EXHIBIT 9

PCA CASE NO. 2016-14

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE RUSSIAN FEDERATION AND THE CABINET OF MINISTERS OF UKRAINE ON THE ENCOURAGEMENT AND MUTUAL PROTECTION OF INVESTMENTS DATED NOVEMBER 27, 1998

AND

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

B E T W E E N:

JSC OSCHADBANK (UKRAINE)

Claimant

-and-

THE RUSSIAN FEDERATION

Respondent

STATEMENT OF CLAIM

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26 August 2016

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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I. INTRODUCTION

1. Pursuant to Article 9 of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Reciprocal Protection of Investments (Moscow, 27 November 1998), in force as of 27 January 2000 (the **Treaty**),[1] Article 18(1) of the UNCITRAL Arbitration Rules 1976 and Section 2.1 of Procedural Order No. 1 dated 19 August 2016, the Claimant hereby submits its Statement of Claim with accompanying exhibits, legal authorities, witness statements and expert reports.

2. The Claimant's submission is accompanied by factual exhibits, numbered sequentially CE-1 to CE-288 and legal authorities numbered sequentially CLA-1 to CLA-190. The submission further is supported by two (2) witness statements, namely:

(i) the Witness Statement of Mr Andriyy Hryhorovych Pyshnyy, who was Chairman of the Management Board of Oschadbank during most of the relevant period that culminated in the destruction of the Claimant's business in Crimea by the Russian Federation, and remains in that position to this day; and

(ii) the Witness Statement of Mr Oleksandr Matyukha, Head of the Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate of Oschadbank, who, during May 2014, was appointed as Supervisor of Oschadbank's Crimean business and was posted at Oschadbank's Crimean regional headquarters in Simferopol;

and three (3) expert reports, namely:

(i) The Expert Legal Opinion of Professor Malcolm N. Shaw QC on international law issues, including the appropriate interpretation of the term "territory" in the Treaty;

(ii) The Expert Legal Memorandum of Professor William E. Butler on Russian law issues, including the Russian Federation's purported annexation of Crimea; and

[1] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (Moscow, 27 November 1998), in force as of 27 Jan. 2000 (**Ukraine-Russia BIT, dated 27 Nov. 1998**), **CLA-1**.

(iii) The Expert Valuation Report of Jeffrey E. C. Davidson of Honeycomb Forensic Accounting, on the valuation of the assets and business lost by the Claimant as a result of the Russian Federation's Treaty violations.

II. EXECUTIVE SUMMARY

3. This case arises from the Russian Federation's unprovoked expansionist aggression against the territory of Ukraine, and in particular its Crimean peninsula. In late February 2014, and pursuant to directions from the Russian government, several elite units of the Russian military invaded Crimea. Meanwhile, the Russian Federation conferred with and gave instructions to various Crimea-based agents and Russophile citizens of Crimea, including high-ranking members of the local administrative, legislative and judicial apparatus.

4. By subverting the power of the existing Ukrainian infrastructure, and exploiting the abject fear instilled by the presence of Russia's nuclear-capable military and Russian-controlled paramilitary units, the Russian Federation hijacked the Crimean political machinery and engineered a sham referendum based on which Crimea proclaimed to be independent of Ukraine. Having firmly established control over Crimea through, *inter alia*, its illegal military occupation, the Russian Federation then purported to conclude Crimea's annexation through a supposed accession treaty, which was signed on 18 March 2014 and went into effect on 21 March 2014.

5. The Claimant, a state-owned Ukrainian commercial bank, had the second largest commercial banking operation in Crimea, with 294 branches throughout the peninsula, and considerable market share in commercial lending and other banking services. The Claimant's Crimean business started suffering damage as the Russian attack unfolded destabilising the region. Given the increasing, and eventually total, control of the Russian Federation over the Crimean territory, including the establishment of increasingly onerous regulatory requirements, the Claimant's ability to continue doing business in Crimea was gradually diminished.

6. In the meantime the National Bank of Ukraine (**NBU**), the main regulator of the Ukrainian banking and financial system, diagnosed substantial threats to that system due to the Russian aggression in Crimea. Among others, the NBU determined that it could no longer perform its regulatory duties in Crimea while Russian agents, including personnel from the Federal Security Service (**FSB**) of the Russian Federation were threatening to infiltrate the NBU's electronic systems, abscond with the NBU's substantial cash reserves in Crimea, and to harm the employees of the NBU and other Ukrainian banks. In the face of multiple threats, on 6 May 2014 the NBU ordered the closure of all Ukrainian banks in Crimea by 6 June 2014.

7. The Claimant took steps to comply with the NBU order, which as explained was caused by the Russian Federation's unlawful conduct. Even if the NBU order had not been issued, however, the Claimant would have been unable to comply with the demands imposed by the Russian-controlled legislative and regulatory authorities in Crimea. The Russian Federation imposed those demands without regard to the existing requirements to which every Ukrainian bank, including the Claimant, were subject, or any attempt to establish compatibility between pre-existing and new requirements. Citing the Claimant's supposed failure to comply with newly imposed regulations, the Bank of Russia, as purported regulator of the forcibly Russified Crimean banking system, ordered the Claimant immediately to shut down operations on 26 May 2014. The Claimant has not operated in Crimea since that date.

8. The Russian Federation's aggressive, egregious and contumacious conduct, which trampled basic precepts of international law while ignoring the admonitions of virtually the entire international community, culminated in:

(i) the takeover of numerous of the Claimant's premises across Crimea by Russian-controlled banks;

(ii) the intimidation and threats against the life and liberty of the Claimant's employees by Russian military and paramilitary units;

(iii) the misappropriation of cash and valuables held in the Claimant's Crimean headquarters by the Russian-controlled, so-called Crimean authorities;

(iv) the collapse of the Claimant's several income-producing assets in Crimea, including most prominently substantial loans extended to a large solar energy concern based in the peninsula;

(v) the commencement of court actions before the Russian-established and controlled Crimean judiciary based on false or misleading allegations, including that the Claimant would not serve Crimean depositors and other customers; and

(vi) the attachment of the Claimant's remaining assets and their transfer to a Russian government-established, supposed non-profit entity, which purports to represent Crimean depositors.

9. The actions of the Russian Federation in Crimea were orchestrated to take over the Claimant's substantial and valuable business. Those actions breached the Bilateral Investment Treaty

between Ukraine and the Russian Federation, thereby entitling the Claimant, a duly incorporated Ukrainian entity, to compensation for the loss of its substantial Crimean investments.

10. Since the Russian Federation established effective control over Crimea at the latest when it unilaterally asserted sovereignty over that territory on 21 March 2014, as at that date it also assumed all obligations under the Treaty in respect of Ukrainian investors in Crimea, including the Claimant.[2] The Claimant is therefore entitled to compensation for the value of its Crimean investment as of that date.

11. Moreover and in the alternative, as the Claimant explains below, the Russian Federation's actions before 21 March 2014 constituted composite or continuing acts that concluded after the Treaty became effective in respect of the Claimant's investments. The Claimant therefore is entitled to compensation for the losses it suffered as of 1 March 2014, when the Russian Federation formally authorised the invasion of Crimea.

12. The Claimant's position that the Russian Federation is responsible under the Treaty does not require the Tribunal to determine the status of the territory of Crimea under international law. As explained in this submission and in the expert report on international law by Professor Malcolm N. Shaw, the Russian Federation's effective control over Crimea, evidenced by, *inter alia*, the Russian Federation's unilateral assertion of sovereignty, satisfies the Treaty's territorial requirement.

13. For the avoidance of doubt, the Claimant unequivocally considers the Russian invasion, occupation, and effective control over Crimea to constitute a breach of fundamental principles of international law. Consistent with the position of the international community, the Claimant categorically rejects any notion that the Russian Federation possesses sovereignty in Crimea under international law.

14. The Russian Federation's conduct breached several provisions of the Treaty, including Articles 2(2) (Unconditional Legal Protection); 3(1) (Most Favoured Nation Treatment); 4 (Transparency and Accessibility of Legislation); 5(1) (Expropriation) and 7 (Transfer of Funds). Those breaches entitle the Claimant to compensation and other relief as set out below.

[2] For the avoidance of doubt, the Claimant does not foreclose the possibility that the Russian Federation in fact established complete control over Crimea earlier than 21 March 2014.

PART A – FACTS

III. THE RUSSIAN FEDERATION'S INVASION AND ANNEXATION OF CRIMEA

A. THE RUSSIAN FEDERATION SOUGHT TO EXERT UNDUE INFLUENCE OVER UKRAINIAN POLITICS AND POLICY

15. Since achieving independence from the Soviet Union in 1991, Ukraine's policy has been to establish a close relationship with, and ultimately to seek membership in the European Union.[3] That policy has met fierce opposition from the Russian Federation and its allies among Ukrainian politicians. In 2014, Russia's opposition took the form of a military invasion and occupation of several parts of Ukraine, including Crimea.

16. The Russian Federation has a long history of attempting to intervene in Ukrainian state affairs. During the 2000s the Russian Federation widely distributed passports in Crimea, raising fears that the Kremlin could be stoking separatist sentiment in Crimea as a prelude to possible military intervention.[4] Reportedly, in 2008, the President of the Russian Federation, Mr Vladimir Putin (**President Putin**), told U.S. President George W. Bush that Ukraine was not even a state and that a greater part of Ukraine was a "gift" from Russia.[5] Whilst Russia has therefore had an interest in Ukrainian matters for years, the catalyst for increased Russian interference in Ukraine's affairs was the progress in Ukraine's relations with the European Union. In March and July 2012, Ukraine and the EU initialled the text of the political part of an Association Agreement and Deep and Comprehensive Free Trade Agreement (the **DCFTA**) as its integral part that evidenced the successful completion of five years negotiations between Ukraine and the EU.[6]

17. Further on 25 February 2013, at the Sixteenth EU-Ukraine Summit, Ukraine and the EU reaffirmed their commitment to concluding the Association Agreement, with a view to doing so at the Vilnius Summit scheduled for November 2013.[7] Thus, in response to this progress, during the year 2013, the Russian Federation applied intensified pressure to Ukraine,[8] in combination with certain incentives and concessions.[9]

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3 Historical overview "Ukraine-EU Relations", **CE-277**.

4 Adrian Blomfield "Russia 'distributing passports in the Crimea'", The Telegraph, 17 Aug. 2008, **CE-14**; Taras Kuzio "Russian Intelligence Seeks to Destabilize Crimea", Eurasia Daily Monitor Volume: 5 Issue: 188, 1 Oct. 2008, **CE-15**.

5 Josh Cohen, "Next, Putin Will Seize Donetsk and Kharkiv", The Moscow Times, 3 Mar. 2014, **CE-72**.

6 Historical overview "Ukraine-EU Relations", **CE-277**.

7 16th EU-Ukraine Summit: Joint Statement, Brussels, 25 Feb. 2013, **CE-17**.

8 S. Blank, "Russia's Ukrainian Hostage", Wall Street Journal, 18 Oct. 2013, **CE-28**.

9 "Putin Bails out Ukraine to Assert Kremlin Power", 18 Dec. 2013, **CE-38**.

18. The Russian Federation applied economic pressure and other coercive measures against Ukraine including:

(i) extraordinary customs procedures with a practical effect to create a *de facto* trade ban on all Ukrainian exports to Russia;[10]

(ii) bans on the importation of certain goods originating from Ukraine;[11]

(iii) threats to procure suspension of the gas supply to Ukraine,[12] and bankrupt factories in eastern Ukraine,[13] as well as

(iv) economic pressure placed on Ukraine's supporters in Western Europe.[14]

19. Furthermore, the economic pressure to Ukraine was accompanied by numerous public statements of high-ranking Russian state officials expressing Russia's dissatisfaction with Ukraine's foreign policy and stressing adverse consequences for Ukraine were it to pursue its European ambitions, *inter alia*:

(i) Sergei Glazyev, an Advisor to the Russian President on matters of Eurasian integration, referred to Ukraine's entry into the DCFTA as a "*disaster*" and a "*suicidal*" step;[15] and "*a big hit for [the Russian Federation]*", which *"[w]e would like to do our best to avoid*".[16]

(ii) On 22 August 2013, President Putin suggested that if Ukraine concluded the Association Agreement with the EU "the member states of the [Eurasian]

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10 A. Panin, "Ukrainian Imports Barred as Relations Hit a New Low", The Moscow Times, 16 Aug. 2013, **CE-19**; New Russian Customs Rules Cause Delays at Ukrainian Border, The Moscow Times, 4 Nov. 2013, **CE-31**.

11 A. E. Kramer, "Chocolate Factory, Trade War Victim", The New York Times, 29 Oct. 2013, **CE-29**.

12 In October 2013, the Lithuanian Foreign Minister, Linas Linkevičius, indicated that Russia had threatened to suspend gas supply to Ukraine should Ukraine proceed to sign the Association Agreement. L. Baker, J. Pawlak Lithuania Warns Russia over Pressuring Its Neighbors, 2 October 2013, **CE-27**.

13 'Blackmail' accusations fly over Ukraine, Euobserver, 22 Nov. 2013, **CE-34**.

14 "Lithuania Summons Russian Ambassador over New Border Checks", 13 Sept. 2013, **CE-24**.

15 A. Umland, "Raising the Stakes of a Russian Strangulation of Ukraine's Economy", Foreign Policy Journal, 12 Nov. 2013, **CE-32**; Kremlin Aide Threatens End of Free Trade With Ukraine, The Moscow Times, 22 Aug. 2013, **CE-22**.

16 Publication "After execution of EU AA Ukraine ceases to be a strategic partner of Russia", Interfax Ukraine, 27 Aug. 2013, **CE-23**.

Customs Union will have to consider protective measures [against imports from Ukraine]."[17]

(iii) On 19 September 2013, President Putin warned Ukraine that Russia would retaliate with protectionist measures if Ukraine entered into the Association Agreement: "*We would somehow have to stand by our market, introduce protectionist measures. We are saying this openly in advance*".[18]

20. On at least two occasions, Mr Glazyev effectively threatened Ukrainian territorial integrity in reaction to its European ambitions:

(i) In September 2013 Mr Glazyev threatened that Russia would support a partitioning of Ukraine if it signed the Association Agreement. Mr Glazyev stated that Ukraine's Russian-speaking minority might break up the country in protest at such a decision, and stated wrongly that Russia would be legally entitled to support them.[19]

(ii) Mr Glazyev declared that Russia would regard Ukraine's entry into the DCFTA as a violation of the bilateral Friendship, Cooperation and Partnership Agreement between Ukraine and Russia of 31 May 1997, and that Ukraine and Russia "*will have to start over [discussion of] all matters from the very beginning, including the issues of borders*".[20]

21. Russia by its pressure to Ukraine, combined with various incentives in the form of financial assistance[21] as well as a supposed gas price discount,[22] procured the decision of the then Ukrainian President Viktor Yanukovych not to proceed with signing the Association Agreement with

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17 Putin rekindles fears of Ukraine trade war over EU ties, Financial Times, 23 Aug. 2013, **CE-20**; The Customs Union will take measures in the event of association of Ukraine with the EU, NB News, 22 Aug. 2013, **CE-21**.

18 Putin warns Ukraine over Europe ambitions, Reuters, 19 Sep. 2013, **CE-25**.

19 Russia threatens to back Ukraine split, The Times, 23 Sep. 2013, **CE-26**.

20 Putin's Advisor: "Russia is left with nothing after Ukraine signs the "Association", 1 Nov. 2013, **CE-30**.

21 Shortly after Ukraine withdrew from the Association Agreement talks, on 17 December 2013, the Russian Federation promised a USD 15 billion financial assistance package to Ukraine. "Putin Bails out Ukraine to Assert Kremlin Power", 18 Dec. 2013, **CE-38**.

22 On 17 December 2013 Gazprom and Naftogaz of Ukraine have signed a contract supplement, which enables Gazprom to sell gas to Ukraine at the price of $268.5 per 1,000 cubic metres. Press statement following a meeting of Russian-Ukrainian Interstate Commission, 17 Dec. 2013, **CE-37**.

the EU.[23] President Yanukovych did not sign the Association Agreement at the Vilnius Summit on 28 November 2013.

22. Western political figures and commentators, as well as President Yanukovych, attributed Ukraine's decision to defer the EU deal to Russian pressure.[24] The former President of Poland and participant in the Ukraine-EU negotiations, Aleksander Kwasniewski, opined: "*I believe the unprecedented pressure from the Russians was the decisive factor. […] The Russians used everything in their arsenal*".[25] According to Carl Bildt, the Swedish Foreign Minister: "*Ukraine government suddenly bows deeply to the Kremlin. […] Politics of brutal pressure evidently works*".[26]

23. President Yanukovych's shift away from Europe in favour of closer ties with the Russian Federation triggered mass protests in the biggest cities of Ukraine in November 2013. While these protests were initially peaceful, they became increasingly violent following attacks on protesters by the "Berkut" special police force under the Ministry of Internal Affairs, the enactment of draconian anti-protest laws (known as the "dictatorship laws"), and the abduction and beating of opposition activists.[27] What started out as peaceful protests eventually turned into a revolution known as "Euromaidan", "Maidan" or the "Ukrainian Revolution of Dignity" that ultimately led to the ouster of President Yanukovych himself.

24. 20 February 2014 saw mass killings in Kyiv, with dozens dead and hundreds injured in the bloodiest day of violence since protests began, with police using snipers and live ammunition against protesters. The next day, under intense pressure from opposition protesters, President Yanukovych negotiated and signed a compromise agreement that reduced the powers of the presidency and called for an early presidential election.[28] On 22 February 2014, President

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23 Defence of Ukraine filed in Claim No. FL-2016-000002 in the High Court of Justice "The Law Debenture Trust Corporation PLC -and- Ukraine, represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine", **CE-266**.

24 President Yanukovych informed President of Lithuania Dalia Grybauskaite that "Ukraine could not withstand the economic pressure and blackmail" of the Russian Federation: *see* Ukraine and the European Union at the Vilnius Summit and in Its Aftermath, Eurasia Daily Monitor Volume: 10 Issue: 216, 3 Dec. 2013, **CE-36**.

25 Spiegel Staff, "Putin's Gambit: How the EU Lost Ukraine", 25 Nov. 2013, Spiegel, **CE-35**.

26 R. Balmforth, P. Polityuk, "Ukraine drops plan to go West, turns East", Reuters, 21 Nov. 2013, **CE-33**.

27 Why is Ukraine in turmoil, BBC, 22 Feb. 2014, **CE-44**; Ukraine's revolution and Russia's occupation of Crimea: how we got here, The Guardian, 5 Mar. 2014, **CE-74**.

28 Compromise Agreement, **CE-43**; Why is Ukraine in turmoil, BBC, 22 Feb. 2014, **CE-44**; Anton Lavrov, "Russian Again: The Military Operation for Crimea", in Colby Howard and Ruslan Pukhov eds. Brothers Armed: Military Aspects of the Crisis in Ukraine, Second Edition, Minneapolis: East View Press, 2015, (**Lavrov**), **CE-230**, p. 159; Sonia Koshkina, Maidan. Nerozkazana Istoria., Kyiv: Bright Star Publishing, 2015, **CE-231**, pp. 217, 301.

Yanukovych published a recorded video message denouncing the terms of the compromise agreement.[29] President Yanukovych then fled to Russia with the assistance of the Russian military.[30]

25. Following the public release of President Yanukovych's video statement, on 22 February 2014, the Ukrainian Parliament resolved by a 73 percent majority to dismiss President Yanukovych on grounds he had abdicated his constitutional duties, and to schedule early presidential elections for 25 May 2014.[31]

26. Russian secessionist developments in Crimea (known as the purported "Crimean Spring") gained momentum in parallel with the escalation of the violent protests in Ukraine against President Yanukovych and his decision to avoid closer ties with Europe.[32]

B. THE RUSSIAN FEDERATION SUPPORTED AN ILLEGITIMATE REFERENDUM IN CRIMEA

27. The Russian Federation played an active role from the outset in fuelling secessionist sentiment in Crimea. Pro-Russian organisations in Crimea openly conducted anti-Maidan propaganda, colluded with Russian politicians, and were actively engaged in all aspects of the Crimean Spring.[33]

28. Moscow took a number of steps to prepare for a military invasion and occupation of Crimea in case the Yanukovych regime collapsed.

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29 Koshkina, **CE-231**, pp. 321-322; Statement of President Yanukovych, **CE-45**; President Putin's Fiction: 10 False Claims About Ukraine, 5 Mar. 2014, **CE-75**.

30 Russian President notes in the interview presented in Kondrashov's documentary, "Crimea. The Way Home", that he convened an all-night meeting on 22–23 February with Russian security services chiefs to conduct the operation of extrication of the deposed Ukrainian president, Viktor Yanukovych. At the end of the mentioned meeting Vladimir Putin stated "*we [Russia] must start working to re-incorporate Crimea to Russia*". The Kondrashov's documentary, "Crimea. The Way Home" with English subtitles, **CE-46**. Additionally *see* Putin reveals secrets of Russia's Crimea takeover plot, BBC News, 9 Mar. 2015, **CE-236**.

Furthermore, Vladimir Putin during the meeting of the Valdai International Discussion Club of 24 October 2014 stated that: "*I will not conceal it; we helped him [Viktor Yanukovych] move to Crimea, where he stayed for a few days [...] Yes, I will tell you frankly that he asked us to help him get to Russia, which we did. That was all*". Transcript of the Valdai International Discussion Club of 24 Oct. 2014 meeting, **CE-223**.

31 Radio Free Europe/Radio Liberty: Ukrainian Parliament Votes To Oust President, Tymoshenko Released From Jail, 22 Feb. 2014, **CE-48**; The English text of Resolution No. 757-VII "On Self-Withdrawal of the President of Ukraine from Performing his Constitutional Duties and Setting Early Elections of the President of Ukraine", **CE-47**.

32 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

33 S. Shuvaynikov, "How Russian Activists Furthered 'Crimean Spring'", official gazette of the State Council of the Republic of Crimea "Crimean News", 10 Mar. 2016, **CE-263**.

29. Ostensibly in order to ensure security of the 2014 Olympic Winter Games that took place on 7 – 23 February 2014 in Sochi, Russian troops were deployed in the Southern Military Region of the Armed Forces of the Russian Federation – and therefore in the general direction of Crimea. The number of the deployed troops reportedly exceeded the declared need to ensure security of the Olympics by several times.[34]

30. According to the 2015 NATO report "as part of its overall military build-up, the pace of Russia's military manoeuvers and drills have reached levels unseen since the height of the Cold War. Over the past three years, Russia has conducted at least 18 large-scale snap exercises, some of which have involved more than 100,000 troops. These exercises include simulated nuclear attacks on NATO Allies (e.g., ZAPAD) and on partners (e.g., March 2013 simulated attacks on Sweden), and have been used to mask massive movements of military forces (February 2014 prior to the illegal annexation of Crimea) and to menace Russia's neighbours."[35]

31. On the eve of the Crimea invasion, Russia arranged its military presence in the Mediterranean, to serve as a "Fleet in being".[36] Thus, according to Russian Navy Commander Viktor Chirkov, there were 12 warships and support vessels of the Russian Navy, including heavy nuclear missile cruiser "Peter the Great" ("Pyotr Velikiy") and heavy aircraft-carrying cruiser "Admiral Kuznetsov" in the eastern part of the Mediterranean Sea as of 20 February 2014.[37]

32. It is clear that President Putin began the annexation of Crimea immediately after Russian forces extricated President Yanukovych from mainland Ukraine.[38] The Russian campaign medal "For the Return of Crimea", minted by the Ministry of Defense of the Russian Federation, shows the dates of the Russian operation to be 20 February – 18 March 2014;[39] 20 February 2014 being the day of mass killings in Kyiv that led to the defunct compromise agreement and the date as

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34 Proceedings "To the Second Year of Russia's Aggression upon Ukraine" ('NISS Report'), National Institute for Strategic Studies, 20 Feb. 2016, **CE-259**, p. 17; As Moscow was preparing for the annexation of Crimea: the intelligence, 22 Feb. 2016, **CE-260**; the Ukrainian Ministry of Defense slides on Russia's military aggression against Ukraine, **CE-279**.

35 The 2015 NATO report, **CE-232**.

36 Ilia Kramnik "Politely and Quietly: The Military Aspect of the 2014 "Russian Spring" in Crimea", 14 March 2015, **C-239**.

37 Russian Navy to enhance potential with new stealth and noiseless submarines, 20 Feb. 2014, **CE-42**.

38 Russian President notes in the interview presented in Kondrashov's documentary, "Crimea. The Way Home" that he convened all-night meeting on 22–23 February with Russian security services chiefs to conduct the operation of extrication of the deposed Ukrainian president, Viktor Yanukovych. At the end of the mentioned meeting Vladimir Putin stated "*we [Russia] must start working to re-incorporate Crimea to Russia*". The Kondrashov's documentary, "Crimea. The Way Home" with English subtitles, **CE-46**. Additionally *see* Putin reveals secrets of Russia's Crimea takeover plot, BBC News, 9 Mar. 2015, **CE-236**.

39 Lavrov, **CE-230**, p. 159; Picture of the Medal 'For the Return of the Crimea', **CE-280**.

of which Ukraine considers Crimea being occupied by the Russian Federation,[40] while 18 March 2014 (discussed below) was the date of signing of what the Russian Federation claimed to be an Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation (the **Accession Treaty**).[41]

33. Although this was denied at time the events took place,[42] President Putin eventually conceded that the Russian Federation's strategy in Crimea was first to secure Crimea militarily, and then to incorporate it to Russia politically by means of a referendum.[43] As will be shown in Section III.C below, securing the referendum in Crimea was necessary for the Russian Federation to absorb Crimea as its constituent entity pursuant to Russian law. It is therefore evident that the Russian Federation intentionally established military control over the territory of Crimea in advance of the decision to hold a referendum,[44] with Russian military operation in Crimea being in progress already from late February 2014.[45] The results of any referendum were clearly a foregone conclusion.

34. Developments in Crimea from February 2014 until Crimea was formally annexed by the Russian Federation are now well-documented and publicly known.

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40 Law of Ukraine "On Amending Certain Laws of Ukraine regarding Determination of the Date of Commencement of Temporary Occupation" of 15 September 2015 ("**Occupation Date Law**"), **CE-250**, Para I.1.1.

41 Press-release 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed', 18 Mar. 2014, **CE-104**.

42 During the whole period of the "Crimean Spring", the official policy of Kremlin was to deny any military interference in Crimea. For instance, *see* Interview of Vladimir Putin, 4 Mar. 2014, **CE-73**.

43 **"**Direct Line with Vladimir Putin", 17 Apr. 2014, **CE-159**. Putin stated [emphasis added]:

"… in my conversations with my foreign colleagues I did not hide the fact that our goal was to ensure proper conditions for the people of Crimea to be able to freely express their will. And so we had to take the necessary measures in order to prevent the situation in Crimea unfolding the way it is now unfolding in southeastern Ukraine. We didn't want any tanks, any nationalist combat units or people with extreme views armed with automatic weapons. Of course, the Russian servicemen did back the Crimean self-defence forces. They acted in a civil but a decisive and professional manner, as I've already said.

It was impossible to hold an open, honest, and dignified referendum and help people express their opinion in any other way. Still, bear in mind that there were more than 20,000 well-armed soldiers stationed in Crimea. In addition, there were 38 S-300 missile launchers, weapons depots and rounds of ammunition. It was imperative to prevent even the possibility of someone using these weapons against civilians."

44 US concedes Russia has control of Crimea and seeks to contain Putin, The Guardian, 3 Mar. 2014, **CE-70**; Ukraine crisis: Crimea announces referendum on joining Russia, The Guardian, 6 Mar. 2014, **CE-76**.

45 Lavrov, **CE-230**, p. 160.

35. On 23 February 2014, a pro-Russian rally in Sevastopol purported to elect businessman Alexei Chalyy,[46] a Russian citizen, as the city's "popular mayor",[47] suspend payment of taxes to Kyiv, and transfer control over local police to the municipal authorities. The leader of the "Russian block" party, Gennadiy Basov, announced the creation of paramilitary troops.[48]

36. During late February 2014, checkpoints appeared on the main roads leading to Sevastopol[49] and on the narrow strips of land connecting Crimea to mainland Ukraine. For example, a key checkpoint at Perekop, which provides the main point of entry to the Crimean peninsula, was manned by former Berkut officers, Crimean Cossacks and Russian Kuban Cossacks.[50] A checkpoint was also established at Chongar, another main road from mainland Ukraine to the Crimean peninsula.[51]

37. On 26 February 2014, the Supreme Rada of the Autonomous Republic of Crimea (**Crimean Parliament**) attempted (unsuccessfully) to convene an extraordinary session at which the Chairman of the Crimean Parliament, Vladimir Konstantinov, had planned to discuss the issue of referendum.[52] Local media reported that secession might be on the agenda,[53] which prompted a massive rally before the premises of the Crimean Parliament.[54]

38. On 26 February 2014, President Putin ordered a snap inspection of the combat readiness of Russian troops stationed in the West Military District and parts of the Central District, near the border with Ukraine.[55] Ukraine viewed this Russian army exercise as a threat of full-fledged

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46 Ukraine: Sevastopol installs pro-Russian mayor as separatism fears grow, The Guardian, 25 Feb. 2014, **CE-50**.

47 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

48 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**; Ukraine crisis fuels secession calls in pro-Russian south, The Guardian, 23 Feb. 2014, **CE-49**; Ukraine: Sevastopol installs pro-Russian mayor as separatism fears grow, The Guardian, 25 Feb. 2014, **CE-50**.

49 Sevastopol installs pro-Russian mayor as separatism fears grow, The Guardian, 25 Feb. 2014, **CE-50**; T. Berezovets, Annexation: Crimean Island. Chronicles of a "Hybrid War", Bright Star Publishing, 2015, **CE-233**, p. 51.

50 Lavrov, **CE-230**, p. 162, 166. Koshkina, **CE-231**, p. 349; Globe in Ukraine: Russian-backed fighters restrict access to Crimean city, 26 Feb. 2014, **CE-51**.

51 Russia's Crimea plan detailed, secret and successful, 19 Mar. 2014, **CE-107**; On the Front Lines: Exclusive Photos of the Ukraine Russia Standoff, 8 Mar. 2014, **CE-83**.

52 Interview of Vladimir Konstantinov, at "Crimean News", 2 Mar. 2016, **CE-261**.

53 Russia flexes military muscle as tensions rise in Ukraine's Crimea region, 27 Feb. 2014, **CE-53**.

54 Crimean Tatars, pro-Russia supporters approach Crimean parliament building, Interfax, 26 Feb. 2014, **CE-52**.

55 Lavrov, **CE-230**, p. 162; Russia flexes military muscle as tensions rise in Ukraine's Crimea region, 27 Feb. 2014, **CE-53**; Ukraine: Gunmen seize Crimea government buildings, 27 Feb. 2014, **CE-54**.

military intervention into its territory.[56] The drill was a cover for a military operation to establish Russian military control of Crimea, thus, under the ruse of snap inspections, Russia deployed several thousand spetsnaz and VDV (airborne) troops to Crimea.[57] On 26 – 27 February 2014 forty Il-76 military transport aircraft left Ulyanovsk airbase. More than ten of those aircraft reportedly landed at Anapa[58] and on 28 February 2014 some of the aircraft were spotted in Crimea.[59] On 27 February 2014, Russia's Azov large landing ship moored at a Russian dock and unloaded 300 armed soldiers, possibly the 382nd Independent Marines Battalion from Temryuk, whose arrival had not been coordinated with the Ukrainian government.[60]

39. On 27 February 2014, Russian elite military units seized and occupied the Crimean Parliament and Crimean Government premises and raised a Russian flag there.[61] After the Crimean Parliament premises were occupied, Vladimir Konstantinov convened an extraordinary session of the Crimean Parliament,[62] which ostensibly decided to hold a local referendum on 25 May 2014 to vote

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56 Transcript of the meeting of the Ukrainian National Security and Defense Council, 28 Feb. 2014, **CE-58**.

According to Teniukh I.Y., Ukrainian Ministry of Defense: *"Under the guise of military training, the armed forces of the Russian Federation concentrate along the entire Ukraine-Russia border. Their goal is not purely the demonstration of power, but the real preparation for invasion of our territory: border crossing and combat missions. As many as 38 thousand military personnel, 761 armed tank machinery, 2,200 armored vehicles, 720 artillery systems and multiple launch rocket systems, and also up to 40 strike helicopters and 90 combat support helicopters, as well as 90 assault aircraft are concentrated on the Kyiv, Kharkiv and Donetsk directions. 80 warships of the Russian Federation left ports for a tour of combat duty in the water area of the Black Sea."*

Turchynov O.V., Acting President of Ukraine and Chairman of the Verkhovna Rada of Ukraine, made the following report on the results of his telephone conversation with Mr Naryshkin, Chairman of the Russian State Duma: *"Ok, we had a talk ... What to say? Naryshkin conveyed threats from Putin. According to him, they do not exclude making 'tough decisions' in respect of Ukraine for persecuting Russians and Russian speaking individuals. Apparently, they are hinting at a decision to send troops not only to Crimea. He delivered Putin's words that if at least one Russian dies, they will declare us war criminals and will persecute us around the world…"*

57 Lavrov, **CE-230**, p. 162-163.

58 According to Lavrov, **CE-230**, p. 160, the Anapa airfield became the key logistics base of the operation due to its convenient location only 70 km from a ferry crossing to the eastern Crimean port of Kerch and 50 km from the port of Novorossiisk, where Russian troops heading for Crimea later boarded large landing ships. There were also direct airlift operations from Anapa to airfields in Crimea.

59 Lavrov, **CE-230**, p. 163.

60 Lavrov, **CE-230**, p. 164.

61 Lavrov, **CE-230**, p. 163 – 164; President Putin has stated that he had personally ordered Russian special forces (Spetsnaz) to seize control of government buildings in Crimea – *see* Putin Celebrates First Anniversary of Seizing Crimea, 17 Mar. 2015, **CE-243**; According to Konstantinov, he knew that the Crimean Parliament building was occupied by "friendly" forces; he stated that he had a call with Sergey Aksenov; and at the same day he got acquainted with Oleg Belaventsev, Russian naval officer and political figure, who undertook to coordinate "their" cooperation with Moscow – *see* Interview of Vladimir Konstantinov, at "Crimean News", 2 Mar. 2016, **CE-261**.

62 Interview of Vladimir Konstantinov, at "Crimean News", 2 Mar. 2016, **CE-261**; RPT-INSIGHT-How the separatists delivered Crimea to Moscow, 13 Mar. 2014, **CE-87**.

on the question whether "Crimea has state sovereignty and is a part of Ukraine, in accordance with treaties and agreements".[63] The Crimean Parliament also resolved to remove the Kyiv-appointed government of Crimea, and appoint Sergiy Aksenov as Prime Minister of Crimea.[64]

40. From 28 February 2014 to 2 March 2014 well-armed Russian military units without insignia (later confirmed to be Russian military personnel or paramilitary troops controlled by Russia)[65] continued to arrive in Crimea, took control of its strategic sites[66] and began blocking Ukrainian military units:[67] For instance:

41. Before dawn of 28 February 2014, a convoy of 10 trucks, 3 armoured personnel carriers (APCs) and soldiers without insignia arrived at Belbek airfield and took control of the runway, aircraft, and tower.[68] Russia's army put the main Ukrainian Air Defense Service in Crimea out of action.[69]

42. Simultaneously so-called Crimean Self-Defense Forces[70] and a company of soldiers seized Crimea's main civilian airport and the air traffic control station in Simferopol.[71] On the same day, the telecommunication stations of Ukrtelecom, a major telecommunication provider in Crimea,

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63 Crimean Parliament Dismisses Cabinet and Sets Date for Autonomy Referendum, 28 Feb. 2014, **CE-59**.

64 Crimean parliament sacks regional government, approves referendum, 27 Feb. 2014, **CE-55**.

65 **"**Direct Line with Vladimir Putin", 17 Apr. 2014, **CE-159**. Putin stated: *"… Of course, the Russian servicemen did back the Crimean self-defence forces. They acted in a civil but a decisive and professional manner, as I've already said*".

Additionally *see* Putin acknowledges Russian military serviceman were in Crimea, 17 Apr. 2014, **CE-160**.

Additionally *see* Putin Celebrates First Anniversary of Seizing Crimea, 17 Mar. 2015, **CE-243**, where President Putin stated that he had ordered a specific force mix, including Russian military intelligence (GRU) Spetsnaz, elite airborne units (VDV) and marine infantry, to lead the operation under the guise of "reinforcing" the Russian Black Sea Fleet HQ in Sevastopol. Putin also said that Russian special services "knew well" the situation in the Ukrainian military due to monitoring their communications. Putin also mentioned that he could have placed the nuclear forces on alert in case of escalation.

66 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

67 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

Vladimir Putin stated at the meeting of the Valdai International Discussion Club of 24 October 2014: "*I will be frank; we used our Armed Forces to block Ukrainian units stationed in Crimea...*" – *see* Transcript of the Valdai International Discussion Club of 24 October 2014 meeting, **CE-223**.

68 Lavrov, **CE-230**, p. 164.

69 Lavrov, **CE-230**, p. 164.

70 Novaya Gazeta, Attack on Crimea (interview with Vladimir Mertsalov), 25 Apr. 2016, **CE-264**.

71 Lavrov, **CE-230**, p. 164 – 165; Novaya Gazeta, "Polite people" in Crimea: How It Happened – Investigation, **CE-161**; Berezovets, **CE-233**, p. 98; "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

had been seized, rendering the company unable to provide connection between Crimea and mainland Ukraine, as well as probably within Crimea.[72]

43. On 28 February 2014 three Mi-8 transport helicopters carrying Spetsnaz special forces stationed with Russia's Black Sea Fleet, and eight Mi-35M attack helicopters arrived from the direction of Anapa, on the northern coast of the Black Sea, and landed at Kacha, Crimea. This was in direct violation of all agreements with Ukraine, which did not permit the stationing of Russian attack helicopters in Crimea. The Russian attack helicopters were then deployed to blockade Ukrainian bases.[73]

44. Late in the afternoon of 28 February 2014, and again without authorisation, several Russian Il-76 transport planes from Anapa landed in Crimea, at Gvardeiskoye airport near Simferopol.[74]

45. On 1-2 March 2014, four large landing ships carrying Russian troops arrived in Sevastopol. These ships carried the 10th Independent Spetsnaz Brigade from their base outside Krasnodar and the equipment of the 25th Independent Spetsnaz Regiment.[75]

46. On 1 March 2014, Russia reinforced military control over the administrative heart of Crimea, employing soldiers of the 10th Independent Spetsnaz Brigade.[76] Russian troops took control of two Ukrainian radar installations.[77] Ukrainian Navy's ships were blocked in their ports by auxiliary ships of the Russian Black Sea Fleet.[78]

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72 Ukrtelecom's Crimean sub-branches officially report that unknown people have seized several telecommunications nodes in the Crimea, 28 Feb. 2014, **CE-60**; Berezovets, **CE-233**, p. 112.

73 Lavrov, **CE-230,** p. 165; *also see* Interview with Admiral Kasatonov, 13 Mar. 2015, **CE-237**; On deployment of troops, *see* Obama to Putin: Step back from Ukraine, 1 Mar. 2014, **CE-63**, where CBS News national security correspondent David Martin reported that Russia flew hundreds of troops into Crimea Friday on 28 February 2014 and that between 2,000 and 6,000 Russian troops were already based in Crimea, according to U.S. officials. Those troops were deployed from their bases to secure other facilities in Crimea.

74 Lavrov, **CE-230**, p. 165, where Lavrov notes that the precise number of those aircraft is unknown; according to various Ukrainian sources, there were eight to 14 aircraft. These flights would have been sufficient to airlift about 1,500 fully equipped spetsnaz troops to Crimea, which immediately would have shifted the balance of forces on the peninsular in Russia's favor; additionally *see* - Interview with Admiral Kasatonov, 13 Mar. 2015, **CE-237**.

75 Lavrov, **CE-230**, p. 166; Infographic: Russia's Military in Crimea, **CE-64**.

76 Lavrov, **CE-230**, p. 166.

77 Lavrov, **CE-230**, p. 166.

78 Lavrov, **CE-230**, p. 167.

47. On 2 March 2014, battalion and company-sized troop convoys with numerous trucks carrying soldiers without insignia, accompanied by Russian GAZ Tigr armoured vehicles, were spotted all over the Crimean peninsula.[79] At 2 pm, the regional headquarters of Ukraine's Border Service was stormed and taken.[80]

48. Between 28 February and 1 March 2014, Vladimir Konstantinov and Sergey Aksenov appealed to the Russian President to facilitate peace and security in the territory of Crimea. Sergey Aksenov, in his capacity as so-called Prime Minister of Crimea, made a video address announcing his decision to assume control over the law enforcement agencies in Crimea, and issued a formal order to this effect on 3 March 2014.[81]

49. On 1 March 2014, at the request of President Putin,[82] the Russian Federation provided formal authorisation for the deployment of Russian armed forces in the Ukrainian territory.[83] President Putin stressed in a telephone conversation with U.S. President Obama that Russia retained the right to protect its interests and those of the Russian-speaking population of Eastern Ukraine and Crimea.[84] Effectively, as of 1 – 2 March 2014, Russia was recognised to have complete operational control over the Crimean peninsula.[85] On 1 March 2014, Sergey Aksenov announced that the referendum would be rescheduled from 25 May 2014 to an earlier date – 30 March 2014.[86]

50. On 3 March 2014, the Russian Minister of Finance stated that Russia was considering the provision of financial aid to Crimea.[87] President Putin confirmed Russia's intention to support

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79 Lavrov, **CE-230**, p. 166.

80 Lavrov, **CE-230**, p. 167; Novaya Gazeta, "Polite people" in Crimea: How It Happened – Investigation, **CE-161**.

81 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

82 Vladimir Putin submitted appeal to the Federation Council, 1 Mar. 2014, **CE-65**.

83 Decree of the Federation Council of the Federal Assembly of the Russian Federation dated 1 Mar. 2014 No. 48-СФ "On the Use of Armed Forces of the Russian Federation on the Territory of Ukraine", **CE-66**.

84 Vladimir Putin stressed in a telephone conversation with Barack Obama that in case of any further spread of violence to Eastern Ukraine and Crimea, Russia retained the right to protect its interests and those of the Russian-speaking population of those areas – *see* Telephone conversation with US President Barack Obama, 2 Mar. 2014, **CE-69**; US calls for international observers as Ukraine places forces on combat alert and threatens war – as it happened, 1 Mar. 2014, **CE-67**.

85 By the morning of 1 March 2014, all Ukrainian military units in Crimea were effectively blocked, according to Ilia Kramnik – *see* "Politely and Quietly: The Military Aspect of the 2014 "Russian Spring" in Crimea", 14 March 2015, **CE-239**.

The US conceded on 2 March 2014 that Moscow had *"complete operational control of the Crimean peninsula"*, *see* US concedes Russia has control of Crimea and seeks to contain Putin, 3 Mar. 2014, **CE-70**.

86 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

87 Russia to decide on financial aid to Crimea by day-end - Finance Minister, 3 Mar. 2014, **CE-71**.

Crimea financially the following day.[88] On 18 March 2014, Crimea's First Deputy Prime Minister confirmed that Crimea had received its first tranche of Russian financial aid.[89]

51. Russia continued its military buildup in Crimea even after establishing operational control over the Crimean peninsula, for example:

52. By the end of 5 March 2014, the 810th Russian Marines Brigade, which was stationed in Crimea, had been joined by units of the 3rd, 10th, 16th, and 22nd Independent Spetsnaz Brigades, the 25th Independent Spetsnaz Regiment, the 45th Independent VDV Spetsnaz Regiment, part of the 31st Independent VDV Airborne Assault Brigade and small but very capable Special Operations Forces units.[90]

53. Russia conducted another wave of mobilisation and military build-up in Crimea from 6 March to 17 March 2014.[91] Large landing ships were steadily bringing Russian troops to Crimea. On 6 March 2014, the 727th Independent Marine Battalion, based in Astrakhan, and the 18th Independent Motor Rifle Brigade, based in Chechnya, left their bases and headed for Crimea.[92]

54. The Russian navy blockaded Ukrainian naval ships in port, first with gunships, and then, on 6 March, by scuttling the Ochakov (a decommissioned warship) in the channel connecting Lake Donuzlav (and Ukraine's Donuzlav Naval Base) to the Black Sea.[93]

55. On the night of 9 March 2014, several Bastion-P coastal defense anti-ship missile systems were spotted in Sevastopol. They belonged to the Russian 11th Independent Coastal Defense Rocket Brigade, which had been brought in from Anapa. Strategically positioned in Crimea, this advanced Russian system could target almost the entire Black Sea. The Ukrainian Navy was almost under full Russian blockade at its bases, and the deployment of the Bastion-P systems in Crimea was aimed against any possible intervention by third countries.[94] President Putin stated that he ordered the

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88 The next day Putin stated: *"Now about financial aid to Crimea. As you may know, we have decided to organise work in the Russian regions to aid Crimea, which has turned to us for humanitarian support. We will provide it, of course. I cannot say how much, when or how – the Government is working on this, by bringing together the regions bordering on Crimea, by providing additional support to our regions so they could help the people in Crimea. We will do it, of course." – see* Interview of Vladimir Putin, 4 Mar. 2014, **CE-73**.

89 Crimea receives first tranche of Russian financial aid, 18 Mar. 2014, **CE-99**.

90 Lavrov, **CE-230**, p. 169.

91 Lavrov, **CE-230**, p. 170 - 171.

92 Lavrov, **CE-230**, p. 171**.**

93 Lavrov, **CE-230**, p. 171; Russia Sinks Ship to Block Ukrainian Navy Ships, 6 Mar. 2014, **CE-77**.

94 Lavrov, **CE-230**, p. 171.

deployment of coastal defence missile systems to dissuade an American warship that was in the Black Sea from intervening.[95]

56. Furthermore, President Putin, unsure whether the West would intervene militarily to stop the Russian invasion, was ready to face "the worst possible turn of events" meaning that President Putin was ready to put Russia's nuclear forces on alert.[96]

57. On 12 March 2014, the 18th Independent Motor Rifle Brigade, armed with new BTR-82A wheeled APCs, entered Crimea via the Kerch ferry crossing.[97] On 14 March 2014, the 291st Artillery Brigade entered Crimea and was immediately deployed on the isthmus between Crimea and mainland Ukraine. On 15 March 2014, a battery of S-300PS Surface-to-Air Missiles systems arrived in Crimea.[98]

58. Against the background of Russia's control over Crimea and continued deployment of military forces there, on 6 March 2014, the Crimean Parliament resolved that Crimea would accede to the Russian Federation[99] as a constituent entity, to hold on 16 March 2014 (i.e., rescheduling from the earlier announced date of 30 March 2014) an all-Crimean referendum (including in the city of Sevastopol),[100] and to call upon President Putin and the Federal Assembly of the Russian State Duma to commence Crimea's accession to the Russian Federation.[101]

59. The Crimean Parliament proposed the following questions to be put to a vote at the referendum:

(i) "Do you support the reunification of Crimea with Russia as a subject of the Russian Federation?"

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95 Vladimir Putin mulled putting nuclear forces 'on alert' over Crimea, 15 Mar. 2015, **CE-240**.

96 Vladimir Putin mulled putting nuclear forces 'on alert' over Crimea, 15 Mar. 2015, **CE-240**.

97 Lavrov, **CE-230**, p. 172.

98 Lavrov, **CE-230**, p. 172.

99 Berezovets, **CE-233**, p. 218.

100 Sevastopol and Crimean parliament vote to join Russia, referendum to be held in 10 days, 6 Mar. 2014, **CE-78**; Crimean port city Sevastopol votes to join Russia as US urges Russia to allow observers in, 7 Mar. 2014, **CE-81**.

101 Decree of the Supreme Rada of the Autonomous Republic of Crimea "On an All-Crimean Referendum" dated 6 Mar. 2014 No. 1702-6/14, **CE-79**; Ukraine crisis: Crimea parliament asks to join Russia, 6 Mar. 2014, **CE-80**.

(ii) "Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of Crimea as part of Ukraine?"[102]

60. Crimea's First Deputy Prime Minister, Rustam Temirgaliev, stated to the BBC that "Russian troops are on the Russian territory. Crimea is Russia. Crimeans will vote for joining Russia".[103] Sergei Tsekov, deputy of Vladimir Konstantinov, explained that "this means we have reunited with our motherland which we have been a part of for so long".[104]

61. Following the parliamentary session on 6 March 2014, a group of deputies headed by Vladimir Konstantinov were reported to have left to Moscow where Mr Konstantinov was reported to have met President Putin.[105] On 7 March 2014, the delegation of the Crimean Parliament held a number of meetings with chairmen of both chambers of the Russian Parliament and heads of factions of the Russian State Duma.[106]

62. Upon return to Crimea, on 9 March 2014, Mr Konstantinov announced that the Crimean Parliament delegation had returned from Moscow with "good news": "Our fraternal people admit Crimea as a constituent entity of the Russian Federation!". Mr Konstantinov called on Crimeans to participate in the referendum on 16 March 2014 and remarked, "On 16 March we, without going anywhere, will return to our Motherland!"[107] Ukrainian television broadcasting companies in Crimea were replaced with Russian television broadcasting companies.[108]

63. On 11 March 2014, the Crimean Parliament approved a purported Declaration of Independence of the Republic of Crimea and the City of Sevastopol, which provided that if a decision would be made at the 16 March 2014 referendum that Crimea should become a part of Russia, then Crimea would be proclaimed an independent and sovereign state with a republican form of government following the referendum. The Declaration further provided that the Republic of Crimea, as an independent and sovereign state, would propose that the Russian Federation accept the Republic

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102 Decree of the Supreme Rada of the Autonomous Republic of Crimea "On an All-Crimean Referendum" dated 6 Mar. 2014 No. 1702-6/14, **CE-79**.

103 Ukraine crisis: Crimea parliament asks to join Russia, 6 Mar. 2014 & BBC interview with Rustan Temirgaliev (video) 6 Mar. 2014, **CE-80**.

104 *Ibid.*, **CE-80**.

105 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

106 *Ibid.*, **CE-278**.

107 *Ibid*, **CE-278**.

108 *Ibid.*, **CE-278**.

of Crimea as a new subject of the Russian Federation under an international treaty.[109] The Russian Ministry of Foreign Affairs issued a statement regarding Crimea's purported Declaration of Independence, stating that "the Russian Ministry of Foreign Affairs believes that the decision of the Crimean Parliament is absolutely within its rights. The Russian Federation will fully respect the results of the free will of the Crimean people at the referendum".[110]

64. Although it was not difficult to foresee the results of the referendum in the territory under Russian control, Russia organised and conducted[111] a massive agitation campaign through television, the internet, press and street advertising, suggesting a choice to Crimeans between living in a fascist country or in prosperous Russia.[112]

65. On 16 March 2014, the purported all-Crimean referendum was held and, according to its announced results, the majority of Crimeans voted for accession to Russia.[113]

66. Given that the Russian Federation had by this time established military control over Crimea (thus, President Putin even boasted that "[w]e turned Crimea into a sea and land fortress"[114]), the outcome of the referendum was a foregone conclusion. In any event, the end result for Crimea would have been the same had the referendum gone the other way since, as discussed above, the military annexation of Crimea had already been practically accomplished as of early March 2014.

C. THE RUSSIAN FEDERATION PURPORTED TO ANNEX CRIMEA BASED ON THE ILLEGAL REFERENDUM

67. After the purported referendum in March 2014, the Chairman of the Russian State Duma, Sergey Naryshkin, explained the procedure for Crimea's accession to Russia[115] by reference to the Russian Federal Constitutional Law "On the Procedure of Acceptance into the Russian Federation

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109 *See* Butler Report, para. 8; Decree of the Supreme Rada of the Autonomous Republic of Crimea No. 1727-6/14 dated 11 Mar. 2014 "On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol", **CE-84**.

110 *See* Butler Report, para. 9; Statement by the Russian Ministry of Foreign Affairs regarding the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, 11 Mar. 2014, **CE-85**.

111 According to a material from a Russian media resource, high profile propaganda was carefully planned by Russian PR experts in collaboration with representatives of the Russian Presidential Administration – *see* Elizaveta Surnacheva "How the Victory in Crimea Came into Being and Whether Russia Assisted in the Holding of the Referendum", 10 May 2014, **CE-182**.

112 Crimeans urged to vote against "neo-Nazis" in Kiev, 13 Mar. 2014, **CE-88**.

113 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

114 Vladimir Putin mulled putting nuclear forces 'on alert' over Crimea, 15 Mar. 2015, **CE-240**; Putin was surprised at how easily Russia took control of Crimea, **CE-241**.

115 Procedure of accession: how it works, 18 Mar. 2014, **CE-105**.

and the Formation within its Composition of a New Subject of the Russian Federation".[116] Mr Naryshkin explained that:

(i) Crimea, as an independent state, would be required to apply to President Putin requesting Crimea's formal acceptance into the Russian Federation;

(ii) The Russian President would inform the Federation Council, the State Duma and the Government of the Russian Federation about such application;

(iii) An international treaty would be drafted and concluded between Crimea and Russia;

(iv) Upon examination by the Russian Constitutional Court, the text of the signed treaty would be submitted to the Russian Parliament for ratification together with a draft federal constitutional law on acceptance of a new territory to Russia; and

(v) Following ratification of the treaty and adoption of the relevant federal constitutional law on acceptance, the name of a new constituent entity of the Russian Federation would be entered into Article 65 of the Russian Constitution.[117]

68. On 17 March 2014, the day after the referendum, the Crimean Parliament issued a number of decisions that would pave the way for the purported acceptance of Crimea into the Russian Federation.

69. Specifically, on 17 March 2014, the Crimean Parliament issued a purported Decree on Independence of Crimea (the **Decree on Independence**).[118] The Decree on Independence referred to "the direct expression of will of the peoples of Crimea at a referendum on 16 March 2014" and the Declaration on Independence of the Autonomous Republic of Crimea and the City of Sevastopol of 11 March 2014 and purported to declare Crimea to be "an independent sovereign state", in which the city of Sevastopol shall have a special status.[119] The Decree on Independence further appealed to the

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116 Federal Constitutional Law "On the Procedure of Acceptance into the Russian Federation and Formation within its Composition of a New Subject of the Russian Federation" No. 6- ФКЗ dated 17 Dec. 2001, as amended, **CE-9**.

117 Procedure of accession: how it works, 18 Mar. 2014, **CE-105**. This procedure is also described by Prof. Butler in the Butler Report, para. 19 *et seq*.

118 Decree of the State Council of the Republic of Crimea No. 1745-6/14 dated 17 Mar. 2014 "On the Independence of Crimea", **CE-94**; *see* Butler Report, para. 10.

119 Decree on Independence, **CE-94**, Item 1.

Russian Federation with a proposal to accept the Republic of Crimea to the Russian Federation as its new subject.[120]

70. Furthermore, the Decree on Independence purported to exclude the application in Crimea of Ukrainian legislation adopted after 21 February 2014 and provided for the temporary applicability of other Ukrainian legislation pending appropriate regulatory acts of the independent Republic of Crimea.[121]

71. The Decree on Independence also purported to terminate the activities of the Ukrainian state agencies in Crimea and transfer their powers, property and monetary means to Crimean state agencies.[122] The decisions of courts in Crimea relating to the application of Ukrainian legislation were required to be in line with the Decree on Independence.[123]

72. Furthermore, the Decree on Independence provided that all institutions, enterprises and other organisations founded by Ukraine or with Ukraine's participation in Crimea became institutions, enterprises and other organisations founded by the Republic of Crimea.[124]

73. Property owned by trade unions and other social organisations of Ukraine and located in Crimea as of 17 March 2014 was proclaimed to be property owned by subdivisions of relevant organisations located in the Republic of Crimea, and if there were no such subdivisions, the state-owned property of the Republic of Crimea.[125]

74. On 17 March 2014, the Sevastopol City Soviet reportedly issued a resolution on accession to Russia as a separate constituent entity of the Federation.[126]

75. On 17 March 2014, the Crimean Parliament purported to authorise Mr Konstantinov, the Chairman of the Crimean Parliament, and Mr Aksenov, the Prime Minister, to sign an inter-State treaty on acceptance of the Republic of Crimea and Sevastopol to the Russian Federation.[127]

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120 *See* Butler Report, para. 11; Decree on Independence, **CE-94**, Item 8.

121 *See* Butler Report, para. 11-12; Decree on Independence, **CE-94**, Item 2.

122 Decree on Independence, **CE-94**, Item 3.

123 Decree on Independence, **CE-94**, Item 4.

124 *See* Butler Report, para. 13; Decree on Independence, **CE-94**, Item 5.

125 Decree on Independence, **CE-94**, Item 7.

126 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**.

127 Decree of the State Council of the Republic of Crimea "On Plenipotentiaries for the Signature of an Inter-State Treaty" No. 1747-6/14 dated 17 Mar. 2014, **CE-95**.

76. On 17 March 2014, the Crimean Parliament adopted the decree "On the Legal Succession of the Republic of Crimea" (the **Decree on Succession**),[128] which, *inter alia*, purported to determine the territory of the self-proclaimed Republic of Crimea by the boundaries of the Autonomous Republic of Crimea and the City of Sevastopol that had existed as of the date of proclamation of independence of the Republic of Crimea.[129]

77. On 17 March 2014 President Putin issued Decree No. 147 stating: "[g]iven the declaration of will by the Crimean people in a nationwide referendum held on March 16, 2014, the Russian Federation is to recognise the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status".[130] This effectively cleared the way for Russia's formal annexation of Crimea as a matter of Russian law.

78. On the following day, 18 March 2014, a statement was posted on President Putin's official website stating that the Russian President had notified the Russian Parliament and the Russian Government of Crimea's proposal to accede to Russia.[131] Also on 18 March 2014, the State Duma of the Russian Federation represented that it would promote the social and economic development of the Republic of Crimea and ensure stability during the transitional period.[132]

79. On the same day, the Accession Treaty between the Russian Federation and the Republic of Crimea was signed in the Kremlin.[133] The Accession Treaty purported to provide:

(i) that the Republic of Crimea, within its boundaries, was deemed to be accepted into the Russian Federation as of the Treaty's execution date, 18 March 2014;[134]

(ii) for the establishment of two new subjects, the Republic of Crimea and the Federal City of Sevastopol, within the composition of the Russian Federation

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128 Decree of the State Council of the Republic of Crimea "On the Legal Succession of the Republic of Crimea" No. 1748-6/14 dated 17 Mar. 2014, **CE-96**; *see also* Butler Report, para. 15.

129 Decree of the State Council of the Republic of Crimea "On the Legal Succession of the Republic of Crimea" No. 1748-6/14 dated 17 Mar. 2014, **CE-96**, Item 5.

130 Publication 'Executive Order on recognising Republic of Crimea', 17 Mar. 2014, **CE-97**.

131 Publication 'The President has notified the Government, the State Duma and the Federation Council of proposals by the Crimean State Council and the Sevastopol Legislative Assembly regarding their admission to the RF and the formation of new constituent territories', 18 Mar. 2014, **CE-100**.

132 Russian State Duma adopts statement on situation in Republic of Crimea, 18 Mar. 2014, **CE-106**.

133 *See* Butler Report, para. 38; Press-release 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed', 18 Mar. 2014, **CE-104**.

134 Accession Treaty, **CE-101**, Article 1(1) and Article 4.

as of the date of Crimea's purported acceptance into Russia, 18 March 2014;[135]

(iii) for the expansion of the Russian Federation's legislative and other normative acts to the territory of Crimea from the date of Crimea's purported acceptance into Russia;[136]

(iv) for a transitional period until 1 January 2015 for resolving the issues of integrating Crimea into Russia's economic, financial, credit and legal systems, Russia's system of agencies of state power, and matters of fulfilling military responsibilities and military service in Crimea;[137] and

(v) for its provisional application as of the execution date and entry into force upon ratification.[138]

80. On 18 March 2014, President Putin requested that the Constitutional Court of the Russian Federation verify the Accession Treaty's compliance with the Russian Constitution.[139] The Russian Constitutional Court promptly did so.[140] Afterwards, President Putin sent the Accession Treaty with accompanying draft law to the Russian Parliament for ratification.[141]

81. On 21 March 2014, President Putin signed the Federal Law on ratification of the Accession Treaty and the Federal Constitutional Law "On the Acceptance of the Republic of Crimea into the Russian Federation and Formation within the Composition of the Russian Federation of New

135 Accession Treaty, **CE-101**, Article 2.

136 *Ibid.*, **CE-101**, Article 9(1).

137 *Ibid.*, **CE-101**, Article 6.

138 *Ibid.*, **CE-101**, Article 10.

139 *See* Butler Report, para. 40; Publication 'Request to verify compliance of Agreement on Accession of Republic of Crimea to the Russian Federation with the Constitution', 18 Mar. 2014, **CE-102**.

140 Decree No. 6-П of 19 Mar. 2014 of the Constitutional Court of the Russian Federation regarding verification of the constitutionality of an international treaty between the Russian Federation and the Republic of Crimea on the acceptance into the Russian Federation of the Republic Crimea and the formation of new subjects within the Russian Federation, **CE-103**.

141 Publication 'Draft Federal Constitutional law on the Accession of the Republic of Crimea to the Russian Federation and the creation of new constituent entities within Russia submitted to the State Duma', 19 Mar. 2014, **CE-108**; Publication 'Agreement on the Accession of the Republic of Crimea to the Russian Federation submitted to State Duma for ratification', 19 Mar. 2014, **CE-109**.

Subjects – the Republic of Crimea and City of Federal Significance Sevastopol" (the **Federal Law on Accession**).[142]

82. Pursuant to the Federal Law on Accession, Russia incorporated the Republic of Crimea and the city of Sevastopol into the list of subjects (constituent entities) of the Russian Federation provided for in Article 65 of its Constitution.[143] Thus, for all official purposes and under its own law, the Russian Federation considers that as of 21 March 2014[144] Crimea became an integral part of the Russian Federation with Russian legislation, including international treaties of the Russian Federation, fully applicable in the territory of Crimea.[145]

83. The Federal Law on Accession develops upon the provisions of the Accession Treaty. Amongst other things, it:

(i) regulates the establishment of prosecutor's offices and courts;

(ii) regulates the functioning of state entities and organisations;

(iii) provides for recognition of Ukrainian title documents;

(iv) regulates the application of the Russian budget, tax and customs regulations; and

(v) addresses local self-governance and other issues.

84. The Federal Law on Accession permitted Ukrainian banks that had a valid licence of the National Bank of Ukraine as at 16 March 2014 and were registered and/or were operating in Crimea, to carry out banking operations in Crimea, subject to certain regulations under Russian law, until 1 January 2015.[146] The Federal Law on Accession also permitted those banks to obtain a licence

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142 Laws on admitting Crimea and Sevastopol to the Russian Federation', 21 Mar. 2014, **CE-111**; Federal Constitutional Law No. 6-ФКЗ "On the Acceptance of the Republic of Crimea into the Russian Federation and Formation within the Composition of the Russian Federation of New Subjects – the Republic of Crimea and City of Federal Significance Sevastopol", 21 Mar. 2014, **CE-112**; *See* also Butler Report, para. 51.

143 Federal Law on Accession, **CE-112**, Article 2(2).

144 As Prof. Butler notes, as a matter of Russian law, this date is arguably 18 March 2014: *see* Butler Report, para. 52-53, 58.

145 *See also* Butler Report, para. 57.

146 Federal Law on Accession, **CE-112**, Article 17(2).

from the Russian Central Bank according to the procedure and subject to the conditions envisaged by Russian law by 1 January 2015.[147]

D. UKRAINE SOUGHT TO RESIST THE RUSSIAN FEDERATION'S AGGRESSIVE TACTICS

85. In the period leading up to and following the assumption of control by the Russian Federation over the Crimean peninsula, Ukraine attempted to resolve its dispute with Russia through diplomatic channels, *inter alia*, Ukraine:

(i) requested immediate bilateral consultations with the Russian Federation under the Agreement of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 31 May 1997;[148]

(ii) consistently sought to invoke the security assurances under Budapest Memorandum on Security Assurances of 1994 and demanded that the Russian Federation cease its infringements of Ukraine's sovereignty and territorial integrity;[149]

(iii) numerously urged Russia to observe its obligations under the agreements relating to the stationing of the Russian Black Sea Fleet in Crimea.[150]

86. Ukraine took all measures at its disposal to address Russia's intervention, including appeals to international community and international organisations. *Inter alia,* Ukraine resorted to the UN. The UN Security Council was convened seven times to discuss the situation in Ukraine. After the Russian Federation blocked the decision of the UN Security Council, Ukraine initiated consideration of the Crimean crisis by the UN General Assembly. On 27 March 2014 the major UN body adopted a resolution on territorial integrity of Ukraine mirroring the blocked Security Council resolution.[151]

87. The General Assembly Resolution states that the "referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the

147 *Id*.

148 Press report by the Ministry for Foreign Affairs of Ukraine, 27 Feb. 2014, **CE-56**.

149 Publication regarding plenary meeting of Verkhovna Rada of Ukraine, 28 Feb. 2014, **CE-61**.

150 Publication regarding plenary meeting of Verkhovna Rada of Ukraine, 27 Feb. 2014, **CE-57**; Press report by the Ministry for Foreign Affairs of Ukraine of 27 Feb. 2014, **CE-56**.

151 "General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region", 27 Mar. 2014, **CE-117**.

city of Sevastopol" and urges the international community "not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognising any such altered status."[152]

88. During the Crimea crisis the Ukrainian authorities refrained from responding militarily[153] to avoid provoking further Russian aggression such as occurred in the case of Georgia in 2008,[154] especially given Russia's threat to use force in Ukraine.[155] Besides, full-fledged military countermeasures were not a realistic option for Ukraine, among other reasons due to the paucity of available Ukrainian combat soldiers at the time.[156] Ukraine at all times responded to the situation with restraint and sought a dialogue with Russia

89. Ukraine developed a national legal framework to address the Crimean crisis, specifically, Ukraine (i) refused to recognise the illegal appointment of Mr Aksenov as Head of the Council of Ministers of Crimea;[157] (ii) condemned the referendum as illegal[158] and unconstitutional;[159] (iii) suspended the Resolution on Independence;[160] and (iv) dissolved the Crimean Parliament.[161]

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152 United Nations General Assembly Resolution No. 68/262 of 27 Mar. 2014 "Territorial integrity of Ukraine", **CE-118**.

153 Ukraine says Russia follows pre-Georgia war scenario in Crimea, 28 Feb. 2014, **CE-62**.

154 In August 2008 Russian troops invaded the Georgian provinces of South Ossetia and Abkhazia in response to a pre-emptive strike by the Georgian army. Russian forces occupy these two provinces to this day.

155 Transcript of the meeting of the Ukrainian National Security and Defense Council, 28 Feb. 2014, **CE-58**.

156 Statement by Igor Teniukh, the Acting Minister for Defense, *see* – Transcript of the meeting of the Ukrainian National Security and Defense Council, 28 Feb. 2014, **CE-58**, p. 11; Interview of Acting President of Ukraine Oleksandr Turchynov for Sonia Koshkina, - *see* Sonia Koshkina, **CE-231**, p. 349.

157 Decree of the President of Ukraine "On Head of the Council of Ministers of the Autonomous Republic of Crimea" No. 187/2014 dated 1 Mar. 2014, **CE-68**.

158 *See* Butler Report, para. 7; Decree of the President of Ukraine "On Suspension of the Effect of the Decree of the Supreme Rada of the Autonomous Republic of Crimea dated 6 March 2014 No. 1702-6/14 "On an All-Crimean Referendum"" No. 261/2014 dated 7 Mar. 2014, **CE-82**; press statement "Oleksandr Turchynov addresses Crimean people with a call to boycott the illegal referendum", 15 Mar. 2014, **CE-93**.

159 Decision of the Constitutional Court of Ukraine No. 2-рп/2014 dated 14 Mar. 2014 in the case on the constitutional petition of the Acting President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, the Ukrainian Parliament Commissioner for Human Rights concerning the compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Supreme Council of the Autonomous Republic of Crimea "On Holding of All-Crimean Referendum" (the case on the all-Crimean referendum in the Autonomous Republic of Crimea), **CE-91**.

160 Decree of the President of Ukraine "On Suspending the Effect of Decree of the Supreme Rada of the Autonomous Republic of Crimea of 11 March 2014 No. 1727-6/14 "On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol" No. 296/2014 of 14 Mar. 2014, **CE-89**.

90. Furthermore, Ukraine adopted the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine"[162] affirming that Crimea and Sevastopol remain an integral part of Ukraine and stipulating that the Russian Federation, as occupying power, shall be liable for violations of human and civil rights and freedoms as determined by the Constitution and laws of Ukraine in accordance with the norms and principles of international law.

IV. THE CLAIMANT'S INVESTMENTS IN CRIMEA WERE DESTROYED BY THE RUSSIAN FEDERATION'S ACTS AND OMISSIONS

A. OSCHADBANK'S OPERATIONS IN CRIMEA PRIOR TO THE ANNEXATION

91. By the time of Russia's purported formal annexation of Crimea, Oschadbank had operated for decades as Crimea's largest banking operation through its local branch with the headquarters located at 55a Kyivska St. in Simferopol and its local subordinated outlets in Crimea (hereinafter the **Crimean Branch** or **Oschadbank Crimea**).[163] Oschadbank operated a profitable business in Crimea, with an expansive presence and excellent market penetration and reputation. Mr Pyshnyy confirms that before the Russian Federation destroyed Oschadbank's operations in Crimea, the Bank was very optimistic about the prospects of the Crimean Branch and intended to further improve its geographic reach and profitability.[164]

92. Under Ukrainian law and the Charter of Oschadbank, the Crimean Branch was not a separate legal entity from Oschadbank and held the property of Oschadbank.[165] It was managed by a Head appointed by the Management Board of Oschadbank and was allowed to perform the services and functions authorised by the Bank by virtue of the Crimean Branch's Regulation.[166]

93. Oschadbank offered a broad range of banking and other financial services throughout Crimea via a network of 294 banking outlets.[167] This was more than any other bank operating in Crimea by a substantial margin. The Crimean Branch was entitled to perform, on behalf of Oschadbank, various legal actions (e.g., conclude various agreements, file claims to courts etc.) and it

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161 News report on Resolution of the Verkhovna Rada of Ukraine "On Early Termination of Authority of the Verkhovna Rada of the Autonomous Republic of Crimea" No. 891-VII of 15 Mar. 2014, **CE-92**.

162 Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" No. 1207-VII of 15 Apr. 2014, as amended, **CE-157**.

163 Pyshnyy Statement, paras. 15, 17.

164 Pyshnyy Statement, para. 15.

165 Pyshnyy Statement, para. 16.

166 Pyshnyy Statement, para. 16.

167 *Ibid.*, para. 17.

was authorised to provide, on behalf of Oschadbank and within the scope of Oschadbank's banking and general licenses, the following (amongst other) banking and other financial services: services for individuals (deposits, lending, cash payment processing, retail money transfers), implementation of social and state programmes on payment of pensions and social aid, as well as repayment to depositors of the former USSR Savings Bank, merchant acquiring and card transactions, corporate client services, and agent operations with foreign currency assets.[168]

94. Oschadbank's core business traditionally had been focused on retail individual deposit accounts, and the Crimean Branch had the second largest market share in that area.[169] The Crimean Branch was also a market leader in lending, with some 45 percent market share at the end of 2013 among the 10 biggest banking institutions in Crimea.[170]

95. The Crimean Branch derived considerable income from its commercial loan portfolio, which included loans to dozens of businesses. The most notable among the various commercial loans were sixteen loan facilities the Crimean Branch extended to the ActivSolar Group (the **Solar Group**), a renewable energy business constructing and operating solar power plants in Crimea.

96. As at the beginning of 2014, the Solar Group companies had borrowed from the Crimean Branch over USD 500 million (in USD and EUR loans) at annual interest rates of over 10 percent.[171] The Ukrainian government was seeking at the time to promote investment in renewable energy sources, and had committed by law to purchasing 100% of solar energy at premium prices until 1 January 2030.[172] This means that the risk of borrowers going out of business (and as a result, amounts owed to the Crimean Branch becoming irrecoverable) was immaterial.

97. The Solar Group loans were to be repaid in hard currency at relatively high interest rates. Loan maturity extended to 2020/2021, and performance was guaranteed against the considerable assets of the Solar Group, including the solar power plants themselves.[173] Further, the Solar Group had long term contracts in place for the supply of the energy the plants were producing into the national grid of Ukraine, as a result of which the Solar Group had a secure, long-term revenue

168 *Ibid.*, para. 16.

169 *Ibid.*, para. 19.

170 *Ibid.*, para. 19.

171 *Ibid.*, para. 22.

172 Article 17-1 of the Law of Ukraine "On Electric Power Industry", version effective as of 1 January 2014, **CE-41**; Pyshnyy Statement, para. 21.

173 Pyshnyy Statement, para. 23.

stream.[174] Before the Russian Federation's purported annexation of Crimea there were no overdue amounts or delays in performance of any of the Solar Group loans by the debtors.[175]

98. The Bank generated additional profits from cash transportation services. Being an integral part of a State-owned entity, Oschadbank Crimea was permitted to have its own security department with all armament and armoured vans, while other commercial banks could only hire the State Security Service to accompany vehicles on cash-in-transit activities. This created a competitive advantage for Oschadbank in this segment, which was expected to grow 20-25 percent annually.[176]

99. The Branch contributed a significant portion of the Bank's overall income across the various services categories: 5–6 percent of retail business fee revenue; 4–5 percent of retail revenue from the loan portfolio; some 37 percent of Bank's revenue from foreign currency exchange transactions by individuals (the first place among other Oschadbank's branches).[177] In sum, the Crimean Branch had a strong financial outlook and would have generated significant future income but for its extinguishment.

100. In summary, as at the start of 2014, the Crimean Branch was a thriving business that had great potential for further growth. In comparison with the other 25 branches of the Bank across Ukraine, the Crimean Branch was one of the best performing and most profitable branches.[178]

B. THE RUSSIAN FEDERATION USURPED ALL ADMINISTRATIVE, LEGISLATIVE AND JUDICIAL POWERS IN CRIMEA

101. Upon the ratification of the Accession Treaty and the adoption of the Federal Law on Accession, authorities of the Russian Federation and the purported "Crimean authorities"[179] promptly commenced actions aimed at integrating Crimea into "the economic, financial, credit and legal systems of the Russian Federation, within the system of agencies of State power of the Russian Federation".[180] New Crimean authorities and courts were formed expeditiously in line with Russian laws and the Russian centralised governance and judicial systems.

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174 *Ibid.*, para. 21.

175 *Ibid.*, para. 25.

176 *Ibid.*, para. 27.

177 *Ibid.*, para. 28.

178 *Ibid.*, paras. 15, 28.

179 Russia refers to these institutions as "Crimean authorities". The Claimant's use of this term is solely for purposes of reference; the Claimant does not accept the legitimacy of the "Crimean authorities", nor does the Claimant accept the actions taken by the "Crimean authorities", including but not limited to their purported legislative and judicial acts.

180 Federal Law on Accession, **CE-112**, Article 6.

1. Crimean Legislative Power

102. Pursuant to the Federal Law on Accession, legislative powers in Crimea were to be exercised by the State Council of the Republic of Crimea (previously called the Supreme Rada of the Autonomous Republic of Crimea)[181] and by the Legislative Assembly of the City of Sevastopol[182] (previously called the Sevastopol's City Soviet) (hereinafter the **Sevastopol's Assembly**).[183] The so-called Crimean Parliament was entitled to adopt local laws and a new Constitution of Crimea[184] (hereinafter the **Crimean Constitution** or the **Constitution**). Both the Constitution and Crimean laws were to be compliant with the Russian Constitution, while the Crimean laws were also to comply with federal laws.[185]

103. On 11 April 2014, the so-called Crimean Parliament purportedly adopted a new Crimean Constitution, "taking another step to cement the region's absorption into Russia".[186] The next day, on 12 April, the purported Crimean Constitution was officially published in the parliamentary newspaper "Crimean News" ("Krymskiye Izvestiya")[187] and entered into force.[188]

104. Notably, it was reported that "Russian experts" played the main role in drafting the new Crimean Constitution, and even before the draft was presented to the special constitutional commission, it had been approved by the Kremlin.[189] Thus, no wonder that the Crimean Constitution essentially resembled the Constitution of the Russian Federation[190] and stated that the Republic of Crimea, being an "integral part" of Russia's territory, was a "democratic, rule-of-law State within the composition of the Russian Federation".[191]

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181 Law of Ukraine "On Approving the Constitution of the Autonomous Republic of Crimea" No. 350-XIV dated 23 December 1998 (as amended), **CE-6**, Article 1(3).

182 Sevastopol is a special municipal district where Russia's Black Sea Fleet has its headquarters.

183 Federal Law on Accession, **CE-112**, Article 7(2) and (3).

184 Federal Law on Accession, **CE-112**, Article 7(3) and (5).

185 Federal Law on Accession, **CE-112**, Article 7(3) and (5).

186 "Crimea's Parliament Adopts Kremlin-Backed Constitution", Reuters, 11 Apr. 2014, **CE-146**.

187 "Crimean Constitution comes into legal force", 12 Apr. 2014, **CE-153**; "Crimea Approves New Constitution", 11 Apr. 2014, **CE-147**.

188 The Crimean Constitution, **CE-148**, Article 93(2).

189 "Crimea is Being Put on a Russian Base", 9 Apr. 2014, **CE-142**; "Crimean Constitution was approved at a meeting of the State Council of the Republic", 11 Apr. 2014, **CE-149**.

190 "Crimean Constitution comes into legal force", 12 Apr. 2014, **CE-153**.

191 The Crimean Constitution, **CE-148**, Article 1(1) and (3).

105. Initially, under the Federal Law on Accession, elections for the Crimean Parliament and the Sevastopol's Assembly were scheduled for September 2015.[192] However, this process was expedited. On 11 April 2014, the Crimean Parliament and the Sevastopol Assembly in their joint appeal requested President Putin for parliamentary elections to be held in September 2014 in order to ensure "rapid integration of the Republic of Crimea and the City of Federal Significance Sevastopol into the system of agencies of State power of the Russian Federation".[193]

106. As a result, on 17 April 2014, President Putin submitted to the State Duma (Russia's lower house of Parliament) a draft law for holding parliamentary elections in Crimea and Sevastopol on 14 September 2014.[194] In May 2014, the State Duma and Federation Council approved the federal law which set the second Sunday of September 2014 as the new date for the Crimean parliamentary elections,[195] and on 27 May 2014, this law was signed by the Russian President.[196]

107. From April 2014, all leading Russian political parties started forming their local divisions in Crimea. This included the United Russia party, the ruling political party in Russia holding the majority of seats in the State Duma, which held the founding conference of its Crimean regional branch headed by Vladimir Konstantinov, the Chairman of the Crimean Parliament on 7 April 2014.[197]

108. On 14 September 2014, Crimea held elections for the Crimean Parliament and district assemblies.[198] Reportedly there was no real opposition at these elections, as all parties supported Putin's Crimean policies and acted "as a fig leaf for Russian rule". Only two Russian parties made it

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192 Federal Law on Accession, **CE-112**, Article 7(1).

193 Appeal of the Crimean Parliament and the Sevastopol's Assembly No. 49-6/14–ГС, 11 Apr. 2014, **CE-150**.

194 "Elections in Crimea and Sevastopol to be held September 14 – Bill", 17 Apr. 2014, **CE-164**; Notice at the official web-site of the President Putin "Draft law on amending law on Crimea and Sevastopol's accession to the Russian Federation submitted to State Duma for ratification", 17 Apr. 2014, **CE-165**.

195 Federal Constitutional Law No. 7-ФКЗ on Amending the Federal Law on Accession, 27 May 2014, **CE-196**.

196 Notice on the official website of President Putin "Law signed on date of elections in Republic of Crimea and City of Sevastopol", 27 May 2014, **CE-197**.

197 "Regional Branch of United Russia has been Established in Crimea", web-site of United Russia political party, 7 Apr. 2014, **CE-140**; "Putin Submits Law on Parliamentary Elections in Crimea, Sevastopol to State Duma", 17 Apr. 2014, **CE-162**.

198 "Crimea Holds First Parliamentary Elections After Annexation by Russia", 14 Sept. 2014, **CE-215**.

into the new Parliament and the Sevastopol's Assembly – the United Russia and the Liberal Democratic Party of Russia.[199]

109. Ukraine[200] and the international community, including the United States,[201] the European Union,[202] and NATO,[203] declared the Crimean "elections" as illegitimate because they occurred under illegal Russian occupation.[204]

2. Crimean Administrative Powers

110. The Federal Law on Accession provided for the establishment of new administrative authorities (agencies of executive power) in Crimea and Sevastopol, in compliance with Russian legislation.[205] Pursuant to the purported Crimean Constitution, the executive branch of power in Crimea included the Head of the Republic of Crimea (hereinafter the **Crimean Head**), the Council of Ministers of the Republic of Crimea (hereinafter the **Crimean Government**) and other executive bodies.[206]

111. Russia expended significant efforts to promptly integrate Crimea and it created a special government agency responsible for the peninsula's integration on the federal level. On 31 March 2014, President Putin established the so-called Ministry on Crimean Affairs (hereinafter the **Federal Ministry on Crimean Affairs**) and appointed Oleg Savelyev to the post of the Minister. The Federal Ministry on Crimean Affairs was authorised to draft state programs aimed at Crimea's development, to coordinate the implementation of such programs and to control the work of the Crimean and Sevastopol authorities in exercising their powers.[207] It was also reported that the

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199 Crimean Elections Russian Style", 13 Sept. 2014, **CE-214**; "Crimea Holds Elections According to Russian Law: Central Election Commission" 16 Sept. 2014, **CE-219**; Composition and Structure of the Sevastopol's Assembly, at the official web-site of the Legislative Assembly of the city of Sevastopol, **CE-281**.

200 Statement by the Ministry of Foreign Affairs of Ukraine on illegal "elections" in Crimea conducted by the Russian Federation, 14 Sept. 2014, **CE-216**.

201 State Department Deputy Spokesperson, Marie Harf, Daily Press Briefing, Washington, 15 Sept. 2014, **CE-217**.

202 Statement on the Reported Holding of Local "Elections" in Crimea, Brussels, 15 Sept. 2014, **CE-218**.

203 NATO Secretary General on the reported elections in Crimea, Ukraine, Press Release issued on 16 Sept. 2014, **CE-220**.

204 U.S., NATO reject legitimacy of elections in Russian-occupied Crimea, 16 Sept. 2014, **CE-221**.

205 Federal Law on Accession, **CE-112**, Article 7(7).

206 The Crimean Constitution, **CE-148**, Article 61(1) and Article 81(1).

207 Notice on the Official Website of President Putin: "Executive Order establishing the Ministry of Crimean Affairs and appointing Oleg Savelyev to the post of minister", 31 Mar. 2014, **CE-122**.

Russian Government had assigned for each Crimean region a certain "courier region" in Russia, which was to send specialists over to train the locals.[208]

112. On 14 April 2014, President Putin appointed Sergey Aksenov as the Acting Crimean Head who was required to perform his duties until election of the Crimean Head by the Parliament.[209]

113. In Sevastopol, on 1 April 2014, the Sevastopol's Assembly appointed Aleksey Chalyy as Acting Governor of Sevastopol.[210] Shortly thereafter, President Putin replaced him with Sergey Menyailo.[211]

114. In April 2014, "in order to make the federal, regional and municipal executive authorities' socioeconomic development efforts in Crimea and Sevastopol more effective", President Putin established the State Commission for Socioeconomic Development in the Republic of Crimea and Sevastopol. The Commission's decisions and instructions were to be binding for the federal and regional executive authorities, local government bodies and other bodies and organisations.[212]

115. Briefly discussed below are several indicative examples of how the Russian Federation had usurped Crimean law enforcement agencies that played a part in destruction of Oschadbank's investment and operations in Crimea.

a. Prosecutor's Office

116. Under the Federal Law on Accession, the General Prosecutor's Office of the Russian Federation was authorised to form regional bodies of prosecutor's offices of the Republic of Crimea and Sevastopol, and the Russian President was entitled to appoint the Prosecutor of the Republic of Crimea (hereinafter the **Crimean Prosecutor**) and the Sevastopol Prosecutor.[213] Thus, on 25 March 2014, the Russian Federation appointed Nataliya Poklonskaya as the purported Acting Crimean Prosecutor, who was later appointed by President Putin as the Crimean Prosecutor,[214] and

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208 "Crimea Still Erasing its Ukrainian Past a Year After Russia's Takeover", 13 Mar. 2015, **CE-238**.

209 Notice at the official web-site of President Putin "Sergei Aksyonov has been appointed Acting Head of Crimea", 14 Apr. 2014, **CE-155**.

210 "Aleksei Chaly Appointed Acting Governor of Sevastopol for Transitional Period", 1 Apr. 2014, **CE-124**.

211 Notice at the official web-site of President Putin "Sergei Menyailo appointed Acting Governor of Sevastopol", 14 Apr. 2014, **CE-156**.

212 Publication "State Commission for Socioeconomic Development of Republic of Crimea and Sevastopol established", 21 Apr. 2014, **CE-166**.

213 Federal Law on Accession, **CE-112**, Article 8 (1).

214 Notice at the official web-site of President Putin "Prosecutors have been appointed in Republic of Crimea and in Sevastopol", 2 May 2014, **CE-174**.

established regional bodies of prosecutor's office in Crimea and Sevastopol.[215] On 1 April 2014, the Russian Federation appointed the First Deputy and Deputy Prosecutors of Crimea and Sevastopol. All of them were ex-officials of prosecutor's offices from different parts of Russia.[216]

b. Ministry of Internal Affairs

117. On 25 March 2014, the Ministry of Internal Affairs of the Russian Federation (hereinafter the **Russian MIA**) established regional bodies in Crimea, including the so-called Ministry of Internal Affairs of the Republic of Crimea, the Directorate of the Russian MIA in Sevastopol, and regional bodies of the Russian MIA in Crimea (together the **Crimean Ministry of Internal Affairs**).[217] Moreover, on 26 March 2014, the Russian MIA appointed Sergey Abisov as Acting Interior Minister of Crimea,[218] and, in May 2014, President Putin appointed him as the Interior Minister of Crimea.[219]

c. Federal Bailiff Service

118. On 26 March 2014, the Russian Ministry of Justice formed the so-called Federal Bailiff Services of the Republic of Crimea (hereinafter the **Crimean FBS**) and Sevastopol, which was tasked primarily with enforcing court decisions.[220] Shortly, in April 2014, the Federal Bailiff Service of the Russian Federation (hereinafter the **FBS**) appointed Yuriy Sibilev, a former official of the FBS, as the Acting Chief of the Crimean FBS.[221] On 8 September 2014, new Chief of the Crimean FBS, Stanislav Krysin, was appointed by the Russian Ministry of Justice.[222]

d. Federal Security Service

119. The Federal Security Service of the Russian Federation (hereinafter the **FSS**), being the principal security agency of Russia, also formed regional bodies in Crimea and Sevastopol (the

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215 "Crimea Prosecutor Poklonskaya Promoted to Senior Counselor of Justice", 27 Mar. 2014, **CE-119**.

216 Information published on the official web-site of the General Prosecutor's Office of the Russian Federation "Prosecutor General of the Russian Federation Yurii Chaika has appointed First Deputy and Deputy Prosecutors of the Republic of Crimea and Sevastopol", 1 Apr. 2014, **CE-125**.

217 Order of the Ministry of Internal Affairs of the Russian Federation No. 175 dated 25 Mar. 2014, **CE-114**.

218 Notice at the web-site of the Ministry of Internal Affairs of the Republic of Crimea "Sergey Vadimovich Abisov, Minister of Internal Affairs of the Republic of Crimea, Police Colonel", **CE-282**.

219 Notice at the official web-site of President Putin "Interior Minister for Republic of Crimea appointed", 6 May 2014, **CE-178**.

220 Order of the Ministry of Justice of the Russian Federation No. 42 dated 26 Mar. 2014, **CE-99**; Information published on the web-site of the Russian Government, **CE-283**.

221 History of Establishment of the Crimean FBS, News Release of the Crimean FBS (p. 1), Oct. 2015, **CE-252**.

222 History of Establishment of the Crimean FBS, News Release of the Crimean FBS (p. 1), Oct. 2015, **CE-252**.

Crimean FSS).[223] In April 2014, mass media reported that Victor Palagin, who had previously headed the FSS in Bashkiria in Russia, had been appointed as the new Chief of the Crimean FSS.[224] Under Russian law, the FSS's activities are based on centralised governance and their main responsibilities include counter-intelligence, counter-terrorism, surveillance and provision of internal, border and information security.[225]

e. Crimean Self-Defence Forces

120. The so-called Crimean Self-Defence Forces, paramilitary units acting under the control of the so-called Crimean authorities,[226] had contributed to the Crimean Spring events,[227] and, as will be described below, to the takeover of the Crimean banking system and the Claimant's investments.

121. However, only in June 2014, the Crimean Parliament fixed the status of the so-called Crimean Self-Defence Forces on the level of law and empowered the Crimean Government to formally found the Crimean Self-Defence Forces.[228] Thus, on 23 July 2014, the Crimean Government resolved to establish the Crimean Self-Defence Forces (which had been in fact operating in Crimea) and their head office, as well as approved the regulation on the Crimean Self-Defence Forces.[229] The activities of the Crimean Self-Defence Forces were generally coordinated by the Crimean Government.[230] Later, on 26 November 2014, the Parliament changed the "legal status" of the Crimean Self-Defence Forces from a state-funded entity to a non-governmental organisation.[231]

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223 "Russia's Federal Security Service to create unit in Crimea", 10 Apr. 2014, **CE-144**.

224 "Victor Palagin Headed the Federal Security Service Directorate in Crimea", 9 Apr. 2014, **CE-143**.

225 Articles 5 and 8 of Federal Law "On Federal Security Service" No. 40-ФЗ as of 3 Apr. 1995 (as amended), **CE-5**.

226 "Regulation on People's Guard of Crimea" approved by Resolution of the Crimean Parliament No. 1734-6/14 dated 11 Mar. 2014, **CE-86**, provides that all actions of the Crimean People's Guard had to be coordinated with, and controlled by, the Crimean Ministry of Internal Affairs.

In the film "Crimea: the Way Home", **CE-46**, head of a Crimean self-defense unit stated that he received his first order from Aksenov on 27 February 2014 to seize an airport in Crimea. Crimean authorities claimed that these units were self-defense forces.

227 "Crimean Spring" timeline, Official Website of the State Council of the Republic of Crimea, **CE-278**; "Crimean Self-Defense Forces Contributed to the Occupation of the Peninsula", 27 Feb. 2015, **CE-235**.

228 Crimean Law "On People's Volunteer Corps – People's Guard of the Republic of Crimea" No. 22-ЗРК as of 17 June 2014 (**CPG Law**), **CE-209**, Article 4.

229 Resolution of the Crimean Government "On Issues Regarding Activity of People's Volunteer Corps – People's Guard of the Republic of Crimea" No. 217 dated 23 July 2014, **CE-212**.

230 CPG Law, **CE-209**, Article 6(1).

231 "People's Volunteer Corps of Crimea have become a non-governmental organization from state-owned entity", 26 Nov. 2014, **CE-227**.

3. Judicial powers in Crimea

122. The Federal Law on Accession envisaged that so-called Crimean courts operating as of the date of the purported Crimean annexation and local judges of such courts (who received Russian passports) should proceed to administer justice "in the name of the Russian Federation" until Russian courts were formed and commenced operation in Crimea and Sevastopol.[232] As required by the Federal Law on Accession, Crimean courts began to hear cases under Russian procedural law immediately after the purported annexation of Crimea.[233]

123. On 23 June 2014, President Putin signed four federal laws towards the creation of a new judicial system in Crimea and Sevastopol. The laws set out the procedure for establishing the court system in Crimea and Sevastopol that included commercial courts (or "arbitrazh courts") and courts of general jurisdiction, including courts-martial (together the **New Crimean Courts**).[234] On 13 November 2014, President Putin appointed the chairmen to 18 purported federal courts in Crimea.[235]

124. Shortly thereafter, the Plenum of the Russian Supreme Court resolved that 26 December 2014 was the date when the New Crimean Courts commenced their operation.[236]

C. THE RUSSIAN FEDERATION ASSUMED CONTROL OF THE BANKING SYSTEM TO ORCHESTRATE THE TAKEOVER OF THE CLAIMANT'S ASSETS IN CRIMEA

125. In addition to usurping all administrative, legislative and judicial powers in Crimea, the Russian Federation acted swiftly to take control of, and absorb, the banking system that existed in Crimea and to squeeze out of Crimea the banks that had a valid license from the NBU as of 16 March 2014 and were registered and/or were operating in Crimea (hereinafter the **Ukrainian banks**).

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232 Federal Law on Accession, **CE-112**, Article 9(5).

233 Federal Law on Accession, **CE-112**, Article 9(7); "Courts have Started to Adjudicate under Russian Laws in Crimea", 25 Mar. 2014, **CE-115**.

234 E. A. Kremyanskaya, Short Note on the Development of the Criminal Justice System after the Accession of Crimea and Sevastopol to the Russian Federation, New Journal of European Criminal Law, Vol. 5, Issue 2, 2014, **CE-39**, p. 260; Federal Council approves Crimea and Sevastopol judicial system reform, Russian Legal Information Agency, 18 Jun. 2014, **CE-210**.

235 Publication on official web-site of the Crimean Supreme Court regarding appointment under Decree of President Putin "On Appointment of Judges of Federal Courts" No. 719, dated 5 Dec. 2014, **CE-134**.

236 Federal Law on Accession, **CE-112**, Article 9(4); Decree of the Plenum of the Russian Supreme Court "On the Day of Commencement of Activity of Federal Courts on the Territories of the Republic of Crimea and City of Federal Significance Sevastopol" No. 21 dated 23 Dec. 2014, **CE-228**.

1. Legislative framework for taking over the Ukrainian banks

126. The Federal Law on Accession initially allowed the Ukrainian banks to perform banking operations in Crimea until 1 January 2015, subject to complying with Russian legislation and without having to obtain an additional license. Thus, the Russian Federation acknowledged the operation of the Ukrainian banks and gave them a so-called "transitional period", to adjust to the Russian occupation. Further, the Ukrainian banks were expected to obtain a license of the Central Bank of the Russian Federation (hereinafter the **Bank of Russia**) by 1 January 2015, according to the procedures and subject to the conditions envisaged by Russian legislation.[237]

127. Whilst the Russian Federation ostensibly purported to enable the Ukrainian banks, including Oschadbank, to continue their operations in Crimea, the Russian Federation promptly set the scheme of expulsion of the Ukrainian banks from Crimea, which was utilised to take over the Claimant's investments in Crimea.

128. The Russian Parliament formalised the scheme by adopting a package of federal laws on 2 April 2014, which targeted at seizure of the Ukrainian banks, specifically:

129. The Federal Law "On the Peculiarities of the Functioning of the Financial System of the Republic of Crimea and the City of Federal Significance, Sevastopol in the Transition Period" (hereinafter the **Federal Law on the Crimean Financial System**).[238] This law reiterated that the Ukrainian banks were permitted to operate in Crimea if they comply with a number of requirements specified in the mentioned law.[239] For the failure to do so the Federal Law on Crimean Financial System subjected the Ukrainian banks to draconian sanctions, including the immediate termination of their banking operations, effectively meaning the prohibition to carry out any banking activity in Crimea.[240]

130. The Federal Law "On the Defense of Interests of Natural Persons Having Deposits in Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance, Sevastopol"

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237 Federal Law on Accession, **CE-112**, Article 17(2); s*ee* also Butler Report, paras. 70-71.

238 Federal Law "On the Peculiarities of the Functioning of the Financial System of the Republic of Crimea and City of the Federal Significance, Sevastopol in the Transition Period" No. 37-ФЗ dated 2 Apr. 2014, **CE-129**.

239 Federal Law on the Crimean Financial System, **CE-129**, Article 3(1).

240 Federal Law on the Crimean Financial System, **CE-129**, Article 7(2), (4) and (5); *see* Butler Report, paras. 73-74.

(hereinafter the **Federal Law on Crimean Depositor Protection**).[241] This law provided for the establishment of an autonomous non-profit organisation, the so-called "Depositor Protection Fund" (Fund for the Defense of Depositors) (hereinafter the **DPF**) that subsequently was used as a vehicle for taking over the Ukrainian banks whose banking activity was prohibited under the Federal Law on the Crimean Financial System.

131. A special federal law[242] on provision of "more than enough" financing designated, *inter alia*, to fund the DPF's compensation payments to the depositors of the Ukrainian banks.[243] The adoption of this law clearly implied that the Russian Federation anticipated that the Ukrainian banks would fall under sanctions and their banking activity in Crimea would be prohibited.

a. Federal Law on the Crimean Financial System

132. The Federal Law on the Crimean Financial System imposed several onerous and vague requirements on Ukrainian banks, including the requirements:[244]

(i) To provide customers with banking services in Russian rubles (**RUB**);[245]

(ii) To notify the Bank of Russia of a Ukrainian bank's decision to continue its business operations in Crimea within the "transition period". As clarified by

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241 Federal Law "On the Defense of Interests of Natural Persons Having Deposits in Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and on the Territory of the City of Federal Significance, Sevastopol" No. 39-ФЗ dated 2 Apr. 2014, **CE-130**.

242 Russian Federal Law "On the Peculiarities of Transfer in Year 2014 of Profit Received from the Central Bank of the Russian Federation as a Result of Year 2013" No. 40-ФЗ dated 2 Apr. 2014, **CE-131**, Articles 1 and 2.

243 Transcript of Session of State Duma, 31 Mar. 2014, **CE-123**.

See, comment of N.V. Burykina, the Head of the State Duma Financial Market Committee: "*Pursuant to another draft law presented within the package of draft laws under consideration, – "On the Peculiarities of Transfer in Year 2014 of Profit Received from the Central Bank of the Russian Federation as a Result of Year 2013" – the funds in the amount of RUB 60 billion will be directed from the 2013 profit of the Bank of Russia to the Deposit Insurance Agency for payment of compensation to depositors of the banks acting in the territory of the Republic of Crimea and the Federal City of Sevastopol*."

N.V. Burykina gave the following response to the question of how the amount of RUB 60 billion had been calculated: "*The credit and financial system of Ukraine is somewhat different from ours, it has its peculiarities of functioning, in principle it has a different reporting structure, a different structure for forming balance sheets, all of this, as a rule, goes to the head organizations in the city of Kyiv. There are certain difficulties, therefore the calculations were made by expertise. We believe that the proposed amount will suffice if force major circumstances occur, for instance, if the obligations towards depositors will not be observed. As of today, I do not think that this sum should be increased, though I will say this: [the amount] is more than enough.*"

244 Federal Law on the Crimean Financial System, **CE-129**, Article 3 (1); *see* Butler Report, para. 70.

245 *See* Butler Report, paras. 92-96.

the Bank of Russia, such a notice was to be filed with the Chief Administration of the Central Bank of the Russian Federation for the Krasnodar Territory by 17 April 2014;[246]

(iii) To comply with the Bank of Russia's requirement to provide a register of obligations towards creditors and depositors. On 3 April 2014, the Bank of Russia ordered that such a register should be submitted within 15 calendar days after a Ukrainian bank receives a relevant demand from the Chief Administration of the Central Bank of the Russian Federation for the Krasnodar Territory.[247] Later, on 17 April 2014, the Bank of Russia acknowledged that there might be practical difficulties and complexities with timely submission of such registers by the Ukrainian banks. The Bank of Russia thus permitted the Ukrainian banks to move to extend the period for filing the registers, at the same time suggesting that the Bank of Russia would evaluate such motions at its own discretion, taking into account the actual state of business of the banks;[248]

(iv) To provide the Bank of Russia with financial reports and other information on the relevant Ukrainian bank's activities.[249] In this regard, on 11 April 2014, the Bank of Russia required that certain financial reports and other information in Russian language should be provided on a monthly basis, with the first submission in respect of March 2014 to be made by 15 April 2014.[250] Shortly, on 2 May 2014, the Bank of Russia mandated that local branches of the Ukrainian banks in Crimea were required to submit certain information on a monthly basis for the purpose of performing banking supervision by the Bank of Russia, specifically the information on the quality of assets, considerable lending (credits, loans or overdrafts), as well as amounts of funds lent to, and attracted from, juridical persons and natural

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246 Information Notice of the Bank of Russia "On Explanations Regarding Provisions of Federal Laws No. 37-ФЗ and No. 39-ФЗ dated 2 Apr. 2014", 7 Apr. 2014, **CE-139**.

247 *See* Butler Report, paras. 83-91; Order of the Bank of Russia No. OD-525 dated 3 Apr. 2014, **CE-133**.

248 Information Notice of the Bank of Russia "On the Work of Credit Institutions on the Territory of the Republic of Crimea and City of Federal Significance, Sevastopol", 17 Apr. 2014, **CE-163**.

249 *See* Butler Report, paras. 99-102.

250 Order of the Bank of Russia No. OD-658 dated 11 Apr. 2014, **CE-151**, parts 1-3.

persons (individuals). The first submission for April 2014 had to be made by 20 May 2014.[251]

(v) To submit a large number of documents and information regarding registration, ownership structure, affiliated persons and management within 30 days (i.e. by 2 May 2014). Moreover, the Bank of Russia required all such documents to be accompanied by Russian translations;[252] and

(vi) To comply with other requirements of the Bank of Russia issued in accordance with the Russian legislation.

133. Furthermore, the Federal Law on the Crimean Financial System stipulated that the Bank of Russia shall terminate the activity of a Ukrainian bank for failure by the latter to comply with any of the above requirements and/or for alleged delay in the performance of any obligations owed to the depositors (creditors) of the Ukrainian banks by as little as a single day.[253]

134. The regulation set by the Federal Law on the Crimean Financial System gave no account to the existing situation in the banking sector in Crimea, lacked due process safeguards and was discriminatory against Ukrainian banks.

135. The majority of the imposed requirements could not feasibly be complied with by the Ukrainian banks. For instance:

(i) The requirement to provide customers with banking services in RUB was introduced without any regard to whether it was practically possible for the Ukrainian banks to implement transactions in RUB immediately. In particular, under Ukrainian law, any payments in RUB and cash flow in RUB were to be carried out in accordance with the rules regulating foreign currency transactions. Accordingly, turnover of funds in RUB within all technical systems of the Bank (including the Ukrainian inter-banking system) was set up subject to the restrictions stipulated by Ukrainian foreign currency regulations. In this regard, Ukrainian law mandated the Ukrainian banks to ensure that a customer intending to transact in a foreign currency (e.g., RUB)

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251 Order of the Bank of Russia No. OD-907 dated 2 May 2014, **CE-175**.

252 *See* Butler Report, paras. 103-105; Information Notice of the Bank of Russia "On Explanations Regarding Provisions of Federal Laws No. 37-ФЗ and No. 39-ФЗ dated 2 Apr. 2014", 7 Apr. 2014, **CE-139**; Order of the Bank of Russia No. OD-563, dated 4 Apr. 2014, **CE-287**.

253 Federal Law on the Crimean Financial System, **CE-129**, Article 7(2) and (5); *See also* Butler Report, para. 74.

within Ukraine would obtain an individual license from the NBU prior to each such transaction.[254] Moreover, whilst initially the Federal Law on Accession had permitted Ukrainian hryvnia circulation until 1 January 2016,[255] on 27 May 2014, the period of hryvnia operation in Crimea was shortened until 1 June 2014.[256]

(ii) Moreover, and crucially, the new requirements imposed on the Ukrainian banks were introduced without any regard to the obligations owed by the Ukrainian banks to their customers to preserve bank secrecy.[257] Disclosing customer information in this manner to the Bank of Russia would have been a direct breach of provisions of the Ukrainian Civil Code and Ukrainian Law "On Banks and Banking Activities".[258]

(iii) The requirement to provide an extensive number of documents and information in Russian language or with translations into Russian to the Bank of Russia within relatively short deadlines that varied from several days to one month, as detailed above, was practically impossible or constrained (as eventually recognised by the Bank of Russia itself at least with respect to submission of the registers of obligations towards creditors and depositors).

136. The provision of the Federal Law on the Crimean Financial System on immediate termination of a Ukrainian bank's activities for alleged failure to comply with certain vague requirements or for the delay in performing any obligations owed to such bank's depositor granted the

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254 Article 5(4)(г) of decree of the Cabinet of Ministers of Ukraine "On the System of Currency Regulation and Currency Control" No. 15-93 dated 19 Feb. 1993 (as amended and effective in April-May 2014), **CE-3**.

Under Ukrainian law, it could take some time for a customer to collect and file necessary documents with the NBU, while the latter might generally review documents within 25 business days, or ask for additional documents and take extra 10 business days for their review. This hindered smooth operations in foreign currency. *See* Resolution No. 483 of the NBU "On Approving Regulation on the Procedure for Issuing by the NBU of Individual Licences for Use of Foreign Currency as Means of Payment on the Territory of Ukraine" dated 14 Oct. 2004, **CE-13**, part 2.2.

255 Federal Law on Accession, **CE-112**, Article 16(2).

256 Federal Constitutional Law No. 7-ФКЗ on Amending the Federal Law on Accession, 27 May 2014, **CE-196**, Article 1(2)(a).

257 Article 60 of Law of Ukraine "On Banks and Banking Activities" No. 2121-III dated 7 Dec. 2000 (as amended as of 19 April 2014, **CE-8**; Article 1076 of Civil Code of Ukraine (as amended as of 19 April 2014), **CE-12**.

258 Article 1076 of Civil Code of Ukraine (as amended as of 19 April 2014), **CE-12**; Article 60 - 62 of Law of Ukraine "On Banks and Banking Activities" No. 2121-III dated 7 Dec. 2000 (as amended as of 19 April 2014), **CE-8**.

Bank of Russia practically unfettered discretion to terminate activities of the Ukrainian banks in Crimea. In addition to it, legal framework established by the Russian Federation for the Bank of Russia's decision on termination of activities of the Ukrainian banks did not even attempt to provide any meaningful assessment process or any practical means for the Ukrainian banks to defend themselves. Namely:

137. By order of 4 April 2014 (hereinafter the **Bank of Russia Order on Termination**), the Bank of Russia provided its Banking Supervision Committee with authority to decide on the termination of activities of the Ukrainian banks in Crimea.[259] The decision to terminate a bank's activities could be implemented based on, *inter alia*, a mere application of a creditor (depositor).[260]

138. The Federal Law on the Crimean Financial System did not require a creditor (depositor) to submit evidence to prove a Ukrainian bank's failure to perform its obligations. The named law merely stated that:

> the failure of credit institutions to perform obligations shall be confirmed by statement of creditors (or depositors) sent to the Bank of Russia with documents appended which prove the existence of obligations (contract of bank deposit, contract of bank account, extracts with regard to an account, other confirming documents or other types of contracts).[261]

139. The Bank of Russia Order on Termination also did not require creditors to submit documentary evidence of the non-performance by the Ukrainian banks of their obligations, although it just recommended creditors to file such documentary evidence.[262]

140. The Federal Law on the Crimean Financial System lacked even the most basic due process safeguards, such as an opportunity for an affected financial institution to present its position regarding alleged breaches, or to contest the charges and sanctions levelled against it.

141. Neither the Federal Law on the Crimean Financial System, nor the Bank of Russia Order on Termination set down a clear procedure and criteria for testing the information submitted to, and decision-making by, the Russian authorities.

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259 Order of the Bank of Russia "On the Termination of the Activity of Solitary Structural Subdivisions of Banks Operating on the Territory of the Republic of Crimea and/or on the Territory of the City of Federal Significance, Sevastopol" No. OD-561 dated 4 Apr. 2014 (**Order of the Bank of Russia No. OD-561**), **CE-135**, (part 3).

260 Federal Law on the Crimean Financial System, **CE-129**, Article 7(3); Order of the Bank of Russia No. OD-561 dated 4 Apr. 2014, **CE-135**, part (1).

261 Federal Law on the Crimean Financial System, **CE-129**, Article 7(3).

262 Order of the Bank of Russia No. OD-561 dated 4 Apr. 2014, **CE-135**.

142. Neither the Federal Law on the Crimean Financial System, nor the Bank of Russia Order on Termination provided for any special appeal procedure. Thus, termination of the Ukrainian banks' activities for different purported failures essentially was subject to the discretion of the Bank of Russia.

143. In contrast to the draconian and obstructive treatment meted out to the Ukrainian banks under the Federal Law on the Crimean Financial System, Russian banks that had licenses with the Bank of Russia and were registered and/or operated in the Russian Federation (hereinafter the **Russian bank(s)**) appeared to be subjected to relaxed banking supervision.

144. For example, the Federal Law "On Banks and Banking Activity" (hereinafter the **Federal Banking Law**) provided that the banking license of a Russian bank could be revoked,[263] *inter alia*, if it:

(i) failed to submit a monthly report for more than 15 days; or

(ii) was not able to satisfy the demands of creditors for monetary obligations and/or perform the duty with regard to the payment of obligatory payments within 14 days from the ensuing of the date for the satisfaction and/or performance thereof, provided such demands in aggregate comprised no less than 1000-times the amount of minimum amount of payment for labour established by Russian federal law.[264]

145. Moreover, the Federal Banking Law required such a decision to be made based only on "credible information that there are grounds for revocation of the license of a credit institution" and established that such a decision may be appealed within a 30 days period.[265]

146. Unsurprisingly, commencing in late April 2014 the Bank of Russia banned the activities of numerous Ukrainian banks in Crimea, while some Russian banks launched operations in Crimea shortly after the purported annexation (e.g., Russian National Commercial Bank (hereinafter

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263 Under Art. 13 of Federal Law "On Banks and Banking Activity" banking activities are performed only on the basis of a license issued by the Bank of Russia in accordance with the mentioned law – *see* Federal Law "On Banks and Banking Activity" No. 395-1 dated 2 December 1990 (as amended and effective in April-May 2014), **CE-1**.

264 Federal Law "On Banks and Banking Activity" No. 395-1 dated 2 December 1990 (as amended and effective in April-May 2014), **CE-1**, Article 20 (1)(4), 20(2)(4), and 20(3).

265 Federal Law "On Banks and Banking Activity" No. 395-1 dated 2 December 1990 (as amended and effective in April-May 2014), **CE-1**, Article 20 (3) and 20(5).

RNCB) and **GenBank**).[266] The above suggests that the Russian Federation treated Ukrainian banks in an arbitrarily harsh and discriminatory manner based solely on their nationality.

2. Federal Law on Crimean Depositor Protection

147. In another act designed to assume control over the Crimean banking system and terminate the operations of the Ukrainian banks, the Russian Federation adopted the Federal Law on Crimean Depositor Protection ostensibly designed to protect the interests of individuals with deposits[267] at the Ukrainian banks in Crimea.[268]

148. As provided for in the Federal Law on Crimean Depositor Protection the DPF was established by the Russian State Corporation, the "Deposit Insurance Agency".[269] As defined in the Charter of the DPF, its main goal was to implement provisions of the Federal Law on Crimean Depositor Protection and the Federal Law on the Crimean Financial System.[270]

149. Pursuant to the Federal Law on Crimean Depositor Protection and the Charter of the DPF, the DPF had broad powers to, *inter alia*: (a) make "compensation payments" to depositors and to make recourse claims to the Ukrainian banks; (b) collect demands to the Ukrainian banks from their depositors; (c) represent depositors in court proceedings against the Ukrainian banks; and (d) administer the assets of the Ukrainian banks in cases and in accordance with the procedure, as ordered by courts.[271]

150. Moreover, the Federal Law on Crimean Depositor Protection envisaged that the DPF acquired rights (demands) in respect of deposits and paid compensation if: (a) a Ukrainian bank failed to perform its obligations towards depositors within three calendar days after such obligations became

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266 "Banks in the Crimea: Business through Fear", 18 Jun 2015, **CE-247**.

267 The Federal Law on Crimean Depositor Protection defined "deposits" as monetary means placed by natural persons or to their benefit in credit institutions on the basis of a contract of bank deposit or contract of bank account, while "depositors" were natural persons (including effectuating entrepreneurial activity without the formation of a juridical person) who placed "deposits" with credit institutions in Crimea (*see* Art. 3 of the Federal Law on Crimean Depositor Protection, **CE-130**). Thus, the terms "deposits" or "depositors" throughout the text of this Section have the same meaning as provided in the Federal Law on Crimean Depositor Protection.

268 *See* discussion of this law by Prof. Butler at Butler Report, paras. 111-123.

269 Federal Law on Crimean Depositor Protection, **CE-130**, Articles 2 and 4(1); The Charter of the DPF approved by the State Corporation "Deposit Insurance Agency" on 1 Apr. 2014 (as amended), **CE-126**, para. 1.6.

270 The Charter of the DPF approved by the State Corporation "Deposit Insurance Agency" on 1 Apr. 2014 (as amended), **CE-126**, para. 1.1 and 2.1.

271 The authorities specified in items (a)-(c) are envisaged by the Federal Law on Crimean Depositor Protection, **CE-130**, Articles 4, 5, 6, 7, 9; the authorities specified in items (a)-(d) are stipulated by the Charter of the DPF approved by the State Corporation "Deposit Insurance Agency" on 1 Apr. 2014 (as amended), **CE-126**, para. 2.2.

due and payable; or (b) the Bank of Russia resolved to terminate activities of a solitary structural subdivision of a Ukrainian bank that operated in Crimea and was registered outside the territory.[272]

151. Accordingly, the Bank of Russia's termination of the activities of numerous Ukrainian banks in Crimea enabled the DPF to formally acquire rights and demands from depositors, pay compensation to depositors, and launch court proceedings against the Ukrainian banks.[273] As mentioned above, from the outset the DPF was provided with "more than enough" financing to make compensatory payments to depositors of the Ukrainian banks in Crimea. The Federal Law on Crimean Depositor Protection provided for no room to adjust the DPF's scheme in case the Ukrainian banks would still be ready to wilfully perform their obligations towards their depositors following a decision of the Bank of Russia to ban their operations.

152. The DPF not only implemented compensation payment scheme, but also effectively served as a bridge to provide Russian banks, newcomers in Crimea, with banking infrastructure of the Ukrainian banks being squeezed out, including Oschadbank. On 21 April 2014 and 29 May 2014, the so-called Crimean courts ordered the DPF to administer the assets of the two largest Ukrainian banks operating in Crimea at the time of the purported annexation – Privatbank and the Claimant, Oschadbank, respectively.[274] The DPF proceeded to lease the main assets of Oschadbank and Privatbank primarily to Russian banks that commenced penetration into and takeover of the Crimean banking market, RNCB and GenBank.[275]

3. State of turmoil in the banking sector in Crimea

153. The above-referenced set of laws was adopted against the background of turmoil in the Crimean banking sector. At that time, the operations of Oschadbank Crimea, as well as other Ukrainian banks had already been affected by actions of the Russian Federation and persons under its control. The developments in Crimea orchestrated by Russia since February 2014 had materially affected the environment in which the Ukrainian banks, including Oschadbank Crimea, were operating.[276] In such circumstances, it could have been reasonably expected that, regardless of the endeavours of the Ukrainian banks, including Oschadbank, to perform their obligations towards their customers in a full and proper manner in accordance with Ukrainian legislation, there could have been an occasional delay in their operations in Crimea. In its turn, such a delay could serve as (and, in the

272 *See* Butler Report, para. 117; Federal Law on Crimean Depositor Protection, **CE-130**, Article 6.

273 *See* Butler Report, paras. 120-122; DPF Annual Report 2014, **CE-40**, pp. 32-33.

274 DPF Annual Report 2014, **CE-40**, p. 4; "Russia's Seizure of Ukrainian Banks in Crimea is still Wreaking Havoc with Locals' Finances", the Economist Newspaper, 20 Nov. 2014, **CE-225**.

275 DPF Annual Report 2014, **CE-40**, p. 12.

276 *See* Pyshnyy Statement, para. 39.

case of Oschadbank, was claimed to be) a formal ground for the Bank of Russia to terminate activities of the Ukrainian banks in Crimea. For instance:

154. As mentioned in Section III.B above, as of the end of February 2014, Russian armed forces started blocking Ukrainian military bases, seized key local infrastructure objects and occupied local authorities' buildings. Pro-Russian political forces organised separatists' rallies. The activities of Kremlin-backed irregulars and so-called Crimean authorities were accompanied by terrifying widespread media coverage against the Euromaidan and new Ukrainian authorities.[277]

155. The media also reported on some decisions of the so-called Crimean authorities imposing restrictions on banking activities (although later claimed to be a provocation). Such actions triggered tensions among the Crimeans who started massively withdrawing their money from the Ukrainian banks.[278]

156. Pro-Russian forces set up checkpoints in the territory connecting the Crimean peninsula and mainland Ukraine.[279]

157. There were problems in circulation of cash in Crimea. Due to security concerns, legal entities also transferred large quantities of cash to their bank accounts. In turn, Ukrainian banks also resolved to transfer much of the cash kept in their vaults (safes) to the Main Directorate of the NBU in Crimea. Consequently, the vault of the Main Directorate was overflowing with cash, which could not be transported out of Crimea due to the closed border and broader security concerns.[280] Attempts to transport the cash to mainland Ukraine were made, but were unsuccessful, and the NBU employees who made such attempts faced threats against their life by the so-called Crimean authorities.[281]

158. At that time Russia took a series of steps to transform the structure of banking supervision in Crimea. In mid-March 2014 the so-called local Crimean authorities purported to establish the Bank of Crimea[282] and the Bank of Sevastopol.[283] The Bank of Russia announced the

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277 Additionally, *see* publication "If it was directed in a certain way, then the director should get alpha plus", an interview of Rustam Temirgaliev with the Russian periodical "Vedomosti" regarding developments leading to the purported Crimean referendum, **CE-242**.

278 "Withdrawal Limit Creates Long Queues at Crimea Banks", 14 Mar. 2014, **CE-90**.

279 *See* Pyshnyy Statement, para. 36.

280 Pyshnyy Statement, paras. 36-37.

281 Letter from the former Head of the NBU of 3 Mar. 2016, **CE-262**; *see* also Pyshnyy Statement, para. 36.

282 On 17 March 2014 the State Council of the Republic of Crimea issued Decree "On Confirmation of the Provisional Statute on the Bank of Crimea" No. 1751-6/14, **CE-98**; on 28 March 2014 the President of the State Council of the Republic of Crimea issued Decree "On the Creation of the Bank of Crimea"

establishment as of 1 April 2014 of its territorial divisions in Crimea and Sevastopol.[284] Given the state of Ukraine-Russia relations at that time, the transformation process of the banking system in Crimea could not be but troubled. For instance, an official of the Bank of Russia in Sevastopol reported about practical difficulties in setting the operation of the Bank of Russia in the peninsula and switching to the Russian legal system.[285]

159. There were serious concerns due to lack of transparency and accessibility of the Crimea-related legislation. For instance, the Regulation establishing an official information portal of the Republic of Crimea was approved only on 4 July 2014.[286]

160. The actions of the Russian Federation had rendered Crimea unstable to the point that even major Russian banks reportedly refused to enter the Crimean market as of 1 April 2014, although the Bank of Russia set up an expedited procedure for Russian banks to expand to Crimea on 27 March 2014.[287]

161. Furthermore, the illicit activities and violent manner of the so-called Crimean Self-Defence Forces seem to have contributed to the security concerns. The so-called Crimean authorities adopted a law purporting to regulate the status of the Crimean Self-Defence Forces only in June 2014.

162. The above-referenced legal scheme put in place by the Russian Federation was utilised to force Ukrainian banks to leave Crimea.[288] A Russian business analyst opined that "behind the exodus of Ukrainian banks from Crimea" were the newly-adopted Russian laws.[289]

No. 1884-6/14, **CE-121**, creating the Bank of Crimea and retroactively sanctioning its operation as of 17 March 2014; on 4 Apr. 2014 the State Council of the Republic of Crimea issued Decree "On Creation of the Bank of Crimea" No. 1941-6/14, **CE-136**, establishing the Bank of Crimea as of 17 March 2014); "Crimeans may now use Rouble, if they can find out what it is worth", 24 Mar. 2014, **CE-113**.

283 The Pension Fund and the City Bank are established in Sevastopol, 19 Mar. 2014, **CE-110**.

284 Publication "The Central Bank Deprived Crimea of Independence. The New Structure of the Central Bank and the Expedited Procedure for Establishment of the Russian Banks' Branches in Crimea Have Been Approved", 1 Apr. 2014, Russian periodical "Izvestia", **CE-127**.

285 Publication "Sevastopol. The Bank of Russia Division – the first year…" by the Deputy Head of the Bank of Russia Division in Sevastopol, V.B. Ablezgov, **CE-284**.

286 Edict of the Head of the Republic of Crimea No. 144-У dated 04 July 2014, **CE-211**.

287 Publication "The Central Bank Deprived Crimea of Independence. The New Structure of the Central Bank and the Expedited Procedure for Establishment of the Russian Banks' Branches in Crimea Have Been Approved" of 1 April 2014 in the Russian periodical "Izvestia", **CE-127**.

288 *See* Pyshnyy Statement, paras. 38-40.

289 P. Hobson, "Ukrainian Banks Flee Crimea as Little-Known Russian Bank Expands", the Moscow Times, 13 Apr. 2014, **CE-154**.

163. From the very beginning of Crimea's annexation, the intention of the Russian and Russia-backed Crimean authorities was to "rebuild" the Crimean banking system by forcing the Ukrainian banks to flee Crimea and then to replace them with Russian banks.[290] It was reported that the Bank of Russia's process for banning banking operations in Crimea focused on "non-resident" (mainly Ukrainian) banks.[291] Indeed, Crimea's First Deputy Prime Minister, Rustam Temirgaliev, reportedly stated on 13 April 2014 that the so-called Crimean authorities were "actively building up a network of Russian banks". According to Mr Temirgaliev, "Ukrainian banks are fleeing for shelter", and "of a huge network of Ukrainian banks, only four are now operating, and according to our information, these banks could wrap up operations within two weeks". Tellingly, these statements were made even before the Bank of Russia started banning operations of Ukrainian banks; the first such decision was not issued until 21 April 2014.[292] Between 21 April and 29 December 2014, the Bank of Russia banned operations of 45 Ukrainian banks in Crimea, including Oschadbank Crimea.[293]

164. In sum, the Russian Federation destroyed the traditional banking system in Crimea that existed prior to the annexation. Russia forced Ukrainian banks (including Oschadbank) to close down their Crimean operations, squeezed out the Ukrainian national currency, and replaced the region's retail banking network almost overnight.[294]

D. THE RUSSIAN FEDERATION BANNED THE CLAIMANT'S OPERATIONS

165. The Russian Federation, having usurped the banking sector of Crimea, continuously interfered in the operation of Oschadbank Crimea and eventually formalised its decision to ban the Claimant's activity in Crimea.

1. Russia banned Oschadbank Crimea's operation in Crimea

166. On 26 May 2014, the Bank of Russia issued a formal prohibition against the banking activities of Oschadbank Crimea. This was done through the issuance, pursuant to Article 7 of the Federal Law on the Crimean Financial System,[295] of the decision "On the Termination of Activities of Solitary Structural Subdivisions of Public Joint Stock Company "State Savings Bank of Ukraine", city of Kyiv, Ukraine, in the Territory of the Republic of Crimea and the City of Federal Significance

290 *See* Pyshnyy Statement, paras. 38-40.

291 "Russia's Seizure of Ukrainian Banks in Crimea is Still Wreaking Havoc with Locals' Finances", 20 Nov. 2014, **CE-225**.

292 P. Hobson, "Ukrainian Banks Flee Crimea as Little-Known Russian Bank Expands", the Moscow Times, 13 Apr. 2014, **CE-154**; DPF Annual Report 2014, **CE-40**, pp. 32-33.

293 DPF Annual Report 2014, **CE-40**, pp. 32-33.

294 "Russia Has Basically Blown up Crimea's Banking System", Reuters, 20 Nov. 2014, **CE-226**.

295 Federal Law on the Crimean Financial System, **CE-129**, Article 7(4) and (5).

Sevastopol"[296] (hereinafter the **Decision on Termination of Oschadbank Crimea**). On the same day the Bank of Russia ordered the appointment, as of 26 May 2014, of a "plenipotentiary representative" of the Bank of Russia to Oschadbank Crimea[297] and requested the Russian MIA "to ensure security" of Oschadbank Crimea's assets, its databases and other documentation.[298]

167. In its Decision on Termination of Oschadbank Crimea, the Bank of Russia referenced a decision of its Banking Supervision Committee formalised in non-public protocol No. 22 of that Committee's session of 23 May 2014. However, the management of Oschadbank had not been informed in advance of such a session of the Banking Supervision Committee and had not been afforded an opportunity to refute the alleged grounds for termination of Oschadbank Crimea activities.

168. The Bank of Russia substantiated its Decision on Termination of Oschadbank Crimea by the alleged failure of Oschadbank Crimea to perform its obligations towards its creditors (depositors). The management of Oschadbank had not been notified of the alleged failure of Oschadbank Crimea to comply with its obligations.

169. The decision to take over Oschadbank Crimea business was taken in advance and the ultimate formal Decision on Termination of Oschadbank Crimea was inevitable. Following the adoption of the Federal Law on the Crimean Financial System, the Russian-controlled Crimean authorities and Self-Defence Forces undertook a number of activities that were a precursor of the Bank of Russia's Decision on Termination of Oschadbank Crimea. In addition to the self-telling facts of turmoil state of the banking sector in Crimea described above, the below illustrates the gravity of the situation created by the Russian Federation and its controlled persons.

170. In addition to the spurious legal grounds used to engineer the ouster of Ukrainian banks from Crimea, in some instances armed force was also employed in seizing the assets of the Ukrainian banks in Crimea. Sometime in April, Russian-speaking armed forces, reportedly organised by the Russian Federal Security Service (FSB) carried out organised armed attacks or intimidation campaigns against Ukrainian banks and their separate units throughout Crimea, including against the

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296 Decision of the Bank of Russia "On the Termination of Operations of Solitary Structural Subdivisions of Public Joint Stock Company "State Savings Bank of Ukraine", city of Kyiv, Ukraine, in the Territory of the Republic of Crimea and the City of Federal Significance Sevastopol" No. PH-33/II dated 26 May 2014, **CE-189**.

297 Order of the Bank of Russia "On the Appointment of Plenipotentiary Representatives of the Bank of Russia to Public Joint Stock Company "State Savings Bank of Ukraine" No. ОД-II50 dated 26 May 2014, **CE-190**.

298 Letter of the Bank of Russia to the Russian MIA No. 04-33/4026 dated 26 May 2014, **CE-191**.

Main Directorate of the NBU in Crimea.[299] On 8 May 2014, a "group of armed people", including representatives of so-called Crimean authorities and law-enforcement agencies, were reported to have physically blocked and seized the premises and cash vault of the NBU's territorial directorate in Crimea.[300]

171. As reported by news agency "Crimeainform", in spring 2014, Rustam Temirgaliev, then so-called First Deputy Prime Minister of the Republic of Crimea responsible for economic issues in the government, convened daily unofficial meetings devoted to the banking sector and aimed at keeping the property and assets of Ukrainian banks' outlets under the control of the Republic of Crimea.[301] Igor Vasilchenko, then so-called Adviser to the Prime Minister of the Republic of Crimea, reportedly had implemented Mr Temirgaliev's instructions in order to ensure smooth termination of activities of the Ukrainian banks and their substitution by the Russian banks.[302]

172. Also Mr Temirgaliev reportedly held a meeting with Oleg Riabtsev, the then Head of Oschadbank Crimea.[303] In turn, in April 2014 Mr Riabtsev reported to the CEO of Oschadbank that representatives of the Crimean Self-Defence Forces warned him of criminal liability if Oschadbank Crimea assets were moved to mainland Ukraine.[304] Furthermore Mr Matyukha, Kyiv-appointed supervisor of Oschadbank Crimea, reported that on 15 May 2014 Mr Riabtsev informed that he was subjected to pressure by the Crimean Self-Defence Forces to hand over cash and valuables; Mr Riabtsev further stated that he was warned by the Crimean Self-Defence Forces that he would be punished out of court and that Oschadbank Crimea would be seized if he ignored the request and failed to hand over cash and valuables.[305]

173. The so-called Crimean authorities personally threatened the local management and employees of Oschadbank Crimea should they choose to comply with the orders coming from

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299 Letter from the former Head of the NBU of 3 Mar. 2016, **CE-262**.

300 NBU Press Release as of 12 May 2015, **CE-183**.

301 Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

302 Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

303 Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

304 Email from Mr Riabtsev to Mr Pyshnyy No. 22/1-01/954 dated 10 Apr. 2014 on the fulfilment of order concerning the repair of cash-in-transit vehicles, **CE-145**.

305 Office memorandum of Mr Matyukha, Head of Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate No. 50-10/1350, "Report on business trip to branch – Crimean Republican Directorate" dated 27 May 2014, **CE-198**; Matyukha Statement, para 21, where Mr Matyukha indicated that "*I heard that Mr Riabtsev said a few times that if we did not give the cash voluntarily, they would take it by force*".

Oschadbank Kyiv management.[306] In one incident, the so-called Self-Defense Forces detained the Kyiv-appointed supervisor of Oschadbank Crimea in order to clarify the purpose of his visit to Crimea, place of work, position, and duration of stay in Crimea.[307] Moreover, at some point, so-called Crimean authorities even drafted and publicised a list of persons whose presence in Crimea was considered "undesirable", which included the CEO of Oschadbank, Mr Andriyy Pyshnyy.[308]

174. There were reports that Russian agents would attempt, if they were not already attempting, to infiltrate and sabotage the Ukrainian banking system through the Main Directorate of the NBU in Crimea. Furthermore, Oschadbank had received information that unknown people, most likely agents of the Russian Federal Security Service, were present in Oschadbank Crimea's premises. These people requested staff of Oschadbank Crimea to provide them with access to all information systems of Oschadbank (it should be stressed that access to Oschadbank's information systems is strictly limited for reasons including to ensure compliance with banking secrecy laws).[309] Also Mr Riabtsev, Head of the Branch, informed management of Oschadbank about the presence of unknown people who identified themselves as Russian state security agents in the Branch.[310]

175. As detailed below, Oschadbank Crimea was subjected to the so-called "Crimea Banking Sector Development Program", which amounted to little less than the forced termination of operation of Oschadbank Crimea outlets. Furthermore, Oschadbank Crimea was the target of two crimes[311] organised and perpetrated by the so-called Crimean authorities (i.e., seizure of cash and valuables stored in Oschadbank Crimea).

2. "Crimea Banking Sector Development Program"

176. The so-called local Crimean authorities supported fully the program of the Bank of Russia promoting the expansion of Russian banks to Crimea. In particular, they sought to pave the

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306 Email from Mr Riabtsev to Mr Pyshnyy No. 22/1-01/954 dated 10 Apr. 2014 on the fulfilment of order concerning the repair of cash-in-transit vehicles, **CE-145**; Pyshnyy Statement, para 34.

307 Office memorandum of Mr Matyukha, Head of Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate No. 50-10/1350, "Report on business trip to branch – Crimean Republican Directorate" dated 27 May 2014, **CE-198**.

308 The list was published on the website of the so-called State Council of the Republic of Crimea on 2 Apr. 2014, **CE-132**.

309 Pyshnyy Statement, para. 33.

310 Pyshnyy Statement, para 34.

311 Subsequently Russia recognised that the described episodes with respect to seizure of cash and valuables were criminally punishable offences – *see* Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding I.V. Vasilchenko dated 22 Sept. 2015, **CE-251**; Sentence of Kyiv District Court of Simferopol in criminal case No. 1-406/2015 regarding A.I. Tiazhkosilo, dated 17 Aug. 2015, **CE-249**. Also reportedly there are criminal sentences against Sergey Shatalov and Viacheslav Zadorozhniy. "Crimean gold promises freedom", 28 Jul 2016, **CE-268**.

way for the Russian banks to enter the Crimean market and substitute the Ukrainian banks, including Oschadbank Crimea.

177. During April 2014, operations in 85 Oschadbank Crimea outlets had to cease because the lease agreements for the premises of these outlets were terminated prematurely without a prior written notice and in breach of the relevant lease agreements. The Head of Oschadbank Crimea explained that the implementation of the "governmental purpose-oriented program for the development of the banking system of the Republic of Crimea and its swift integration into the banking system of the Russian Federation" was the declared reason for such early termination of Oschadbank Crimea lease agreements.[312]

178. As further detailed by Mr Riabtsev, in the context of the Crimea Banking Sector Development Program, the so-called Council of Ministers of the Republic of Crimea gave instructions that several of Oschadbank's leased premises now be leased to Russian bank RNCB. The Crimea Banking Sector Development Program never appeared in the public domain. The Head of Oschadbank Crimea sent to Oschadbank a copy of one of the instructions issued by Mr Temirgaliev, the so-called First Deputy Chairman of the Council of Ministers of the Republic of Crimea. According to Mr Temirgaliev's instructions, certain persons, apparently the purported heads of Crimean municipal authorities, were required to ensure the lease of certain premises, identified by their addresses, to RNCB.[313] Five Oschadbank Crimea outlets were located at the addresses listed in Mr Temirgaliev's instructions.[314]

179. Mr Riabtsev also informed the CEO of Oschadbank that the mentioned premises previously leased by Oschadbank Crimea had been occupied by RNCB.[315] According to Mr Matyukha, the Kyiv-appointed Supervisor to Oschadbank Crimea, during April 2014, after Oschadbank Crimea's lease agreements were prematurely terminated on the order of the so-called Crimean authorities, RNCB came to occupy more than 80 premises previously leased by Oschadbank Crimea.[316]

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312 Letter from Mr Riabtsev to the CEO of Oschadbank No. 24-01/070 dated 5 May 2014, **CE-176**.

313 Letter from Mr Riabtsev to the CEO of Oschadbank No. 24-01/070 dated 5 May 2014, **CE-176**.

314 Office memo of Mr Karnaushenko, Deputy Director of Banking Security Department, Head of Directorate of Protection and Securing of Assets Collection No. 22/2-05/2-1055, "Report on the results of business trip to the Crimean RD" dated 5 May 2014, **CE-177**, Annex 1 "The general list of transferred outlets".

315 Letter from Mr Riabtsev to the CEO of Oschadbank No. 24-01/070 dated 5 May 2014, **CE-176**.

316 Matyukha Statement, para 12.

180. At least as of the beginning of May 2014, RNCB reportedly planned to occupy all premises of Oschadbank Crimea. Oschadbank outlets' movable property was transferred for storage to RNCB.[317] Also RNCB hired Oschadbank Crimea employees who worked in the outlets of Oschadbank Crimea that were forcefully closed due to early termination of the lease agreements.[318]

181. According to Mr Matyukha, Mr Riabtsev told him that there were certain "options" for Oschadbank Crimea in the nearest future – either to be transformed into the Sberbank of Crimea or to become a part of RNCB (supposedly owned by the so-called Crimean government, which was operating under orders from Moscow) as its Tauric branch in Crimea.[319]

3. Seizure of Cash

182. The so-called First Deputy Chairman of the Council of Ministers of the Republic of Crimea, Rustam Temirgaliev, also reportedly planned and organised the robbery of cash from Oschadbank Crimea.[320] On 16 May 2014, the so-called Adviser to Prime Minister of the Republic of Crimea, Igor Vasilchenko, and the so-called Head of the Anti-Corruption Committee, Vladimir Mertsalov, both of whom claimed to be members of the Crimean Self-Defence Forces, accompanied by other individuals, stole over UAH 32 million (approximately equivalent to USD 2.8 million using an exchange rate of 11.657 as at 16 May 2014) in cash from Oschadbank Crimea premises located at 55a Kyivska St. in Simferopol.[321]

183. The representatives of the so-called Crimean authorities and the Crimean Self-Defence Forces were armed and threatened Oschadbank Crimea employees.[322] In particular, after Mr Matyukha, Kyiv-appointed supervisor of Oschadbank Crimea, enquired about the grounds for the removal of cash, Mr Vasilchenko said that they were acting in accordance with a resolution of

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317 Office memo of Mr Karnaushenko, Deputy Director of Banking Security Department, Head of Directorate of Protection and Securing of Assets Collection No. 22/2-05/2-1055 "Report on results of business trip to the Crimean RD" dated 5 May 2014, **CE-177**; 19 signed Acts of Bank outlets' movable property transfer and its acceptance for storage by Russian National Commercial Bank dated 7, 18, 19, 21 and 23 Apr. 2014, **CE-168**.

318 Office memo of Mr Karnaushenko, Deputy Director of Banking Security Department, Head of Directorate of Protection and Securing of Assets Collection No. 22/2-05/2-1055, "Report on the results of business trip to the Crimean RD" dated 5 May 2014, **CE-177**.

319 Matyukha Statement, para 12.

320 Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

321 Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding Vasilchenko I.V. dated 22 Sept. 2015, **CE-251**; Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

322 Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

Crimea's so-called "state council", that all property of Ukraine was now the property of Crimea, that Oschadbank was state-owned, so all of its cash now belonged to the so-called "Republic of Crimea", and they were entitled to take it away; and Mr Mertsalov replied that if Mr Matyukha were to ask too many questions, they had "enough cellars for him".[323] The funds were seized purportedly for their transfer for keeping to the NBU in Crimea on the basis of a non-existent resolution of the Council of Ministers of the Republic of Crimea.[324] In fact, the cash was removed by representatives of the Crimean Self-Defense Forces[325] to be transferred to the premises of GenBank, a Russian bank in Simferopol.[326]

4. Seizure of Valuables

184. On 21 May 2014 the so-called Crimean officials and representatives of the Crimean Self-Defence Forces (i.e., the so-called First Deputy Chairman of the Council of Ministers of the Republic of Crimea, Rustam Temirgaliev, and the so-called Adviser to Prime Minister of the Republic of Crimea, Igor Vasilchenko) completed another high profile well-planned theft, this time of jewellery and precious stones with a total weight of approximately 300 kg and an estimated value of more than RUB 605 million[327] (approximately equivalent to USD 17.5 million at the stated date)[328] that were stored at Oschadbank Crimea.

185. These so-called Crimean officials forged an order of the Commercial Court of the Republic of Crimea purporting to require transfer of the valuables in the custody of Oschadbank

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323 Office memorandum of Mr Matyukha, Head of Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate No. 50-10/1350, "Report on business trip to branch – Crimean Republican Directorate" dated 27 May 2014, **CE-198**; Matyukha Statement, paras. 19–20.

The so-called Crimean authorities referred to Decree "On Questions of the Administration of Ownership of the Republic of Crimea" No. 2085-6/14 of 30 Apr 2014, **CE-172**.

324 Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding Vasilchenko I.V. dated 22 Sept. 2015, **CE-251**; Alla Dobrovolskaya "Lowest Purity, P.1: "How Temirgaliev Organized Theft of Almost RUB 100 Million", 4 Feb. 2016, **CE-257**.

325 The employees of Oschadbank Crimea completed two reports (acts) in respect of seizure of monetary funds: (i) the act on transfer of monetary funds to the NBU in Crimea indicating that the money was transferred to the Main Office of the NBU dated 16 May 2014, **CE-186** and (ii) the act on seizure of monetary funds at the request of Crimean Self-Defense Forces dated 16 May 2014, **CE-187**; office memo from Mr Sinyagovskiy, Head of the Audit and Supervision Directorate of Oschadbank, No. 20-10/116, "On implementation of action plan on closure of the Branch – Crimean Republican Directorate", 27 May 2014, **CE-199**.

326 Matyukha Statement, paras. 22–23.

327 Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding I.V. Vasilchenko dated 22 Sept 2015, **CE-251**; Sentence of Kyiv District Court of Simferopol in criminal case No. 1-406/2015 regarding A.I. Tiazhkosilo dated 17 Aug. 2015, **CE-249**.

328 Using exchange rate of 34.5451 as at 21 May 2014 – *see* Davidson Report, para 10.3.

Crimea for a gemmological expert examination.[329] The forged court order purported to bear the signature of Judge Anton Pukas, who had never obtained Russian citizenship and had left his judge's seal at the court on 23 March 2014 before departing for mainland Ukraine.[330]

186. In addition to the sham court order, the criminal gang of the so-called Crimean officials also engaged a certain Artem Tiazhkosilo to pretend to be an expert gemmologist. Having misled the employees of Oschadbank Crimea that the valuables were taken away for expert examination based on the court order, the so-called Crimean officials took the valuables from Oschadbank Crimea in order to share them between themselves.[331] Given that the so-called Crimean officials were acting at the direction and under the control of the Russian Federation, responsibility for this series of brazen crimes falls to the Russian Federation as well.

187. The foregoing examples of unjust and unlawful actions of persons under Russian control had further magnified the grounds for termination of Oschadbank Crimea operation by the Bank of Russia. Such acts of interference into the operation of Oschadbank in Crimea and the functioning of the Crimean banking system evidence impossibility for further operation of Oschadbank in Crimea.

E. IN COLLABORATION WITH UKRAINIAN AUTHORITIES, THE CLAIMANT SOUGHT TO PROTECT ITS CRIMEAN INVESTMENTS AND OPERATIONS, TO NO AVAIL

188. Oschadbank actively (although unsuccessfully) tried to resist illegal actions towards its business in Crimea by adopting a special regime of operation. Oschadbank also sought out ways to secure its Crimean investments, including: return cash, valuables and sensitive customer records to its headquarters in mainland Ukraine for safekeeping,[332] set up a commission in Oschadbank's headquarters and formed a number of local inventory commissions for taking inventory of various types of assets and liabilities of Oschadbank Crimea, performed inventory counts, required Oschadbank Crimea to transfer all credit files of its customers as well as databases and data

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329 Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding I.V. Vasilchenko dated 22 Sept 2015, **CE-251**; Sentence of Kyiv District Court of Simferopol in criminal case No. 1-406/2015 regarding A.I. Tiazhkosilo dated 17 Aug. 2015, **CE-249**.

330 Alla Dobrovolskaya "Lowest Purity, P.2: "How Temirgaliev Organized Theft of 300 kg of Gold", 5 Feb. 2016, **CE-258**.

331 Sentence of Kyiv District Court of Simferopol in criminal case No. 1-483/2015 regarding I.V. Vasilchenko dated 22 Sept. 2015, **CE-251**; Sentence of Kyiv District Court of Simferopol in criminal case No. 1-406/2015 regarding A.I. Tiazhkosilo dated 17 Aug. 2015, **CE-249**.

332 Pyshnyy Statement, para. 37.

cryptographic protection facilities of the Crimean Branch to Oschadbank's headquarters and to transfer all cash collected by Oschadbank Crimea to the Main Directorate of the NBU in Crimea.[333]

189. Discussed below are several indicative examples of Oschadbank's attempts to protect its investments and operations in Crimea.

1. Transfer of valuables to mainland Ukraine

190. Oschadbank actively sought out ways to return cash, valuables and sensitive customer records to its headquarters in mainland Ukraine for safekeeping, however on most occasions such a transfer proved impossible due to multiple fortified checkpoints across the so-called "border" between Crimea and Ukraine and threats to Oschadbank employees from the so-called Crimean Self-Defence Forces.[334] The most telling example is the Oschadbank's unsuccessful attempts to transfer the cash-in-transit vehicles to mainland Ukraine.

191. Before the Russian Federation's interference in operation of Oschadbank in Crimea, Oschadbank Crimea generated additional profits from currency exchange and cash transportation services. The Bank enjoyed a considerable competitive advantage in the cash transportation business because, unlike other commercial banks, its employees are authorised to carry weapons for security during cash-in transportation services. This allowed Oschadbank to offer armed transport services at lower cost. The high demand for those services required the purchase of 75 armoured cash collection vehicles exclusively for the use of Oschadbank Crimea.[335]

192. Oschadbank Crimea had 77 armoured cash-in-transit vehicles recorded on its balance sheet as of 1 March 2014.[336] In early April 2014, the Claimant repeatedly ordered Oschadbank Crimea to transport 20 cash-in-transit vehicles to mainland Ukraine for repair.[337] The main reason for this order was to preserve the Bank's vehicles by way of relocating them to a safe place. However, Oleg Riabtsev, the then Head of Oschadbank Crimea, reported that he was warned by the head of the Crimean Self-Defence Forces that he would incur criminal liability if the Claimant's assets were removed from Crimea. Furthermore, Mr Riabtsev informed that the vehicles could not be transported to mainland Ukraine since all 50 employees of Oschadbank's internal collection service had

333 Pyshnyy Statement, paras. 41, 42 and 49.

334 Pyshnyy Statement, para. 36.

335 Pyshnyy Statement, paras. 27.

336 Letter from Oschadbank Crimea to Claimant No. 23/1-04/142/913 dated 4 Apr. 2014, **CE-137**.

337 Letter from Claimant to Oschadbank Crimea No. 50-5/819 dated 4 Apr. 2014, **CE-138**; Letter from Claimant to Oschadbank Crimea No. 50-5/848 dated 8 Apr. 2014, **CE-141**.

terminated their employment with Oschadbank Crimea, and refused to transfer vehicles due to the critical situation in Crimea and possible consequences.[338]

193. Therefore, on 15 May 2014, Oschadbank at least attempted to secure technical documents, including title ones, for 77 cash-in-transit vehicles and ordered Oschadbank Crimea to devise possible means of transferring such documents to Oschadbank's headquarters in Kyiv.[339] However, the so-called Crimean authorities thwarted Oschadbank's attempts to transfer the vehicles, title documents, and other assets (such as cash-registering equipment and certified safe boxes) out of Crimea.[340]

2. Inventory Counts

194. To ensure that Oschadbank could salvage at least some of its Crimean assets, and to reserve more effectively its rights as to the rest, on 16 April 2014 the management of Oschadbank ordered a comprehensive audit of Oschadbank Crimea's assets and liabilities.[341] Thus, Oschadbank resolved to:

(i) set up a commission in Oschadbank's headquarters that would be responsible for taking inventory count of assets and liabilities of Oschadbank Crimea (**Oschadbank's Inventory Commission**);

(ii) form a number of local inventory commissions for taking inventory of various types of assets and liabilities of Oschadbank Crimea and authorise such commissions to complete the assigned inventories (**Oschadbank Crimea's Inventory Commissions**);

(iii) order Mr Riabtsev to (i) arrange for the delivery of cash, investment metals, securities in paper form, strict security forms, other valuables and various original documents from local outlets to Oschadbank Crimea by 25 April 2014, and (ii) ensure the provision to Oschadbank's Inventory

338 Email from Mr Riabtsev to Mr Pyshnyy No. 22/1-01/954 dated 10 Apr. 2014 on the fulfilment of order concerning the repair of cash-in-transit vehicles, **CE-145**.

339 Letter from Claimant to Oschadbank Crimea No. 50-5/1226 dated 15 May 2014, **CE-185**.

340 "Protocol of the Results of Inventory, Inventory Sheets of Assets and Liabilities of the Branch – Crimean Republican Directorate of JSC "Oschadbank" of the Commission of the Head Office of the Bank on the Inventory of Assets and Liabilities of the Branch – Crimean Republican Directorate of JSC "Oschadbank" dated 27 May 2014", approved by the Chairman of Oschadbank's Management Board on 30 May 2014, ("**Protocol of the Results of Inventory**"), **CE-200**.

341 Pyshnyy Statement, para. 41.

> Commission of the consolidated protocol of inventory results, inventory sheets of assets and liabilities by 26 May 2014.[342]

195. Thus, during April – May 2014, Oschadbank Crimea's Inventory Commissions performed inventory counts of various types of accounts and assets of Oschadbank Crimea and reported on their results.[343] Even a delegation of officials from Oschadbank's headquarters was sent on a business trip to Oschadbank Crimea to conduct on-site audits.[344] Consequently, Oschadbank's Inventory Commission consolidated the results of inventories and Oschadbank's management approved such results on 30 May 2014.[345] These results, *inter alia*, shed light on certain events leading to the disruption of normal operation of Oschadbank Crimea, including the circumstances relating to seizure of valuables and monetary funds, as described in more detail in Section IV(D) above.[346] As regards losses incurred by the Claimant, these issues are covered separately in Section VII below.

3. Introducing Special Measures and Temporary Regulation

196. On 30 April 2014, the Management Board of Oschadbank, having considered the decision of the Operational Risk Management Committee of Oschadbank of 24 April 2014,[347] appointed Oleksandr Matyukha, one of the senior managers at Oschadbank's headquarters,[348] as a supervisor of Oschadbank Crimea (**Oschadbank Crimea's Supervisor**).[349] Oschadbank also approved temporary regulation on special conditions providing for a special regime for Oschadbank Crimea's operation (the **Temporary Regulation**) and certain special measures to ensure Oschadbank Crimea's operation (the **Crimean Special Measures**).[350]

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342 Order No. 101 of Mr Pyshnyy, Chairman of the Management Board, "On Taking Inventory of Cash, Investment Metals, Securities in Paper Form, Strict Security Forms, Other Valuables, Customer Accounts, Advanced Loan Accounts, Receivables and Payables Accounts, Transit and Other Accounts of the Branch – Crimean Republican Directorate" dated 16 Apr. 2014, **CE-158**.

343 Pyshnyy Statement, para. 42.

344 Order No. 114 of Mr Pyshnyy, Chairman of the Management Board, "On the Audit of Certain Issues and Business Trip to the Branch – Crimean Republican Directorate of Oschadbank" dated 23 Apr. 2014, **CE-169**.

345 Protocol of the Results of Inventory, **CE-200**.

346 Protocol of the Results of Inventory, **CE-200**.

347 Minutes of the Meeting of the Operational Risk Management Committee of Oschadbank No. 1404-2 dated 24 Apr. 2014, ("**Minutes No. 1404-2**"), **CE-170**; Matyukha Statement, para 5.

348 At that time, Mr Oleksandr Matyukha was the Head of the Division on Work with System Customers and Banks of the Currency Assets Collection, Recount and Custody Directorate at Oschadbank.

349 Management Board Resolution No. 277 of 30 April 2014, **CE-173**; Pyshnyy Statement, para. 46.

350 Minutes No. 1404-2, **CE-170**; Management Board Resolution No. 277 of 30 April 2014, **CE-173**; Pyshnyy Statement, para. 46.

197. Under the Temporary Regulation, Oschadbank Crimea and its outlets were forbidden to (i) perform various banking operations, except for those expressly allowed by the Temporary Regulation, (ii) conclude new contracts or agreements with customers (including loan, deposit, bank account and overdraft agreements), or (iii) amend the existing contracts or agreements with customers, except for certain agreements that were subject to an approval of Oschadbank Crimea's Supervisor.[351] Oschadbank Crimea was also required to transfer all credit files of its customers to Oschadbank's headquarters by 25 May 2014. Furthermore, all cash collected from customers by Oschadbank Crimea's cash collection service was to be transferred to the vault of the Main Directorate of the NBU in Crimea not later than the next banking day after such collection.[352]

198. Additionally, the Crimean Special Measures envisaged, *inter alia*, that: (i) all documents to be executed by Oschadbank Crimea were subject to an approval of Oschadbank Crimea's Supervisor; (ii) databases and data cryptographic protection facilities of Oschadbank Crimea were to be transferred to Oschadbank's headquarters; and (iii) Oschadbank's headquarters would take control over Oschadbank Crimea's operations with its customers.[353]

199. Moreover, under the Crimean Special Measures, the Bank directed the Crimean Branch not to cooperate with Russia or its representatives and not to recognise decisions adopted by the so-called "Crimean" and Russian authorities, or by the so-called Crimean courts, as they were contrary to Ukrainian laws. Also, if premises of Oschadbank Crimea's outlets were subjected to physical seizure by third parties, Mr Riabtsev was obliged to ensure that: (i) the databases and information systems of such outlets were promptly cut off; (ii) all documents were to be taken out of such outlets; and (iii) all facts confirming the infliction of any property losses on Oschadbank were to be recorded (including photo or video evidence) and were to be immediately notified of to the Oschadbank's management.[354]

4. NBU's Resolution and Closure of Oschadbank Crimea

200. On 6 May 2014, the NBU issued Resolution No. 260 that prohibited the Ukrainian banks from: (1) conducting any banking activities in Crimea; (2) maintaining any correspondent relations with any other banks (Ukrainian or foreign) and financial institutions located or operating in Crimea; (3) provision by the Ukrainian banks of financial services to their customers in Crimea through their commercial agents, with whom the Ukrainian banks concluded agency agreements; and

351 Pyshnyy Statement, para. 47.

352 Pyshnyy Statement, para. 48; Management Board Resolution No. 277 of 30 April 2014, **CE-173**, Temporary Regulations.

353 Pyshnyy Statement, para. 49.

354 Minutes No. 1404-2, **CE-170**.

(4) opening branches in Crimea. To this end, the Ukrainian banks were obliged to immediately cease any activities of their existing Crimean branches and to close them by 6 June 2014. [355]

201. As stated in Resolution No. 260 and further clarified by the NBU in its response to Oschadbank's query (**NBU Letter**),[356] such measures sought to ensure the stability of the Ukrainian national currency, protect interests of depositors and other creditors of the Ukrainian banks, and prevent the Ukrainian banks from risky activities.

202. According to the then Head of the NBU, there were two reasons for the NBU's Resolution No. 260. First, after the Russian invasion of Crimea, all Ukrainian banks and their branch offices, which operated in that area, including the Main Directorate of the NBU in the Autonomous Republic of Crimea, came under direct and imminent threat of armed violence. Bank employees were intimidated and harassed by armed personnel that appeared to be Russian. Using the equipment available in the Main Directorate of NBU in the Autonomous Republic of Crimea, Russian agents had also sought to infiltrate the NBU electronic systems, which could have compromised the security of the entire Ukrainian banking system. Second, due to the takeover of the legal and administrative apparatus in Crimea and the physical closing of the border through the installation of armed checkpoints by the so-called Crimean authorities, the NBU lost all power to regulate the banking network and monetary system in Crimea.[357]

203. The Russian invasion of Crimea immediately impacted the NBU's ability to carry out its functions in that area. The occupation of Crimea rendered the NBU unable to exercise banking regulation and banking supervision, currency control and state financial monitoring, of and over the operations of the Ukrainian banks in Crimea. Moreover, the NBU became unable to verify whether such Ukrainian banks in Crimea complied with Ukrainian law requirements.[358]

204. Further operation of the Ukrainian banks in Crimea without NBU's control and supervision posed serious dangers to those banks as well as to the entire Ukrainian banking system because it could have resulted in (1) a breach of the Ukrainian legal requirements to payment

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355 Pyshnyy Statement, paras. 51-52; Resolution No. 260 of the NBU "On the Revocation and Cancellation of Bank Licenses and General Licenses for Carrying out Currency Operations of Certain Banks and the Closure by Banks of Separate Units Located in the Territory of the Autonomous Republic of Crimea and the City of Sevastopol" dated 6 May 2014, **CE-179**, parts 3-5.

356 Letter No. 18-03012/87200 from NBU to Oschadbank "On Provision of Information and Documents" dated 12 Nov. 2015, ('**NBU Letter regarding Resolution No. 260**'), **CE-253**.

357 Letter from the former Head of the NBU of 3 Mar. 2016, **CE-262**.

358 NBU Letter regarding Resolution No. 260, **CE-253**; Letter from the former Head of the NBU of 3 Mar. 2016, **C-262**; NBU press release 'Ukrainian banks forced to cease to operate in the Autonomous Republic of Crimea and the city of Sevastopol', 6 May 2014, **CE-180**.

procedures and use of the Ukrainian national currency as a means of payment; (2) violation of procedures for observing and disclosing bank secrecy,[359] (3) disclosure and use of confidential information in favour of third parties, and (4) non-compliance with the procedure for submitting financial statements and statistical reports by the banks to the NBU.[360]

205. Ultimately, due to the actions of the Russian Federation, the NBU was confronted with a serious threat to the safety and financial stability of the Ukrainian banks in Crimea but also the entire Ukrainian banking system. Given the immediate threat to the interests of depositors or creditors of the Ukrainian banks in Crimea,[361] combined with the NBU's inability to exercise almost all of its functions (i.e., banking regulation and supervision, currency regulation and control, as well as state financial monitoring), the NBU resolved to cease operations of the Ukrainian banks in Crimea.[362] As Mr Pyshnyy explains, the NBU's decision was not surprising, as Russia had usurped the NBU's authority and was setting up the legislative framework in a manner that would enable it to take over the entire Crimean banking system. Thus, it would have been irresponsible of the Ukrainian banking regulator to allow Russia to destabilise the Ukrainian economy while abandoning under its control the entire illegally seized Ukrainian banking sector in Crimea.[363]

206. Oschadbank complied with NBU's Resolution No. 260. The Management Board and the Supervisory Council of Oschadbank, on 8 and 13 May 2014 respectively, resolved to terminate the operations of, and to close, Oschadbank Crimea and approved a detailed action plan on its closure that encompassed various actions, including to cease operations, complete inventory counts, and transfer all tangible assets (e.g., equipment, cash-in-transit vehicles, firearms), customer files and other Oschadbank Crimea documentation to Oschadbank's headquarters.[364] As required by Ukrainian law,

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359 Article 1076 of Civil Code of Ukraine No. 435-IV dated 16 Jan. 2003 (as amended), **CE-12**, which stated: "*The bank shall guarantee the secret of the bank account, account transactions, and information about the client*"; Article 60 of Law of Ukraine "On Banks and Banking Activities" No. 2121-III dated 7 Dec. 2000 (as amended), **CE-8**, stating that "*Information on activities and financial standing of the client, which has become known to the bank in the course of servicing the client and maintaining relations with the client or to third parties through rendering services to the bank shall constitute bank secrecy*".

360 NBU Letter regarding Resolution No. 260, **CE-253**.

361 In this regard, the NBU referred to provisions of Ukrainian law providing that if banks perform risky activities that pose a threat to the interests of their depositors or other creditors, the NBU can take corrective actions commensurate with the level of such threat, which include, *inter alia*, revocation of a bank license and liquidation of a bank: Article 73 of Law of Ukraine "On Banks and Banking Activities" No. 2121-III dated 7 Dec. 2000 (as amended), **CE-8**.

362 NBU Letter regarding Resolution No. 260, **CE-253**; Letter from the former Head of the NBU of 3 Mar. 2016, **CE-262**.

363 Pyshnyy Statement, para. 53.

364 Pyshnyy Statement, para. 53; Resolution No. 286 of the Management Board of Oschadbank "On Termination of Operations of the Branch – Crimean Republican Directorate of JSC "Oschadbank" and

later in May 2014, Oschadbank notified the NBU of (i) its decision to close the Crimean Branch and (ii) the *de facto* termination of the Crimean Branch's operations as of 26 May 2014.[365] As noted above, on the same date the Russian Central Bank banned Oschadbank's Crimean operations.[366] One day later, on 27 May 2014, the NBU withdrew Oschadbank Crimea and its 294 outlets from the State Register of Banks.[367] The State Registrar made an entry on closure of Oschadbank Crimea in the Unified State Register of Legal Entities and Entrepreneurs on 11 June 2014.[368]

207. Shortly, in June 2014, Mr Pyshnyy received the report, according to which certain items of the action plan were not performed due to Mr Riabtsev's refusal and prohibition of the so-called "Crimean authorities" to take any equipment and documents out of Crimea.[369] Thus, the Claimant was effectively precluded from salvaging its investments, despite its reasonable attempts.

F. THE RUSSIAN FEDERATION ORCHESTRATED THE TAKEOVER OF THE CLAIMANT'S SUBSTANTIAL ASSETS

1. Russia took over control of Oschadbank Crimea assets

208. Following the Decision on Termination of Oschadbank Crimea, Russia sought to establish full control over all remaining assets of Oschadbank Crimea via court proceedings commenced on 29 May 2014 by the so-called Crimean Deputy Prosecutor, Sergey Chernevich,[370] against Oschadbank in the Kyiv District Court of Simferopol (the **Simferopol Court**).

Its Local Separated Non-Accounting Outlets and Their Closure" dated 8 May 2014, **CE-181**; Minutes No. 3 of the Supervisory Board of Oschadbank dated 13 May 2014, **CE-184**.

365 Letter No. 11/4-16/345-5416-5416 from Claimant to NBU dated 19 May 2014, **CE-188**; Letter No. 11/4-16/380-5634 from Claimant to NBU dated 26 May 2014, **CE-192**.

366 Decision of the Bank of Russia "On the Termination of Operations of Solitary Structural Subdivisions of Public Joint Stock Company "State Savings Bank of Ukraine", city of Kyiv, Ukraine, in the Territory of the Republic of Crimea and the City of Federal Significance Sevastopol" No. PH-33/II dated 26 May 2014, **CE-189**.

367 Article 23(9) of Law of Ukraine "On Banks and Banking Activities" No. 2121-III dated 7 Dec. 2000 (as amended), **CE-8**; Letter No. 41-114/27302 from NBU to Claimant "On Making the Entries to the State Register of Banks" dated 30 May 2014, **CE-205**.

The State Register of Banks is the register that is maintained by the NBU and that contains information about state registration of all banks (Art. 2 of the Law of Ukraine "On Banks and Banking Activities", **CE-8**).

368 Letter of the State Enterprise "Information Resource Centre" of the Ministry of Justice of Ukraine No. 102/11 dated 25 Jan. 2016, **CE-256**.

369 Internal Memorandum of Savychenko L.O. "Regarding Information on Compliance with the Action Plan in Connection with the Closure (Liquidation) of Oschadbank Crimea" (with incoming stamp of Oschadbank) dated 16 Jun. 2014, **CE-207**.

370 Information published on the official web-site of the General Prosecutor's Office of the Russian Federation "Prosecutor General of the Russian Federation Yurii Chaika has appointed First Deputy and Deputy Prosecutors of the Republic of Crimea and Sevastopol", 1 Apr. 2014, **CE-125**.

209. The Deputy Prosecutor alleged that Oschadbank Crimea failed to repay bank deposits and perform other obligations towards its customers.[371] In support of his claim brought "in the interest of the public", the Deputy Prosecutor managed to exhibit only five applications, allegedly authored by Oschadbank Crimea's depositors, addressed to the Crimean Division of the Bank of Russia.

210. All five applications before the Simferopol Court stated that the failure of Oschadbank Crimea to perform its obligations towards the applicants was due to "closure of the bank" or "closure of the outlet". Two of these applications[372] specified the addresses of Oschadbank Crimea outlets that were reported to be closed in April 2014 due to implementation of Mr Temirgaliev's so-called governmental "Crimean Banking Sector Development Program" referenced above. All the applications lacked any details or evidence on when and how the depositors applied to Oschadbank Crimea. Three of the applicants allegedly sought early withdrawal of money from their deposits with Oschadbank Crimea.[373]

211. Based on the allegations in these five applications, the Deputy Prosecutor asked the Court "to require the Public Joint Stock Company "State Savings Bank of Ukraine" as represented by the Branch – Crimean Republican Directorate to cease unlawful actions (inaction) in the form of failure to perform obligations arising out of the concluded bank deposit contracts and bank account contracts". It is worth noting that the remedy sought by the Deputy Prosecutor conflicted with the Bank of Russia's Decision on Termination of Oschadbank Crimea prohibiting Oschadbank Crimea from performing banking activities. This suggested from the outset that it would be illegal under Russian laws to execute the eventual court decision.

212. The Simferopol Court ordered that the proceedings move forward.[374] Together with the statement of claim the Deputy Prosecutor filed an application seeking provisional measures securing the enforcement of the ultimate judgment against Oschadbank.[375]

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371 The statement of claim brought by the Deputy Prosecutor of the Republic of Crimea acting in the interests of the public against JSC "State Savings Bank of Ukraine" as represented by the Branch – Crimean Republican Directorate, with attachments, ('**Prosecutor's Statement of Claim'**), **CE-203**.

372 Prosecutor's Statement of Claim, **CE-203**, applications of Ms Zhidkova and Mr Stupko dated 8 May 2014.

373 Prosecutor's Statement of Claim, **CE-203**, applications of Ms Zhidkova, Ms Peksheva and Mr Pekshev dated 8 May 2014.

374 Order of the Kyiv District Court of Simferopol on commencement of court proceedings in case No. 2-931/2014 dated 29 May 2014, **CE-201**.

375 Prosecutor's Statement of Claim, **CE-203**, application for provisional measures together with attachments dated 29 May 2014.

213. The Court immediately granted the application on provisional measures and ordered the appointment of the DPF as administrator of Oschadbank Crimea's assets, including its movable and immovable property, claims and rights of Oschadbank Crimea arising out of agreements (including lease agreements) and other rights/claims of Oschadbank Crimea (including right to claims), granting the DPF the powers of the executive organs of Oschadbank Crimea (the **Order on Provisional Measures**).[376] The administration purported to become effective immediately as of the date of the Order on Provisional Measures.[377] The bailiff service also immediately commenced enforcement of the Order on Provisional Measures.[378]

214. The Order on Provisional Measures prejudged the merits of the case because the Simferopol Court ordered administration of Oschadbank Crimea assets "until the circumstances contributing to such non-fulfilment by the bank of its obligations before depositors and other creditors cease to exist". Thus the Simferopol Court effectively sustained the bare allegation that Oschadbank Crimea had failed to fulfil undetermined obligations towards an unspecified range of its creditors.

215. The Simferopol Court's actions violate basic notions of procedural and substantive justice. At the very least the Court was in violation of the proportionality requirement with regard to provisional measures under Russian law.

216. Specifically, Article 140(3) of the Civil Procedural Code of the Russian Federation requires that provisional measures be proportionate to the remedy sought by the claimant. First of all, the court should not have granted provisional measures to secure an eventual judgment that would be illegal given that the remedy sought contradicted a decision of the Bank of Russia.

217. Furthermore, the claim was filed "in the interest of the public" and was supported solely by five applications. The Deputy Prosecutor sought to induce Oschadbank Crimea to perform its obligations owed to its creditors. According to untested information set forth in the applications supporting the claimant's allegations, Oschadbank Crimea allegedly failed to fulfil its obligations valued at merely USD 15,700 (as of 29 May 2014).

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376 Order of the Kyiv District Court of Simferopol on provisional measures in case No. 2-931/2014 dated 29 May 2014, **CE-171**.

377 Order on Provisional Measures, **CE-171**: para 4(6) of the operative part, which reads as "the administration shall not be subject to state registration and shall take effect from the moment of this Order".

378 The Bailiff's resolution on commencement of enforcement proceedings No. 271/14/19/84 under the enforcement order issued by the Simferopol Court for enforcement of the Order on Provisional Measures dated 29 May 2014, **CE-202**.

218. In response to this application for provisional measures, the Simferopol Court disproportionately put all assets of Oschadbank Crimea under administration. The Court did not apply any mechanism at its disposal to maintain the balance of interests. A more proportionate ruling would rely on Article 146 of the Civil Procedural Code of the Russian Federation that would have allowed the Simferopol Court to require claimant to post security so as to mitigate the risk of possible damages to defendant, namely Oschadbank Crimea.

219. On 17 September 2014, the Simferopol Court considered the case on merits and decided to sustain the claim in its entirety (**Court Decision of 17 September 2014**). The Court Decision of 17 September 2014 states that the Deputy Prosecutor maintains the claim on the grounds listed in the statement of claim, and that, the third parties participating in the case, the Russian Central Bank and the DPF, supported the claim. In general, the Decision parrots the statement of claim and is devoid of independent consideration of the case.[379]

220. The Court sought to compel Oschadbank Crimea "to cease unlawful actions (inaction) in the form of failure to perform obligations arising out of the concluded deposit agreements and bank account agreements". The Court Decision of 17 September 2014 was silent as to what actions Oschadbank Crimea had to take to cease the "unlawful" actions, and how Oschadbank Crimea was to take such actions in light of the Order on Provisional Measures providing for administration of all Oschadbank Crimea assets by the DPF to the exclusion of Oschadbank Crimea executive bodies. Indeed, the Simferopol Court did not address how Oschadbank Crimea was to perform any banking operations *at all* if the Bank of Russia's Decision on Termination of Oschadbank Crimea prohibited its operation as of 26 May 2014. Under Russian law, the provisional measures envisaged by the Order on Provisional Measures are to remain in effect until the execution of the Court Decision of 17 September 2014.[380]

221. The Simferopol Court proceedings described above were far from a fair, impartial process. They were part of a well-orchestrated plan for the complete and prompt takeover of Oschadbank Crimea's assets. According to the letter submitted by the Deputy Prosecutor together with the application on provisional measures,[381] the Crimean Division of the Bank of Russia had advised the Deputy Prosecutor that the DPF should be appointed as an administrator of Ukrainian banks' assets in Crimea more than a month earlier, on 21 April 2014.

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379 Decision of the Kyiv District Court of Simferopol in case No. 2-931/2014 dated 17 Sept. 2014, **CE-222**.

380 Article 144(3) of the Civil Procedural Code of the Russian Federation, **CE-10**.

381 Prosecutor's Statement of Claim, **CE-203**, the letter of the Crimean Division of the Bank of Russia appended to application for provisional measures.

222. Furthermore, the so-called Crimean Court and the Federal Bailiff Service of the Republic of Crimea took all procedural decisions under the newly adopted Russian system with uncommon speed.[382] It is telling, for example, that the so-called Crimean authorities, under Russian control, ensured that the DPF could assume control over Oschadbank Crimea assets in just *one* day, i.e., day of filing the statement of claim.

2. Russia orchestrated the takeover of Oschadbank Crimea via the DPF

223. The Bank of Russia's Decision on Termination of Oschadbank Crimea triggered the scheme of the DPF compensation payments to the depositors of Oschadbank Crimea.[383] Russia promptly set up a broad network of DPF's offices in Crimea.[384] Customers of Ukrainian banks were widely incentivised to apply to the DPF for compensation.[385] The DPF compensation scheme did not take into account the Ukrainian banks' endeavours to fulfil their obligations towards their customer.

224. On 26 May 2014 the DPF announced that it would start accepting applications for compensation from Oschadbank Crimea creditors on 29 May 2014.[386] It took the DPF as little as three days to open the application acceptance centres in the premises of more than 50 former outlets of Oschadbank Crimea.[387]

225. According to the DPF announcement of 29 May 2014, the creditors of Oschadbank Crimea were to open bank accounts for crediting of compensation with RNCB. The list of RNCB's

382 The Court commenced the court proceedings on the day of filing of the statement of claim, which should have required the court, at least, to investigate the statement of claim and supporting materials as to their compliance with Russian laws, to establish absence of any effective court decisions on an identical dispute and to verify the authority of the Deputy Prosecutor to bring such a claim (Chapter 12 of the Civil Procedural Code of the Russian Federation). Ordinarily the judge has up to 5 days for this procedural step (Article 133 of the Civil Procedural Code of the Russian Federation). Interestingly, the Court erred in the Order on Provisional Measures by backdating it as issued in April 2014 (the date of the Order on Provisional Measures was subsequently corrected). On the same day the Court issued an enforcement order, allowing the Deputy Prosecutor to draft a respective application on commencement of the enforcement proceedings and submit it to the Federal Bailiff Service of the Republic of Crimea, and the Federal Bailiff Service of the Republic of Crimea to commence the enforcement proceedings under the Order on Provisional Measures. – *see* relevant excerpts from the Civil Procedural Code of the Russian Federation together with their English translation, **CE-10**.

383 Federal Law on Crimean Depositor Protection, **CE-130**, Article 6(1.2).

384 DPF Annual Report 2014, **CE-40**, p. 6.

385 *See e.g.,* "The Application of the Crimean clients of Oschadbank will be accepted as of 28 May", 26 May 2014, **CE-193**; "26 Offices of the Deposit Insurance Agency Will Commence Their Operation on April 14, the First Vice Prime Minister of the Republic", 11 Apr. 2014, **CE-152**; "Kozak: The Central Bank of Russia to provide the DIA 30 billion roubles to pay out affected depositors in Crimea", **CE-194**; "Depositors of banks in Crimea will get compensations, if banks stop giving deposits back – Deputy Chairman of the Bank of Russia", **CE-167**.

386 Information published on the Fund's web-site "On Compensation Payments and Acquisition of Rights (Claims)", **CE-195**.

387 Information published on the Fund's web-site "Information for Depositors", **CE-204**.

outlets provided in the announcement included 28 premises at the addresses of Oschadbank Crimea outlets. The fact that the DPF engaged Russian bank RNCB – which occupied 85 of Oschadbank's leased premises as an outcome of the implementation of so-called governmental "Crimea Banking Sector Development Program" – as its agent for processing compensation applications and payments secured for the latter not only a share of Oschadbank's customers, but also a commission amounting to 1.5 percent of the paid compensation.[388]

226. According to the general procedure initially provided by the Russian law, the applications for compensation were to be filed within one month following the official notification of the DPF's offer to compensate the customers of a relevant Ukrainian bank.[389] In June 2014 the term for filing the applications was extended to 90 days.[390] Pursuant to the general procedure, the deadline for Oschadbank Crimea customers to apply for compensation fell on 27 August 2014.[391] The DPF was allowed to extend this general period upon a depositor's substantiated request.[392]

227. The DPF claimed that in 2014 it compensated 53,399 Oschadbank Crimea's customers in the aggregate amount of approximately RUB 4.6 billion[393] (equivalent of approximately USD 81.8 million).[394]

228. The DPF claimed that it obtained the right of recourse towards Oschadbank with respect to the compensations that the DPF purported to have paid to Oschadbank Crimea's customers. Starting from July 2014, Oschadbank has received (and continues to receive) letters from the DPF requesting Oschadbank to repay immediately the funds under deposit and bank account agreements with Oschadbank Crimea depositors.[395] The DPF has subsequently initiated a number of court proceedings in the so-called Crimean courts against Oschadbank seeking to recover the alleged debts.

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388 DPF Annual Report 2014, **CE-40**, p. 6.

389 Federal Law on Crimean Depositor Protection, **CE-130**, Article 7(2).

390 Article 4 of Federal Law No. 149-ФЗ of 04 June 2014, effective as of 4 June 2014, **CE-206**.

391 "On Completion of Period for Acceptance of Applications on Compensation Payments under Deposits in Oschadbank", 26 Aug. 2014, **CE-213**.

392 Federal Law on Crimean Depositor Protection, **CE-130**, Article 7(2).

393 DPF Annual Report 2014, **CE-40**, p. 34.

394 Per official exchange rate of RUB 56.2584 per USD set by the Bank of Russia as of 31 December 2014. **CE-229**.

395 Register of the DPF's Letters to Oschadbank, **CE-286**.

G. THE RUSSIAN FEDERATION CONTINUES TO INFLICT LOSSES ON THE CLAIMANT THROUGH ARBITRARY MEASURES

229. After banning Oschadbank Crimea activities and taking control over Oschadbank Crimea assets, Russia has been continuously damaging Oschadbank's investments in Crimea through a number of unjust actions. Thus, Russia (a) has preserved the status quo when the DPF is deriving benefit through continued administration of Oschadbank Crimea assets; (b) has affected the business of Oschadbank's debtors, while a Russian agent, the DPF, attempts to collect debts owed to Oschadbank and even bankrupt its debtors; (c) has endeavoured to deprive Oschadbank of ownership of Oschadbank Crimea assets; and (d) has intensified legal actions against Oschadbank via an additional DPF scheme.

1. The DPF continues to benefit from the administration of Oschadbank Crimea assets

230. As of 31 December 2015, the DPF reported that it administered the following Oschadbank Crimea assets: (i) proprietary rights under 2,033 loans issued to individuals and 66 corporate loans; (ii) 73 real estate properties (with the total area of 15,265.7 sq. m); (iii) movable property (152 ATMs, 774 POS-terminals, 116 vehicles, 19,702 objects of other movable property); (iv) valuables (precious metals and investment coins); and (v) monetary funds.[396]

231. According to the DPF, Oschadbank's assets administration (i.e., leasing of assets) generated for the DPF the profit of RUB 53.4 million in 2014[397] (equivalent approximately to USD 0.95 million)[398] and RUB 98 million in 2015[399] (approximately equivalent to USD 1.3 million).[400] Russian banks RNCB and GenBank have been the key lessees of Oschadbank Crimea's assets.[401]

2. The DPF's sham claims against Oschadbank debtors

232. According to the database of decisions of the Russian arbitrazh courts,[402] the DPF has purported to act on behalf of Oschadbank in the Russian courts. Oschadbank naturally provided the

396 DPF Annual Report 2015, **CE-234**, pp. 10, 38-39.

397 DPF Annual Report 2014, **CE-40**, p. 30.

398 At the official exchange rate of RUB 56.2584 per USD set by the Bank of Russia as of 31 December 2014, **CE-229**.

399 DPF Annual Report 2015, **CE-234**, p. 34.

400 At the official exchange rate of RUB 72.8827 per USD set by the Bank of Russia as of 31 December 2015, **CE-255**.

401 DPF Annual Report 2014, **CE-40**, p. 12.

402 The database is accessible at: https://kad.arbitr.ru/.

DPF with no authority to do so. The DPF has initiated court proceedings against one of the most significant debtors of Oschadbank – the Solar Group. Oschadbank's loans to the Solar Group in USD on average represented 15% of the Bank's assets. The Solar loans in EUR were around 70% in 2011 to 2013, reaching 87% in 2014 immediately prior to the Russian actions.[403]

233. In particular, in July 2015 the DPF initiated court proceedings against 12 of the Solar Group companies seeking to recover debt under loan agreements with Oschadbank. The DPF purported to recover the debt of over RUB 28 billion in total (equivalent to USD 491 million as of 22 July 2015, i.e., the date of filing of the statements of claim).[404] At the moment, the majority of these cases are pending.[405] Also, in September 2015 the DPF attempted to declare the Solar Group's companies as bankrupt by filing relevant applications with the Russian courts in Crimea.[406] The DPF's fraudulent claims have harmed the Claimant's interests in multiple ways, as they were directed at bankrupting Oschadbank's debtors (companies of the Solar Group).

3. Deprivation of Oschadbank's ownership

234. As stated above the DPF claimed to be a creditor of Oschadbank for a debt in the aggregate amount of approximately RUB 4.6 billion (equivalent of approximately USD 81.8 million) as of 31 December 2014. As of 31 December 2015, Oschadbank's purported debt to the DPF amounted to approximately RUB 4.7 billion[407] (equivalent to USD 64.5 million).[408]

235. The DPF has planned to recover the alleged debt by seizing Oschadbank assets through enforcement proceedings.[409] The DPF has initiated a number of court proceedings against Oschadbank seeking recovery of the alleged debts in the so-called Crimean courts. The DPF reported that it had filed 687 statements of claim before the Crimean courts against 37 Ukrainian banks in 2014[410] and more than two thousand statements of claim against 44 Ukrainian banks as of the end of

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403 Davidson Report, para 6.33.

404 At the official exchange rate of RUB 57.0025 per USD set by the Bank of Russia as of 22 July 2015, **CE-248**.

405 Register of the court proceedings initiated by the DPF against companies of the Solar Group, **CE-275**.

406 Register of the court proceedings initiated by the DPF against companies of the Solar Group, **CE-275**.

407 DPF Annual Report 2015, **CE-234**, pp. 20-21.

408 Per official exchange rate of RUB 72.8827 per USD set by the Bank of Russia as of 31 December 2015, **CE-255**.

409 DPF Annual Report 2014, **CE-40**, p. 9; DPF Annual Report 2015, **CE-234**, p. 10.

410 *See* DPF Annual Report 2014, **CE-40**, p. 9.

2015.[411] The Claimant is aware of 30 court proceedings initiated by the DPF against Oschadbank before the Crimean courts to recover alleged debts for the total amount of RUB 4.6 billion.

236. In all these cases against Oschadbank the Russian courts sustained the DPF's claims in full; in fact, in number of cases (the total amount of claim constituted more than 99.9%) the Russian courts allowed the DPF's requests for provisional measures and attached Oschadbank Crimea's assets even before making a determination on the merits. The Bailiff Service has commenced enforcement proceedings under the Russian courts' orders and decisions.[412] Enforcement measures purported to include attachment of Oschadbank's movable and immovable property, claim rights under the agreements (including lease agreements), rights of creditor in the enforcement proceedings and purported to prohibit the disposal of property mortgaged and pledged in favour of Oschadbank under various agreements.[413]

4. Russia has applied additional pressure against Oschadbank via another DPF scheme

237. The Russian Federation has been pursuing an additional scheme intended to seize Oschadbank assets through the DPF. Russia has authorised the DPF to obtain authorisation from Oschadbank Crimea creditors to represent them in court actions for the recovery of the sums of allegedly undischarged liabilities under bank deposit agreements in excess of the guaranteed compensation of RUB 700,000.[414] According to the DPF, as of 23 June 2016, it had received 637 powers of attorney from Oschadbank's creditors and filed 634 statements of claim seeking recovery of alleged deposits from Oschadbank.[415]

238. The mentioned court proceedings are the only court proceedings known to Oschadbank (based on publicly available information). Such proceedings took place while Oschadbank did its utmost to honour its obligations to individual depositors and other creditors through the performance of its internal regulation allowing its customers access to banking services,

411 *See* DPF Annual Report 2015, **CE-234**, p. 9.

412 Register of the court and enforcement proceedings initiated by the DPF on recovery of debt from Oschadbank, **CE-276**.

413 *See* DPF Annual Report 2014, **CE-40**, p. 10.

414 Federal Law on Crimean Depositor Protection, **CE-130**, Article 4(8); Article 4(8) of Federal Law on Crimean Depositor Protection, as amended by Article 1(2)(б) of Federal Law No. 148-ФЗ of 8 June 2015, **CE-245**.

415 Information published at the DPF's official web-site of regarding number of statement of claim filed by the DPF on behalf of Crimean depositors of Ukrainian banks, 23 Jun. 2016, **CE-267**.

including the possibility to withdraw their funds, in any branch of Oschadbank on mainland Ukraine.[416]

239. The Russian Federation continues to inflict losses on the Claimant through a number of arbitrary measures, including those described above. Despite all of the steps that were taken by the Russian Federation to cease the operation of Oschadbank Crimea and assume control over Oschadbank's property in Crimea, and despite all of Oschadbank's efforts to perform its obligations towards its customers, members of the Russian State Duma disparaged Oschadbank as unlawfully "robbing" funds of the Crimeans.[417]

5. Federal Law on Repayment by Crimean Borrowers

240. In December 2015, the Russian Federation enacted a law stipulating a procedure for the repayment of debts, owed by natural persons resident of Crimea, to the Ukrainian banks (hereinafter the **Federal Law on Repayment by Crimean Borrowers**).[418] This law could have facilitated payment of the hundreds of thousands of dollars owed by Crimean residents to Oschadbank at the time its operations in Crimea were terminated. However, the law was clearly designed to frustrate the legitimate claims of Ukrainian banks.

241. In fact, under this law, Crimean borrowers were required to repay their debts to creditors provided that the creditor meets all set criteria. For instance, the creditor shall be a legal entity established under Russian law.[419] This condition was discriminatory against Ukrainian banks, which are not legal entities established under Russian law, and were therefore unable to satisfy all conditions and receive their money.

242. It is plain that the termination of Oschadbank's operations in Crimea, along with other Ukrainian banks, was part of a deliberate campaign to replace the Ukrainian banks in Crimea with Russian banks. The Russian and so-called Crimean authorities conveyed their discriminative intent in public statements. Upon Crimea's annexation, President Putin and high-ranking officials of

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416 Pyshnyy statement, para 45; "Regulation on Servicing Customers of the Branch – Crimean Republican Directorate of JSC "Oschadbank" under Retail Business Operations" approved by Resolution No. 371 of the Management Board of Oschadbank as of 16 Jun. 2014, **CE-208**.

417 The Russian State Duma debates of 19 May 2015, agenda item 13, **CE-244**.

418 Federal Law "On the Specifics of Repayment and Out-of-court Settlement of Debt of Borrowers Residing in the Territory of the Republic of Crimea or in the Territory of the City of Federal Significance, Sevastopol, and on Amending Federal Law "On the Defense of the Natural Persons Having Deposits In Banks and Solitary Structural Subdivisions of Banks Registered and/or Operating on the Territory of the Republic of Crimea and the City of Federal Significance, Sevastopol" No. 39-ФЗ dated 2 April 2014", **CE-254**.

419 Federal Law on Repayment by Crimean Borrowers, **CE-254**, Article 1(1) and 1(9).

Crimea (such as the Prime Minister of Crimea, Mr Aksenov) stated publicly that Crimean residents were relieved from their debts owed to Ukrainian banks, arguing that these banks allegedly "[had] no moral right" to require the residents of Crimea to observe their contractual obligations.[420]

243. To date, the Russian Federation procures continuing losses to the Claimant and has not provided any compensation for its blatant abuse of state power.

[420] "Direct Line with Vladimir Putin", 17 Apr. 2014, **CE-159**; "Russia Has Basically Blown up Crimea's Banking System", Reuters, 20 Nov. 2014, **CE-226**; "Residents of Crimea Do Not Have to Pay Loans to Ukrainian Banks", **CE-224**.

PART B – LAW

V. THE TRIBUNAL HAS JURISDICTION UNDER THE UKRAINE-RUSSIA BILATERAL INVESTMENT TREATY

A. THE TREATY APPLIES TO UKRAINIAN INVESTMENTS IN CRIMEA

244. The jurisdictional scope of the Contracting Parties' obligations under the Treaty is governed by Article 1(1), which limits the Treaty's application to "investments" that "are invested by an investor of one Contracting Party in the territory of the other Contracting Party".[421]

245. Article 1(4) of the Treaty defines "territory" in respect of the Russian Federation as "the territory of the Russian Federation, as well as [its] respective exclusive economic zone and continental shelf, as determined in conformity with international law".[422]

246. The ordinary meaning of Article 1(4), interpreted in the context of the Treaty's other provisions, in good faith, and in light of the Treaty's object and purpose, as well as relevant rules of international law, collectively confirm that the Russian Federation's obligations under the Treaty extend to territory over which the Russian Federation exercises *de facto* effective control, including occupation. This principle applies notwithstanding the fact that the Russian Federation's actions in Crimea constituted an illegal occupation and purported annexation.[423]

247. As explained above, through a series of acts beginning in February 2014, Russia established effective control and jurisdiction over the territory of Crimea by, *inter alia,* exercising administrative control over that territory, adopting legislative and administrative acts that mandate the application of Russian laws in that territory, and assuming control of or establishing institutions charged with enforcing those acts.[424] The Russian Federation has introduced fundamental changes in the constitutional, social, economic, and legal order within the occupied territory of Crimea, and has purported to change its legal status to that of a component part of the Russian Federation. Given the *de facto* control exercised by the Russian Federation over Crimea, the duties owed by the Russian Federation under the Treaty extend to Ukrainian investors and their investments in the territory of Crimea.

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421 Ukraine-Russia BIT Treaty, dated 27 Nov. 1998, **CLA-1**, Art. 1(1).

422 Ukraine-Russia BIT Treaty, dated 27 Nov. 1998, **CLA-1**, Art. 1(4).

423 *See* para. III.D.86–III.D.87 above.

424 *See* Section IV.B above.

248. Moreover, the Russian Federation may not "blow hot and cold".[425] The Russian Federation has occupied and controlled Crimea, even purporting to render it, along with the administratively separate city of Sevastopol, as constituent entities of the Russian Federation under Russian law.[426] In the process, the Russian Federation has benefited enormously from the many assets and resources located in Crimea, while ousting forcibly, treating abusively and otherwise harming the Ukrainian holders of such assets. The Russian Federation must therefore be barred under international law from relying on any interpretation of the term "territory" that is adverse to the Tribunal's assertion of jurisdiction in this case.

249. Consequently, without prejudice to the Claimant's stated position that the Russian Federation's purported annexation of Crimea violated Ukrainian and international law, the Claimant's investments must be treated as if they were located in Russian territory for purposes of the Treaty, when the relevant Treaty breaches occurred.

1. The legal standard for treaty interpretation

250. Article 31 of the Vienna Convention on the Law of Treaties (**VCLT**)[427] sets forth the principal customary international law rule for treaty interpretation as follows:[428]

> Article 31. General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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425 *See* para. V.A.4.328 below.

426 *See* para. III.C.79 above.

427 Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force on 27 Jan. 1980 1155 U.N.T.S. 331, 8 I.L.M. 679, **CLA-2**.

428 The ICJ has on numerous occasions ruled that Articles 31 and 32 VCLT reflect rules of customary international law: *see, e.g., Maritime Dispute (Peru v. Chile)*, I.C.J. Reports, 2014, 27 Jan. 2014, **CLA-3**, pp. 3, 28. *See also, e.g., AAPL v. Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 Jun. 1990, **CLA-4**, para. 38 (noting "the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by *l'Institut de Droit International* in its General Session in 1956, and as codified in Article 31 of the *Vienna Convention on the Law of Treaties*").

> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

251. Under Article 31 VCLT, the language in Article 1(4) of the Treaty shall be interpreted in good faith, according to the ordinary meaning of its terms, read in their context and in the light of the Treaty's object and purpose.

252. Article 31 does not prioritise among these criteria, but expects them to be addressed in a logical sequence and as a totality. Article 31(3) further provides that the interpretation of the Treaty shall take into account any subsequent practice in the application of the Treaty, and any other relevant rules of international law. Article 31 directs that the Treaty's meaning will be based on the overall conclusion to be drawn from all of these considerations.

253. Further, Article 32 VCLT sets forth the supplementary means of treaty interpretation as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> *(a)* Leaves the meaning ambiguous or obscure; or
>
> *(b)* Leads to a result which is manifestly absurd or unreasonable.

254. Under Article 32, the negotiating history may be examined as a supplementary means of interpretation to confirm an understanding based on application of the interpretative rules under Article 31. Alternatively, if after applying the Article 31 test, the language of the Treaty is ambiguous or leads to a manifestly absurd or unreasonable result, the negotiating history of the Treaty may be examined to "determine" that meaning.

255. Moreover, arbitral tribunals have held that since Article 38(1) of the ICJ Statute provides that judicial decisions and awards are applicable for the interpretation of public international

law as "subsidiary means", such decisions and awards can also be understood to constitute "supplementary means of interpretation" in the sense of Article 32 VCLT.[429]

2. The application of the VCLT supports the Claimant's position on the meaning of the Treaty

a. Ordinary meaning of "territory"

256. Article 31 VCLT provides that the object of treaty interpretation is to give the "ordinary" meaning to the terms of the treaty. The International Court of Justice (**ICJ**) has confirmed that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur".[430]

257. The jurisdictional scope of the Treaty extends to investments made "in the territory of" the Russian Federation".[431] This broad reference is not limited to "territory within the national borders of the Russian Federation"; nor is it qualified by concepts of sovereignty or title.

258. General and legal dictionaries in the English language confirm that the plain and ordinary meaning of "territory" is not constrained by sovereign limitations.[432] The *Oxford Dictionary Online* defines "territory" as denoting "[a]n area of land *under the jurisdiction* of a ruler or state".[433] Among legal dictionaries, the reputed *Black's Law Dictionary* likewise defines "territory" as a "geographical area included *within a particular government's jurisdiction*", *i.e.* within the "state's *exclusive possession and control*".[434] The term "jurisdiction" is in turn defined as a "government's

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429 *See, e.g., Caratube v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 Jul. 2009, **CLA-5**, para. 71.

430 *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, I.C.J. Reports, 1950, 3 Mar. 1950, 8; 17 ILR. pp. 326, 328, **CLA-6**; A. Aust, *Modern Treaty Law and Practice*, (CUP, 2014) **CLA-7**, p. 209 (observing that "in most cases, it is important to give a term its ordinary meaning, since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended").

431 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Article 1(4).

432 Consistent with the VCLT's requirement to determine the "ordinary meaning" of treaty terms, arbitral tribunals in investment treaty cases frequently make use of dictionaries in seeking the ordinary meaning of terms expressed in treaties: *see, e.g., Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 Sept. 2001, **CLA-8**, para. 221; *Technicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **CLA-9**, paras. 113-16.

433 "Territory", *Oxford Dictionaries Online*, ed. 2016 (emphasis added), **CLA-10**.

434 "Territory", Black's Law Dictionary 10th Edition., (Thomson West, 2014) (emphasis added), **CLA-11**.

general *power to exercise authority* over all persons and things within its territory" and "a geographic area within which *political or judicial authority may be exercised*".[435]

259. Moreover, the Dictionary of Modern Russian Language defines "territory" as including land "*within powers* of any state"; "within powers" is, in turn, defined as "[s]ubjected to somebody's powers, subordinated, dependent".[436] The Terminological Dictionary of Librarian of Social and Economic Themes by Russian National Library defines the "territory of state (national territory)" as "part of the surface of the Earth *subjected to powers* of a particular state".[437] The Ukrainian Dictionary of Legal Terms defines "territory of state" as "territory *subjected to jurisdiction* of a state".[438]

260. Thus, as a matter of textual interpretation, the word "territory" in the Treaty refers to a geographical area in which a Contracting State has the power to exercise authority. The ordinary meaning of "territory" is not limited to an area over which the state has internationally recognised sovereignty or title.

261. This position finds further support in Article 1(4) of the Treaty which defines territory to expressly include the Russian Federation's "exclusive economic zone and continental shelf", i.e. territory where the Russian Federation exercises jurisdiction but does not possess sovereignty under international law.[439]

262. The Claimant's international legal expert, Professor Malcolm N. Shaw QC, agrees with the Claimant's interpretation. In Professor Shaw's opinion, the language of the Treaty:

> demonstrates the clear intention that the BIT is to apply beyond the sovereign land territory of the States concerned so as to include areas over which the States exercise jurisdiction and control, but not sovereignty as such. *This precludes a definition of territory in the BIT which is restricted to territory over which the State has sovereign title*.[440]

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435 *Black's Law Dictionary*, 9th Ed., (Thomson West, 2009) **CLA-12**, at 927-28 (emphasis added).

436 Dictionary of Modern Russian Language, volume 15, issued by the Academy of Sciences of the USSR (Union of the Soviet Socialist Republics) edited by G.A. Kachevskaya, E.N. Tolikina (Moscow – Leningrad, 1963) (emphasis added), **CLA-13**.

437 Terminological Dictionary of Librarian of Social and Economic Themes by Russian National Library, St. Petersburg, 2011 (emphasis added), **CLA-14**.

438 Dictionary of Legal Terms, educational and scientific edition of the Ministry of Internal Affairs of Ukraine, Ministry of Education and Science of Ukraine, National Academy of Internal Affairs, Kyiv – 2014 (emphasis added), **CLA-15**.

439 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Art. 1(4).

440 Shaw Report, para. 39 (emphasis added).

b. Good faith interpretation

263. The principle of good faith is fundamental to the interpretation of all treaties.[441] A prominent commentator has explained that the function of good faith is to hold states to a standard of "fairness and reasonableness":

> The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.[442]

264. A fundamental precept of good faith interpretation is the avoidance of unconscionable double standards in determining the responsibility of a state under its treaty obligations. In this case, if the term "territory" is interpreted as "sovereign territory", which as shown above would unduly narrow the ordinary meaning of the term, the Russian Federation would be allowed at once to derive substantial benefits from harming the investments of Ukrainian entities such as the Claimant, without incurring any liability under the Treaty – which is the only effective recourse Ukrainian investors in Crimea have to recoup the damage caused to them by the Russian Federation.

265. This potential double standard has been recognised by prominent adjudicatory bodies, both international and domestic, including the European Court of Human Rights (**ECtHR**), the UN Human Rights Committee (**UNHRC**), the ICJ and the Supreme Court of the United States (**US Supreme Court**).

266. The ECtHR's established practice emphasises that the European Convention on Human Rights (**ECHR**) "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[443]

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441 *See, e.g.,* A.D. McNair, *The Law of Treaties* (Oxford, 1961), **CLA-16**, p. 465 ("The performance of treaties is subject to an overriding obligation of mutual good faith"); *Europe Cement v. Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 Aug. 2009, **CLA-17**, para. 171 ("It is well accepted in investment arbitrations that the principle of good faith is a principle of international law applicable to the interpretation and application of obligations under international investment agreements").

442 O'Connor, *Good Faith in International Law* (Dartmouth, 1991), **CLA-18**, p. 124. *See also* Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (Cambridge, 1987), **CLA-19**, p. 115 ("Performance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally. As the ascertainment of this mutual understanding, i.e. the real and common intention of the parties, is a matter of interpretation, it is also said that treaty interpretation is governed by the principle of good faith").

443 *Issa and Others v. Turkey* (dec.), No. 31821/96, 16 Nov. 2004, **CLA-20**, at 71. *See also Solomou v. Turkey,* (dec.), No. 36832/97, 24 Jun. 2008, **CLA-21**, para. 45; *Issa and Others v. Turkey* (dec.), No. 31821/96, 16 Nov. 2004, **CLA-20**, para. 71; *Andreou v. Turkey*, (dec.), No. 45653/99, 3 Jun. 2008, **CLA-22**; *Isaak v. Turkey (*dec.), No. 44587/98, 28 Sept. 2006, **CLA-23**.

The ECtHR has referred to the "legal black hole" created if a State could functionally control another State's territory without incurring any legal obligations.[444]

267. Moreover, according to the UNHRC with respect to the applicability of the International Covenant of Civil and Political Rights (**ICCPR**), "it would be unconscionable to permit a state to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory".[445] The ICJ in affirming the approach of the UNHRC observed that "the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory".[446]

268. Similar considerations have guided the US Supreme Court's recognition of the application of statutory and constitutional *habeas corpus* rights to aliens held in military detention at Guantanamo Bay, a territory under the sovereignty of Cuba that has been leased to, and is under the *de facto* control of, the United States. In *Rasul v. Bush*,[447] the Court held that since Guantanamo was, pursuant to the treaty between the United States and Cuba, under US "complete jurisdiction and control", even if Cuba retained sovereignty, *habeas corpus* guaranteed under the United States Constitution was available to persons detained there.[448] In his concurring opinion, Justice Kennedy held that "[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it", notwithstanding Cuba's formal sovereignty.[449]

269. In the *Boumediene* case, the US Supreme Court noted that "it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another".[450] The Court held that aliens detained in Guantanamo had a constitutional right to *habeas corpus* on grounds, *inter alia*, that "[t]he detainees … are held in a

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444 *Issa*, **CLA-20**, para. 71. As Professor Shaw has noted, Article 1 of the ECHR uses the term "jurisdiction" rather than "territory"; yet "the evolution of the European Court of Human Rights' thinking is relevant to the present matter, not least because the Court has consistently held that the ECHR's concept of jurisdiction is 'essentially territorial'": Shaw Report, para. 63.

445 UNHRC, *Lopez Burgos v. Uruguay*, Communication No. R 12/52, 6 June 1979, **CLA-24**, para. 10.3. In his individual opinion in *Lopez Burgos*, Christian Tomuschat considered that to construe the words "within its territory" in Article 2(1) ICCPR "as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results".

446 *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports, 2004, **CLA-25**, para. 109.

447 *Rasul v. Bush*, 542 U.S. 466 (2004), **CLA-26**.

448 *Rasul v. Bush*, 542 U.S. 466 (2004), **CLA-26**, at 480-84.

449 *Rasul v. Bush*, 542 U.S. 466 (2004), **CLA-26**, at 487.

450 *Boumediene v. Bush*, 553 U.S. 723 (2008), **CLA-27**, at 2262.

territory that, while technically not part of the United States, is under the complete and total control of our Government".[451]

c. Context to Article 1(4)

270. Article 31(1) VCLT provides that the terms of a treaty must be interpreted "in their context". Pursuant to Article 31(2) VCLT, the applicable context includes the text and preambles of the treaty, including the "use of the same term elsewhere in the treaty".[452]

271. The Treaty contains 17 references to "territory", which term is found in every article governing the substantive and procedural protections afforded to qualifying investors. Therefore, whilst Article 1(4) contains a definition of "territory", the meaning of that term must be determined in light of the broader context in which that term appears in the Treaty.

272. The context of the Treaty confirms that "territory" is not limited to "sovereign" territory. Professor Shaw observes in his legal opinion that the other provisions of the Treaty utilising the term "territory" "adopt an approach which couples territory with the prescriptive or legislative jurisdiction of the State, underling in practice the importance of the exercise of control".[453] For example, Article 1(1), in defining "Investments", connects the territory of a Contracting Party with its ability to legislate for that area:

> The term "investments" means all kind of assets and intellectual values, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws …[454]

273. Professor Shaw further observes that:

> A similar methodology, linking territory with the prescriptive or legislative jurisdiction of the State, can be seen in Article 2 (Promotion and protection of Investments), Article 4 (Transparency and accessibility of legislation) and Article 7 (Transfer of Funds). In addition, a link between territory and each of the legislative and enforcement aspects of the jurisdiction of the State can be seen in Article 3 (National treatment and most favoured nation treatment) as part of the ability to put in place a "regime" and in Article 5 (Expropriation) in which the State obliges itself to refrain from measures or conduct that it might otherwise undertake (thus presupposing its ability to do so). Finally, a link between territory and the adjudicative jurisdiction of the State is set out

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451 *Boumediene v. Bush*, 553 U.S. 723 (2008), **CLA-27**, at 2262.

452 O. Dorr, "Article 31: General Rule of Interpretation", in *Vienna Convention on the Law of Treaties: A Commentary,* (Springer, 2012), **CLA-28**, 521, 544. *See also Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010, **CLA-29**, para. 264 (confirming that the meaning of treaty terms must be interpreted through their context).

453 Shaw Report, para. 40.

454 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Art. 1(1).

> in Article 9 (Settlement of Disputes between Contracting Party and an investor of the other Contracting Party), which sets out the option of consideration by a domestic court.[455]

274. Therefore, all of the Treaty provisions containing the term "territory" presume that the State Party exercises sufficient control with respect to the territory at issue to adopt the requisite legislative, institutional or governance measures. The Treaty's references to "territory" are intended to extend the obligations of the States-Parties to circumstances under which they would be capable of exercising the governmental authority necessary to ensure the protections in the Treaty.[456]

275. Accordingly, the context of the term "territory" in Article 1(4) supports its interpretation as the geographic area over which the Russian Federation exercises *de* facto control.

d. Object and purpose of the Treaty

276. Article 31(1) VCLT requires the Treaty to be interpreted in light of its "object and purpose". The meaning of this term has been explained by the ILC as follows:

> The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, *in particular the title and preamble of the treaty*. Recourse may also be had in particular to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.[457]

277. Various international dispute resolution bodies have confirmed that the preamble is a primary source from which to derive the object and purpose of a treaty.[458] According to Professor Shaw:

> Incorporating the concept of object and purpose in this fashion emphasises that the process of interpretation is intended to ensure that the aims of the treaty are to be furthered and introduces the principle of effectiveness into the equation. In the negative sense, it operates to preclude an interpretation that would diminish the application of the treaty in whole or in part. In the positive sense, it seeks to warrant that the terms of the treaty are applied and

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455 Shaw Report, para. 41.

456 Shaw Report, para. 42 ("while the application of public powers … are usually aligned with the territorial sovereignty of the State, this is not an absolute rule. In the BIT the obligations taken as a whole are sufficiently aligned with the exercise of legislative and jurisdictional control of the parties that a broader view is warranted").

457 United Nations, General Assembly, *Report on the International Law Commission,* Sixty-third Session, Supplement No. 10, 2011, A/66/10/Add. 1, **CLA-30**, para. 3.1.5.1 (emphasis added).

458 *See, e.g., Guinea-Bissau v. Senegal*, I.C.J. Reports, 1991, Arbitral Award, 31 July 1989, **CLA-31**, pp. 53; *Case Concerning Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports, 2002, Judgment, 17 Dec. 2002, **CLA-32**, pp. 625, 652; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010, **CLA-29**, paras. 264, 272-73.

> not diminished. The principle of effectiveness has been determined to be of "particular importance" in relation to the object and purpose of a treaty.[459]

278. Professor Shaw further opines in this respect as follows:

> [T]he orientation and function of investment treaties focuses primarily upon the promotion and protection of investments. That is the key purpose. It is my view that the determination of "territory" in the BIT and for these purposes must bear a meaning that is consistent with this, in the sense that it would be read in a way which does not run contrary to the promotion and protection of investments.[460]

279. Moreover, the States-Parties to the Treaty have declared in the Preamble their "intention to create and maintain favourable conditions for reciprocal investments", and their "desir[e] to create favorable conditions for the promotion of economic cooperation between the Contracting Parties".[461] These references emphasise the Treaty's focus on investments and economic cooperation.

280. Professor Shaw explains that:

> the object and purpose of the BIT as laid down in the preamble also focuses upon the promotion of favourable conditions for reciprocal investment and economic cooperation. Accordingly, *any interpretation of the BIT that precluded or hindered the promotion of investments and economic cooperation and the protection of investments would be inconsistent with the object and purpose of the treaty.* In particular, the object and purpose of the BIT could hardly be accomplished by withdrawing protections from investors.[462]

281. The tribunal in *Sanum v. Laos* reached a similar conclusion when assessing whether the China-Laos BIT was to be extended to China's special administrative region Macao, which China took over from Portugal after the BIT had been concluded. The tribunal explained:

> The purpose [as stated in the BIT's Preamble] is twofold: to protect the investor and develop economic cooperation. The Tribunal does not find – and no element has been provided by the Respondent to that effect – that the extension of the PRC/Laos BIT could be contrary to such a dual purpose. *In fact, the larger scope the Treaty has, the better fulfilled the purposes of the Treaty are in his case: more investors – who could not otherwise be protected – are internationally protected, and the economic cooperation benefits a larger territory that would otherwise not receive such benefit*.[463]

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459 Shaw Report, para. 47.

460 Shaw Report, para. 49.

461 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Preamble.

462 Shaw Report, para. 50 (emphasis added).

463 *Sanum Investments Ltd v. Laos*, UNCITRAL, Award, 13 Dec. 2013, **CLA-33**, para. 240 (emphasis added).

282. The Treaty's provisions must be interpreted so as to give maximum effect to the Treaty's objectives as stated in the Preamble. Conditioning a Contracting State's obligations under the Treaty on its sovereign title over the territory in question, rather than the State's full control over that territory, would allow the Russian Federation to enter a legal black hole and place Ukrainian investors in a legal vacuum in Crimea, thereby diminishing, not maximising, the encouragement and mutual protection of investments that the Treaty seeks to advance.

e. General international law

283. BITs are "governed by international law" and as such must be "applied and interpreted against the background of the general principles of international law".[464] Moreover, pursuant to Article 38(1) of the ICJ, the decisions of courts and tribunals are relevant sources in the determination of international law. Arbitral tribunals have acknowledged the role of judicial and arbitral decisions as a source of international law for the purposes of interpreting the meaning of the terms used in a treaty.[465]

284. In the present case, the Claimant's submission regarding the true meaning of "territory" in the Treaty is reinforced by reference to several analogous situations in international law where the concept of territory is informed by a state's exercise of effective control and exercise of jurisdiction beyond its sovereign territory. These situations concern:

(i) the customary principle of "moving treaty boundaries" applicable in case of state succession;

(ii) investment treaty arbitration concerning intangible financial investments;

(iii) the principle of state responsibility;

(iv) human rights law;

(v) extradition law; and

(vi) the laws governing belligerent occupation.

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464 C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles,* (OUP, 2007), **CLA-34**, at 1.11. *See also* A. Aust, **CLA-7**, p. 216 ("a treaty must be interpreted also in the wider context of general international law"); Statute of the International Court of Justice, Annexed to the Charter of the United Nations, signed on 26 Jun. 1945 and entered into force on 24 Oct. 1945, **CLA-35**, Art. 38(1)(c).

465 *See e.g., Sempra v. Argentina*, ICSID Case No. ARB02/16, Decisions on Objections to Jurisdiction, 11 May 2005, **CLA-36**, para. 147.

285. Each of these situations is addressed in turn below.

f. Articles 15 VCST and 29 VCLT

286. Under international law, when part of the territory of one State becomes part of the territory of another State, the general rule is that the treaties of the former cease to apply to the territory while the treaties of the latter extend to the territory.[466] This rule is codified by Article 15 of the Vienna Convention on Succession of States in respect of Treaties (**VCST**) (the so-called principle of "moving treaty boundaries").

287. For instance, there are many decisions by French and Belgian courts holding that French treaties applied to Alsace and Lorraine after they were ceded to France in 1919.[467] Similarly, when the US annexed Hawaii in 1898, its treaties were extended to the islands and Belgium was informed that US-Belgium commercial agreements were thenceforth to be applied to Hawaii also.[468] The rule formulated in Article 15 VCST is well grounded in customary international law.[469]

288. The territorial scope of treaties is also addressed in Article 29 VCLT, which states: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". Article 29 is repeated as a principle of U.S. foreign relations law in the Restatement (Third) of the Foreign Relations Law of the United States,[470] which acknowledges that an international agreement may bind states with respect to activities they undertake outside their national territories.[471]

289. The tribunal in *Sanum Investments v. Laos* had occasion to consider the interplay between Articles 15 VCST and 29 VCLT. It held that:

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466 M. Shaw, *International Law,* (CUP, 6th edition, 2008), **CLA-37**, p. 973.

467 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, (Routeledge, 1997), **CLA-38**, p. 163.

468 M. Shaw, *International Law*, (CUP, 6th edition, 2008), **CLA-37** p. 973.

469 *See, e.g.,* Yearbook of the International Law Commission, 1974, Volume II (ILC Commentary), **CLA-39**, at pp. 208-209.

470 *Restatement (Third) of Foreign Relations Law,* Section 322, Reporters' Note 3, **CLA-40**, Section 322(2) ("Unless a different intention appears, an international agreement binds a party in respect of its entire territory….").

471 *Restatement (Third) of Foreign Relations Law,* Section 322, Reporters' Note 3, **CLA-40**. *See also* K. Doehring, "The Scope of the Territorial Application of Treaties" (1967) 27 Heid. J. Int'l L. 483, **CLA-41**, 488-89 (observing that under Article 29 VCLT, the application of a treaty to a State's "territory" could include "occupied zones" held by that State); M. Villiger, *Territorial Scope of Treaties* (2009) 392, **CLA-42**, 394 (noting that "[r]ecognition under international law of the State and its territory is not required" in order for a treaty to apply to a territory).

> automatic succession applies unless it appears from the treaty itself or is otherwise established that such a result would not be appropriate for one of two reasons: either because such succession would be incompatible with the object and the purpose of the treaty or because it would radically change the conditions of its operation.[472]

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

291. Thus, according to Professor Shaw, given that neither of the *Sanum Investments* exceptions noted above apply here, and that the official position of the Russian Federation is that it has annexed Crimea under Russian law, "Crimea now forms part of the Russian Federation and thus the BIT would necessarily extend to that territory".[473] Besides, as discussed below, the Russian Federation is barred under the international law doctrines of estoppel and preclusion from denying that position for the purposes of these proceedings.

g. Investment treaty arbitrations concerning intangible financial investments

292. The Claimant's interpretation of the term "territory" receives further support by analogy from the interpretation of the territorial requirement in investment treaties in the context of intangible financial investments. The seminal financial case is *Fedax v. Venezuela*, in which the tribunal adopted a "flow of funds" criterion for determining whether an investment was made in the "territory" of the host state.

293. Venezuela argued that Fedax did not qualify as an investor because, only being the holder of promissory notes issued by Venezuela, it had not made any investment in the "territory" of that country. The tribunal recognised that "in some kinds of investments, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country", but it stressed that "this does not necessarily happen in a number of other types of investments, particularly those of a financial nature". According to the tribunal, the test in such circumstances is whether the available funds are used by the beneficiary of the credit to finance its various governmental needs. Since it was not disputed that through its promissory notes

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472 *Sanum Investments Ltd v. Laos*, UNCITRAL, Award, 13 Dec. 2013, **CLA-33**, para. 230.

473 Shaw Report, para. 19.

Venezuela had received credit that was used for its financial needs, those promissory notes were determined to be invested in the territory of Venezuela within the meaning of the treaty.[474]

294. The approach in *Fedax* has been adopted in subsequent cases. For example:

(i) In *Abaclat v. Argentina*, the tribunal held that security entitlements to sovereign bonds fulfilled the applicable treaty's territorial requirements because the funds were ultimately made available to Argentina and financed its economic development.[475]

(ii) In *Deutsche Bank v. Sri Lanka*, a hedging agreement to protect Sri Lanka against rising oil prices fulfilled the territorial requirement because funds were made available to Sri Lanka, were linked to an activity taking place in Sri Lanka, and served to finance its economy.[476]

(iii) In *Ambiente Ufficio v. Argentina*, the tribunal held that security entitlements on sovereign bonds fulfilled the territorial requirement because the bonds aimed to raise money for budgetary needs of Argentina and further its development.[477]

295. Moreover, arbitral tribunals determining the financial cases have consistently rejected objections by respondent states equating the territorial requirement in investment treaties with the exercise of sovereign rights in respect of the investment. For example, the tribunal in *Ambiente Ufficio* observed that: "nowhere in … the Argentina-Italy BIT it is said that an investment may only be considered to be made in the territory of the host State if that State can exercise full sovereign rights or, for that matter, otherwise full control in regard to those investments".[478]

296. In Professor Shaw's opinion:

> What is clear is that, in the financial context, Tribunals have regarded the territorial requirement as having little or no impact in terms of restricting

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474 *Fedax v. Venezuela*, ICSID Case No. ARB/96/3, Decisions on Objections to Jurisdiction, 11 Jul. 1997, **CLA-43**, para. 41.

475 *Abaclat v. Argentina,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011, **CLA-44**, paras. 373-378.

476 *Deutsche Bank v. Sri Lanka,* ICSID Case No. ARB/09/2, Award, 31 Oct. 2012, **CLA-45**, paras. 288-292.

477 *Ambiente Ufficio v. Argentina,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 Feb. 2013, **CLA-46**, paras. 498-509.

478 *Ambiente Ufficio v. Argentina,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 Feb. 2013, **CLA-46**, para. 507.

> their jurisdiction, given that the contrary view would not have sat comfortably with the object and purpose of the treaties in question. In these cases, the "flow of funds" or ultimate beneficiary criteria better reflected the object and purpose of the relevant treaties, i.e. investor protection and the promotion of investment, rather than the application of a narrow concept of territory.[479]

297. In the present case, the Russian Federation has clearly received the financial benefits of the Claimant's investments in Crimea, which is now under the effective control of the Russian Federation. Oschadbank Crimea had operated for decades as one of Crimea's largest banking operations through 294 banking outlets.[480] Oschadbank Crimea was a market leader in lending and financed, *inter alia*, the ActivSolar Group's considerable renewable energy infrastructure investment in Crimea.[481] As the Claimant's financial expert Mr Davidson has explained in his Expert Report, the Claimant's investment contributed significantly to the development of the Crimean economy from which the Russian Federation is now benefitting.[482] In these circumstances, a narrow interpretation of the territorial application of the Treaty is unwarranted and, for the reasons identified above, would run counter to the object and purpose of the Treaty.

h. State responsibility

298. International law has recognised the fact of "effective control" as giving rise to jurisdiction, state responsibility and other legal obligations.[483] In its *Namibia* advisory opinion, the ICJ emphasised that:

> The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. *Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.*[484]

299. In *Nicaragua v. United States*, the ICJ likewise indicated that state responsibility for acts directly committed by third parties may arise, *inter alia*, where a state exercises "effective

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479 Shaw Report, para. 59.

480 Pyshnyy Statement, para. 17.

481 Pyshnyy Statement, para. 19, 22.

482 *See* Davidson Report, paras. 3.24-3.26.

483 The League of Nations Covenant, **CLA-47**, Art. 23(b), stipulates that: "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League … undertake to secure just treatment of the native inhabitants of *territories under their control*") (emphasis added).

484 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 at 54, **CLA-48**, para. 118.

control" over a specific operation by a group that otherwise is not sufficiently linked to the State to be considered an arm of the State:

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[485]

300. Similar tests have been articulated by the International Law Commission.[486]

301. These cases demonstrate that a State may be held responsible in international law for unlawful conduct with regard to matters occurring outside its sovereign territory, but over which it exercised effective direction or control. As noted by Professor Shaw:

> In this sense, the rules pertaining to State responsibility are supportive of a flexible or broader understanding of territory in the current matter, for they establish the international legal liability of the State for breaches of the law committed by those over whom it exercises effective control even if they are acting outside of the national territory.[487]

i. Human rights

302. National, regional and international courts and tribunals have shown increasing willingness to assert the applicability of human rights treaty obligations beyond the national territory of state parties.[488] In the last decade the ICJ, the ECtHR, the UNHRC, the UN Committee Against

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485 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* I.C.J. Reports, 1986, 27 Jun. 1986, **CLA-49**, 65 (emphasis added). *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports, 2007, 26 Feb. 2007, **CLA-50**, 398-400 (applying the "effective control" test enunciated in Nicaragua).

486 United Nations, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, **CLA-51**, art. 6 (stating that conduct is attributable to a state when "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed"). The ILC also has employed effective control as a basis for determining State responsibility in the context of operations with international organizations: United Nations, International Law Commission, *Draft Articles on Responsibility of International Organisations and its Commentary, 2009,* **CLA-52**, art. 6 ("The conduct of an organ of a State ... that is placed at the disposal of [an] international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct.") (emphasis added); *see also id.* at Commentary, art. 6, 7 (providing that where an organ or agent of an international organization retains some control over its national contingent, the decisive question in establishing legal responsibility for given conduct appears to be "who has *effective control* over the conduct in question") (emphasis added).

487 Shaw Report, para. 78.

488 *See International Thunderbird Gaming Corp. v. Mexico,* UNCITRAL, Separate Opinion of Thomas Walde, 1. Dec. 2005, **CLA-53**, para. 13 (noting that the relationship between the parties in investor-state dispute resolution bears a strong resemblance to the relationship arising out of human rights claims against states).

Torture (**UNCAT**), the UN Human Rights Council, the UN General Assembly, and national courts and governments (including those of Canada, the US, Australia, and European states) have all become increasingly assertive in publicly recognising the application of human rights treaty obligations in contexts where states exercise effective control outside their national territories. This approach is consistent with the ICJ's view that either "physical control" of a territory or complete or "effective control" over operatives or conduct abroad can give rise to state responsibility for violations of international law.[489]

303. For example, the ICCPR provides that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant".[490] The UNHRC interpreted this provision as allowing the ICCPR to bind a State party not just for acts within its national territory but also in other areas subject to its jurisdiction, which the Committee defined to cover "anyone within the power or effective control of that State Party".[491] The UNHRC has thus found that the ICCPR is applicable to the Occupied Palestinian Territories: "the Covenant must be held applicable to the occupied territories and those areas … where Israel exercises effective control".[492]

304. This approach was confirmed by the ICJ in its 2004 Advisory Opinion in the *Israeli Wall Case*, which held that the ICCPR and other "essentially territorial" human rights treaties each apply whenever the impugned state exercises "effective control" over a foreign territory. The Court held that Israel's presence in the Occupied Palestinian Territories and its exercise of territorial jurisdiction over those territories triggered Israel's obligations under the ICCPR and other human rights treaties.[493] The Court observed that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory".[494] The Court noted that the "constant

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489 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* I.C.J. Reports, 1986, 27 Jun. 1986, **CLA-49**, 65 (noting that states must exert "effective control" over operatives in foreign territory to incur liability for human rights violations).

490 *International Covenant on Civil and Political Rights,* adopted on 16 Dec. 1966, entered into force on 23 Mar. 1976, **CLA-54**, Art. 2(1).

491 UNHRC, "General Comment No 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant", 29 Mar. 2004, UN Doc CCPR/C/21/Rev.1/Add.13, **CLA-55**.

492 Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, 18 Aug. 1998, **CLA-56**, para. 10.

493 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports, 2004, **CLA-25**, paras. 108-111.

494 *Ibid.*, **CLA-25**, para. 109.

practice" of the Human Rights Committee was consistent with this reading, and that "the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory".[495]

305. In 2005, in the *Congo* case, the ICJ reaffirmed this approach in recognising that Uganda's occupation in the northeastern part of Congo gave rise to obligations under international human rights and humanitarian law treaties. The court reiterated that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territories".[496]

306. The Committee on Economic, Social and Cultural Rights has reached the same conclusion with regard to the International Covenant on Economic, Social and Cultural Rights (**ICESCR**): "The Committee is of the view that the State's obligations under the Covenant, apply to all territories and populations under its effective control."[497] The UNCAT has read "any territory" in the Convention against Torture to include all territories where the state exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control.[498] Moreover, the Inter-American Commission on Human Rights has construed obligations under the American Convention on Human Rights as "linked to authority and effective control, and not merely to territorial boundaries",[499] and has applied an "authority and control" standard to the extraterritorial application of the American Declaration on the Rights and Duties of Man.[500]

307. An approach that focuses on actual control rather than formal title also receives support from a consideration of the case law of the ECtHR (and before it the European Commission

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495 *Ibid.*, **CLA-25**, para. 109. The court cited the Committee's early cases involving extraterritorial kidnappings by Uruguay and denial of a citizen's passport abroad, as well as its more recent decisions recognising Israel's responsibility under the Covenant in the Occupied Territories: ibid.

496 *Case Concerning Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. Reports, 2005, **CLA-57**, 243 (citing *Legal Consequences of Wall*, 2004, I.C.J. at 178-81).

497 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.27, 4 Dec. 1998, **CLA-58**, para. 8.

498 Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, 10 Dec. 2004, **CLA-59**, para. 4(b) ("the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party's authorities"); Comm. Against Torture, General Comment No.2, U.N. Doc. *CATIC/GC/2* (2008), **CLA-60**, para. 16. Similarly, the Committee on the Rights of the Child considered that the CRC applied to the Occupied Palestinian Territories, and also seemed to have thought that it applied to Israeli army activities with regard to de-mining in Southern Lebanon: Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, 4 Oct. 2002, **CLA-61**, paras. 2, 5, 57-58.

499 *Victor Saldano v. Argentina,* Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L./V/II.102, doc. 6 rev, 11 Mar. 1999, **CLA-62**, para. 19.

500 *Coard v. United States*, Case 10.051, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev, 29 Sept. 1999, **CLA-63**, para. 37.

on Human Rights), which has repeatedly stated that a State party to the European Convention on Human Rights (**ECHR**) is accountable for acts contrary to its conventional commitments even if materially these acts take place outside the national territory of that State.[501]

308. The classic statement on the scope of application of the ECHR is found in the ECtHR's *Loizidou v. Turkey* judgment. In that case, the applicant complained that her property rights had been breached as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces that had prevented her from gaining access to her home and other properties. The Court recalled that, although Article 1 (obligation to respect human rights) of the ECHR set limits on the reach of the Convention, the concept of "jurisdiction" under that provision "is not restricted to the national territory of the High Contracting States":[502]

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it *exercises effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. [503]

309. The Court added that sometimes there is no need for proof of a "detailed control" of the acts of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned. Consequently, the acts of the northern Cypriot authorities, supported by Turkish armed forces, fell within Turkish jurisdiction.[504] This ruling was reaffirmed in the subsequent case of *Cyprus v. Turkey*, in which Turkey was again held liable for human rights violations committed in the territory over which it had "effective overall control".[505]

310. In *Ilaşcu and Others v. Moldova and Russia*,[506] the ECtHR found jurisdiction of Russia for the acts by authorities of the Moldovian Republic of Transnistria (**MRT**), an entity controlling part of Moldova's territory. The Grand Chamber considered the financial support and the

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501 The Court bases this interpretation on Article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Ukraine and the Russian Federation are both parties to the ECHR.

502 *Loizidou v Turkey,* (preliminary objections.), No. 15318/89, 23 Mar. 1995, **CLA-64**, para. 62.

503 *Loizidou v Turkey,* (preliminary objections.), No. 15318/89, 23 Mar. 1995, **CLA-64**, para. 62 (emphasis added).

504 *Loizidou v. Turkey*, (dec.), No. 15318/89, 18 Dec. 1996, **CLA-65**, para. 56.

505 *Loizidou v. Turkey*, (dec.), No. 15318/89, 18 Dec. 1996, **CLA-65**, paras. 52-7; *Cyprus v Turkey,* (dec.), No. 25781/94, 10 May 2001, **CLA-66**, paras. 77-78.

506 *Ilaşcu and Others v. Moldova and Russia,* (dec.), No. 48787/99, 8 Jul. 2004, **CLA-67**.

supply of weapons by the Russian Federation to be of great importance, stating that the Transnistrian separatist forces:

> vested with organs of power and its own administration, remains under the effective authority, or at least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.[507]

311. The ECtHR has reached similar conclusions in other cases. In *Al-Skeini v. United Kingdom*, the Court held that the ECHR applies to situations "when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory".[508] In *Issa v. Turkey*, the Court recognised the application of the ECHR to "persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state".[509] In *Hussein v. Albania,* the Court declared the case inadmissible because the applicant "has not demonstrated that [the respondent states] had jurisdiction on the basis of their control of the territory where the alleged violations took place".[510] In *Bankovic*, the Court noted the existence of jurisdiction:

> when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[511]

j. Extradition cases

312. National courts have on several occasions equated the territorial requirement of treaties with the actual and effective exercise of jurisdiction, including in circumstances where the state exercising jurisdiction did not hold sovereign title to the territory.[512]

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507 *Ibid*., **CLA-67**, para. 392.

508 *Al-Skeini v. United Kingdom,* (dec.), No. 55721/07, 7 Jul. 2011, **CLA-68**, para. 138.

509 *Issa and Others v. Turkey* (dec.), No. 31821/96, 16 Nov. 2004, **CLA-20**, 588.

510 *Hussein v. Albania,* App No. 23276/04, E.H.R.R. SE16 42 (2006), **CLA-69**.

511 *Bankovic v. Belgium*, (dec.), No. 52207/99, 19. Dec. 2001, **CLA-70**, para. 71. *See also Al-Saadoon v. UK*, (dec.), No. 61498/08, 2 Mar. 2010, **CLA-71**, para. 87 (recognising application of the ECHR where the UK exercised "exclusive control" over detention facilities in Iraq); *Medvedyev v. France*, (dec.), No. 3394/03, 29 Mar. 2010, **CLA-72**, para. 67 (recognising application of the ECHR where France "exercised full and exclusive control" over the capture of a ship on the high seas).

512 *See* I. Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003), **CLA-73**, at 112-13.

313. In the *Schtraks* case[513] the Israeli Government requested that the UK extradite a prisoner who was wanted for prosecution on charges that he had committed a crime in Jerusalem. The request was made pursuant to a UK-Israel extradition agreement, which provided in relevant part:

> The contracting parties agree to extradite to each other … those persons who, being accused or convicted of any of the offences enumerated in article 3 and *committed within the territory of the one party* … shall be found within the territory of the other party.[514]

314. The prisoner applied for a writ of *habeas corpus* on grounds that Jerusalem was not a "territory" of Israel within the meaning of the extradition agreement. The basis of the argument was the fact that the UK government did not recognise the *de jure* sovereignty of Israel in Jerusalem but only its *de facto* authority.

315. The House of Lords held that "territory" in the context of the extradition agreement included any area over which a contracting party exercised effective jurisdiction; and that, accordingly, since the Israeli Government had *de facto* authority and exercised jurisdiction over Jerusalem, it was within the "territory" of Israel within the meaning of the agreement.[515] Viscount Radcliffe held that "territory" in that context encompassed "whatever is under the State's effective jurisdiction".[516] Lord Evershed concurred that "the 'territory' of any State must prima facie mean the area in which the jurisdiction of that State is practically and normally exercised".[517]

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513 *R. Governor of Brixton Prison, ex parte Schtraks* (**Schtraks**) [1964] A.C. 556; I.L.R. 33, 319, **CLA-74**.

514 Israel (Extradition) Order, 1960 (S.I. 1960 No. 1660), **CLA-75**, Art. 1 (emphasis added). *See also Schtraks*, **CLA-74**, at 558.

515 *Schtraks*, **CLA-74**, at 579 (Lord Reid). *See* ibid. (noting that the extradition agreement "draws no distinction between territories over which Her Majesty exercises sovereignty and Protectorates and other territories where Her Majesty is not sovereign but where her authority is exercised").

516 *Schtraks*, **CLA-74**, at 587 (Viscount Radcliffe). *See* ibid. (noting that "if a British national were to suffer some outrage in the Israeli-occupied part of Jerusalem, the United Kingdom Government would properly address itself to the Government of Israel for investigation and, possibly, redress, because it would look to that Government as responsible for the maintenance of law and order by virtue of its de facto authority").

517 *Schtraks*, **CLA-74**, at 593 (Lord Evershed). *See also* ibid. at 604 (Lord Hodson) ("in its context the word 'territory' where it appears includes territory over which H.M. Government recognises that Israel exercises de facto authority, and [ ] so far as extradition is concerned as between Israel and the United Kingdom, no distinction is to be drawn between the conceptions de jure and de facto").

316. Similarly, in the *Minervini* case the High Court of Justice of England and Wales held that the term "territory" in a UK-Norway extradition treaty was "equivalent to jurisdiction" and therefore included ships of the other party.[518]

317. Brownlie endorsed the House of Lords' approach to the territorial application of treaties in the *Schtraks* and *Minervini* cases, finding that such an application of a treaty's scope:

> avoids a legal vacuum in such territories and provides sensible solution without the necessity for lengthy inquiry into roots of title, or the legal quality of a protectorate or trusteeship. Further, the equation of territory and jurisdiction is theoretically sound … since in a legal context the word [territory] denotes a particular sphere of legal competence and not a geographical concept. Ultimately territory cannot be distinguished from jurisdiction for certain purposes. Both terms refer to legal powers, and, when a concentration of such powers occurs, the analogy with territorial sovereignty justifies the use of the term 'territory' as a form of shorthand.[519]

318. In the present case, the Tribunal should employ this "shorthand" by extending the territorial scope of the Treaty to include the situation of overall effective control by one State over the territory of another.

k. Belligerent occupation

319. As provided in Article 42 of the Hague Regulations, belligerent occupation is a legal regime that arises when territory:

> is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[520]

320. This standard is generally interpreted in the literature as being one of "effective control".[521] When a state of occupation occurs, international law tries to limit any potential abuses by setting out a certain number of rights, and a greater amount of obligations, which are incumbent upon the occupying state. As prescribed by Article 43 of the Hague Regulations:

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518 *R. v. Governor of Brixton Prison, ex parte Minervini* [1959] 1 QB 155; [1958] 3 WLR 559, **CLA-76**, at 162 (Lord Parker CJ). The court held that to read the terms "territory" and "jurisdiction" as two completely separate notions "is just nonsense" (ibid.).

519 I. Brownlie, *Principles of Public International Law* (6th ed., Oxford, 2003), **CLA-73**, at 112-13 (emphasis added).

520 Hague Regulations Concerning the Laws and Customs of War on Land, dated 18 Oct. 1907, **CLA-77**, Art. 41.

521 *See, e.g.,* Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, 2009), **CLA-78**, at 40, 42 *ff.*

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

321. In the present case it is clear that Crimea constitutes territory occupied by the Russian Federation. Accordingly, Russian authority is based in international law upon its actual and effective control of the territory.

322. As noted above, the ICJ has held that States occupying the territory of another State carry with them into that territory certain international treaties to which they are parties. In the *Construction of a Wall* advisory opinion, the Court declared that the ICCPR applied both within Israel and with regard to acts done "in the exercise of its jurisdiction outside its territory":[522]

> the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.[523]

323. In *Democratic Republic of Congo v. Uganda*, the Court reaffirmed that "international human rights instruments are applicable 'in respect of acts done by a state in the exercise of its jurisdiction outside its territory', particularly in occupied territories".[524] In this connection, Professor Shaw opines that:

> If human rights treaties to which the occupying State is a party apply to territories occupied by that State, it is but a short step to venture the conclusion that treaties that protect the rights of investors may similarly apply.[525]

3. The Russian Federation's effective control over Crimea renders Crimea as Russian "territory" under the Treaty

324. The following military, administrative and legislative acts illustrate amply the Russian Federation's effective control over Crimea, thereby rendering Crimea as Russian "territory" under Article 1(4) of the Treaty:

(i) Commencing in the latter part of February 2014, and through a complex and carefully planned operation, the Russian Federation effected the military

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522 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports, 2004, **CLA-25**, pp. 136, 180.

523 *Ibid.*, **CLA-25**, at p. 181.

524 *Case Concerning Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. Reports, 2005, **CLA-57**, pp. 168, 242-43.

525 Shaw Report, para. 88.

invasion and occupation of Crimea, which included Russian elite military units seizing and occupying the Crimean Parliament and Crimean Government premises and raising a Russian flag there;

(ii) On 1 March 2014, the Russian Federation provided formal authorisation for the deployment of Russian armed forces into Ukrainian territory,[526] although such deployment had commenced days earlier and would continue for two more weeks;

(iii) On 18 March 2014, the Russian Federation and Republic of Crimea entered into the Accession Treaty which provided, *inter alia*, for the Republic of Crimea's admission to the Russian Federation[527] and the extension of the Russian Federation's laws and regulations to the territory of Crimea;[528]

(iv) On 18 March 2014, the State Duma of the Russian Federation represented that it would promote the social and economic development of the Republic of Crimea and ensure stability during the transitional period;[529]

(v) On 21 March 2014, the Russian Federation ratified the Accession Treaty and adopted the Federal Law on Accession that formally incorporated the Republic of Crimea and Sevastopol as subjects of the Russian Federation (provided for in Article 65 of its Constitution),[530] and expressly provided for the integration of Crimea into "the economic, financial, credit and legal systems of the Russian Federation, within the system of agencies of State power of the Russian Federation";[531]

(vi) Upon ratification of the Federal Law on Accession, the Russian Federation formed new administrative authorities (agencies of executive bodies)[532] and courts[533] in Crimea and Sevastopol, in compliance with Russian laws and the

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526 Decree of the Federation Council of the Federal Assembly of the Russian Federation dated 1 Mar. 2014 No. 48-СФ "On the Use of Armed Forces of the Russian Federation on the Territory of Ukraine", **CE-66**.

527 Accession Treaty, **CE-101**, Article 1(1).

528 Accession Treaty, **CE-101**, Article 9(1).

529 Russian State Duma adopts statement on situation in Republic of Crimea, 18 Mar. 2014, **CE-106**.

530 Federal Law on Accession, **CE-101**, Article 2(2).

531 Federal Law on Accession, **CE-101**, Article 6.

532 Federal Law on Accession, **CE-101**, Article 7(7), Article 8.

533 Federal Law on Accession, **CE-101**, Article 9.

Russian centralised governance and judicial system, including, *inter alia*, the so-called:

a. Regional prosecutor's offices;[534]

b. Regional bodies of the Russian Ministry of Internal Affairs;[535]

c. The Crimean and Sevastopol FBS;[536]

d. The Crimean FSS;[537] and

e. a new court system that included commercial courts (or "arbitrazh courts") and courts of general jurisdiction, including courts-martial;[538]

(vii) Upon adoption of the Federal Law on Accession, President Putin appointed a range of Crimea and Sevastopol officials, including, *inter alia*, the Acting Crimean Head, Interior Minister of Crimea, Governor of Sevastopol, Crimean and Sevastopol Prosecutors, and the chairmen to purported federal courts in Crimea;[539]

(viii) Pursuant to the Federal Law on Accession, so-called Crimean courts began to hear cases under Russian procedural law immediately after Crimea's annexation;[540]

(ix) On 31 March 2014, President Putin established the Federal Ministry on Crimean Affairs that was authorised to draft state programs aimed at Crimea's development and tasked with controlling the conduct of the Crimean and Sevastopol authorities in exercising the powers delegated to them under Russian legislation;

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534 Federal Law on Accession, **CE-101**, Article 8(1).

535 Order of the Ministry of Internal Affairs of the Russian Federation No. 175 dated 25 Mar. 2014, **CE-114**.

536 Order of the Ministry of Justice of the Russian Federation No. 42 dated 26 Mar. 2014, **CE-116**.

537 Articles 5 and 8 of Federal Law "On Federal Security Service" No. 40-ФЗ as of 3 Apr. 1995 (as amended), **CE-5**.

538 E. A. Kremyanskaya, Short Note on the Development of the Criminal Justice System after the Accession of Crimea and Sevastopol to the Russian Federation, New Journal of European Criminal Law, Vol. 5, Issue 2, 2014, **CE-39**, p. 260.

539 Publication on official web-site of the Crimean Supreme Court regarding appointment under Decree of the President Putin "On Appointment of Judges of Federal Courts" No. 719 dated 5 Dec. 2014, **CE-134**.

540 Federal Law on Accession, **CE-112**, Article 9(7); "Courts have Started to Adjudicate under Russian Laws in Crimea", 25 Mar. 2014, **CE-115**.

(x) On 11 April 2014, the so-called Crimean Parliament purportedly adopted a new Crimean Constitution, "taking another step to cement the region's absorption into Russia";[541]

(xi) The new Crimean Constitution was officially published and entered into force on 12 April 2014,[542] and it called for the application of international treaties of the Russian Federation to Crimea;[543]

(xii) In April 2014, "in order to make the federal, regional and municipal executive authorities' socioeconomic development efforts in Crimea and Sevastopol more effective", President Putin established the State Commission for Socioeconomic Development in the Republic of Crimea and Sevastopol;[544]

(xiii) The Russian Federation established complete control of the banking system in Crimea through the enactment of various pieces of legislation following the March 2014 referendum, including, *inter alia*, the Federal Law on the Crimean Financial System that regulated the operations of Ukrainian banks in Crimea.

325. Through its conduct Russian Federation clearly established effective jurisdiction and control over Crimea. At the latest on 21 March 2014, and very likely earlier, Crimea's territory and people were within the administrative, legislative and judicial jurisdiction of the Russian Federation. The Russian Federation's effective control over Crimea rendered it as Russian "territory" for purposes of the Treaty.

541 "Crimea's Parliament Adopts Kremlin-Backed Constitution", Reuters, 11 Apr. 2014, **CE-146**.

542 "Crimean Constitution comes into legal force", 12 Apr. 2014, **CE-153**; "Crimea Approves New Constitution", 11 Apr. 2014, **CE-147**.

543 The Crimean Constitution, **CE-148**, Article 39(3).

544 Publication "State Commission for Socioeconomic Development of Republic of Crimea and Sevastopol established", 21 Apr. 2014, **CE-166**.

4. The Russian Federation is barred from denying this Tribunal's jurisdiction in respect of Ukrainian investments in Crimea, based on general principles of estoppel and preclusion

326. The Russian Federation has taken the position before this Tribunal that its actions in Crimea cannot be regulated by the Treaty.[545] This position is untenable, and for the reasons explained below should be barred by the international law doctrines of estoppel and preclusion.

a. The Russian Federation's position is barred by the doctrine of estoppel

327. The principle of estoppel is an established element of international law, particularly in the context of state responsibility for injury to foreign investment, because it is based on fundamental principles of predictability and reliance.

328. Estoppel is one of the "general principles of law recognised by civilised nations".[546] Its aim is to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon one of its representations. International law has long recognised such a requirement on the basis that "a State ought to be consistent in its attitude to a given factual or legal situation".[547] As Lord McNair noted in his *Law of Treaties*, a State "cannot blow hot and cold" (*allegans contraria non audiendus est*).[548] This principle has been affirmed by a number of treaty tribunals.[549]

329. The Russian Federation's current position before this Tribunal is a prime example of "blowing both hot and cold". Whereas the Russian Federation has formally declared to the international community and informed the Tribunal of its position that Crimea forms an integral part of the territory of the Russian Federation, it simultaneously maintains that its actions in Crimea cannot be regulated by the Treaty.[550]

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545 Letter of the Russian Federation to the PCA, dated 21 June 2016, **CE-288**.

546 I. Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003), **CLA-73**, 616 ("A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency").

547 I.C. MacGibbon, *Estoppel in International Law* (1958) 7 Int'l & Comp. L. Q. 468, **CLA-79**.

548 A.D. McNair, *The Law of Treaties,* (Oxford, 1961), **CLA-16**, p. 485. *See also* I.C. MacGibbon, *Estoppel in International Law* (1958) 7 *Int'l & Comp. L. Q.* 468, **CLA-79**, at 469.

549 *See, e.g., RSM v. Grenada*, ICSID Case No. ARB/05/14, Decision on Preliminary Objections, 7 Dec. 2009, **CLA-80**, para. 27 ("international law, as much as any system of municipal law, will not permit a party to blow hot and cold in respect of the same matter"); *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006, **CLA-81**, para. 475 ("Almost all systems of law prevent parties from blowing hot and cold").

550 Letter of the Russian Federation to the PCA, dated 21 June 2016, **CE-288**.

330. In addition, the Russian Federation's inconsistency violates the more traditional notion of estoppel involving detrimental effect to the other party. Investment tribunals have defined estoppel as "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party".[551]

331. In the present case, permitting the Russian Federation to avoid its international and treaty obligations by reversing the positions it has taken in the past would cause "serious injustice" to the Claimant, because it would deny the Claimant the ability to challenge the Russian Federation's serious misconduct in respect of the Claimant's investments in Crimea.

332. In *SPP (Middle East) Ltd. v. Egypt*, the tribunal concluded that actions by the State preventing the claimant from completing work on a local project "contravened a general principle (recognised both under Roman law as well as common law traditions) whereby a party is barred from taking a contrary course of action (*i.e.*, alleging or denying a certain act or state of facts) after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party".[552]

333. Here, the Russian Federation adopted the Federal Law on Accession on 21 March 2014. Under that law, the Ukrainian banks that operated in Crimea and held a valid license of the NBU were permitted in clear and unequivocal terms to continue carrying out banking operations in Crimea until 1 January 2015, by which date the Ukrainian banks would be permitted to obtain a banking license from the Russian Central Bank.[553]

b. The Russian Federation's position is barred by the doctrine of preclusion

334. The Russian Federation's position that this Tribunal does not have jurisdiction over the present dispute is also barred by the international law principle of preclusion. That principle reflects maxims such as *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") and *allegans contraria non audiendus est* ("one making contradictory statements is not to be heard"). The tribunal in the *Argentine-Chile Frontier Case* described the

551 *Pan American Energy and Another v Argentina,* ICSID Case Nos. ARB/03/13 and ARB/04/8, Decision on Preliminary Objections, 27 Jul. 2006, **CLA-82**, para. 159.

552 *SPP (Middle East) Ltd. v. Egypt,* ICC Case No. 3493, 11 Mar. 1983, **CLA-83**, para. 51.

553 Federal Law on Accession, **CE-112**, Article 17.

preclusion principle as barring "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith".[554]

335. The terms estoppel and preclusion have often been employed interchangeably.[555] However, a number of tribunals and courts have found that the principle of preclusion is broader than the concept of estoppel *stricto sensu.* In particular, detrimental reliance is not a required element of preclusion; instead, a party is precluded from taking inconsistent positions by virtue of the principle of good faith regardless of reliance. This broader notion of preclusion has been invoked either expressly or implicitly in a number of arbitrations, decisions and separate opinions.[556]

336. For example, the sole arbitrator in *The Lisman* found that the claimant was precluded from adopting an inconsistent factual position:

> By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful … claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.[557]

337. The preclusion principle was likewise illustrated in the Iran-US Claims tribunal case of *Oil Fields of Texas*. In 1954, the Iranian State-owned company NIOC entered into an agreement with a US-European consortium of eight major oil companies. Under the agreement, Iran granted the consortium exploration, drilling, refining, and transportation rights with respect to oil in a specified sector of Iran. In 1973, the parties replaced the 1954 agreement with a new agreement whereby NIOC assumed control of all exploration, extraction and refining activities in Iran, but which required the consortium members to form a "service company", OSCO, which then entered into the service contract with NIOC. Following a series of mergers, NIOC eventually expressed its willingness to take over all contracts entered into by OSCO and explicitly represented itself to many third party companies as the party to their contracts executed by OSCO.

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554 *Argentine-Chile Frontier Case (Arg. v. Chile)*, Award, 9 Dec. 1966, 16 R.I.A.A. 109 (1969), **CLA-84**, 164.

555 *Argentine-Chile Frontier Case (Arg. v. Chile)*, Award, 9 Dec. 1966, 16 R.I.A.A. 109 (1969), **CLA-84**, 164. *See also Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment (Separate Opinion of Judge Ajibola), I.C.J. Reports, 1994, **CLA-85**, para. 96 (Separate Opinion of Judge Ajibola) (noting that "in international arbitral or judicial tribunals estoppel and preclusion have tended to be referred to interchangeably or indiscriminately.").

556 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (Cambridge, 1987), **CLA-19**, 142 *et seq*. (discussing arbitrations and cases in which the maxim *allegans contraria non est audiendus* has been applied).

557 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (Cambridge, 1987), **CLA-19**, 142 (emphasis in original) (citing *The S.S. Lisman (U.S. v. U.K.)*, Award, Oct. 5, 1937, 3 R.I.A.A. 1767, 1790 (1950)).

338. At the interlocutory stage, Judge Richard Mosk, in his Concurring Opinion, explained that Iran and NIOC were precluded from disavowing their previously-made representations concerning NIOC's status, while explicitly rejecting any detrimental reliance requirement:

> NIOC has, in order to derive certain benefits, represented itself as the party to contracts executed by OSCO. Iranian Government entities have even represented to this Tribunal that NIOC is OSCO's successor … there is authority for the proposition that Iran and NIOC should not now be able to disavow these representations …

339. This principle has long been accepted as a rule of international law … There are suggestions that in international law, 'estoppel', or its equivalent, may be utilized, even in the absence of technical municipal law requirements, such as reliance. Underlying the use of estoppel or analogous doctrines in international law "is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation … Thus, for all of the foregoing reasons, if, as the majority concludes, NIOC was not OSCO's principal, NIOC is the successor to the liability of OSCO to Oil Field and should be liable to Oil Field to the same extent as would be NIOC's predecessor, OSCO.[558]

340. The ICJ and its predecessor, the Permanent Court of International Justice, have also supported a broad concept of preclusion. In the case of the *Legal Status of Eastern Greenland*, the Court stated that because "Norway reaffirmed that she recognised the whole of Greenland as Danish", Norway "has debarred herself from contesting Danish sovereignty over the whole of Greenland".[559] Although this case is often cited as evidence of the principle of estoppel (in particular estoppel by conduct), the Court in fact did not concern itself with the question of whether or not one of the parties had relied, to their detriment, on Norway's statements; it was sufficient that the statement had been made, intending to produce legal effects.

341. In sum, the broader principles underlying many of these cases do not require that a party rely upon the statements or conduct of the other; rather, a party is precluded from taking an inconsistent position by virtue of the principle of good faith alone. The underlying basis of the

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[558] Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran, No. ITL 10-43-FT, 1982 WL 229382, **CLA-86**, at 23-24 (emphasis added) (internal citations omitted).

[559] *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J., Ser. A/B, No. 53 (5 Apr. 1933), **CLA-87**, at 68-69.

preclusion doctrine "is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation".[560]

342. In the present dispute, the Russian Federation, having invaded Crimea and claimed sovereign title to the territory, which claim is entrenched in its constitutional order and legal system, is now barred by the international law principle of preclusion from taking a contrary position in these proceedings.

343. Professor Shaw concurs that Russia's declaration of territorial sovereignty over Crimea:

> cannot bind *other states* as such, but in the case of Crimea, such declaration is binding on Russia itself and operates with regard to the areas that are subject to the effective control and exercise of jurisdiction of Russia. Internally such declarations (including, of course, legislative acts) are constitutionally binding. Externally, they are not binding as such, but are equally not without consequence. *Russia is not permitted to "blow hot and cold" and assert at the highest level a sovereign claim on the one hand, and yet deny that claim for the purposes of an arbitration on the other, particularly when to do so would be to the detriment of legitimate investors, a class protected under the BIT.*[561]

344. The Russian Federation wants to have it both ways. On the one hand, it has declared that Crimea now forms part of the Russian Federation. On the other hand, the Russian Federation has attempted to represent to the Tribunal that it does not have jurisdiction to hear the present dispute since the Claimant's assets were not invested in the "territory" of the Russian Federation for purposes of the Treaty. The Tribunal must apply the doctrine of preclusion and reject the Russian Federation's attempt to question the Tribunal's jurisdiction.

B. THE CLAIMANT IS A QUALIFYING INVESTOR THAT HELD PROTECTED INVESTMENTS IN CRIMEA

1. Jurisdiction ratione personae

345. Article 1(2) of the Treaty defines qualifying "investors" to include, *inter alia*:

> any legal entity, constituted under the law in force in the territory of that Contracting Party, provided, that the legal entity is competent under the laws of its Contracting Party to make investments in the territory of the other Contracting Party.[562]

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560 I.C. MacGibbon, *Estoppel in International Law* (1958) 7 Int'l & Comp. L. Q. 468, **CLA-79**, 468.

561 Shaw Report, para. 110 (emphasis added).

562 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Art. 1(2).

346. "Laws of the Contracting Party" is, in turn, defined to mean "respectively the laws of Ukraine or the Russian Federation".[563]

347. The Claimant is a company incorporated in conformity with the laws of Ukraine. Moreover, prior to the commencement of the Russian Federation's series of unlawful measures that ultimately destroyed the Claimant's investment, the Claimant, a duly incorporated Ukrainian entity, faced no restrictions in conducting business in Crimea. Accordingly, the Claimant is clearly an "investor" within the meaning of the Treaty.

2. Jurisdiction ratione materiae

348. Article 1(1) of the Treaty defines protected "investments" in broad and unqualified terms:

> The term "investments" means *all kinds of assets and intellectual values*, which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws, and in particular:
>
> a) movable and immovable property, as well as associated proprietary rights;
>
> b) money, as well as securities, liabilities, deposits, and other forms of participation;
>
> c) intellectual property rights, including copyright and related rights, trademarks, the rights to inventions, industrial designs, models, as well as technological processes and know-how;
>
> d) rights to perform business activity, including rights to search for, cultivate and exploit natural resources.[564]

349. Pursuant to this broad definition, the Claimant's covered investments included *inter alia*, material assets (movable and immovable property), rights to real property (including rights emanating from lease agreements), claims, rights and economic interests arising from the relations of Oschadbank Crimea with its clients (including, *inter alia*, the right to dispose of and manage deposited funds, as well as claims under loan agreements), goodwill, credit and reputation. The Claimant's extensive and profitable business operations in Crimea, taken as a whole, also constituted an investment under Article 1(1) of the Treaty.

350. There is no merit to the argument that the Claimant's assets do not qualify as "investments" under the Treaty because they were already "invested" in Crimea before the Russian Federation established control over it. The core of the Claimant's case is that the Russian Federation

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563 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Art. 1(5).

564 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**, Art. 1(1) (emphasis added).

deliberately assumed all obligations under the Treaty in respect of Crimea when it forcibly occupied and took over that territory. Consistent with this position, virtually in all its provisions the Treaty connects responsibility with investments "made" – not "originally made" or made ab initio" – in the host state's "territory". This is sensible because compliance with host state obligations under the Treaty requires sufficient ability to exercise jurisdiction and control over the relevant assets. In this case, at the latest as of 21 March 2014, and very likely earlier, the Russian Federation exercised such jurisdiction and control.

351. Thus, for purposes of the Tribunal's subject matter jurisdiction, it is sufficient for the relevant assets to have suffered harm after the Russian Federation's obligations under the Treaty became effective in respect of Crimea, at which point the Claimant's assets became "investments" in Russian "territory" for purposes of the Treaty. In fact, as the Claimant explains below, the Tribunal has jurisdiction also before the effectiveness of the Russian Federation's obligations in respect of continuing of composite acts.

352. Similarly, the Treaty contains no requirement that investments be taxed or otherwise contribute to the development of the Russian Federation's economy as a condition to qualifying for Treaty protection. Still, as demonstrated above, the Russian Federation has derived, albeit illegally, enormous financial benefit from the takeover of the Claimant's substantial Crimean assets.

C. THE TRIBUNAL HAS TEMPORAL JURISDICTION OVER THE ENTIRETY OF THE RUSSIAN FEDERATION'S CONDUCT THAT DEVALUED THE CLAIMANT'S INVESTMENTS

353. As explained above, the Treaty became effective in respect of the Claimant's investments in Crimea at the latest upon the Russian Federation's establishment of effective control over Crimea, i.e., at the latest upon the formal purported annexation of Crimea on 21 March 2014. The Russian Federation's sequence of carefully orchestrated steps to take over Crimea, including the Claimant's assets, however, commenced before that date, and at the latest on 1 March 2014, when the Russian Federation provided formal authorisation for the deployment of Russian armed forces in the Ukrainian territory. As of that date, at the latest, the Claimant's assets started losing value due to the acts and omissions of the Russian Federation.

354. In the sections that follow, the Claimant demonstrates that the Russian Federation must be held accountable for all acts and omissions that resulted in the devaluation of the Claimant's investments in Crimea.

1. The Russian Federation's acts and omissions constitute composite and continuing acts that breached the Treaty

355. As explained above, the Treaty became effective in respect of the Claimant's investments in Crimea at the latest upon the Russian Federation's establishment of effective control over Crimea, i.e., at the latest upon the formal purported annexation of Crimea on 21 March 2014.

356. Although the general presumption under international law is that treaties do not apply retroactively, the doctrines of composite and continuing acts, set forth in the ILC Articles, empower tribunals to consider acts and omissions pre-dating a treaty's entry into force provided that: (a) they form part of a "composite" treaty violation that crystallises after the date of entry into force;[565] or (b) those acts and omissions continue and do not cease to exist after the date of entry into force.[566] In the present case, the Russian Federation's conduct is both composite and continuing; its unlawful conduct both prior to and following the Treaty's effectiveness with respect to Ukrainian investments in Crimea on 21 March 2014 is therefore subject to the jurisdiction of the Tribunal.

2. The Tribunal possesses jurisdiction over the Russian Federation's composite acts and omissions

357. This Tribunal has temporal jurisdiction over treaty breaches perpetrated by the Russian Federation occurring through the accumulated effect of a series of acts, or "composite" act, that began before the Treaty came into force with respect to Ukrainian investments in Crimea on 21 March 2014.

358. A composite treaty violation occurs when acts and omissions pre-dating a treaty's entry into force combine with acts and omissions occurring after the treaty's entry into force to form a violation. Article 15 of the ILC Articles defines a composite violation of an international obligation as follows:

> (i) The breach of an international obligation by a State through a series of actions or omissions defined in the aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> (ii) In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions

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565 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, adopted by the International Law Commission at its 53rd session in 2001, **CLA-51**, Arts. 14, 15.

566 *Ibid.*, **CLA-51**, Arts. 14, 15.

> or omissions are repeated and remain not in conformity with the international obligation.[567]

359. The Commentaries to the ILC Articles explain:

> Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in the aggregate as wrongful"…Composite acts may be more likely to give rise to continuing breaches [than simple acts]…[568]

360. The Report for the Thirtieth Session of the ILC explained that "the distinctive common characteristic of State acts of the type here considered is that they comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content, and effects, although relating to different specific cases".[569]

361. A composite act is not complete until the last act which makes the aggregate conduct wrongful:

> A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in the aggregate as wrongful.[570]

362. Thus a composite act "lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation".[571]

363. The acts or omissions that form the composite act may be unlawful individually. This means that each act or omission in a series could serve as a basis for relief, while together also constituting a composite act:

> While composite acts are made up of a series of actions or omissions defined in the aggregate as wrongful, this does not exclude the possibility that every

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567 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 15.

568 Ibid., **CLA-51**, at 62-63.

569 Report of the International Law Commission on the work of its Thirtieth session, 8 May – 28 July 1978, A/33/10, **CLA-89**, p. 93.

570 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, at 63.

571 Ibid. **CLA-51**, at 62.

> single act in the series could be wrongful in accordance with another obligation…Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.[572]

364. Several tribunals have confirmed that a State can breach an investment treaty through a composite act that began before the treaty came into force but which continues past that date.

365. The *Tecmed* tribunal applied this concept of composite violation to find that acts and omissions pre-dating the entry into force of the relevant investment treaty formed part of Mexico's expropriation of the claimant's investment.[573] Tecmed was a Spanish company that in February 1996 acquired a landfill of hazardous industrial waste from a municipal government agency in Mexico. The landfill had operated since 1994 pursuant to a license of indefinite term granted by a federal government agency (Instituto Nacional de Ecología or INE) in charge of environmental matters. Following the purchase, Tecmed successfully applied for and obtained two one-year licenses to operate the landfill. In 1998, the Mexican government denied Tecmed's application to renew the licence and the landfill was ordered to be closed.

366. In 2000, Tecmed brought a claim against Mexico pursuant to the Mexico-Spain BIT that had come into force in December 1996. Tecmed claimed that Mexico granted it a permit for only one year after having granted the previous operator an unlimited permit and after having indicated that it would grant Tecmed the same. According to Tecmed, Mexico's conduct before and after the treaty came into force was part of the same composite act. The Mexican government objected to the temporal jurisdiction of the tribunal.

367. When deciding if Mexico's conduct breached the BIT, the tribunal began by affirming its ability to take into account the conduct that occurred before the BIT came into force:

> [C]onduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting party, concurrent factor or aggravating or mitigating elements of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.[574]

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572 *Ibid.*, **CLA-51**, at 63.

573 *See Technicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **CLA-9**, paras. 66, 151.

574 *Technicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **CLA-9**, para. 68.

368. The tribunal accepted that it could take into account Mexico's actions that occurred before the BIT came into force together with actions after that date, such that the entire composite act could effectively be looked at as a whole when determining if there had been a breach of the BIT:

> Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises [sic] or to what extent damage is caused.[575]

369. After examining Mexico's conduct "as a whole", the tribunal found that a breach of the BIT had occurred:

> INE's contradictory and ambiguous conduct at the beginning of the relationship between INE … and Tecmed before the entry into force of the Agreement has the same deficiencies as those encountered in such conduct during the last stage of the relationship, immediately preceding the Resolution. Thus, INE's conduct during such time is added to the prejudicial effects of its conduct during the last stage, which breached Article 4(1) of the Agreement.[576]

370. Consequently, the tribunal found a breach of the BIT after "adding" the elements of the composite act that occurred before the BIT came into force to those elements that occurred afterwards.

371. Other tribunals have likewise affirmed that acts and omissions that pre-date an international obligation can breach that obligation if, taken in aggregation with post-dating conduct, they constitute a violation of the treaty in question once it has come into force.[577] In *Societe Generale v. Dominican Republic*, the tribunal confirmed that respondent States may breach investment treaties through composite acts:

> As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it is sufficient to constitute the wrongful act. But of course the latter determination can only be made when the obligation is in force.[578]

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575 *Ibid.*, **CLA-9**, para. 68.

576 *Ibid*, **CLA-9**, para. 172.

577 *See Mondev International v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002, **CLA-90**, paras. 57, 69-70; *Technicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **CLA-9**, paras. 66,68; *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 Oct. 2006, **CLA-91**, paras. 49-50.

578 *Societe Generale v. Dominican Republic,* UNCITRAL, Preliminary Objections to Jurisdictions, 19 Sept. 2008, **CLA-92**, para. 91.

372. The *Societe Generale* tribunal noted that "[i]n situations of this kind, the preceding acts might be relevant as factual background to the violation that takes place after the critical date".[579] The tribunal proceeded to conclude:

> that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in fore at the time it occurs, it will come within the Tribunal's jurisdiction. This will also be the case if a series of acts results in the aggregate in such breach of an obligation in force at the time the accumulation culminates after the critical date.

373. *Walter Bau v. Thailand* concerned a protracted period of nonfeasance by the respondent host State that began prior to entry into force of the applicable BIT and continued after entry into force. The investor was a participant in a concession agreement for the construction and operation of a toll road in Thailand. Under the agreement, tolls were to increase periodically starting in 1997.[580] Thailand consistently failed to act on the investor's requests for toll increases from 1997 through the BIT's entry into force in 2004. The failure to act continued and culminated, shortly after entry into force, in a statement by Thailand's Prime Minister of an intention to decrease tolls.[581] The tribunal held that it did not have jurisdiction over disputes that arose before the BIT entered into force, but that in determining whether there was a breach of the 2002 Treaty, it could take into account acts or omissions that originated before the treaty entered into force but continued in existence after that date and crystallised into a treaty breach.

374. The ruling in *Tecmed*, *Societe Generale* and *Walter Bau* that significant weight should be accorded to elements of a composite act that occur before a treaty comes into force is consistent with jurisprudence of other international courts and tribunals, including the ECtHR. The ECtHR has, on a number of occasions, considered claims that challenge composite acts that straddle the date the ECHR came into force, and has relied heavily on elements that occur before this date in finding a breach.

375. For example, in *Rosinski v. Poland*, the ECtHR examined a claim that Poland breached its obligation not to interfere with property through a land development plan adopted before the ECHR had come into force for Poland and a series of acts after that date. In rejecting Poland's complaint that it had no temporal jurisdiction to hear the claim, the Court ruled

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579 *Ibid.*, **CLA-92**, para. 92.

580 *Walter Bau AG v. Thailand*, UNCITRAL, Award, 1 Jul. 2009, **CLA-93**, paras. 2.37, 5.14.

581 *Ibid.*, **CLA-93**, para. 6.7.

> that the applicant's complaint is not directed against a single measure or decision taken before, or even after, [the date the ECHR came into force]. It rather refers to continuous restrictions imposed on the exercise of his ownership and arising from various legal measures, adopted both before and after that date".[582]

376. The ECtHR appeared to accord the same weight to Poland's conduct prior to and following the ECHR's entry into force, holding "that the applicant's situation was affected by the local land development plan … because it provided for the future expropriation of his land".[583] The ECtHR proceeded to state:

> [T]he measures complained of, taken as a whole … in practice … significantly reduced the effective exercise of that right [to continue to use and dispose of the applicant's possessions]. The applicant's property rights thus became precarious and defeasible. … The Court therefore concludes that there was indeed an interference with the peaceful enjoyment of the applicant's possessions.[584]

3. The Tribunal possesses jurisdiction over the Russian Federation's continuing acts and omissions

377. Article 28 VCLT supports the principle that State actions that begin before a treaty comes into force, but continue after that date, can breach the treaty. It provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation *which ceased to exist before the date of the entry into force of the treaty* with respect to that party.[585]

378. Consequently, the Russian Federation's conduct that began before the Treaty became effective in respect of Crimea, and which does not cease to exist before this date, but continued thereafter, is subject to the obligations under the Treaty. The ILC's commentary to the VCLT confirms this interpretation of Article 28:

> [When] an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty.[586]

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582 *Rosinski v. Poland*, (dec.), No. 17373/02, 17 Oct. 2007, **CLA-94**, para. 43.

583 *Ibid.*, **CLA-94**, para. 70.

584 *Ibid.*, **CLA-94**, paras. 72-3. Judge Mularoni observed in his separate opinion that his "distinguished colleagues do not make any distinction between measure adopted before and after … ratification"; concurring Opinion of Judge Mularoni.

585 Emphasis added.

586 United Nations, Year Book of the International Law Commission, Volume II, 1966, **CLA-95**, 212.

379. Furthermore, Article 14 of the ILC Articles ("Extension in Time of the Breach of an International Obligation") establishes that an act or omission that breaches an international obligation, including a treaty obligation, remains a violation and is thus actionable so long as the conduct remains "not in conformity" with the international obligation.[587] Thus, wrongful conduct that may not have had an international remedy prior to a treaty's entry into force is nevertheless actionable once the treaty enters into force, even if the conduct commenced before the obligation attached.[588]

380. Academic commentary likewise supports the principle that a State can breach a treaty through a continuing act that begins before a treaty comes into force. For example, the Institut de Droit International resolved that "any rule which relates to an actual situation shall apply to situations existing while the rule is in force, even if these situations have been created previously".[589] Similarly, Aust notes in his seminal text on the law of treaties that "[a] treaty can, of course, apply to a pre-existing act, fact or situation which continues after entry into force".[590]

381. Investment tribunals have consistently affirmed that continuing conduct is subject to treaty protections, and that conduct that pre-dates a treaty's entry into force is relevant to decide an investor's claims. For example, the *Feldman* tribunal stated that "if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date … that post-January 1, 1994 part of Respondent's alleged activity *is* subject to the Tribunal's jurisdiction".[591] The *SGS v. Philippines* tribunal held that "it is clear that [the BIT] … applies to breaches which are continuing at" the date the treaty came into force.[592]

382. Other international courts and tribunals have likewise applied this principle of continuing violations to find that they have jurisdiction to consider claims that challenge acts that

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587 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 14(2) ("The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation").

588 *See* J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002), **CLA-96**, Commentary to Art. 14(2) at 138, para. 12 ("[C]onduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue to give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State Responsibility").

589 Institut de Droit International, *The Intertemporal Pronblem in Public International Law*, Annuaire de l'Institut de Droit International (1975), **CLA-97**, para. 2(c).

590 A. Aust, *Treaty Law and Practice* (CUP, 2014), **CLA-7**, 157.

591 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 Dec. 2000, **CLA-98**, para. 62 (emphasis in original).

592 *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004, **CLA-99**, para. 167.

commenced before the treaty came into force but continued past that date. For example, in *Mavrommatis Concessions*, the PCIJ held that the alleged breach of the Mandate at issue in that case, "no matter what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it".[593] Moreover, in *Loizidou* the ECtHR found that Turkey breached the ECHR by continuing to prevent Cypriots from returning to their homes following Turkey's annexation of Cyprus years before the Convention came into force.[594]

4. The Tribunal need not distinguish between the Russian Federation's composite and continuing acts

383. The Tribunal need not choose whether the Russian Federation's acts or omissions constitute a continuing measure or a composite measure. If the Tribunal finds that the measure at issue is conduct that commenced prior to the Treaty's effectiveness with respect to Ukrainian investments in Crimea, and continued thereafter, that is sufficient to establish jurisdiction over that conduct.

384. A case in point is *Walter Bau v. Thailand*,[595] where the claimant described the impugned conduct as "the continuing/composite acts of the Respondent".[596] The tribunal, in finding that the conduct breached Thailand's obligations under the applicable treaty, did not classify it as either one or the other and described it in ways that would fit either category. The Tribunal ruled that the ultimate announcement of a toll reduction "can be seen as an addition to the composite acts which had started before but which continued after the entry into force of the BIT",[597] or "the convergence of the various acts of nonfeasance by the Respondent over a long period".[598] It added that "the refusal to increase tolls originated long before the crucial date [i.e., the BIT's entry into force] in October 2004; but it continued in existence after that date, thus amounting to a breach of a Treaty obligation in force at the time when it occurred".[599]

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593 *Mavrommatis Palestine Concessions* PCIJ Rep Series A No 2, Decision on Objections to the Jurisdiction of the Court, 30 Aug. 1924, **CLA-100**, p. 35.

594 *Loizidou v. Turkey*, (dec.), No. 15318/89, 18 Dec. 1996, **CLA-65**.

595 *Walter Bau AG v. Thailand*, Award, UNCITRAL, 1 July 2009, **CLA-93**.

596 *Id.*, **CLA-93**, para. 9.88.

597 *Id.*, **CLA-93**, para. 12.26.

598 *Id.*, **CLA-93**, para. 12.27; *see also* para. 12.36 ("The failure to increase tolls was the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls").

599 *Id.*, **CLA-93**, para. 12.37. The *Walter Bau* tribunal relied on the analytical construct articulated by the *Société Générale* tribunal, which explained the circumstances under which acts or omissions pre-dating a treaty's entry into force may be taken into account as continuing or composite acts or omissions, but did not find a need to classify such acts or omissions one way or the other for purposes of establishing its jurisdiction *ratione temporis*. *See Walter Bau,* paras. 9.84–9.85 (tribunal finding it should follow

5. The Russian Federation's conduct constitutes composite and continuing violations of the Treaty

385. As detailed above, the Russian Federation's purported annexation of Crimea, and the systematic derailment and eventual termination of the Claimant's operations in Crimea and expropriation of its investment, may be considered either a composite act or a continuing act in violation of the Russian Federation's obligations under the Treaty.

386. The Russian Federation's conduct *vis-à-vis* the Claimant's investment may be seen as a composite measure. As discussed above, a composite measure is a series of acts and omissions that, in the aggregate, constitute a breach of relevant obligations (regardless of whether the individual acts or omissions on their own constitute such a breach).[600] In the present case, the Russian Federation's conduct prior to the Treaty's entry into force with respect to Ukrainian investments in Crimea is relevant to the assessment of the Russian Federation's breaches thereof after its entry into force. In this sense, the Russian Federation's breaches should be considered as a process, and not as an unrelated sequence of events. The Russian Federation's unlawful composite measure comprises, but is not limited to, the following acts and omissions for which it is responsible under international law:

(i) the establishment at least as of March 2014 of effective control over the territory of Crimea, which compromised the safety and security of the Claimant's activities in Crimea;

(ii) the forced takeover of legal and administrative facilities in Crimea and border closures, which deprived the NBU of power to regulate the banking network and monetary system in Crimea, thereby threatening the financial stability of the Claimant's activities in Crimea;

(iii) the imposition of restrictions on banking activities by Russia-backed Crimean authorities in March 2014;

(iv) the enactment of the Federal Law on the Crimean Financial System on 2 April 2014, which imposed onerous and discriminatory obligations on Oschadbank Crimea and lacked basic due process safeguards;

(v) implementation in April 2014 of the "governmental purpose-oriented program for the development of the banking system of the Republic of

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principles articulated by tribunal in *Société Générale* and quoting at length from paragraphs 87 to 92 of that tribunal's award); *Société Générale*, **CLA-92**, para. 94.

600 *See Société Générale*, **CLA-92**, para. 91.

Crimea and its swift integration into the banking system of the Russian Federation" which entailed early termination of Oschadbank Crimea's lease agreements and subsequent occupation of at least 85 Oschadbank Crimea outlets by RNCB;

(vi) armed attacks and intimidation against Ukrainian banks in Crimea in April 2014 by Russian-speaking armed forces, reportedly organised by the Russian FSB;

(vii) looting of Oschadbank Crimea's premises – including the organised theft on 16 May 2014 of over UAH 32 million (approximately USD 2.8 million at that date) in cash, and the organised theft on 21 May 2014 by so-called Crimean authorities and representatives of the Crimean Self-Defence Forces of jewellery and precious stones with an estimated value of more than RUB 605 million (approximately USD 17.5 million at that date);

(viii) the Bank of Russia's Decision on Termination of Oschadbank Crimea dated 26 May 2014 that terminated Oschadbank Crimea's banking activities;

(ix) the Russian Federation's assumption of control over and administration of all assets of Oschadbank Crimea through the DPF and via court proceedings commenced on 29 May 2014 by the so-called Crimean Deputy Prosecutor in the Kyiv District Court of Simferopol.

387. At the same time, the Russian Federation's conduct is continuing, in the sense that it may be seen as consisting of a single course of conduct that has persisted without interruption throughout the occupation period.

388. In any event, the Russian Federation's conduct can be seen as either a continuation of prior conduct, or an accumulation of acts and omissions converging towards the destruction of Oschadbank Crimea's business and takeover of its assets. In both scenarios, the entirety of the Russian Federation's unlawful conduct unquestionably falls within the Tribunal's jurisdiction.

D. THE RUSSIAN FEDERATION IS RESPONSIBLE FOR THE HARM INFLICTED ON THE CLAIMANT'S CRIMEAN INVESTMENTS

389. This section explains that the Russian Federation has violated its obligations under the Treaty by the acts and omissions of persons and entities for which it is responsible under international law, including:

(i) the Military and Parliament of the Russian Federation;

(ii) the Bank of Russia;

(iii) the DPF;

(iv) the so-called Crimean authorities; and

(v) the so-called Crimean Self-Defence Forces.

1. Legal principles of attribution under international law

390. The Treaty is silent on matters of attribution. As such, the Tribunal is required to apply the rules of attribution under customary international law, as codified by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (**ILC Articles**).[601] Under the ILC Articles, the Russian Federation is legally responsible for the acts and omissions of:

(i) its organs, recognised as such either expressly in law or *de facto* (the "structural" test);[602]

(ii) entities or persons exercising elements of delegated government authority (the "functional" test);[603] and

(iii) entities or persons acting in accordance with the instructions, or under the direction or control of, the Russian State in relation to the specific acts in question (the "effective control" test).[604]

391. In practice, arbitral tribunals have often used a combination of the criteria of structure, function and control to decide whether conduct of an entity should be considered to be the conduct of its State, looking at these categories in conjunction rather than in isolation.[605]

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601 United Nations, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, **CLA-51**. It has frequently been recognised in jurisprudence that the rules on attribution in the ILC Draft Articles reflect customary international law: *see, e.g., Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 Nov. 2008, **CLA-101**, para. 156.

602 *Ibid*., **CLA-51**, Art. 4.

603 *Ibid*., **CLA-51**, Art. 5. *See Iiurii Bogdanov v. Moldova*, SCC, Award, 22 Sept. 2005, **CLA-102**, para. 2.2.2 ("It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions").

604 United Nations, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, **CLA-51**, Art. 8.

a. The Russian Federation is responsible for the conduct of Russian state organs

392. The acts of an organ of a State are attributable to that State under international law. This principle is set out in Article 4 of the ILC Articles, which provides that:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

393. The Commentary to the ILC Articles adds the following explanation:

> Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind of classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.[606]

394. Arbitral tribunals have held on numerous occasions that the conduct of government departments[607] and government ministers[608] is attributable to the State in accordance with ILC Article 4.[609]

395. The conduct of a State organ is attributable to a State whether it is commercial or governmental in nature,[610] and even if it is contrary to law.[611] Therefore, *all* of the relevant acts and omissions of Russian State organs are attributable to the Russian Federation under international law.

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605 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford, 2012), **CLA-103**, at 222, 225; *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 Jan. 2000, **CLA-104** para. 77.

606 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, p. 40, para. 6.

607 *See*, e.g., *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 Jun. 2010, **CLA-105**, para. 293; *Jan Oostergetel & Anor. v. Slovak Republic*, UNCITRAL, Final Award, 23 Apr. 2012, **CLA-106**, para. 152.

608 *See*, e.g., *Texaco Overseas Petroleum Company & Anor. v. Libya* (1977), ILR, vol. 53, **CLA-107**, para. 23; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford, 2012), **CLA-103**, p. 217.

609 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford, 2012), **CLA-103**, p. 216 ("The state's responsibility extends to all branches of the government, that is, to the executive, the legislature, and to the judiciary").

610 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51,** Article 4, para. (6) of the Commentary: "It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*".

b. The Russian Federation is responsible for the conduct of persons or entities exercising elements of delegated governmental authority

396. A State is responsible under international law for the conduct of persons or entities exercising elements of delegated governmental authority.[612] This rule is set out in Article 5 of the ILC Articles:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[613]

397. Accordingly, the test of attribution under ILC Article 5 has two elements. *First*, it must be demonstrated that the person or entity under consideration was authorised to exercise governmental authority. *Second*, the person or entity must have exercised such authority in carrying out the conduct in question.

398. Arbitral tribunals have held that entities charged with implementing State policy satisfy the first element of ILC Article 5. In *Bosh v. Ukraine*, the tribunal held that a university exercises governmental authority for purposes of Article, since "the provision by the University of, *inter alia*, higher education services and the management of State-owned property … constitute forms of governmental authority that the University is empowered by the law of Ukraine to exercise".[614] In *Helnan v. Egypt*, the claimant argued that the conduct of the Egyptian Company for Tourism and Hotels (**EGOTH**) engaged the responsibility of Egypt.[615] The Tribunal accepted this argument due to the pivotal role EGOTH played during the implementation of Egypt's privatisation of its tourism industry.[616]

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611 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 7.

612 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 5. *See Iiurii Bogdanov v. Moldova*, SCC, Award, 22 Sept. 2005, **CLA-102**, para. 2.2.2 ("It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions").

613 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Article 5.

614 *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine,* ICSID Case No. ARB/08/11, Award, 25 Oct. 2012, **CLA-108**, para. 173.

615 *Helnan International Hotels A/S v. Egypt*, Decision of the Tribunal on Objection to Jurisdiction, 17 Oct. 2006, **CLA-91**, para. 85.

616 *Ibid.*, **CLA-91**, para. 93.

399. The Appellate Body of the WTO has also held that the implementation of State policy is the decisive criterion for purposes of attributing conduct to the state. In *US-AD/CVD*, the Appellate Body was required to determine the status of State-owned commercial banks of China (**SOCBs**). The Appellate Body referred to ILC Article 5 in its application of the Agreement on Subsidies and Countervailing Measures (**SCM**).[617] According to the Appellate Body, "being vested with governmental authority is the key feature of a public body" both under the ILC Articles and the SCM.[618] It found that "SOCBs are required to support China's industrial policies" and, in doing so, they "exercise governmental functions on behalf of the Chinese Government".[619]

400. The practical application of ILC Article 5 was intended to be flexible. As the Tribunal noted in *FW Oil Interests v. Trinidad and Tobago*, "the notion is intended to be a flexible one, not amenable to general definition in advance; and the elements that would go in its definition in particular cases would be a mixture of fact, law and practice".[620]

c. The Russian Federation is responsible for the conduct of persons or entities committed on the instructions of, or under the direction and control of, the State

401. A State is responsible for acts committed on its instructions or under its direction or control. Article 8 of the ILC Articles provides that:

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

402. A commentator on state responsibility has noted that the penultimate draft of Article 8 referred to "direction *and* control", but the word "and" was replaced by "or" in the final version of the text. In this regard:

> The criterion of "control" thus becomes an autonomous criterion, alternative in relation to two others.
>
> The ILC also abstained from qualifying the type of control that is required: that being the case, it can thus be understood either as a subjective condition

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617 *United States – Definitive Anti-dumping and Countervailing Duties on Products from China*, Report of the Appellate Body, 11 Mar. 2011, **CLA-109**, para. 310.

618 *Ibid.*, **CLA-109**, para. 310.

619 *Ibid.*, **CLA-109**, para 355.

620 *F-W Oil Interests, Inc. v. Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 Mar. 2006, **CLA-110**, para. 203.

> of attribution – "effective" or "overall" control – or as an objective condition, a form of factual link, just like an "instruction" given or "directives".[621]

403. In relation to the exercise of control by a State over an entity, the Commentary to the ILC Articles observes that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it".[622] In *Bayindir v. Pakistan*, the tribunal found that a "certain degree of government involvement" in the project to which the claimant's investments related, including "guidance from higher levels of the Pakistani government", supported the conclusion that the acts of a regulatory authority were controlled by the State.[623]

2. The Military and Parliament are organs of the Russian Federation

404. The Military and Parliament[624] of the Russian Federation are clearly organs of the State for which the Russian Federation is responsible under international law. Accordingly, the Russian Federation is responsible for the harm caused to Oschadbank Crimea by:

(i) The Russian Federation's military occupation of the territory of Crimea on the direct orders of President Putin commenced in February 2014, which disrupted the operation of the banking system in that region, rendered the NBU unable to exercise control and supervision of Ukrainian banks in Crimea, and presented a serious threat to the safety and financial stability of the Ukrainian banks in Crimea and the entire Ukrainian banking system; and

(ii) the Russian Parliament's enactment of onerous and discriminatory legislation that derailed the Claimant's operations in Crimea, including:

a. the Federal Law on the Crimean Financial System, which:

i. imposed a number of disclosure and other obligations on the Ukrainian banks operating in Crimea that could not practically be complied with and would have placed the

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621 O. de Frouville, "Attribution of Conduct to the State: Private Individual", in J. Crawford et. al., *The Law of International Responsibility* (Oxford, 2010), **CLA-111**, p. 271.

622 United Nations, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, **CLA-51**, Art. 8(5).

623 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, **CLA-112**, para. 128.

624 *See Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010, **CLA-29**, para. 37.

banks in direct violation of their obligations under Ukrainian law;

ii. subjected the Ukrainian banks in Crimea to draconian sanctions, including the immediate termination of their banking operations, for failure to comply with a range of vague regulations or for delaying the performance of certain obligations by as little as a single day; and

iii. lacked even the most basic due process safeguards, such as an opportunity for an affected Ukrainian financial institution to present its position regarding alleged breaches or to contest the charges and sanctions levelled against it;

b. the Federal Law on Crimean Depositor Protection that enabled the Bank of Russia to terminate the operations of Ukrainian banks in Crimea and trigger the scheme of the DPF's compensation payments to depositors of Ukrainian banks in Crimea and thereafter assume control of their assets; and

c. the Federal Law on Repayment by Crimean Borrowers that made it practically impossible for Ukrainian banks to recover debts owed by Crimean residents.

3. The Bank of Russia is an organ of the Russian Federation and/or exercises elements of delegated governmental authority

405. The predecessor of the Bank of Russia was founded in 1990.[625] The Bank of Russia is an instrument of the State and is charged with performing public services. The Bank of Russia is the highest monetary authority in the Russian Federation. It sets and carries out Russian monetary policy, supervises the commercial banking system, and maintains the payments system. The Bank of Russia carries out its functions, which were established by the Constitution of the Russian Federation and the Federal Law "On the Central Bank of the Russian Federation (Bank of Russia)" ("**Federal Law on the Bank of Russia**").[626] It performs its functions in compliance with the Constitution of the Russian Federation. Under Russian law, 75 per cent of its profit must be channelled into the federal budget.[627]

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625 Publication on the Bank of Russia web-site "The Central Bank of the Russian Federation", **CE-285**.

626 Publication on the Bank of Russia web-site "The Central Bank of the Russian Federation", **CE-285**.

627 Article 16 of Federal Law "On the Central Bank of the Russian Federation (Bank of Russia)" No. 86-ФЗ of 10 July 2002, **CE-11**.

406. According to Article 75 of the Constitution of the Russian Federation, the Bank of Russia has the exclusive right to issue currency, and is responsible for protection the ruble and insurance of its stability.[628] The status, purposes, functions and powers of the Bank of Russia are also spelled out in Federal Law on the Bank of Russia. According to Article 3 of Federal Law on the Bank of Russia, the goals of the Bank of Russia are to protect the ruble and ensure its stability, promote the development of and strengthen the Russian banking system, ensure the stability and development of the national payment system, and develop the financial market of the Russian Federation and ensure its stability.

407. Pursuant to Article 4 of Federal Law on the Bank of Russia, the Bank of Russia:

(i) elaborates and implements a single state monetary policy in collaboration with the federal government;

(ii) elaborates and implements the policy towards developing the financial market of the Russian Federation and ensuring its stability in collaboration with the federal government;

(iii) is the sole issuer of cash and organiser of cash circulation;

(iv) approves the graphic symbol of the ruble as a sign;

(v) is the creditor of last resort for credit institutions and organises the credit institution refinance system;

(vi) sets the settlement rules in the Russian Federation;

(vii) exercises supervision and oversight of the national payment system;

(viii) sets the rules for conducting banking operations;

(ix) services budget accounts of all levels of the Russian budget system, unless the federal laws stipulate otherwise, by effecting settlements at the instruction of the authorised bodies of executive power and government extra-budgetary funds, which are assigned the task of organising the execution of and executing the budgets;

(x) manages the Bank of Russia international reserves;

628 Constitution of the Russian Federation, 12 Dec. 1993 (as amended), **CE-4**, Article 75.

(xi) takes the decision on the state registration of credit institutions, issues banking licences to credit institutions and suspends and revokes them;

(xii) takes decisions on the state registration of non-governmental pension funds;

(xiii) supervises the activities of credit institutions and banking groups;

(xiv) exercises regulation, control and supervision over the activities of non-credit financial institutions in compliance with federal laws;

(xv) registers securities issues and prospectuses and registers reports on the results of securities issues;

(xvi) exercises control and supervision over the compliance by issuers with the requirements of federal legislation on joint-stock companies and securities;

(xvii) exercises regulation, control and supervision over corporate governance in joint-stock companies;

(xviii) conducts independently or at the instruction of the Russian Government all types of banking operations and other transactions necessary for the performance of Bank of Russia functions;

(xix) organises and exercises foreign exchange regulation and foreign exchange control pursuant to federal legislation;

(xx) sets the procedure for effecting settlements with international organisations, foreign states and legal entities and private individuals;

(xxi) approves industry accounting standards for credit institutions, the Bank of Russia, and non-credit financial institutions, the chart of accounts for credit institutions and the procedure for its application, the chart of accounts for the Bank of Russia and the procedure for its application;

(xxii) approves a chart of accounts for the accounting of non-credit financial institutions and the procedure for its application;

(xxiii) sets and publishes official exchange rates of foreign currencies against the ruble;

(xxiv) takes part in the compiling of Russia's balance of payments forecast and organises the compiling of Russia's balance of payments;

(xxv) takes part in the development of the methodology for compiling Russia's financial account within the national account system and organises the compiling of Russia's financial account;

(xxvi) keeps official statistical records of direct investments to and from Russia in compliance with federal legislation;

(xxvii) establishes independently the statistical methodology of direct investments to and from Russia, the list of respondents, approves the procedure for their submitting of primary statistical data on direct investments, including the methods of federal statistical review;

(xxviii) analyses and makes forecasts for the situation in the Russian economy and publishes the corresponding materials and statistical data;

(xxix) pays compensation for household deposits with bankrupt banks uncovered by the compulsory deposit insurance system in the cases and according to the procedure established by the federal law;

(xxx) is the depository of the IMF funds in the Russian currency and it conducts operations and transactions provided by the Articles of Agreement of the International Monetary Fund and the agreements with the International Monetary Fund;

(xxxi) exercises control over the compliance with the requirements of federal legislation on countering the illegal use of insider information and market manipulation;

(xxxii) protects the rights and legitimate interests of shareholders and investors in the financial markets, insurers, insured persons, and beneficiaries recognised as such in accordance with the insurance legislation, and also insured persons in the system of compulsory pension insurance, depositors and participants of a non-governmental pension fund in the system of non-governmental pension insurance;

(xxxiii) it shall organise provision of the services to transmit electronic messages on financial operations (hereinafter, financial messages); and

(xxxiv) performs various other functions in compliance with federal laws.[629]

408. The Bank of Russia is supervised by and accountable to the State Duma, which appoints and dismisses the Bank of Russia Governor (on the proposal of the President of the Russian Federation) and members of the Bank of Russia Board of Directors (on the proposal of the Bank of Russia Governor, agreed with the President of the Russian Federation), and sends and recalls its representatives in the National Financial Board within its quota. The State Duma has the power to order the State audit of the financial and economic activities of the Bank of Russia. In addition, the State Duma holds parliamentary hearings on the Bank of Russia's activities with the participation of its representatives.

409. In light of the foregoing, the Bank of Russia is structurally a part, and therefore an "organ" of, the Russian Federation for purposes of ILC Article 4.[630] All of the Bank of Russia's conduct must therefore be attributed to the Russian Federation regardless of whether that conduct is commercial in nature. In the alternative, if the Tribunal does not find that the Bank of Russia is an "organ" of the Russian Federation, the functions and powers of the Bank of Russia set out in the Constitution of the Russian Federation and Federal Law on the Bank of Russia make it clear that the Bank is endowed with elements of governmental authority and charged with implementing state monetary policy, and thus its actions are to be considered actions of the State under Article 5 of the ILC Articles.

4. The Russian Federation is responsible for acts of the DPF

410. The DPF is a creation of the Russian State. It was formed by the Deposit Insurance Agency of the Russian Federation as provided in, and for the purposes of implementing provisions of the Federal Law on Crimean Depositor Protection.[631] Throughout the course of 2014 the Russian Federation set up a broad network of DPF offices in Crimea.[632]

411. The DPF is an instrument of the Russian State under the direction and control of the Russian Government. As defined in the DPF Charter, its main objective is to implement provisions of the Federal Law on Crimean Depositor Protection and the Federal Law on the Crimean Financial

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629 Article 16 of Federal Law "On the Central Bank of the Russian Federation (Bank of Russia)" No. 86--ФЗ of 10 July 2002, **CE-11,** Art. 4.

630 Several tribunals have held that a central bank is an organ of the State whose acts are attributable to the State. *See, e.g.*, *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award, 26 Jun. 2009, **CLA-113**, para. 363 ("The statements in question, having been made publicly by the CNB [Czech National Bank] spokeswoman, are imputable to the CNB; the conduct of a state entity such as the CNB being attributable to the Czech Republic").

631 Federal Law on Crimean Depositor Protection, **CE-130**, Article 1.

632 DPF Annual Report 2014, **CE-40**, pp. 32-33.

System.[633] The DPF played a key role in facilitating the Russian Federation's control over the Crimean banking system.

412. Applying the functions of structure, function and control in accordance with the ILC Articles, it is plain that the Russian Federation may be held responsible under international law in respect of the DPF's actions.

5. The Russian Federation is responsible for the acts of the Crimean authorities

413. The Russian Federation is internationally responsible for the acts of the so-called Crimean authorities, including but not limited to:

(i) Crimean state officials;

(ii) the Crimean courts;

(iii) the Crimean Parliament; and

(iv) the Sevastopol's Assembly.

414. Both prior to and following the Russian Federation's assertion of sovereignty over Crimea through the enactment of the Federal Law on Accession on 21 March 2014, the so-called Crimean authorities were clearly acting under the direction and control of the Russian Federation when dealing with the Crimean banking sector in general and Oschadbank Crimea in particular. As described in Section III.B above, there is ample evidence that the Crimean and Russian authorities together planned and orchestrated the so-called Crimean Spring and Russian annexation of Crimea. The Russian Federation and Russia-backed Crimea authorities subsequently worked together to force Ukrainian banks to flee Crimea and then to replace them with Russian banks.

415. Upon the ratification of the Accession Treaty and the adoption of the Federal Law on Accession, the Russian Federation established effective control and jurisdiction over the territory of Crimea by, *inter alia,* exercising physical and administrative control over Crimean territory, adopting legislative and administrative acts that mandate the application of Russian laws in that territory, and assuming control of or establishing institutions charged with enforcing those acts. Given the control exercised by the Russian Federation over Crimea since 21 March 2014, the so-called Crimean Authorities have clearly acted as organs of the Russian Federation and/or been authorised to exercise Russian governmental authority in the territory of Crimea since that date. Accordingly, the Crimean

633 The Charter of the DPF approved by the State Corporation "Deposit Insurance Agency" on 1 Apr. 2014 (as amended), **CE-126**, para. 1.1 and 2.1.

authorities' wrongful conduct *vis-à-vis* the Claimant's investment in Crimea must be attributed to the Russian Federation under international law.

6. The Russian Federation is responsible for the acts of the Crimean Self-Defence Forces and other Russia-backed and/or funded groups and individuals in Crimea

416. The Russian Federation is responsible for the acts of the Crimean Self-Defence Forces and other Russia-backed individuals and entities acting under the direction or control of the Russian Federation within the meaning of Article 8 of the ILC Articles.

417. The Crimean Self-Defence Forces were paramilitary units acting under the control of the so-called Crimean authorities, had contributed to the purported "independence" of Crimea and to the takeover of the Crimean banking system and the Claimant's investments.

418. There is also evidence that the Crimean Self-Defence Forces together and on the instructions of the Russia-controlled Crimean authorities engaged in:

(i) intimidating Oschadbank Crimea's CEO against the removal of assets to mainland Ukraine;[634] and

(ii) conducting organised raids on the Claimant's assets in Crimea.[635]

419. Moreover and in the alternative, the Russian Federation must be held internationally responsible for failing to prevent the unlawful conduct of the Crimean Self-Defence Forces in the period following Russia's assumption of *de facto* control over the Crimean territory. This position has much support in the jurisprudence of the ICJ. For example, in *Congo v. Uganda*:

> The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations *and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.*[636]

420. Similarly, in the *Genocide* case the Court found the negative obligation not to commit genocide implicit in the positive state obligation to prevent genocide under Article 1 of the Genocide

634 Pyshnyy Statement, paras. 34, 36.

635 Matyukha Statement, paras. 17-25.

636 *Case Concerning Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. Reports, 2005, **CLA-57**, para. 179 (emphasis added).

Convention.[637] Since it was impossible to prove to the required degree of certainty that the Srebrenica genocide was attributable to Serbia under either the test of complete control or the test of effective control,[638] the Court nonetheless found Serbia responsible for failing to prevent that genocide, i.e. for its own wrongful act of failing to exercise due diligence to prevent violations by third parties.[639]

421. Likewise, in the *Velasquez-Rodriguez* case, the Inter-American Court held that:

> in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[640]

422. Further, in *Loizidou*, the ECtHR established that Turkey, by virtue of its effective overall control over northern Cyprus, had the positive obligation to prevent human rights violations, regardless of by whom they were committed:

> The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[641]

423. Accordingly, all of the unlawful conduct of the Crimean Self-Defence Forces and other Russia-backed and/or funded groups and individuals in Crimea *vis-à-vis* the Claimant's investments in the post-occupation period must be attributed to the Russian Federation under international law.

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637 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports, 2007, 26 Feb. 2007, **CLA-50**, paras. 166-67.

638 *Ibid.*, **CLA-50**, paras. 393-95, 408-15.

639 *Ibid.*, **CLA-50**, paras. 428-38.

640 *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), **CLA-114**, para. 172.

641 *Loizidou v Turkey,* (preliminary objections.), No. 15318/89, 23 Mar. 1995, **CLA-64**, para. 62.

VI. THE RUSSIAN FEDERATION HAS VIOLATED SEVERAL SUBSTANTIVE PROVISIONS OF THE TREATY

424. In light of the evidence and reasons explained above and developed more fully in the witness statement of Mr Pyshnyy, the acts and omissions of the Russian Federation in relation to the Claimant's investment constitute, separately and in combination, violations of the Russian Federation's obligations under the Treaty.

425. Specifically, the Russian Federation has breached, *inter alia,* the following provisions of the Treaty and other rules of international law binding on the Russian Federation:

(i) the obligation to accord full and unconditional legal protection under Article 2(2) of the Treaty;

(ii) the obligation to accord the Claimant's investments fair and equitable treatment and full protection and security arising under Article 3(1) of the Treaty, in combination with more favourable provisions from the Russian Federation's investment treaties with third parties, on which the Claimant may rely by operation of the Treaty's Most Favoured Nation (**MFN**) clause;

(iii) the obligation under Article 3(1) of the Treaty to provide treatment of the Claimant's investments no less favourable than the treatment accorded to its own investors or investors of any third state, and to avoid the application of discriminatory measures that could interfere with the management and disposal of those investments;

(iv) the obligation of transparency of its legislation under Article 4 of the Treaty;

(v) the obligation under Article 5(1) of the Treaty not to expropriate the Claimant's investments, with the exception of cases when such measures are not of a discriminatory nature and entail prompt, adequate and effective compensation;

(vi) the obligation under Article 7 of the Treaty to ensure the right of the Claimant to transfer payments associated with investments and the right to divest investments; and

(vii) the guarantee against denial of justice that binds the Russian Federation under the Treaty and in accordance with principles of international law.

426. Each of the Russian Federation's breaches of the Treaty is discussed in turn below.

B. ARTICLE 2(2): FULL AND UNCONDITIONAL LEGAL PROTECTION

1. The legal standard

427. Article 2(2) of the Treaty imposes on the Russian Federation the positive obligation to guarantee "the full and unconditional legal protection" of the Claimant's investment in accordance with the laws of the Russian Federation. This phrase is a formulation of the "full protection and security" (**FPS**) standard reflected in most contemporary investment treaties.[642] According to several leading commentators, "[t]he variations in language for these clauses do not frequently have any ramifications for the substance of the protection and how it is applied".[643] The Tribunal may therefore take guidance from the arbitral jurisprudence on the application of the FPS standard.

428. In *National Grid v. Argentina*, the tribunal considered certain measures introduced by Argentina that destroyed the remuneration regime provided under the previous electricity regulatory framework. The tribunal found that Argentina had fundamentally changed the legal framework that had been used to solicit the claimant's investment, in breach of the "protection and constant security" standard in the applicable treaty.[644]

429. In *Bogdanov v. Moldova II*, the tribunal found a breach of a provision guaranteeing "a complete and unconditional legal protection" in the Russia-Moldova BIT as a result of changes in the Moldovan customs regime that caused disproportionate customs fees to be levied on the claimant's investment.[645]

430. In *CME v. Czech Republic*, the tribunal found that the host State's conduct was targeted to remove the legal protections of the claimant's investment in the Czech Republic, in breach of the FPS standard in the applicable treaty. According to the tribunal:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.

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642 The phrasing of the protections vary across investment treaties, including, *inter alia*, "full protection and security", "the most constant protection and security", and "full and unconditional legal protection".

643 *Investment Treaty Arbitration and International Law*, Vol. 8 (Laird, Sabahi, Frédéric G. Sourgens, Todd J. Weiler), **CLA-115**, at 140; C. Schreuer, *Full Protection and Security*, Journal of International Dispute Settlement (2010), **CLA-116**, p. 1. *See also* G. Moss, *Full Protection and Security*, in *Standards of Investment Protection* (A. Reinisch, ed.) (2008), **CLA-117**, p. 134 (noting that the wording of the particular formulation of this standard "does not seem to pay a decisive role ion the result").

644 *National Grid v Argentina,* UNCITRAL, Award, 3 Nov. 2008., **CLA-118**, para. 189.

645 *Yury Bogdanov v. Republic of Moldova*, Arbitration No. V114/2009, Final Award, 30 March 2010, **CLA-119**, paras. 77-85.

431. The tribunal in *Siemens v. Argentina*, in interpreting a treaty that refers specifically to "legal security", found that this protection entails a guarantee of "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application".[646] The tribunal found that Argentina's renegotiation of the claimant's concession contract for the sole purpose of reducing costs negatively affected the legal security of the claimant's investment, in breach of the FPS standard.

2. The Russian Federation's conduct towards the Claimant and its investment has violated the full and unconditional legal protection standard

432. The Russian Federation's actions towards the Claimant's investment have breached the legal protection standard in Article 2(2) of the Treaty.

433. As described in Section IV above, following the Russian Federation's unlawful annexation of Crimea commenced in February 2014, the Russian Federation usurped all legislative powers in Crimea and enacted a range of unfair and discriminatory laws that enabled the Russian Federation to ban the activities of Oschadbank Crimea and initiate court proceedings seeking recovery of alleged debts in the so-called Crimean courts. The abusive legislation enacted by the Russian Federation included:

(i) The Federal Law on the Crimean Financial System that imposed several onerous and discriminatory obligations that were far too stringent for the Ukrainian banks operating in Crimea to comply with, and which lacked the most basic due process safeguards such as an opportunity for the affected financial institution to present its position regarding alleged breaches of the law.[647]

(ii) The Federal Law on Crimean Depositor Protection that established the DPF which played a key role in facilitating the Russian Federation's control over the Crimean banking system.[648] The Claimant is aware of 30 court proceedings initiated by the DPF against Oschadbank before the Crimean courts to recover alleged debts for the total amount of RUB 4.6 billion[649]

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646 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CLA-121**, para. 303.

647 *See* paras. IV.C.1.132–IV.C.1.142 above.

648 *See* paras. IV.C.2.147–IV.C.2.152 and IV.F.2.223–IV.F.2.228.

649 DPF Annual Report 2014, **CE-40**, p. 34.

(equivalent of approximately USD 81.8 million).[650] According to the DPF website, as of 23 June 2016, the DPF had filed 6,906 statements of claim on behalf of depositors against the Ukrainian banks, including 634 against the Claimant.[651]

(iii) The Federal Law on Repayment by Crimean Borrowers that was clearly designed to frustrate the legitimate claims of Ukrainian banks and made it practically impossible for Ukrainian banks to recover debts owed by Crimean residents.[652]

434. These laws destroyed the traditional banking regulatory environment in Crimea, eroded the legal security of the Claimant's investments, and enabled Russian organs to terminate the Claimant's operations and orchestrate the takeover of the Claimant's assets in Crimea, in clear breach of the legal protection standard in Article 2(2) of the Treaty.

C. ARTICLE 3(1): NON-DISCRIMINATORY TREATMENT

1. The legal standard

435. Article 3(1) of the Treaty provides an obligation on the Russian Federation to accord non-discriminatory treatment to investments of investors:

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

436. The purpose of Article 3(1) is to oblige the Russian Federation to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations. The tribunal in *Bayindir v. Pakistan* held that the non-discrimination standard is "essential for ensuring a level playing field between all trading partners" and is meant "to ensure an equality of competitive conditions between foreign investors of different nationalities".[653]

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650 Per official exchange rate of RUB 56.2584 per USD set by the Bank of Russia as of 31 December 2014, **CE-229**.

651 Information published at the DPF's official website regarding the number of statements of claim filed by the DPF on behalf of Crimean depositors of Ukrainian banks, 23 Jun. 2016, **CE-267**.

652 *See* paras. IV.G.5.240–IV.G.5.243 above.

653 UNCTAD, "Most Favoured Nation Treatment", UNCTAD Series on Issues in International Investment Agreements (2010), **CLA-122**, p. 13.

437. Tribunals tend to focus on the discriminatory effect of the conduct, regardless of intent.[654] For example, the tribunal in *Siemens v. Argentina* held that "intent is not decisive or essential for a finding of discrimination", and that "the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment".[655]

438. In *Saluka v. Czech Republic*, the Czech government failed to treat a foreign banking institution in "an even-handed and consistent manner" *vis-à-vis* the local state-owned bank.[656] Both banks suffered due to a systemic debt problem in the Czech Republic, but the Czech Government refused to deal constructively with the foreign investor. Instead, it accorded preferential treatment to the local bank and offered no rational justification for its disparate treatment of the claimant. The tribunal held that bias of this kind against a foreign investor was discriminatory.[657]

2. The Russian Federation's conduct towards the Claimant and its investment has violated the non-discrimination standard

439. The Russian Federation has violated Article 3(1) of the Treaty by granting to Russian banks treatment more favourable than that which it afforded the Claimant.

440. As described above, the legal scheme put in place by the Russian Federation was utilised to force Ukrainian banks to leave Crimea. From the very beginning of Crimea's annexation, the intention of the Russian and Russia-backed Crimean authorities was to "rebuild" the Crimean banking system by forcing the Ukrainian banks to flee Crimea and then to replace them with Russian banks. Crimea's First Deputy Prime Minister himself declared on 13 April 2014 that the "Ukrainian banks are fleeing for shelter" whilst the so-called local Crimean authorities were "actively building up a network of Russian banks that will work according to Russian laws".[658] President Putin and high-ranking officials of Crimea (such as the Prime Minister of Crimea, Mr Aksenov) stated publicly that Crimean residents were relieved of their debts owed to Ukrainian banks which allegedly "[had] no moral right" to require the residents of Crimea to observe their contractual obligations.[659]

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654 Dolzer and Schreuer, *Principles of International Investment Law*, (Oxford, 2008), **CLA-123**, at 177-78.

655 *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, **CLA-121**, para. 321.

656 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, **CLA-124**, paras. 498-99.

657 *Ibid.,* **CLA-124**, paras. 498-99.

658 *See* para. IV.C.3.163 above.

659 *See* para. IV.G.5.242 above.

441. Between April and December 2014, the Bank of Russia terminated the operations of 45 Ukrainian banks in Crimea, including Oschadbank Crimea.[660] It was reported that the Bank of Russia's process for terminating operations in Crimea focused on "non-resident" (mainly Ukrainian) banks.[661] In view of the available evidence, there can be no doubt that the termination of Oschadbank Crimea's operations and administration of its assets in May 2014, along with other Ukrainian banks, was clearly part of a deliberate campaign to derail the traditional banking system that had existed in Crimea prior to the annexation.

442. In contrast to the treatment accorded the Ukrainian banks in Crimea, Russian banks that had licences with the Bank of Russia and were registered and/or operated in the Russian Federation were subject to relaxed banking supervision under the Federal Banking Law. Several smaller Russian banks (such as RNCB and GenBank) commenced operations in Crimea shortly after annexation.[662] The Russian Federation clearly treated Ukrainian banks in a discriminatory manner.

443. The Russian Federation's application of discriminatory measures against the Ukrainian banks in Crimea interfered with the Claimant's investment and breached the non-discrimination standard in Article 3(1), which breach caused significant harm to the Claimant's operations in Crimea.

D. ARTICLE 3(1): MOST FAVOURED NATION TREATMENT

444. Article 3(1) of the Treaty contains an MFN clause which provides that the Russian Federation's treatment of the Claimant's investment shall be "no less favorable, than the treatment, accorded to its own investors or investors of any third state". A consistent line of international decisions confirms that the MFN Clause entitles the Claimant to invoke more favourable protections contained in other investment treaties concluded by the Russian Federation.

445. For example, in *MTD v. Chile* the *ad hoc* Committee confirmed that the MFN clause entitled the investor to invoke protections that extended beyond the scope of obligations in the underlying treaty:

> The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and

660 DPF Annual Report 2014, **CE-40**, pp. 32-33.

661 "Russia's Seizure of Ukrainian Banks in Crimea is Still Wreaking Havoc with Locals' Finances", 20 Nov. 2014, **CE-225**.

662 *See* paras. IV.C.1.143–IV.C.1.146.

> equitable treatment standard. Article 3(1) *attracts any more favourable treatment extended to third State investments and does so unconditionally.*[663]

446. According to the tribunal in *White Industries v. India*, the incorporation of more favourable substantive protections in third-party treaties "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause".[664] The tribunal in that case ruled that the MFN clause in the Australia-India BIT incorporated the "effective means" provision present in the India-Kuwait BIT.

1. Fair and equitable treatment

447. The Russian Federation has concluded dozens of bilateral investment treaties that contain FET protection. For example, the Lebanon-Russia BIT provides that: "Each Contracting Party shall ensure in its territory *fair and equitable treatment* of the investments made by investors of the other Contracting Party and activities in connection with such investments"[665] For the reasons identified above, the FET protection in the Lebanon-Russia BIT is incorporated into the Treaty by application of the MFN clause in Article 3(1).

a. Elements of the fair and equitable treatment standard

448. It is generally accepted that the FET standard of conduct cannot readily be reduced to a statement of the host State's legal obligations without reference to the specific facts of a case.[666] Tribunals have concluded that the ordinary meaning of "fair and equitable" is "just", "even-handed", "unbiased", and "legitimate".[667]

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663 *MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 Mar. 2007, **CLA-125**, para. 64 (emphasis added). *See also Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, **CLA-112**, paras. 153-60, 163-67.

664 *White Industries v. India,* UNCITRAL, Award, 30 Nov. 2011., **CLA-126**, para. 11.2.4.

665 Lebanon-Russia BIT, **CLA-127**, Art. III(1).

666 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 132. The clause is broadly designed "to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties": *see* R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 132; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sept. 2007, **CLA-128**, para. 297. The principle of good faith is the "common guiding beacon" that will orient the understanding and interpretation of the obligations: R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 132; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 Sept. 2007, **CLA-128**, para. 297.

667 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, **CLA-124**, paras. 297-8. *See* also *MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **CLA-129**, para. 113; *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **CLA-130**, para. 360.

449. Tribunals have elucidated a number of specific categories required by the FET standard, including the duty to safeguard legitimate expectations, provide a stable legal and business framework, act for a proper purpose, refrain from arbitrary or discriminatory measures, and act in good faith. These strands are described in turn below.

i. The requirement to safeguard legitimate expectations

450. A touchstone of FET manifests in the legitimate expectations of the investor. In *Saluka v. Czech Republic*, respect for an investor's legitimate expectations was described as the "dominant element" of the fair and equitable treatment standard.[668]

> An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard.[669]

451. The *Tecmed* tribunal found that the obligation to provide FET means: "to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment".[670] Such expectations can arise from a variety of sources, including the contractual undertakings of the State and "assurances explicit or implicit, or on representations made by the State which the investor took into account in making the investment".[671]

ii. The requirement to provide a stable legal and business framework

452. A stable legal and business framework in the host State is a basic expectation that forms part of the FET standard under the Treaty.[672] The *Merrill & Ring* tribunal found that "[s]tate practice and jurisprudence have consistently supported such a requirement in order to avoid sudden

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668 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, **CLA-124**, para. 302.

669 *Ibid.*, **CLA-124**, paras. 301-302.

670 *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/002, Award, 29 May 2003, **CLA-9**, para. 154 (emphasis added). *See* also *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, **CLA-131**, para. 602.

671 *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **CLA-130**, para. 318.

672 *See*, e.g., *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, **CLA-132**, para. 99.

and arbitrary alterations of the legal framework governing the investment".[673] According to Schreuer, "[w]hile the host State is entitled to determine its legal and economic order, the investor has a legitimate expectation in the system's stability to facilitate rational planning and decision making".[674] Schreuer states that:

> *Transparency* means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework. *Stability* means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host State will be protected. The *legitimate expectations* of the investor will rest primarily on the legal order of the host state as it stood at the time when the investor acquired the investment. The investor may rely on that legal framework as well as on representations and undertakings made by the host State in legislation, treaties, decrees, licences and contracts. An *arbitrary* reversal of such undertakings will constitute a violation of FET.[675]

453. An investor is entitled to consistent behaviour on the part of the State, both over time and across all organs of the State.[676]

iii. The requirement to act for a proper purpose

454. A State is required to exercise its powers and take decisions for a proper purpose. What will amount to a proper purpose will depend on all the circumstances. In *Tecmed*, Mexico's regulatory body for environmental issues refused to renew the claimant's permit to operate a landfill. However, it did so not because of the landfill's environmental impact, but because the site had "become a nuisance due to political reasons relating to the community's opposition". The tribunal held that such politically-motivated conduct amounted to a breach of the fair and equitable treatment standard.[677]

455. A further aspect of this requirement is that a State must not engage in conduct that is intended to coerce or harass a foreign investor. The *Tokios Tokelės v. Ukraine* tribunal held that a State campaign to punish an investor "must surely be the clearest infringement one could find of the

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673 *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 Mar. 2010, **CLA-133**, para. 232.

674 C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (June 2005) *Journal of World Investment & Trade* 357, **CLA-134**, p. 126.

675 *Ibid.*, **CLA-134**, p. 126 (emphasis added).

676 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **CLA-129**, para. 166.

677 *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CLA-9**, paras. 164, 166.

provisions and aims of the Treaty".[678] In *Vivendi v. Argentina II*, the tribunal found that the State, improperly and without justification, had mounted an illegitimate "campaign" against the investment, which constituted a breach of the fair and equitable treatment standard.[679] In *Pope & Talbot v. Canada*, the tribunal found that the relevant government organ had:

> changed its previous relationship with the Investor and the Investment from one of cooperation … to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the investment's conduct.[680]

456. The tribunal held that Canada's conduct breached the FET requirement in that case.

457. In *Tecmed v. Mexico*, an unlimited licence for the operation of a landfill had been replaced by a licence of limited duration. The tribunal applied a provision in the applicable BIT guaranteeing FET according to international law. The tribunal found that the denial of the permit's renewal was designed to force the investor to relocate to another site, bearing the costs and risks of a new business. The tribunal held that:

> Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law.[681]

iv. The requirement to refrain from discriminatory measures

458. The Treaty also prohibits in Article 3(1) interference with qualifying investments by "discriminatory measures".[682] Most tribunals agree that discriminatory conduct is *per se* a breach of the FET standard.[683]

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678 *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, **CLA-135**, para. 123.

679 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CLA-136**, paras. 7.4.19–7.4.41.

680 *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, **CLA-137**, para. 68.

681 *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CLA-9**, para. 163.

682 Agreement Between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, entered into force 25 Mar. 1999, **CLA-138**, Art. 2(2).

v. The requirement to act in good faith

459. Good faith is a broad principle that is one of the foundations of international law in general and of foreign investment law in particular.[684] Arbitral tribunals have confirmed that good faith is inherent in the concept of FET.[685] Several tribunals have confirmed that State conduct that is carried out in demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.[686]

460. In *Bayindir v. Pakistan*, the investor claimed that its expulsion was based on local favouritism and on bad faith, since the reasons given by the government did not correspond to its actual motivation.[687] The tribunal found that "the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT".[688] The *Frontier Petroleum* tribunal held that the concept of "bad faith":

> includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and *expulsion of an investment based on local favouritism*.[689]

461. It follows from the above authorities that action in bad faith against the investor is a violation of the FET standard.[690] However, arbitral practice clearly indicates that the standard may be violated even if no *mala fides* is involved.[691] FET, like the prohibition on unreasonable and

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683 *See*, e.g., *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **CLA-139**, para. 290; UNCTAD, "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (vol III) (1999), **CLA-140**, p. 37.

684 *See* R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, pp. 156-58.

685 *See* R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, pp. 156-58; *Waguih Elie George* Siag *& Anor. v. Egypt,* ICSID Case No. ARB/05/15, Award, 1 June 2009, **CLA-141**, para. 450 (describing the principle that States must act in good faith as the "general, if not cardinal principle of customary international law").

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

687 *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005, **CLA-143**, paras. 232-43.

688 *Ibid.*, **CLA-143**, para. 250.

689 *Frontier Petroleum Services Ltd v Czech Republic,* UNCITRAL, Final Award, 12 Nov. 2010, **CLA-144**, para. 300 (emphasis added).

690 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 157.

691 *See,* e.g., *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, **CLA-132**, para. 186 ("this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not").

discriminatory measures, is an objective standard, and can be breached even where the State has acted in good faith.[692]

b. The Russian Federation's conduct towards the Claimant's investment has violated the fair and equitable treatment standard

462. Under the Federal Law on Accession that was ratified by the Russian Federation on 21 March 2014, the Ukrainian banks that operated in Crimea and held a valid license of the NBU were permitted in clear and unequivocal terms to continue carrying out banking operations in Crimea until 1 January 2015, by which date the Ukrainian banks would be permitted to obtain a banking license from the Russian Central Bank.[693] The Claimant therefore had a legitimate expectation of legal stability in Crimea which the Russian Federation breached when it proceeded to destabilise the legal and business framework for Ukrainian banks operating in Crimea by enacting a series of laws that imposed onerous and discriminatory obligations on Oschadbank Crimea and lacked basic due process safeguards. The Russian Federation proceeded to orchestrate the abusive termination of Oschadbank Crimea's banking activities on 26 May 2014, and the subsequent administration of the Bank's assets and leasing of Oschadbank Crimea's premises to Russian banks.

463. The evidence is clear that the Russian Federation intentionally and in bad faith destroyed the traditional banking system in Crimea that existed prior to the annexation, and coordinated the systematic derailment of the Claimant's operations in Crimea and termination of its investment. These acts and omissions for which the Russian Federation is responsible under international law, both individually and in aggregate, breached the Russian Federation's obligation to provide fair and equitable treatment to the Claimant's investment in Crimea.

2. Full protection and security

464. The Russian Federation has concluded dozens of bilateral investment treaties that contain FPS protection. For example, the UK-Russia BIT provides that: "Investments of investors of each Contracting Party shall at all times … enjoy full protection and security in the territory of the other Contracting Party".[694] For the reasons identified above, the FPS protection in the UK-Russia BIT is incorporated into the Treaty by application of the MFN clause in Article 3(1).

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692 *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, **CLA-132**, para. 186 (finding that the fair and equitable treatment standard represents "an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not").

693 Federal Law on Accession, **CE-112**, Article 17.

694 Ukraine-Russia BIT, dated 27 Nov. 1998, **CLA-1**.

a. The legal standard

465. Contemporary case law and commentators generally agree that the FPS standard imposes an obligation of objective vigilance and due diligence upon States, which "should be legitimately expected to be secured for foreign investors by a reasonably well-organised modern State".[695]

466. The *AMT* tribunal described the standard of full protection and security as:

> an obligation of vigilance, in the sense that … the receiving State of investments … shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. [The State] must show that it has taken all measures of precaution to protect the investments …[696]

467. Deliberate actions can violate the FPS standard just the same as the failure to act.[697] Several tribunals have confirmed that the FPS standard implies a State's guarantee of stability in a secure environment (physical, commercial and legal),[698] applies when the physical assets of an investment have been affected by civil strife and physical violence,[699] and requires that the State exercise due diligence to prevent harm to the investment.[700] In the recent decision of *Pezold v. Zimbabwe*, the tribunal found that the respondent had breached the FPS standard in relation to the failure of the police to protect the claimant's properties from occupation and the police's non-responsiveness to various violent incidents.[701]

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695 *See Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 30 I.L.M. 580, 621 (1991), **CLA-4**; *see also American Manufacturing and Trading*, *Inc. v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award, 21 Feb. 1997, 36 I.L.M. 1531, 1548 (1997), **CLA-145**; *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Award, 1 Jul. 2004, **CLA-132**, para. 187 (concluding that treatment that is not fair and equitable entails a violation of the full protection and security standard); R. Dolzer and C. Schreuer, *Principles of International Investment Law* 149 (2008), **CLA-123**, ("The wording of these clauses suggests that the host state is under an obligation to take active measures to protect the investment from adverse effects").

696 *American Manufacturing and Trading*, *Inc. v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award, 21 Feb. 1997, 36 I.L.M. 1531, 1548 (1997), **CLA-145**, para. 6.05.

697 *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 13 Sept. 2001, **CLA-120**, para. 613; *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, **CLA-146**, paras. 85-88.

698 *Biwater Gauff v. Tanzania*, **CLA-131**, paras. 729-30.

699 *Saluka v. Czech Republic*, **CLA-124**, para. 483.

700 *Vannessa v. Venezuela,* ICSID Case No. ARB(AF)04/6, Award, 16 Jan. 2013, **CLA-147**, para. 223.

701 *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 Jul. 2015, **CLA-148**, paras. 597-99.

b. The Russian Federation's conduct towards the Claimant's investment has violated the full protection and security standard

468. The Russian Federation's conduct is the very opposite of "due diligence" and "vigilance" required under the FPS standard. The Russian Federation has done nothing to protect the Claimant's investment; instead it has done much within its power – at times expressly and at other times covertly and through inaction – to undermine and nullify the value of the Claimant's investment.

469. By way of examples of such unlawful actions and activities:

(i) In April 2014, the premises of at least 85 outlets of Oschadbank Crimea were subjected to physical seizure and looting, and their operations terminated under the so-called governmental "Crimea Banking Sector Development Program", to be later occupied by RNCB.[702]

(ii) In May 2014, Mr Riabtsev reported that he had been subjected to pressure by the Crimean Self-Defence Forces to hand over cash and valuables, and had been warned that he would be punished out-of-court and Oschadbank Crimea would be seized if he failed to comply with their request;[703]

(iii) On 16 May 2014, representatives of the so-called Crimean authorities and the Crimean Self-Defence Forces carried out an attack on the premises of Oschadbank Crimea at 55A Kyivska St. in Simferopol and stole over UAH 32 million (approximately USD 2.8 million at that date) in cash.[704]

(iv) On 21 May 2014, representatives of the so-called Crimean authorities and Crimean Self-Defence Forces seized from Oschadbank Crimea jewellery and precious stones with a total weight of approximately 300 kg and an estimated value of more than RUB 605 million (approximately USD 17.5 million at that date), under the guise of enforcing an apparently forged order from a local court.[705]

(v) The so-called Crimean authorities threatened and exerted pressure on the local management and employees of Oschadbank Crimea, and drafted and

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702 *See* paras. IV.D.2.176–IV.D.2.180 above.

703 *See* para. IV.D.1.172 above.

704 *See* paras. IV.D.3.182–IV.D.3.183 above.

705 *See* paras. IV.D.4.184–IV.D.4.186 above.

> publicised a list of persons whose presence in the territory of Crimea was considered "undesirable".[706] The list included the head of the management board of Oschadbank, Mr Andriyy Pyshnyy.

470. The physical seizures, harassment and other interference with the Claimant's operations caused substantial harm and made it impossible for Oschadbank Crimea to comply with all the requirements of the Federal Law on the Crimean Financial System, in clear breach of the FPS standard.

E. ARTICLE 4: TRANSPARENCY OF LEGISLATION

1. The legal standard

471. Article 4 of the Treaty provides an obligation on the Russian Federation to ensure that legislation is "transparent and accessible":

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

472. Several investment treaty tribunals have held that the obligation of "transparency" is a self-standing subcategory and independent basis for claiming under the FET standard. In *Plama v. Bulgaria*, the tribunal observed that the obligation of transparency in the Energy Charter Treaty "can be related to the standard of fair and equitable treatment", and "appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework".[707]

473. In *Metalclad v. Mexico*, the tribunal interpreted "transparency" to mean:

> that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors … There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government … become aware of any scope of misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[708]

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706 *See* para. IV.D.1.173 above.

707 *Plama v. Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 Aug. 2008, **CLA-149**, para. 178.

708 *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, **CLA-150**, para. 76.

474. The tribunal held that the investor was entitled to rely on the representations of the federal officials and that the Respondent:

> failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process... in relation to an investor... acting in the expectation that it would be treated fairly and justly.[709]

475. In *Tecmed v. Mexico*, the tribunal held:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[710]

2. The Russian Federation failed to legislate transparently in regard to the Claimant's investment

476. Following the Russian Federation's annexation of Crimea, the Russian Government and Russia-controlled Crimean authorities failed to adequately ensure the transparency and accessibility of legislation regulating the operations of Ukrainian banks in Crimea.

477. On 26 May 2014, the Bank of Russia formally prohibited the activities of Oschadbank Crimea through the issuance, pursuant to Article 7 of the Federal Law on the Crimean Financial System, of the Decision on Termination of Oschadbank Crimea.[711] The Bank of Russia referenced in the Decision on Termination a decision of its Banking Supervision Committee apparently formalised in non-public protocol No. 22 of the Committee's session of 23 May 2014. However, the management of Oschadbank had not been informed in advance of such a session of the Banking Supervision Committee and had not been afforded an opportunity to refute the alleged grounds for termination of Oschadbank Crimea activities.[712]

478. Moreover, the Claimant had general concerns regarding the lack of transparency and accessibility of Crimea-related legislation in the post-annexation period. For instance, the establishment of an official information portal of the Republic of Crimea was only approved on 4 July

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709 *Ibid.*, **CLA-150**, para. 89.

710 *Tecmed v. Mexico*, Award, 29 May 2003, **CLA-9**, para. 154.

711 *See* para. IV.D.1.166 above.

712 *See* para. IV.D.1.167 above.

2014, after the Bank of Russia had already ordered the termination of Oschadbank Crimea's banking activities on 26 May 2014 and the purported Crimean courts had ordered the administration of Oschadbank Crimea's assets by the DPF on 29 May 2014.[713]

479. Accordingly, the evidence demonstrates that the Russian Federation failed to legislate in an unambiguous manner with respect to the Claimant's investment, much less ensure the "maximum possible transparency and accessibility of the legislation" in accordance with Article 4 of the Treaty. The Russian Federation's failure to promptly alert the Claimant of the rules and regulations governing its investment in Crimea was a direct and proximate cause of the Bank of Russia's purported reasons for terminating Oschadbank Crimea's operations, which measure caused substantial harm as quantified in Section VII below.

F. ARTICLE 5(1): EXPROPRIATION

1. The legal standard

480. Article 5(1) of the Treaty establishes the following protection from unlawful expropriation:

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

a. Unlawful expropriation

481. The legality of a measure of expropriation under Article 5(1) is conditioned on the following requirements:

(i) public interest;

(ii) due process of law;

(iii) non-discrimination; and

(iv) prompt, adequate and effective compensation.

482. An expropriation that fails to meet any one or more of those conditions is wrongful under the Treaty.[714]

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713 *See* para. IV.C.3.159 above.

b. Direct and indirect expropriation

483. The prohibition on unlawful expropriation in Article 5(1) of the Treaty encompasses both direct expropriation and measures "the effect of which is tantamount to expropriation" (*i.e.*, "indirect" expropriation). The Treaty's protection thus covers an outright taking of property or measures that affect legal title, as well as acts that deprive an investor of the use and enjoyment of its investment without affecting possession or formal title to the investment.[715] The term "measures" includes actions as well as omissions of the State or entities whose conduct is attributable to the State.[716]

484. Included in the concept of indirect expropriation is "creeping" expropriation. Such an expropriation may result from a series of acts or omissions over time that cumulatively result in an indirect expropriation, even if each individual measure would not constitute an expropriation standing alone.[717] In *Siemens v. Argentina*, the tribunal described creeping expropriation in the following terms:

> By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.[718]

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714 Arbitral tribunals have frequently held that when a treaty cumulatively requires several conditions for a lawful expropriation, failure of any one of those conditions makes the expropriation wrongful. *See,* e.g., *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 Apr. 2009, **CLA-151**, para. 98 ("The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6").

715 *See*, e.g., *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/002, Award, 29 May 2003, **CLA-9**, para. 116; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina,* ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, **CLA-136**, paras. 7.5.11-7.5.17.

716 *See Eureko B.V. v. Poland*, Ad Hoc, Partial Award, 19 Aug. 2005, **CLA-152**, paras. 185-9 (finding that the term "measures taken" in Article 5 of the applicable BIT included actions as well as omissions, citing, *inter alia*, Judge Crawford's authoritative commentary on the UN International Law Commission's Articles of State Responsibility and several international arbitral awards).

717 *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr. 2002, **CLA-153**, para. 107; UNCTAD, "Taking of Property", Series on issues in international investment agreements (2000) UNCTAD/ITE/IIT/15, **CLA-154**, pp. 11-12 (describing creeping expropriation as "a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment").

718 *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, **CLA-121**, para. 263.

485. A State's intention is normally irrelevant when assessing whether its measures have resulted in an expropriation.[719] Rather, the more frequently accepted criterion is the extent of the economic impact on the investment (also known as the "effects test"). The *Metalclad* tribunal provided the classic formulation in this regard:

> [E]xpropriation … includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[720]

486. The *Metalclad* standard has been frequently followed since and widely accepted by commentators.[721]

2. The Russian Federation's unlawful expropriatory acts

487. The Claimant has set out the facts giving rise to the destruction of its investment in Section IV of this Statement of Claim. Following its military annexation of Crimea, the Russian Federation intentionally and in bad faith destroyed the traditional banking system that had existed in Crimea, and orchestrated the termination of the Claimant's operations in Crimea and the expropriation of its substantial assets.

488. As explained below, the expropriation was wrongful under the Treaty because the Russian Federation's expropriatory measures were (1) contrary to the public interest; (2) not in accordance with due process of law; (3) discriminatory; and (4) not compensated at all, much less promptly, adequately or effectively.

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719 *See,* e.g., *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, **CLA-121**, para. 270.

720 *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, **CLA-150**, para. 103 (finding expropriation for the wrongful denial of a construction permit that resulted in the termination of investment activities).

721 *See,* e.g., *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/002, Award, 29 May 2003, **CLA-9**, para. 113, n. 125; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 118 ("The issue becomes obvious when a host state substantially deprives the investor of the value of the investment leaving the investor with control of an entity that amounts to not much more than a shell of the former investment"); *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, **CLA-135**, para. 120 ("one can reasonably infer that a diminution of 5% of the investment's value will not be sufficient for a finding of expropriation, while a diminution of 95% would likely be sufficient"); *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 13 Sept. 2001, **CLA-120**, para. 604 (expropriation claims properly cover measures "that effectively neutralize the benefit of the property of the foreign owner").

3. The Russian Federation's unlawful expropriation engages its responsibility at international law

a. The expropriation lacked any public interest

489. Under Article 5(1) of the Treaty, the expropriation must be "adopted in the public interest" to be lawful. This requires a concrete, genuine interest of the public that is furthered by the expropriation.[722]

490. The Russian Federation's expropriatory acts caused the destruction of the largest banking network in the Crimean peninsula, with 294 banking outlets and activities spanning numerous segments of banking services, which was contributing significant to the Crimean economy and the development of a competitive banking industry. The Russian Federation's expropriation therefore clearly lacked any semblance of public interest and was unlawful under the Treaty.

b. The expropriation lacked due process of law

491. The Treaty provides that an expropriation that is not taken "under due process of law" is wrongful. The Treaty does not distinguish between substantive and procedural due process. Accordingly, the Russian Federation was bound to respect both substantive and procedural due process in carrying out the expropriation.[723] The Claimant has been denied both forms of due process.

492. Tribunals have confirmed that a lawful exercise of the right to expropriate requires compliance with *substantive* due process. For example, in *Vivendi v. Argentina*, the tribunal recognised that a claimant could be denied substantive due process or "substantive justice" through a "substantively unfair" result.[724] As regards *procedural* due process, the tribunal in *ADC v. Hungary* explained that it:

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

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722 *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006, **CLA-81**, para. 432.

723 *Waguih Elie George Siag and Corinda Vecchi v. Egypt*, ICSID Case No ARB/05/15, Award, June 1, 2009, **CLA-141**, para. 440.

724 *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v. Argentina*, ICSID Case No. ARB/97/3, Award, Nov. 21, 2000, **CLA-155**, para. 80.

> claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.[725]

493. As noted above, the Russian Federation enacted the Federal Law on the Crimean Financial System, which subjected Ukrainian banks in Crimea to draconian sanctions, including immediate termination of their banking operations for failing to comply with a variety of vague requirements; or for delaying the performance of certain obligations by as little as a single day.[726] The so-called Crimean authorities, operating as part of the Russian State, invoked the Federal Law on the Crimean Financial System to hinder the Claimant's operations in Crimea. Moreover, various individuals and entities under the control of the Russian and Crimean authorities instituted court proceedings against Oschadbank in Crimea that were abusive, and legally and factually unfounded, and resulted in numerous violations of elementary due process rights and guarantees.[727] These acts violated the Claimant's substantive and procedural due process rights under Article 5(1) of the Treaty, and rendered the Russian Federation's expropriation unlawful.

c. The expropriation lacked compensation

494. Article 5(1) of the Treaty requires that expropriatory measures shall be accompanied by "prompt, adequate and effective compensation". The same provision defines how compensation must be calculated and how it must be paid:

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

495. To date, the Russian Federation has not paid any compensation to the Claimant, much less the "adequate and effective" compensation required by the Treaty. The Russian Federation's enduring failure to pay any compensation makes the expropriation unlawful under the Treaty.[728]

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725 *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006, **CLA-81**, para. 435. *See* also *Ioannis Kardassopoulous v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 Mar. 2010, **CLA-156**, paras. 395-96.

726 *See* paras. IV.C.1.132–IV.C.1.142 above.

727 *See* paras. IV.F.2.223–IV.F.2.228 above.

728 *See*, e.g., *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 Dec. 2012, **CLA-157**, paras. 543-45.

d. The expropriation was discriminatory

496. Under Article 5(1) of the Treaty, an expropriation is unlawful if it is discriminatory. Several of the Russian Federation's measures were targeted specifically at the Claimant and its investment, including the termination of Oschadbank Crimea's operations and takeover of its substantial assets in May 2014, and therefore were by definition discriminatory. The discriminatory nature of the Russian Federation's expropriation of the Claimant's investment renders the expropriation unlawful under the Treaty.

G. ARTICLE 7: TRANSFER OF FUNDS

1. The legal standard

497. The Russian Federation has violated the free transfer of funds provision contained in Article 7 of the Treaty. Article 7 reads as follows:

> 1. Each Contracting Party shall guarantee to the investors of the other Contracting Party after they fulfil all tax obligations in conformity with the laws of either Contracting Party unimpeded transfer abroad of payments associated with the investments, and in particular of:
>
> a) funds of initial investments and any extra funds to support and increase the investments;
>
> b) returns;
>
> c) funds, in repayment of loans, related to the investments;
>
> d) funds, received by an investor in connection with partial or total liquidation or sale of the investments;
>
> e) the compensation, provided for in Article 5 of this Agreement.
>
> 2. Transfer of funds shall be effected without delay in freely convertible currency at the exchange rate, applicable on the date of transfer pursuant to the laws on currency regulation of the Contracting Party, in whose territory the investments were made.

498. The above provision is drafted in broad and unqualified terms, and is of a non-exhaustive nature. The tribunal in *Continental Casualty v. Argentina* found that the transfer of funds right in the applicable BIT guaranteed unimpeded cross-border payments:

> This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a

> foreign investment and an essential element of the promotional role of BITs.[729]

499. According to the *Biwater Gauff* tribunal:

> The free transfer principle is aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host State which effectively imprison the investors' funds, typically in the host State of the investment.[730]

500. The *Metalpar v. Argentina* tribunal agreed that such provisions "guarantee[] the transfer of funds abroad".[731]

2. The Russian Federation has denied the Claimant the right to freely transfer funds

501. As described in Section IV above, from the moment that the Russian Federation occupied Crimea, the Claimant sought to protect its investments and operations in Crimea. It did so, *inter alia*, by attempting to transfer Oschadbank Crimea's assets to the bank's headquarters in Kyiv, to no avail. As Mr Pyshnyy makes clear in his witness statement, the Russian Federation blockaded the border and prohibited the transfer of cash and other assets to mainland Ukraine.[732] Moreover, representatives of the Crimean Self-Defence Forces personally warned the Head of Oschadbank Crimea of criminal liability if assets were moved to mainland Ukraine.[733] Thus, the cash and other valuables kept in the vaults of Oschadbank Crimea was effectively imprisoned in Crimea and subsequently seized, in breach of the free transfer of funds obligation contained in Article 7 of the Treaty.

H. DENIAL OF JUSTICE

502. The Treaty protects against denials of justice in three ways. First, a denial of justice would breach the FET standard in Article 3(1) of the Treaty.[734] Second, a denial of justice would breach the full and unconditional legal protection in Article 2(2) of the Treaty.

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729 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **CLA-158**, para. 239.

730 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, **CLA-131**, para. 735.

731 *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, **CLA-159**, para. 179.

732 Pyshnyy Statement, para. 36.

733 *See* para. IV.D.1.172 above.

734 *Rumeli Telekom & Anor. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CLA-142**, para. 654 (confirming that "the fair and equitable treatment standard … also includes in its generality the standards of denial of justice"). *See* also C. Dugan et. al., *Investor-State Arbitration* (2008), **CLA-160**, p.

503. Third, the Russian Federation has concluded investment treaties that expressly require investor-state arbitration proceedings to be decided in accordance with customary and general principles of international law. For example, Article 9(4) of the Russia-China BIT requires that "[t]he arbitration award shall be based on: … the rules and universally accepted principles of international law".[735] For the reasons described above, the governing law clause in Article 9(4) of the Russia-China BIT is imported into the Treaty by application of the MFN clause in Article 3(1).

1. The concept of denial of justice

504. The basic premise of the rule of denial of justice is that a State incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner.[736] Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process".[737] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilised justice" and is fairly administered.[738] "Civilised justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control".[739]

505. Whether a denial of justice has occurred in any particular case cannot be determined by the application of a formula. International law simply requires that litigants are afforded "even-

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525 ("The concept of 'denial of justice' … appears to occupy the very core of the fair and equitable treatment standard"); M. Goldhaber, "The Rise of Arbitral Power Over Domestic Courts" (2013) 1(2) *Stanford Journal of Complex Litigation* 373, **CLA-161**, p. 383 ("A denial of justice is a form of unfair and inequitable treatment under international law"); *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 Nov. 2008, **CLA-101**, para. 188 ("the fair and equitable treatment standard encompasses the notion of denial of justice").

735 *See, e.g.,* Russia-China BIT, **CLA-162**, Art. 9(4).

736 J. Paulsson, *Denial of Justice in International Law* (2005), **CLA-163**, p. 4. Courts and tribunals have formulated different descriptions of the objective defects that must exist in the domestic administration of justice before a denial of justice can be held to have occurred. One accepted formulation is that adopted by the Tribunal in *Loewen v. The United States*, which stated that a denial of justice exists where there is: "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety": *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, **CLA-164**, para. 132.

737 E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1925) 330, **CLA-165**; J. Brierly, *The Law of Nations* (6th edn, 1963) 278, **CLA-166**, at 286-87 (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

738 E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1925), **CLA-165**, at 198.

739 E. Borchard, "The "Minimum Standard" of the Treatment of Aliens", 33 *Am. Soc. Int'l L. Proc* (1939), **CLA-167**, at 63.

handed" and "ordinary justice".[740] Proceedings leading to judgments that are "evidently unjust and partial" will be internationally unlawful.[741] As the ICJ stated in discussing the concept of "arbitrariness", it "is not so much something opposed to a rule of law, as something opposed to the rule of law".[742]

506. In the context of cases involving the administrative tribunals of international organisations, the ICJ has had occasion to observe that:

> certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.[743]

507. Internationally wrongful administration of justice may be perpetrated by acts of a state's executive, legislature or judiciary. Sir Gerald Fitzmaurice stated that denial of justice concerns:

> such actions *in or concerning the administration of justice*, whether on the parts of the courts or of some other organ of the state.[744]

508. Thus, a denial of justice can occur not just as a result of actions of the court responsible for a judgment, but also from actions of the executive government in connection with proceedings before that court. It is also possible that abuses of legislative power may constitute or form part of a denial of justice if they have a direct impact on the administration of justice.[745]

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740 *Idler (USA) v. Venezuela* (1995) in J. Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* (1898) Vol IV, 3491, **CLA-168**, at p. 3517.

741 Vattel, *The Law of Nations*, Book II (1852 reprint), **CLA-169**, at para. 350.

742 *Case concerning Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports, 1989, **CLA-170**, para. 128.

743 *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Reports, **CLA-171**, at para 92; reaffirmed in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization*, Advisory Opinion of 1 February 2012, **CLA-172**, para. 30.

744 G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice'" (1932) 13 *British Year Book of International Law* 93, **CLA-173**, at p. 94 (emphasis in original).

745 *U.S. v. Great Britain (Robert E. Brown* case), Vol VI UNRIAA 120 (1923), **CLA-174**, p. 129.

509. An international tribunal adjudicating whether a State is responsible for a denial of justice need not make a finding about whether any particular individuals were motivated by bad faith.[746] The test for denial of justice is objective.[747] This was made clear in the *Martini* case:

> If the decision of the Venezuelan court is legally founded, the psychological motives of the judges are irrelevant. On the other hand, the decision may be so defective that one can suppose the judges' bad faith; but in this case too, what is decisive is the objective character of the decision.[748]

510. Descriptions of the objective defects that must exist in the domestic administration of justice before a denial of justice can be held to have occurred have been formulated in a variety of ways by different courts and tribunals over time. One accepted formulation is that adopted by the tribunal in *Loewen v. The United States*, which stated that a denial of justice exists where there is:

> Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.[749]

2. The Russian Federation's conduct towards the Claimant and its investment constitutes a denial of justice

511. The Russian Federation's derailment of the Claimant's operations in Crimea was partly effected through judicial abuses, and in particular several decisions of the Commercial Court and Simferopol Court described above.

512. The so-called Crimean authorities forged an order of the Commercial Court purporting to require the transfer of over USD 17.5 million of valuables in the custody of Oschadbank Crimea for a gemmological expert determination. The Crimean authorities used the court order to mislead the employees of Oschadbank Crimea and steal the valuables for themselves on 21 May 2014.[750]

513. Moreover, on 29 May 2014, the so-called "Crimean Deputy Prosecutor" commenced court proceedings against Oschadbank Crimea in the Simferopol Court for the alleged failure to repay bank deposits and perform other obligations towards its customers valued at the equivalent of approximately USD 15,700. The Simferopol Court, without properly considering the available evidence in a full hearing, issued an Order on Provisional Measures on 29 May 2014 that ruled on the

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746 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., 2012), **CLA-103**, p. 182 ("Proof of bad faith may be relevant, but is not required in such a case").

747 *Chevron Corporation & Anor. v. Ecuador*, UNCITRAL, Opinion of J. Paulsson, 12 Mar. 2012, **CLA-175**, para. 18.

748 *Martini Case*, Vol II UNRIAA 977 (1930), **CLA-176**, p. 987.

749 *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, 26 June 2003, **CLA-164**, para. 132.

750 *See* paras. IV.D.4.184–IV.D.4.186 above.

alleged failure of Oschadbank Crimea to fulfil undetermined obligations towards an unspecified range of its creditors and placed all assets of Oschadbank Crimea under administration.[751]

514. The Order on Provisional Measures, which was issued in response to the Deputy Prosecutor's largely unsupported application in respect of a small amount of money, violated basic notions of procedural and substantive justice, including the principle of proportionality enshrined in Article 140(3) of the Civil Procedural Code of the Russian Federation, which requires that provisional measures be proportionate to the remedy sought by the claimant.[752]

515. On 17 September 2014, the Simferopol Court issued a final decision against Oschadbank Crimea that largely replicates the Deputy Prosecutor's statement of claim and lacks independent consideration of the merits. The decision ordered Oschadbank Crimea to cease its "unlawful actions" without particularising what those actions were, or how Oschadbank Crimea could possibly have taken such actions in light of: (a) the Order on Provisional Measures providing for the administration of Oschadbank Crimea's assets by the DPF; and (b) the Bank of Russia's Decision on Termination of Oschadbank Crimea that prohibited its operation as of 26 May 2014.[753]

516. Further, the Court and the Federal Bailiff Service of the Republic of Crimea took all procedural decisions under the newly adopted Russian system with uncommon speed, egregiously violating Oschadbank's fundamental due process rights along the way.[754]

517. Clearly the Simferopol Court proceedings were part of a well-orchestrated plan for the complete and prompt takeover of Oschadbank Crimea's assets. The so-called Crimean authorities, under Russian control, manipulated and abused the legal process so that the DPF could assume control over Oschadbank Crimea assets in just *one* day, i.e. the day of filing the statement of claim.[755] This conduct constitutes a violation of the rule of law and basic notions of proper judicial conduct. The actions of the Crimean judiciary and related administrative bodies, for which the Russian Federation is internationally responsible, accordingly have failed to accord the Claimant's investment due process of law and constitute a denial of justice, in breach of its obligations under the Treaty.

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751 *See* paras. IV.F.1.208–IV.F.1.213 above.

752 *See* paras. IV.F.1.213–IV.F.1.218 above.

753 *See* paras. IV.F.1.219–IV.F.1.220 above.

754 *See* para. IV.F.1.222 above.

755 *See* para. IV.F.1.222 above.

PART C – QUANTUM

VII. DAMAGES AND QUANTUM

A. OVERVIEW AND SUMMARY

518. The Claimant has incurred very substantial damages as a direct and proximate result of the Russian Federation's violations of the Treaty. Oschadbank Crimea was a profitable enterprise with significant value, and contributed significantly to the overall financial success of the Claimant. Indeed, Oschadbank Crimea's profitability had over-performed the rest of the Bank in the years leading up to the Russian action both in terms of profits made as well as return on net assets.[756] There was a marked deterioration in the asset position of the Claimant following the Russian Federation's military occupation of Crimea and extinguishment of Oschadbank Crimea, which had a significant negative effect on the profitability of the Claimant. Whereas the Claimant was previously profitable with a positive outlook, in 2014 and 2015 it recorded significant losses as a result of the extinguishment of Oschadbank Crimea.[757]

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

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

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[756] Davidson Report, para. 3.20.

[757] Davidson Report, para. 3.12-3.13.

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

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

523. The table below sets forth a summary of the Claimant's damages:[758]

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

524. Adding interest to the claim value would produce the following results:[759]

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

758 *See* Davidson Report, para. 3.106.

759 *See* Davidson Report, para. 3.109.

B. LEGAL STANDARD

525. Allegations of treaty breaches and their consequences are "subjects that belong to the customary law of state responsibility".[760] Thus, the customary international law principles of state responsibility apply to the Russian Federation's breaches of the Treaty. These principles have been codified in the ILC Articles.[761]

526. Under Article 1 of the ILC Articles, every "internationally wrongful act" of a State entails the "international responsibility" of that State. An "internationally wrongful act" is defined under Article 2 as an act or omission which is: (i) attributable to the State under international law; and (ii) constitutes a breach of an international obligation of that State.[762]

527. As set out above, the breaches of the Treaty are attributable to the Russian Federation, being the product of the acts and omissions of persons and entities for whom the Russian Federation is internationally responsible.[763]

528. The governing standard of reparation for internationally wrongful acts is restoration of the *status quo ante.* As the Permanent Court of International Justice held in the *Chorzów Factory* case, the reparation must "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[764] The same principle was codified in Article 31 of the ILC Articles: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[765] Today this standard enjoys universal recognition.[766]

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760 *Rainbow Warrior* arbitration (*New Zealand v. France*), Award, 30 Apr. 1990, 82 I.L.R. 499, **CLA-177**, para. 75.

761 *See Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, **CLA-121**, para. 350 (noting that "[t]he Draft Articles are currently considered to reflect most accurately customary international law on State responsibility").

762 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Article 2.

763 *See* Section V.D.1 above.

764 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, Judgment of 13 September 1928 P.C.I.J., ser. A, No. 17, **CLA-178**, p. 47.

765 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 31.

766 *See,* e.g., *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, p. 7*, **CLA-179**, para. 152 (the International Court of Justice noting that the *Chorzów Factory* standard reflects a "well-established rule" of customary international law); *S.D. Myers Inc. v. Canada*, Partial Award, 13 Nov. 2000, **CLA-180**, para. 311 (finding that the "principle of international law stated in the *Chorzów Factory (Indemnity)* case is still recognised as authoritative on the matter of general principle"); *ADC Affiliate Ltd. v. Hungary,* Award, 2 Oct. 2006, **CLA-81**, para. 493 (reviewing numerous decisions and concluding that "there can be no doubt about the present vitality of the

529. As provided in ILC Articles 35 and 36, reparation has two components. The first component is an obligation to provide "restitution", which requires the State "to re-establish the situation which existed before the wrongful act was committed ... to the extent that restitution is not materially impossible".[767] Second, "in so far that such damage is not done good by restitution", the ILC Articles recognise the State's obligation to provide the investor compensation for the damage caused by the State's internationally wrongful act.[768] Under this principle, reparation is complete only when the damages award serves to restore the investor to the situation it would have been in but for the State's wrongful conduct.

530. The Claimant is therefore entitled to financial compensation which wipes out all negative consequences of the Russian Federation's illegal acts. ILC Article 36 confirms that such compensation must cover "any financially assessable damage including loss of profits insofar as it is established".

C. DAMAGES METHODOLOGY

531. The Tribunal has wide discretion to equitably quantify the loss of value of an investment. This principle was recognised by the tribunal in *Rumeli Telekom v. Kazakhstan* among many other decisions and authorities. In *Rumeli Telekom*, the tribunal explained that its basic task with regard to a quantum assessment is to "apply the method or methods of valuation which will most closely reflect the value of the expropriated investment to the investor at the relevant time".[769]

532. In the present circumstances, the most equitable valuation of the business of Oschadbank Crimea expresses in monetary terms both the factual position of the business (the assets already built into its balance sheet) and the potential of Oschadbank Crimea to generate profits in the future (essentially, goodwill which is not recognised in the balance sheet).

533. To calculate the loss of individual assets that constitute the business, Mr Davidson has reviewed the assets position of Oschadbank Crimea according to its management accounts for

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Chorzów Factory principle, its full current vigor having been repeatedly attested by the International Court of Justice").

767 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Art. 35.

768 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, **CLA-51**, Arts. 35, 36.

769 *Rumeli Telekom AS & Anor. v. Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, **CLA-142**, para. 786.

each of the dates of the loss, scrutinised each type of asset (historically and immediately prior to the extinguishment), and assessed the recoverability of each asset individually.[770]

534. Mr Davidson has approached the loss of the business "goodwill" of Oschadbank Crimea as a valuation exercise.[771] He has conducted a DCF valuation where the loss of business is calculated as future profits capitalised using an appropriate capitalisation rate. This method has been employed frequently by investor-state tribunals in their valuation of harmed investments that have an operating history.[772] Where the loss suffered is an investment in a present or future income-producing asset, a DCF analysis is recognised as the most appropriate valuation methodology.[773]

535. The Claimant's operations in Crimea meet the definition of a present and future income-producing asset under international legal principles. Oschadbank Crimea was well-capitalised, carefully structured, positioned for strong growth, and generated profits. A DCF analysis is the proper methodology for a quantum valuation in these circumstances.

D. VALUATION DATE

536. In order to re-establish the situation that existed before the wrongful acts complained of in these proceedings, the Russian Federation must pay a sum that in the words of *Chorzow Factory*, would "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[774]

537. Here, the act triggering or commencing the wrongful acts was the Russian Federation's assertion of military control over Crimea on 1 March 2014, when the Federation Council of the Russian Federation authorised the military intervention in Crimea. As described above, the

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770 Davidson Report, para. 3.4.

771 Davidson Report, para. 3.5.

772 *See,* e.g., *Rumeli Telekom AS & Anor. v. Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, **CLA-142**, para. 810.

773 *See*, e.g., *Phillips Petroleum Company Iran v. Iran*, The National Iranian Oil Company, Award, IUSCT Case No. 39 (425-39-2), 29 June 1989, **CLA-181**, para. 112 (stating that "calculations of anticipated revenues" from an expropriated asset were "a relevant factor to be considered in the determination of the fair market value of its property interest", as any "prospective buyer of the asset would almost certainly undertake such DCF analysis to help it determine the price it would be willing to pay"); S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), **CLA-182**, paras. 192-93 (stating that the price of an income-generating asset "reflects the cash flows it is expected to generate over its operative life"); J. Gotanda, *Recovering Lost Profits in International Disputes*, 36 Geo. J. Int'l L. 61, 2004, **CLA-183**, para. 91 ("Because the DCF method values the asset lost according to its income-producing capabilities, in theory, the method fully compensates the claimant by awarding an amount that reflects both the loss incurred and the gain of which the claimant was deprived").

774 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, Judgment of 13 September 1928 P.C.I.J., ser. A, No. 17, **CLA-178**, p. 47.

harm to the Claimant's investment ensued thereafter. Where a State's conduct has involved multiple instances of identifiable wrongful measures, as is the case here, the selection of an early measure, even if less severe or direct than a later measure, will assure both equity and full compensation for the State's unlawful conduct.

538. Moreover, where, as in the present case, the conduct complained of constitutes a continuing or composite act and violation, pursuant to the ILC Articles "the breach extends over the entire period *starting with the first of the actions or omissions of the series*".[775] The Tribunal should accordingly adopt 1 March 2014 as the proper valuation date to assess the Claimant's lost assets and business, with 28 February 2014 as the accounting date for quantifying the loss. In Mr Davidson's view, the position at 28 February 2014 is the last unaffected position of Oschadbank Crimea prior to any wrongful conduct of the Russian Federation.[776]

539. In the alternative, the Tribunal should set the valuation date at the date, according to Russia's own legislation, the Treaty entered into force with respect to the Claimant's investment in Crimea (i.e. 21 March 2014).[777] In this alternative scenario the accounting date for quantifying the loss is 31 March 2014.[778] In Mr Davidson's view, the position at 31 March 2014 is already impaired to some extent by wrongful acts of the Russian Federation.[779] Adopting 31 March 2014 as the valuation date would therefore risk under-compensating the Claimant.

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

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

541. The Claimant has incurred substantial damages as a direct and proximate result of the Russian Federation's violations of the Treaty and the permanent loss of the Claimant's assets in Crimea. To put matters in context, Oschadbank Crimea was the largest lender in Crimea between 2011 and 2013 with a market share reaching 44.7% in 2013.[780] It was also the second biggest in the

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775 United Nations, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, **CLA-51**, Art. 15(2) (emphasis added). *See also* Art. 14.

776 Davidson Report, para. 3.62.

777 *See* para. III.C.82 above.

778 Davidson Report, para. 2.7.

779 Davidson Report, para. 3.57.

780 Davidson Report, para. 3.24.

market for deposits, with a market share of 16.5% in 2013.[781] The Crimean branch was also one of the most profitable of the Claimant's branches, contributing 11% of its overall profits in 2013 (despite representing merely 5% of the Bank's assets) and with a rapidly growing business.[782] Accordingly, the Claimant's loss is unsurprisingly substantial. The assets lost by the Claimant included in particular:

(i) corporate and private loans;

(ii) amounts owed by other branches of the Bank to Oschadbank Crimea; and

(iii) real property, cash and other assets.

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

1. Corporate and private loans

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

544. The vast majority of the corporate/commercial loans given by Oschadbank Crimea represent loans to the Solar Group (discussed above) for development of solar power stations (the **Solar Loans**). As described by Mr Pyshnyy, Oschadbank Crimea had a unique opportunity to finance, at an interest rate of over 10 percent, the long-term projects for the development of solar power stations located in Crimea for the following reasons:[783]

(i) The Crimean Peninsula is the most attractive region of Ukraine for solar energy plants because of significant solar activity.

(ii) There has historically been a constant deficit in energy sources in Crimea and a significant demand for green energy in Crimea and few alternatives. Solar power stations are in great demand given the region's popularity as a tourism and recreation destination which renders high-pollution sources of energy untenable.

781 Davidson Report, para. 3.24.

782 Davidson Report, para. 5.47.

783 Pyshnyy Statement, para 22.

(iii) To stimulate the green energy industry, the government of Ukraine had undertaken to purchase 100% of solar energy from its producers at a favourable fixed price until 1 January 2030.[784] This meant that the risk of borrowers going out of business (and as a result, amounts owed to Oschadbank Crimea becoming irrecoverable) was virtually non-existent.

(iv) The Solar Loans were intended to be denominated in foreign currency so that Oschadbank Crimea had no foreign currency risk because the borrowing and the lending would have been made in the same currency.

(v) All Solar Loans were secured by the underlying assets (including, *inter alia*, the solar power stations) and, if any problems occurred, the Claimant would have been able to seek recovery and enforce it freely under Ukrainian law.

545. The Solar Loans performed as expected until March 2014, at which point both capital and interest repayments became impaired.[785] Whilst ordinarily these loans would have been fully recoverable given the security over, inter alia, the power stations granted in favour of Oschadbank Crimea, effective enforcement against assets within Crimea was self-evidently not possible following the events in Crimea. To make matters worse, as described above, in July 2015 the DPF initiated court proceedings against 12 of the Solar Group companies seeking to recover debt under loan agreements with Oschadbank.[786] The DPF sought recovery of the debt of over RUB 28 billion in total (equivalent to USD 491 million as of 22 July 2015, i.e., the date of filing of the statements of claim).[787] Therefore, it is clear that the Claimant has no hope of recovery of the Solar Loans assets.

546. In addition to its corporate loan book, Oschadbank Crimea's portfolio also included retail loans, i.e. personal loans and mortgages. The Claimant's retail loans became irrecoverable following the occupation of Crimea.[788] Individual customers refused to honour their commitments and following the events in Crimea, effective enforcement against physical assets located in Crimea was self-evidently impossible.

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784 Article 17-1 of the Law of Ukraine "On Electric Power Industry" (version effective as of 1 January 2014), **CE-41**.

785 Davidson Report, para. 3.45-3.46.

786 *See* para. IV.G.2.233 above.

787 At the official exchange rate of RUB 57.0025 per USD set by the Bank of Russia as of 22 July 2015, **CE-248**.

788 Pyshnyy Statement, para. 57.

2. Settlement between bank branches

547. The Claimant's "settlement between the branches" (i.e., amounts owed by other branches of Oschadbank to Oschadbank Crimea) were a major asset of Oschadbank Crimea. Each branch of the Claimant forms its resource base from the deposits of local customers, and requires specific levels of resources to lend to its local customers. Some branches have resources in excess of the required amount (net lenders) while others have a deficit of particular resources (net borrowers). The Claimant's branches are permitted to trade and reallocate resources internally within the bank. Such operations of internal transfers of resources are under control of the Treasury of the Bank, which acts as a middleman in the operations between the branches.[789]

548. Mr Davidson confirms that Oschadbank Crimea had excess resources that it traded with the Treasury.[790] Those resources remain recoverable (as they have been on-lent by the 'borrowing' branch to customers located elsewhere in Ukraine) and therefore have been excluded from Mr Davidson's valuation.[791]

1. Real property, cash and other assets

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

(i) financial and capital investments, representing buildings (including 294 branch units, leasehold and freehold), fixtures and fittings, and capitalised expenditure on property, and a physical banking infrastructure (including ATMs, cars, other vehicles, other equipment), none of which are recoverable given their location;[792] and

(ii) cash and other valuables (gold and cash deposits, securities), which are also not recoverable after the closing down of the head office of Oschadbank Crimea in May 2014.[793]

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789 Davidson Report, paras. 3.41-3.42.

790 Davidson Report, paras. 3.52.

791 Davidson Report, paras. 3.54.

792 Davidson Report, paras. 3.55, 4.12, 6.52-6.54.

793 Davidson Report, para. 4.12.

550. In March 2014 there was a sharp decline in the cash held by Oschadbank Crimea which is explained by the outflow of the deposits called upon by clients' demands after the referendum to decide on the status of Crimea that was held on 16 March 2014.[794]

F. CALCULATION OF THE CLAIMANT'S DAMAGES

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

552. Mr Davidson assesses the value of the assets based on Oschadbank Crimea's asset position immediately prior to the loss. Mr Davidson uses two Valuation Dates, 28 February 2014 and 31 March 2014, as an assumed date of extinguishment.[795] The value of future profits is determined by applying a multiple, or a discount rate, to the anticipated future profits of the business.

553. Given that in early 2014 the Ukrainian economic and political situation was unstable, Mr Davidson has, in accordance with established practice, valued the business with hindsight to arrive at a more accurate estimate for the losses at both Valuation Dates.[796]

1. Lost assets

554. To arrive at his valuation of the Claimant's lost assets in Crimea, Mr Davidson has conducted a detailed analysis of each type of asset that Oschadbank Crimea held, the asset position for each full financial year in the last three unaffected years (2011-2013), how the position changed during the first three months of 2014, and forms a view on what was the correct position of the assets at 28 February 2014 and 31 March 2014. Mr Davidson has scrutinised each type of asset and assessed the recoverability of each asset individually.[797]

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

556. Prior to March 2014, Oschadbank Crimea and its assets were performing well without any significant indications of impairment. In Mr Davidson's opinion: "*I have found nothing in the*

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794 Pyshnyy Statement, para. 29.

795 Davidson Report, para. 2.7.

796 Davidson Report, para. 4.7; also *see Occidental Petroleum v. Ecuador,* ICSID Case No. ARB/06/11, Award, 5 Oct. 2012, **CLA-184**, para. 726 (finding that it is permissible to utilise post-valuation date data to verify or otherwise check assumptions made in the DCF model).

797 Davidson Report, paras. 3.4.

financial information I have reviewed and the explanations provided to me to suggest that at the beginning of 2014, the Crimean Branch was underperforming in relation to any internal or external factors existing at the time. On the contrary, the loan book was healthy, the Crimean Branch attracted good market rates of interest and there was no indication of impairment as at 28 February 2014".[798] Mr Davidson has made no adjustments to the asset position of Oschadbank Crimea at 28 February 2014 because he has found no indication of damage at that stage. He considers the position at 28 February 2014 to be the last unaffected position of Oschadbank Crimea prior to interference of the Russian Federation.[799]

557. As discussed above, during the course of March 2014 most assets were lost, gradually or immediately, given there was no opportunity to exercise control over them in light of ongoing events.

558. Accordingly, it is clear that the asset position at 31 March 2014 was already impaired to some extent by the actions of the Russian Federation. One such example is the deterioration in the cash position of Oschadbank Crimea caused by the clients' deposits outflow following the referendum on 16 March 2014. Mr Davidson suggests an adjustment to the asset base for the position at 31 March 2014 of 10% to reflect the impairment of the assets – and in particular the significant deterioration in the Solar Loans during March 2014.[800]

559. In sum, Mr Davidson estimates the loss of Oschadbank Crimea's assets at **USD 668,008,976.95** as at 28 February 2014 and **USD 597,771,793.33** as at 31 March 2014.[801]

2. Loss of goodwill

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

798 Davidson Report, paras. 6.62

799 Davidson Report, paras. 3.62.

800 Davidson Report, para. 6.47.

801 Davidson Report, para. 3.64.

current trading performance of the business.[802] Added to this pro forma he applied a discount rate in order to reach a capitalised value of future income streams.

a. Projected income

561. In Mr Davidson's opinion, Oschadbank Crimea had a strong financial outlook and would have generated significant future income but for its extinguishment.[803] Mr Davidson has projected the growth of Oschadbank Crimea's income based on a number of factors. These include the following factors:[804]

(i) Oschadbank Crimea could offer stability and protection to its customers during a difficult time for the Ukrainian banking industry;

(ii) the lending and borrowing structure which was mainly denominated in foreign currency made Oschadbank Crimea resistant to foreign exchange risk. Accordingly, unlike other banks that were more vulnerable, Oschadbank Crimea would not have been affected by the depreciating national currency and could build more on its strong market position;

(iii) Oschadbank Crimea was an attractive part of the Claimant's business and there were plans to increase its presence in Crimea by increasing the number of outlets during 2014 – this expansion would have led to better relationships with customers and also attracted new business for Oschadbank Crimea;

(iv) the Claimant had undergone a strategic makeover under a new Chairman in 2014 – if Oschadbank Crimea had continued to exist, it would have been affected by the strategic reshaping, better management quality and new vision; and

(v) Oschadbank Crimea had a unique sustainable competitive advantage in cash-in-transit services because of its ownership structure which allowed minimising the cost of security.

562. Having analysed the totality of the available information, Mr Davidson considers UAH 983,550,000 and UAH 737,300,000 to be valid and reliable estimates of the maintainable profits

802 Davidson Report, paras. 3.7.

803 Davidson Report, paras. 3.82.

804 Davidson Report, para. 3.86.

at 28 February and 31 March 2014 which Oschadbank Crimea could have achieved if its activity had not been curtailed by the actions of the Russian Federation.[805]

b. Capitalisation rate

563. The capitalisation rate for the valuation of a business is a specific factor that evaluates the risks and opportunities of the business and suggests the rate at which the future profits should be capitalised. Mr Davidson has based his capitalisation rate on a consideration of the Claimant's cost of capital, calculated using the Weighted Average Cost of Capital (**WACC**) model and the Capital Asset Pricing Model (**CAPM**).[806]

564. The WACC approach considers a variety of relevant factors and is accepted in the industry as a reasonable and valid approach to calculating a discount rate. The WACC model works well when, as in the present circumstances, there are no immediate comparators.[807] It seeks to identify the entity's overall cost of capital, taking account of both equity and debt, and relies more significantly on the entity's internal information, its internal requirements in terms of return on capital, and its internal measuring of risk. The CAPM, on the other hand, relies on more market formed information and takes its cue from the premium which an investor in the market requires to compensate himself for the additional risk attached to a particular investment in excess of the risk free alternative (government bonds and other securities deemed risk-free).[808]

565. Mr Davidson concludes that the cost of capital of 14% represents a valid estimate of the capitalisation rate for the valuation of goodwill lost for both Valuation Dates.[809]

566. Mr Davidson values the loss of goodwill using the relevant projected profits after tax and capitalisation rate as follows: **USD 712,371,214.29** as at 28 February 2014; **USD 484,616,757.14** as at 31 March 2014.[810]

3. Other heads of loss

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

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805 Davidson Report, para. 3.100.

806 Davidson Report, para. 3.93.

807 Davidson Report, para. 4.23.

808 Davidson Report, para. 4.25.

809 Davidson Report, para. 3.99.

810 Davidson Report, para. 3.100.

a. Seized assets that belong to third parties

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

569. As described above, on 16 May 2014 and 21 May 2014, representatives of the Crimean Self-Defence Forces and purported high ranking Crimean officials seized cash and valuables stored at the head office of Oschadbank Crimea, including 40 bags of gold, jewellery and precious stones.[811] There are two criminal court judgments of the purported Crimean courts against the conspirators and they establish the value of the lost gold, jewellery and precious stones at RUB 605 million (approximately equivalent to USD 17.5 million at the date of seizure, 21 May 2014) and cash at over UAH 32 million (approximately equivalent to USD 2.8 million as at the date of seizure, 16 May 2014).[812] The total loss of these assets is therefore calculated at USD 20.3 million.[813]

b. Securities lost for the transactions of other branches

570. In December 2013 and January 2014, the Claimant entered into two agreements confirming stand-by letters of credit with a third entity, Brokbiznesbank.[814] For both confirmation agreements, the Bank had honoured its commitments but did not receive the commission that was due and in respect of one, reimbursement of the sums paid under the letter of credit. As a result, the Bank commenced arbitration proceedings before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in September 2014, receiving successful awards in January 2015 for the recovery of debt in the amounts of EUR 125,000 and USD 8,377,778.38 and legal costs in the amount of EUR 9,303.62 and USD 44,298.49.[815] The awards are not enforceable as the relevant assets of the counterparty comprises of petrol and diesel which was stored in Crimea and enforcement in Crimea remains impossible due to the Russian action in Crimea. This is a loss to the Claimant caused by the Russian Federation that Mr Davidson has valued at USD 8,605,857.94 as at 28 February 2014 and USD 8,606,798.07 as at 31 March 2014.[816]

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811 *See* paras. IV.D.3.182, IV.D.4.184 above.

812 *See* footnote 311 above.

813 Davidson Report, 3.106.

814 Pyshnyy Statement, para. 58.

815 Davidson Report, para. 10.11.

816 Davidson Report, para. 10.12.

G. INTEREST

571. Interest is an integral part of full reparation under customary international law.[817] The purpose of the payment of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive".[818] The Tribunal has full discretion to determine the most appropriate rate of interest to achieve full reparation.[819] The Claimant notes, in this regard, that the Treaty's reference to an applicable interest rate in connection with compensation for expropriation does not bind the Tribunal, as that provision concerns only lawful expropriations under the Treaty.

572. A State's duty to make reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the compensation to productive ends.[820] Thus, in addition to the principal sum that the Claimant should be awarded, it is entitled under the Treaty to interest from the date of breach until the date that it is paid in full. Moreover, pursuant to established arbitral practice, compound interest should be awarded in order for the amount of compensation to reflect the additional sum that the Claimants would have earned if the money had been reinvested each year at generally prevailing rates of interest.[821]

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

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817 *See*, e.g., *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina,* ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, **CLA-136**, para. 9.2.1 ("the liability to pay interest is now an accepted legal principle"); *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, **CLA-150**, para. 128; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, **CLA-51**, Art. 38; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (2002), **CLA-96**, p. 235.

818 *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, **CLA-136**, para. 9.2.3.

819 *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 Feb. 2000, **CLA-185**, para. 103 ("the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal").

820 *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, **CLA-150**, para. 128.

821 Compound interest has become the norm in investment arbitration: *see*, e.g., *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, **CLA-146**, para. 129; *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 Feb. 2000, **CLA-185**, para. 104.

a. Pre-award interest

574. The Claimant is entitled to pre-award interest on all compensation awarded for the expropriation of its investment in Crimea. This interest accrues from the appropriate Valuation Date until the date of the Award.[822]

(i) Rate of interest

575. As Mr Davidson states in his Expert Report, the appropriate pre-award interest rate in this case should be the commercial interest rate available to the Claimant in the Ukrainian marketplace, this being the rate most appropriate to compensate the Claimant for the time value of its economic loss until the rendering of an award compensating the Claimant for that loss.[823] Accordingly, and in order to calculate the relevant rate of interest, Mr Davidson has obtained statistics published by the National Bank of Ukraine and opines that for the period under review (March 2014 until 31 December 2017), the applicable interest rate was between 8.27% and 8.81%.[824]

(ii) Compounding of interest

576. Compound interest is routinely awarded in investment treaty awards because it gives effect to the rule of full reparation.[825] Compound interest ensures that a respondent state is not given a windfall as a result of its breach, as compounding recognises the time value of the claimant's losses.[826] It also "reflects economic reality in modern times" where "the time value of money in free market economies is measured in compound interest".[827] Mr Davidson concurs that interest is often

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822 *See*, e.g., *LG&E Energy Corp. & Ors. v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, **CLA-186**, paras. 104; *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, 24 Dec. 2007, **CLA-187**, para. 457; *Gemplus SA and Ors. v. Mexico*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, **CLA-188**, para. 16.21.

823 Davidson Report, para. 11.10.

824 Davidson Report, para. 11.15.

825 S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), **CLA-182**, p. 384. *See*, e.g., *Metalclad Corporation v. Mexico*, Award, ICSID Case No. ARB(AF)/97/1, 30 Aug. 2000, **CLA-150**, para. 128 (stating that interest should be compounded in order to "restore the Claimant to the position in which it would have been if the wrongful act had not taken place").

826 T. Senechal and J. Gotanda, "Interest as Damages" (2008-2009) 47 *Columbia JTL* 491, **CLA-189**, p. 532.

827 *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, **CLA-158**, para. 309.

applied to the principal loss sum on a compound basis.[828] Mr Davidson accordingly has calculated interest on a compound basis.[829]

b. Post-award interest

577. To the extent that the Russian Federation does not immediately satisfy an eventual damages award issued by this Tribunal, the Claimant is entitled to interest accruing from the date of the Tribunal's damages award until such time as payment is made in full. This category of interest, which is "intended to compensate the additional loss incurred from the date of the award to the date of final payment",[830] must be sufficient to deter potential delay in the payment of the amount specified in an award.

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

VIII. REQUEST FOR RELIEF

579. For the reasons stated, the Claimant respectfully requests an Award from the Tribunal:

(i) confirming that it has jurisdiction to determine the present dispute;

(ii) declaring that the Russian Federation has breached the Treaty and international law, and in particular Articles 2(2) (Unconditional Legal Protection); 3(1) (Most Favoured Nation treatment); 4 (Transparency of Legislation); 5(1) (Expropriation) and 7 (Transfer of Funds) of the Treaty;

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

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828 Davidson Report, para. 11.2(i).

829 Set out in the Davidson Report, para. 11.18.

830 *Autopista Concesionada de Venezuela, CA v. Venezuela*, ICSID Case No. ARB/00/5, Award, 23 Sept. 2003, **CLA-190**, para. 380.

(iv) alternatively, ordering the Russian Federation to pay such other amount to be determined by the Tribunal, in accordance with the Honeycomb Report;

(v) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at a rate at least between 8.27% and 8.81% or another reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of valuation until the date of the Award;

(vi) under (iii) and (iv), ordering the Russian Federation to pay interest on any amount awarded, at an annual rate of at least 8.27% or a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full;

(vii) ordering the Russian Federation to pay all costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest thereon at a reasonable commercial rate to be determined by the Tribunal, compounded annually, accruing from the date of the Award until payment in full; and

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

Respectfully submitted,

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