIT Is Not Intended To Protect A Purely Domestic Investment Or Investor Affected By Territorial Change Based On Context Under VCLT 31(1) And 31(2)

112. Article 12 uses the same language as Articles 1(1) and 1(2): "This Agreement shall apply to all ***investments***, ***made*** by the investors of one Contracting Party ***in the territory of the other Contracting Party*** [starting from] 1 January 1992." In light of the object and purpose of Article 12, this language requiring a ***cross-border act*** of investing – same as that in Articles 1(1) and 1(2) – can only be understood as denoting that a purely domestic investment cannot be internationalized by the effect of a mere territorial change.

113. Article 12 provides that the BIT only applies to investments made after January 1, 1992. As discussed *supra*, the intention of the parties was to protect only investments made after the dissolution of the USSR, excluding application of the BIT based on territorial changes resulting from that kind of event. Thus, Article 12's temporal limitation is based on the idea that an investment made in a domestic territory cannot become foreign by virtue of a change in sovereignty over that territory. The very function of Article 12 is based on the premise that a change of territorial sovereignty cannot result in the creation of an investment.

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[20] *See*, *e.g.*, *Cem Cengiz Uzan*, *supra*, Ex. YN 167, ¶148 ("[T]he mere fact of the Claimant's subsequent change of residence, as well as the reasons and the circumstances thereof, cannot as such operate to transform the legal characteristic of the person into an Investor, within the meaning of [ECT]."); *Littop Enterprises*, *supra*, Ex. YN 166, ¶614 ("ECT was not designed to protect the interest of ***domestic investors***").

114. Under international law, the general purpose of a treaty provision as specific as Article 12, whose genesis is in addressing change of territorial sovereignty, must be fully applied. "If the parties, in a freely accepted treaty, go to the length of inserting a provision of an exceptional nature, it must be presumed that they intended that provision to be fully effective and its operation unhampered by restrictive rules." H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BYIL 48 (1949), Ex. YN 172, at 60-61. The purpose of Article 12 would not be fulfilled if a territorial change such as occurred in Crimea could somehow create a cross-border investment under the BIT.

115. A treaty's "provision is extended to cases which, although not included within the meaning of the terms, are included within the intention of the provision and are embraced by the motive which gave rise to it." E. de Vattel, *The Law of Nations, Vol. 3* (Charles G. Fenwick, trans., 1916), Ex. YN 173, at 210, §292. Therefore, Oschadbank's investment cannot be transformed from a domestic into a foreign investment and no jurisdiction *ratione materiae* under the BIT results from Crimea's accession. Equally, Oschadbank cannot be transformed into a foreign investor and no jurisdiction *ratione personae* under the BIT results from the accession.

D. The RF Did Not Offer To Arbitrate Investments In Crimea Because Ukraine Does Not View Investments In Crimea As Cross-Border

116. Even if Oschadbank's domestic investment in Crimea became foreign as a result of the change of borders in 2014 (which it was not), the RF's offer to arbitrate would still not apply because Ukraine does not view investments in Crimea as cross-border, rejecting reciprocity.

117. Bilateral investment treaties are structured to create reciprocal obligations between contracting parties.[21] The BIT's core provisions require each state to recognize, protect and

[21] *See, e.g., Rompetrol Group NV v. Romania*, ICSID No. ARB/06/3 (2008), Ex. YN 174, ¶101 (BITs are "of course a reciprocal bargain"). As such, "[i]f state A acts in breach of a treaty, then state B can use this as a reason not to perform its side of the bargain. The underlying theory of

encourage incoming investments and investors from the other Contracting Party. The reciprocal nature of obligations under the BIT is confirmed by the BIT's title, defining its object as "the encouragement and ***reciprocal*** protection of investments," and preamble, stating that Ukraine and the RF have "an intention to create and maintain favorable conditions for ***reciprocal*** investments." BIT, Title, Preamble.

118. Ukraine, however, does not treat investments in Crimea as cross-border, based on legislation enacted in April 2014, invalidating any acts of the RF authorities in Crimea:

> Any act (decision, document) issued by the bodies and/or persons provided for in part two of this Article ["Any bodies, their officials and officers within the temporarily occupied territory [if] established, elected or appointed in an unlawful manner"] ***shall be invalid and shall have no legal effect***.

Law of Ukraine No. 1207-VII, *On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine*, dated April 15, 2014, Ex. YN 158, Art. 9, §3.

119. Ukraine's legislation denies investor protections to any company incorporated in Crimea under RF law which invests in Ukraine. Ukraine does not consider such investments as cross-border due to the disputed status of Crimea. Reciprocally, the RF's offer of arbitration is inapplicable to Ukrainian investors' investments made in Crimea because Ukraine does not view them as cross-border, but as made in Ukraine, and does not consider that the RF has the authority to regulate investments in Crimea by Ukrainian investors. Thus, the RF did not offer to arbitrate and the Tribunal lacked jurisdiction *ratione materiae* and *ratione personae* because Oschadbank's investments in Crimea were not cross-border when made.

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course is precisely that treaties are the result of a bargain; A provides something to B and hopes to receive something else in return." J. Klabbers, *International Law* (2nd ed. 2017), Ex. YN 175, at 181.

VII. The RF Did Not Offer To Arbitrate And The Tribunal Lacked Jurisdiction Over Investments In Crimea, As Confirmed By Other States Recognizing That Their BITs Do Not Apply To Crimea Due To Lack Of Mutual Understanding And Agreement That Crimea Is Part Of The RF's Territory

120. Arbitral tribunals point out that "[t]reaties on the same subject matter concluded […] with third States can legitimately be considered as part of the supplementary means of interpretation." *Planet Mining Pty Ltd et al. v. Indonesia*, ICSID Nos. ARB/12/14 and 12/40 (2014), Ex. YN 118, ¶182. Others point to "[t]he practice of a state as regards the negotiation of BITs may be helpful, however, in testing the assertions of parties as to the[ir] general policies [...] concerning BITs, and in testing assumptions a tribunal may make regarding BITs." *Aguas del Tunari SA v. Bolivia*, ICSID No. ARB/02/3 (2005), Ex. YN 176, ¶292.

121. The RF has entered into numerous bilateral investment treaties with European and other countries similar to the BIT. *Notes Verbales* from other countries regarding similar BITs with the RF refuse to recognize Crimea as RF territory. Their refusal establishes that there is no common understanding that the term "territory of the Russian Federation" encompasses Crimea under multiple other RF's bilateral investment treaties. Under basic principles of contact and treaty interpretation, this dispute reflects a lack of agreement regarding the meaning of territory, which makes the BITs inapplicable to investments made by their nationals in Crimea.

122. Specifically, in August 2023, the RF sent diplomatic notes to 13 states and the European Union, regarding continuing application of their respective bilateral investment treaties with the RF, in relation to Crimea. *See* Declaration of Thomas C. Sullivan, Ex. 20, *Notes Verbales* Summary Chart. For example, August 21, 2023 *Note Verbale* sent to France stated that "the Russian Federation confirms that the Agreement shall apply similarly to the Republic of Crimea and federal city of Sevastopol." *Id*., Ex. 21, RF Verbal Note to France (08/21/2023).

123. On November 3, 2023, France rejected this application, stating it "believes that the territorial scope of the Agreement … corresponds to internationally recognized territory of the Russian Federation" pursuant to U.N. Resolutions 68/262 and ES-11/4. *Id*., Ex. 22, France Verbal Note in Response to the RF 8/21/2023 Verbal Note (11/03/2023). France's response, citing U.N. Resolutions that Crimea is not the RF Territory, is the same as those received from Austria, Belgium, Canada, the European Union, Germany, Lithuania, Luxembourg, Montenegro, Netherlands, Singapore, Switzerland, and the United Kingdom. *Id*., Ex. 20, *Notes Verbales* Summary Chart.

124. Accordingly, on the basis of the "supplementary means of interpretation" (VCLT Art. 32), for purposes of determining jurisdiction *ratione loci* under the BIT, because the *Notes Verbales* from these countries do not recognize Crimea as RF territory, there is no mutual understanding that Crimea is part of RF territory under those BITs and, similarly, under the RF-Ukraine BIT. The RF did not offer to protect investments or to arbitrate claims from investors whose states dispute that Crimea is RF territory.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Paris, March 1, 2024

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