BILAGA 1

IN THE MATTER OF AN ARBITRATION UNDER THE 2017 ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE
SCC ARBITRATION V2019/088

State Development Corporation "VEB.RF"
(Russian Federation)

Claimant

-and-

Ukraine

Respondent

PARTIAL AWARD ON PRELIMINARY OBJECTIONS

Arbitral Tribunal:

Mr Paolo Michele Patocchi
Ms Loretta Malintoppi
Mr Constantine Partasides QC (Presiding)

31 January 2021

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I. INTRODUCTION

1. This Partial Award on Preliminary Objections is rendered in accordance with the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC Rules**").

A. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant

2. The Claimant in this Arbitration is the State Development Corporation "VEB.RF" ("**Claimant**" or "**VEB**"), a State Corporation organised under the laws of the Russian Federation, with its address at:

Akademika Sakharova Prospect, 9
Moscow, 107996, Russia

3. The Claimant is represented in this arbitration by:

Mr Kirill Udovichenko
Mr Dmitry Andreev
Ms Anna Kostina
Ms Maria Petrenko
Ms Nataliia Soldatenkova
Monastyrsky, Zyuba, Stepanov & Partners ("**MZS**")
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Mr Johan Sidklev
Ms Shirin Saif
Mr Andreas Hallbeck
Ms Lotta Näätsaari
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lotta.naatsaari@roschier.com

2. The Respondent

4. The Respondent in this Arbitration is the State of Ukraine ("**Respondent**" or "**Ukraine**").

5. The Respondent is represented by:

Mr Michael Siroyezhko
Ms Yuliia Dikhtiievska
Ministry of Justice of Ukraine
13, Horodetskogo Arkhitektora St.
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Professor Emmanuel Gaillard
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Mr Nils Eliasson
Mr Marc Jacob
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6. The Claimant and the Respondent are individually referred to below as a "**Party**," and jointly as the "**Parties**".

B. THE TRIBUNAL

7. The Members of the Tribunal are:

Mr Paolo Michele Patocchi
Patocchi & Marzolini
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Three Crowns LLP
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8-10 New Fetter Lane
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8. Pursuant to Article 24 of the SCC Rules, and with the Parties' agreement, the Tribunal engaged Ms Ruimin Gao as Administrative Secretary (the "**Administrative Secretary**"). Her details are as follows:

Ms Ruimin Gao
Three Crowns LLP
New Fetter Place
8-10 New Fetter Lane
London EC4A 1AZ
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Email: ruimin.gao@threecrownsllp.com

II. PROCEDURAL HISTORY

A. REQUEST FOR ARBITRATION

9. On 20 June 2019, the Claimant filed a Request for Arbitration ("**Request for Arbitration**"), together with accompanying exhibits and legal authorities, with the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**"), seeking to institute arbitral proceedings under the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, concluded in Moscow on 27 November 1998 ("**Russia-Ukraine BIT**" or "**Treaty**").

10. According to the Request for Arbitration, the Claimant seeks relief for alleged breaches by the Respondent of its obligations under the Treaty in relation to:

(i) legal protection of investments (Article 2(2) of the Treaty);

(ii) national regime, most favoured nation ("**MFN**") treatment and prohibition on discriminatory measures (Article 3(1) of the Treaty);

(iii) ban on unlawful direct and indirect expropriation (Article 5(1) of the Treaty); and

(iv) free transfer of payments (Article 7(1) of the Treaty).

11. In addition, the Claimant alleges in the Request for Arbitration that the Respondent failed to comply with standards of protection extended by Ukraine to other foreign investors, for example, under the bilateral investment treaty between the United Kingdom and Ukraine for:

(i) fair and equitable treatment ("**FET**");

(ii) full protection and security ("**FPS**"); and

(iii) observance of obligations (i.e. an "umbrella" clause).

12. On 20 June 2019, the SCC acknowledged receipt of the Request for Arbitration and payment of the registration fee.

13. On 24 June 2019, the SCC notified the Respondent of the Request for Arbitration, enclosing a copy of the Request for Arbitration, together with accompanying exhibits and legal authorities. The SCC informed the Respondent that according to Article 9 of the SCC Rules, the Respondent was requested to submit its Answer to the Request for Arbitration ("**Answer**") by 8 July 2019.

14. Pursuant to the Respondent's request, by letter dated 5 July 2019, the SCC granted the Respondent an extension of time to submit its Answer until 15 July 2019.

15. On 15 July 2019, the Respondent submitted its Answer, together with accompanying exhibits, in which it contends that the dispute falls outside of the Tribunal's jurisdiction or, alternatively, that the Claimant's claims are not admissible. The Respondent further denies the claims in respect of alleged violations of the Treaty, arguing that even if the losses alleged to have been suffered by the Claimant were caused by the Respondent's conduct – which the Claimant has yet to prove – the allegations are in any event without merit.

16. On 21 August 2019, the Claimant submitted an application for the appointment of an emergency arbitrator to the SCC in accordance with Article 37 and Appendix II of the SCC Rules. An emergency arbitrator, Mr Joe Tirado, was appointed by the SCC Board on 22 August 2019. Mr Tirado rendered an Award on Interim Measures on 28 August 2019 ("**Emergency Award**"), which granted interim conservatory measures sought by the Claimant in respect of its investment in Ukraine.

B. SEAT OF THE ARBITRATION

17. In the Request for Arbitration, the Claimant noted that the Treaty does not provide for the seat of arbitration and requested that, if the Parties did not

agree, the SCC Board should determine pursuant to Article 25(1) of the SCC Rules for Stockholm, Sweden to be the seat of the Arbitration.[1]

18. In its Answer, the Respondent counter-proposed for London to be the seat of the Arbitration. In the event that the Claimant did not agree and the SCC Board was called upon to determine the matter pursuant to Article 25(1) of the SCC Rules, the Respondent requested for the SCC Board to choose a "respectable European arbitration hub other than Stockholm or London".[2]

19. Both Parties maintained their positions with respect to the seat of the Arbitration in subsequent communications to the SCC, from the Claimant dated 23 July 2019 and from the Respondent dated 31 July 2019. On 14 August 2019, the SCC notified the Parties that the SCC Board had determined the seat of the Arbitration is Stockholm, Sweden.

C. LANGUAGE OF THE ARBITRATION

20. Noting the absence of any provisions in the Treaty regarding the language of the Arbitration, the Claimant proposed in its Request for Arbitration that the language of the Arbitration shall be English.[3]

21. In its Answer, Ukraine agreed that English shall be the language of the present proceedings.[4]

D. CONSTITUTION OF THE TRIBUNAL

22. In the Request for Arbitration, the Claimant proposed that the Tribunal shall consist of three arbitrators,[5] and nominated Mr Paolo Michele Patocchi as Co-Arbitrator.

23. In its Answer, the Respondent agreed that the Tribunal shall consist of three arbitrators,[6] and nominated Ms Loretta Malintoppi as Co-Arbitrator.

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1 Request for Arbitration, ¶¶ 109-110.

2 Answer, ¶¶ 27-31.

3 Request for Arbitration, ¶ 111.

4 Answer, ¶ 32.

5 Request for Arbitration, ¶¶ 106-107.

6 Answer, ¶ 24.

24. On 17 July 2019, the SCC notified the Parties of the Co-Arbitrators' confirmation of acceptance of their appointments and provided a copy of each Co-Arbitrator's *curriculum vitae*.

25. On 22 and 29 July 2019, the Claimant sought additional disclosures from Ms Malintoppi, which were provided on 29 July 2019. The Claimant confirmed in a letter to the SCC on 5 August 2019 that it did not intend to challenge Ms Malintoppi at that time, whilst reserving its rights in the event that any new facts should give rise to doubts about Ms Malintoppi's impartiality or independence.

26. Following the Parties' completion of an agreed list procedure method for the appointment of the Presiding Arbitrator, the SCC notified the Parties on 10 September 2019 that Mr Constantine Partasides QC had been appointed as Presiding Arbitrator.

27. A case management conference was held on 18 October 2019 by teleconference with the Tribunal and Parties in attendance. On 25 October 2019, the Tribunal issued Procedural Order No. 1, together with the procedural timetable at Annex A ("**Procedural Timetable**").

28. The Procedural Timetable provided for the Parties to submit two rounds of written submissions each in respect of four preliminary requests:

    (i) The Respondent's request for the bifurcation of the proceedings and early determination of its preliminary objections raised in its Answer to the Request for Arbitration. The procedural history and outcome of this request are detailed in Section II.E below.

    (ii) The Claimant's request for a separate award for the Respondent to reimburse the Claimant for the payment of the Respondent's share of the advance on costs determined by the SCC in the present proceedings. On 10 April 2020, the Tribunal issued a separate award in accordance with Article 51(5) of the SCC Rules, ordering the Respondent to reimburse the Claimant for the former's share of the advance on costs and to pay the Claimant's reasonable legal expenses incurred in making its request.

    (iii) The Respondent's request to set aside the Emergency Award rendered on 28 August 2019. On 2 March 2020, the Tribunal issued Procedural Order No. 3, which detailed the procedural history and

outcome of the emergency arbitration proceedings, and set out the Tribunal's reasons for dismissing the Respondent's request to set aside the Emergency Award at that time.

(iv) The Claimant's request for a separate award on the assessment of its reasonable legal expenses of the emergency arbitration proceedings. On 10 April 2020, the Tribunal issued a separate award in accordance with Article 44 of the SCC Rules, ordering the Respondent to pay forthwith to the Claimant the reasonable legal expenses incurred by the Claimant in connection with the emergency arbitration proceedings.

E. BIFURCATION OF PROCEEDINGS

29. As stated above, the Procedural Timetable provided, *inter alia*, for written submissions in order for the Tribunal to determine a preliminary request by the Respondent to bifurcate the proceedings.

30. On 2 March 2020, following receipt of two rounds of written submissions from each Party, the Tribunal issued Procedural Order No. 2 granting the Respondent's request for bifurcation of the Respondent's preliminary objections with the following directions:

(i) confirming that the Respondent's preliminary objections are stated as follows:

(a) that the Tribunal has no jurisdiction *ratione personae*; and

(b) that pre-conditions for access to arbitration set forth in Article 9 of the Treaty have not been met; and

(ii) ordering the Respondent to raise any other preliminary objections it has as to jurisdiction or admissibility in the bifurcated first phase.

31. On 18 April 2020, the Respondent filed its Memorial on Preliminary Objections and Request for Production of Documents dated 17 April 2020 ("**Memorial**"), together with the expert report of Professor Eyal Benvenisti dated 17 April 2020 ("**Expert Report of Professor Benvenisti**") and accompanying exhibits and legal authorities.

32. The Respondent's Memorial raised the following preliminary objections for the first time:

    (i) "The Claimant has not alleged facts sufficient to make a *prima facie* showing of a denial of justice";[7] and

    (ii) "The Claimant's attempt to import other standards of treatment through the most-favoured-nation clause is unavailing".[8]

33. On 20 April 2020, by way of a letter to the Tribunal, the Claimant sought directions from the Tribunal, *inter alia*, that: (i) the new preliminary objections raised by the Respondent should be considered in the merits phase of the proceedings rather than in the bifurcated first phase of the proceedings; and (ii) no requests for document production be allowed in the bifurcated first phase of the proceedings.

34. On 4 May 2020, having considered submissions and observations from both Parties, the Tribunal issued Procedural Order No. 4, allowing for an additional objection raised by the Respondent in Section III.D.1 of its Memorial to be addressed in the bifurcated first phase of this Arbitration, namely the Respondent's objection that "the MFN clause in Article 3(1) of the BIT cannot import the FET, FPS and 'umbrella' clauses from the UK-Ukraine BIT". In ordering for the remaining new preliminary objections raised by the Respondent to be addressed in the next phase of this Arbitration (if it should occur), the Tribunal had regard to the nature of those objections which would involve evidential considerations that could not be adequately accommodated within the Procedural Timetable for the first phase of the proceedings that had already been fixed.

35. The Tribunal also made provision for document production in the bifurcated first phase of the proceedings in accordance with the timetable at Annex A of Procedural Order No. 4 ("**Additional DPR Timetable**"). By way of a letter to the Parties on 6 May 2020, the Tribunal issued a revised Additional DPR Timetable.

36. Pursuant to the Additional DPR Timetable (as amended), on 18 May 2020, the Respondent submitted its requests for document production in the form of a Redfern Schedule to the Tribunal for determination. On 22 May 2020,

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7 Respondent's Memorial, Section III.C.

8 Respondent's Memorial, Section III.D.

the Tribunal issued Procedural Order No. 5 on the disputed requests for document production, in which it ordered the production of some of the disputed production requests, but rejected others. The Tribunal directed the Claimant to produce the requested documents as agreed or as directed by the Tribunal by 2 June 2020.

37. On 2 June 2020, the Claimant filed its Counter-Memorial on Preliminary Objections ("**Counter-Memorial**"), together with:

(i) the witness statement of Mr Igor Krasnov ("**Witness Statement of Mr Krasnov**");

(ii) the expert report of Professor Anton Asoskov ("**Expert Report of Professor Asoskov**");

(iii) the expert report of Dr Ursula Kriebaum ("**Expert Report of Dr Kriebaum**"); and

(iv) accompanying exhibits and legal authorities.

38. Pursuant to the Additional DPR Timetable (as amended), on 16 June 2020, the Claimant also submitted its requests for document production in the form of a Redfern Schedule to the Tribunal for determination. On 24 June 2020, the Tribunal issued Procedural Order No. 6 on the disputed requests for document production, in which it ordered the production of some of the disputed production requests, but rejected others. The Tribunal directed the Respondent to produce the requested documents as agreed or as directed by the Tribunal by 6 July 2020.

39. On 6 July 2020, the Respondent filed its Reply on Preliminary Objections ("**Reply**"), together with the Second Expert Opinion of Professor Eyal Benvenisti ("**Second Expert Report of Professor Benvenisti**") and accompanying exhibits and legal authorities.

40. On 17 August 2020, the Claimant filed its Rejoinder on Preliminary Objections ("**Rejoinder**"), together with accompanying exhibits and legal authorities.

F. HEARING ON PRELIMINARY OBJECTIONS

41. On 25 November 2019, the Tribunal notified the Parties that the hearing dates for bifurcated proceedings were fixed for 9 to 11 September 2020 ("**September 2020 Hearing**"). On 7 April 2020, the Tribunal wrote to the Parties inviting them to give early consideration to the arrangements for the September 2020 Hearing, in view of the COVID-19 outbreak and its likely impact on the availability of hearing venues.

42. The Claimant responded by way of a letter on 11 April 2020, proposing for the hearing to be held in the Stockholm office of the Claimant's counsel, Roschier, or, alternatively, at the Stockholm International Hearing Centre.

43. By way of email on 21 April 2020, the Respondent indicated that its preference was for the hearing to be held in a neutral forum, such as the Stockholm International Hearing Centre, given the highly political nature of this dispute. The Respondent further expressed concerns that the hearing may not proceed as originally planned given that restrictions and measures in place due to the COVID-19 pandemic may still be in place or have been re-introduced by September 2020, and that travel restrictions may make travel to Stockholm impossible. The Respondent noted that its strong preference was for an in-person hearing but, should that not prove possible, it recognised that video conferencing may need to be considered to allow the hearing to take place without undue delay.

44. On 22 April 2020, the Tribunal responded to the Parties by email and invited them to make efforts to reserve a neutral hearing venue in Stockholm, in order that the Tribunal and the Parties can evaluate the viability of an in-person hearing as circumstances develop. Subsequently, on 18 May 2020, the Respondent informed the Tribunal that a preliminary reservation for the September 2020 Hearing had been made at the Stockholm International Hearing Centre.

45. On 2 July 2020, the Tribunal contacted the Parties again by email to advise that, in view of the ongoing COVID-19 pandemic and the travel and other governmental restrictions introduced to address it, it had become apparent that one or more members of the Tribunal would not be able to travel to Stockholm to attend the September 2020 Hearing in person. Anticipating that similar constraints may exist for some or all of the Parties, their counsel and/or their witnesses/experts, the Tribunal invited the Parties' views on the

possibility of the hearing taking place entirely or partially by means of a virtual platform.

46. The Parties each responded by email on 10 July 2020, as follows:

(i) The Claimant proposed a partially remote hearing to take place at the Stockholm International Hearing Centre, with all attendees invited to attend in person but with the necessary arrangements being made for a virtual hearing for any person who wished to participate remotely. Whilst it was of the view that a partially remote hearing would be more efficient than an entirely remote hearing, the Claimant noted that it wished to be guided by the convenience of the Tribunal and that "[i]f the Tribunal prefers to hold the hearing entirely remotely, the Claimant would agree to such a format as well. It is essential for the Claimant that the existing travel restrictions do not delay the arbitral process."

(ii) The Respondent confirmed that similar constraints as faced by one or more members of the Tribunal applied to the Respondent's team in respect to travel to Stockholm to attend the hearing in person. Accordingly, the Respondent advised it would be willing to proceed with an entirely remote hearing but did not agree to a partially remote hearing because the latter option "cannot be reconciled with the fundamental principles of equality of arms and due process. There would not be a fair balance between the opportunities afforded to the parties involved in this arbitration in a situation where the ability to attend is uneven or not all party-appointed arbitrators can be present in person."

47. In response to a follow-up query from the Tribunal as to which members of each Parties' legal team, their witnesses or experts were unlikely to be able to travel to Stockholm for an in-person hearing in September 2020, the Parties indicated separately by email on 16 July 2020 that:

(i) The Claimant's legal team, witnesses and experts were likely to be able to travel to Stockholm for an in-person hearing. However, the Claimant's legal experts, Dr Kriebaum and Professor Asoskov had expressed a strong preference to give evidence via video link.

(ii) The Respondent's counsel and its representatives from the Ministry of Justice of Ukraine were affected by travel constraints that would

prevent them from attending an in-person hearing in Stockholm. Additionally, the Respondent's expert, Professor Benvenisti, would be subject to a quarantine regime upon his return to Israel and, in the circumstances, expressed a strong preference for his evidence to be given via video link. The Respondent was thus of the view that "a fully remote hearing appears to be the only safe, fair and efficient option".

48. On 21 July 2020, the Tribunal notified the Parties that in the interests of equality the September 2020 Hearing would take place entirely by means of a virtual platform rather than physically in person, taking into account both Parties' indications on the ability of their representatives and witnesses to travel to Stockholm for an in-person hearing, and considering the constraints that would impact one or more members of the Tribunal.

49. In its email to the Tribunal of 10 July 2020, the Claimant also requested that the Tribunal direct an authorised representative of the Respondent to consent to the selected procedure for the September 2020 Hearing, noting that the power of attorney provided to the Respondent's counsel, Shearman & Sterling,[9] had expired on 31 December 2019. Upon the Tribunal's invitation for its comments, the Respondent responded on 16 July 2020 that no question arises as to the Respondent's consent to any steps in the Arbitration given the continuous participation of the Ministry of Justice of Ukraine, representatives of which have been copied on correspondence and appeared as a co-signatory to the Respondent's written submissions throughout.

50. On 17 July 2020, the Claimant requested that the Tribunal direct the Ministry of Justice to provide confirmation of (i) of its participation in these proceedings; (ii) its agreement to the September 2020 Hearing being held remotely via video conference, as proposed by Shearman & Sterling; and (iii) its authorisation for Shearman & Sterling to appear on its behalf at the pre-hearing conference and at the September 2020 Hearing in these proceedings.

51. On 31 July 2020, having received further responses from both Parties with respect to the Claimant's request, the Tribunal issued Procedural Order No. 7, directing the Ministry of Justice of Ukraine to provide either a power

[9] Power of Attorney for Shearman & Sterling LLP executed on 24 December 2019, Exhibit C-081.

of attorney, or another official letter signed by an authorised official and addressed to the Tribunal, confirming that:

(i) the Ministry of Justice of Ukraine confirms and adheres to the content of all of the submissions and other communications made by Shearman & Sterling LLP on the Respondent's behalf in the proceedings since 31 December 2019; and

(ii) the Ministry of Justice of Ukraine authorises Shearman & Sterling LLP to appear on behalf of Ukraine at the pre-hearing conference and at the hearing on 9 to 11 September 2020.

52. By way of a letter to the Tribunal dated 3 August 2020, the Ministry of Justice of Ukraine provided the relevant confirmations pursuant to the Tribunal's directions in Procedural Order No. 7.

53. A pre-hearing conference was held on 12 August 2020 by teleconference ("**Pre-Hearing Conference**") to discuss issues pertaining to the organisation of the September 2020 Hearing. In addition to the members of the Tribunal and the Administrative Secretary, the following persons attended the hearing:

(i) the Claimant's counsel: Mr Kirill Udovichenko, Mr Dmitry Andreev (MZS); Mr Johan Sidklev, Ms Shirin Saif and Mr Andreas Hallbeck (Roschier);

(ii) the Respondent's counsel: Professor Emmanuel Gaillard, Ms Jennifer Younan, Mr Marc Jacob (Shearman & Sterling); and

(iii) the Respondent's representative: Mr Michael Siroyezhko (Ministry of Justice of Ukraine).

54. Following the Pre-Hearing Conference, the Tribunal issued Procedural Order No. 8 on 17 August 2020, setting out the Tribunal's directions concerning the conduct of the September 2020 Hearing and annexing a draft Virtual Hearing Protocol for the Parties' consideration. The Virtual Hearing Protocol was issued by the Tribunal in final form to the Parties on 25 August 2020.

55. On 2 September 2020, pursuant to the Procedural Timetable, the Parties exchanged their skeleton arguments.

56. Following receipt of the Claimant's skeleton argument, the Respondent raised an objection, by way of a letter to the Tribunal on 3 September 2020, that the Claimant had attempted to introduce new exhibits and legal authorities into the record in breach of the Tribunal's directions. Upon invitation from the Tribunal, the Claimant provided its response to the objection on 3 September 2020.

57. On 4 September 2020, the Tribunal notified the Parties of its decision in relation to the new exhibits and legal authorities submitted by the Claimant with its skeleton argument on 2 September 2020, as follows:

(i) the Tribunal did not admit the new Exhibits C-129 and C-130; and

(ii) the Tribunal admitted the new legal authorities CLA-241 to CLA-247, all of which were in any event in the public domain, but only for the purpose of the cross-examination of Professor Benvenisti.

58. On 7 September 2020, pursuant to the Tribunal's directions in Procedural Order No. 8, the Parties exchanged their visual aids for the opening statements at the September 2020 Hearing.

59. The September 2020 Hearing commenced, as scheduled, on 9 September 2020 and concluded the following day on 10 September 2020. In addition to the members of the Tribunal and the Administrative Secretary, the following persons attended the September 2020 Hearing:

(i) the Claimant's counsel: Mr Kirill Udovichenko, Mr Dmitry Andreev, Ms Anna Kostina, Ms Maria Petrenko and Ms Nataliia Soldatenkova (MZS); Mr Johan Sidklev, Ms Shirin Saif, Mr Andreas Hallbeck and Ms Lotta Näätsaari (Roschier);

(ii) the Claimant's representatives: Mr Daniil Yarnykh, Mr Mikhail Demin and Ms Asiyat Kurbanova;

(iii) the Claimant's witness: Mr Igor Krasnov;

(iv) the Respondent's counsel: Professor Emmanuel Gaillard, Ms Jennifer Younan, Mr Marc Jacob, Ms Anna Guillard Sazhko and Mr Andrei Solin (Shearman & Sterling);

(v) the Respondent's representatives: Mr Michael Siroyezhko and Ms Yuliia Dikhtiievska (Ministry of Justice of Ukraine);

(vi) the Respondent's expert: Professor Eyal Benvenisti; and

(vii) the court reporter and virtual platform host.

60. Prior to the conclusion of the September 2020 Hearing, on 10 September 2020, the Tribunal raised with the Parties the question of whether post-hearing briefs would be required. Both Parties' representatives having confirmed that they were of the view that no post-hearing briefs would be necessary, the Tribunal dispensed with the need for post-hearing briefs, save as might be necessary to respond to any questions that the Tribunal may have for the Parties during its deliberations.[10] The Tribunal raised no such further questions.

61. Counsel for the Respondent further made an oral application to the Tribunal pursuant to Article 31(3) of the SCC Rules that the Tribunal exercise its discretion to order Mr Vladimir Dmitriev (former Chairman of VEB) to give evidence in the proceedings.[11] The Tribunal heard brief oral submissions from both Parties and provided directions for the Respondent's request and the Claimant's response to be made in written form.[12] On 11 September 2020, the Tribunal issued Procedural Order No. 9, memorialising its directions.

62. The Respondent submitted its written request on 14 September 2020 pursuant to the Tribunal's directions in Procedural Order No. 9. The Respondent's position was that the timing of its request was driven by a "sudden change in the Claimant's position" following a concession by the Claimant's witness, Mr Krasnov, during cross-examination that Mr Dmitriev was in fact able to testify. According to the Respondent, given his former role as the Claimant's chairman, Mr Dmitriev has personal knowledge of key facts relevant to the Respondent's objection that the Tribunal has no jurisdiction under Article 9 of the Treaty.

63. In its written response on 18 September 2020, the Claimant opposed the Respondent's request on the basis that it was untimely and constituted an

10 Transcript, 10 September 2020, pp. 84-85, 88, 96.

11 Transcript, 10 September 2020, pp. 85-87.

12 Transcript, 10 September 2020, pp. 85-97.

abuse of process, being in violation of Article 33(1) of the SCC Rules and the Procedural Timetable which require the Parties to identify in advance the witnesses they would like to examine at a hearing. The Claimant further submitted that Mr Dmitriev's testimony would be irrelevant and immaterial to the Respondent's preliminary objections and that, in any event, it was the Respondent's responsibility to make Mr Dmitriev available to testify.

64. By way of a letter to the Parties dated 29 September 2020, the Tribunal directed for the Claimant to make best efforts to make Mr Dmitriev available for examination in this phase of the arbitration proceedings. The Parties subsequently made the following communications to the Tribunal in turn:

(i) On 6 October 2020, the Claimant informed the Tribunal that Mr Dmitriev had agreed to give evidence via video conference and would be available on 15 October 2020. The Claimant further requested the Tribunal's permission to submit a witness statement from Mr Dmitriev by 8 October 2020 and to share the hearing bundle with Mr Dmitriev.

(ii) On 8 October 2020, the Respondent confirmed its availability to examine Mr Dmitriev on 15 October 2020 by video conference and requested that the Claimant make the necessary arrangements, given that the arrangements for the September 2020 Hearing had been made by the Claimant.

(iii) On 8 October 2020, the Claimant requested that the Respondent make the arrangements for the examination of Mr Dmitriev given that, *inter alia*, the further hearing session had been convened at the Respondent's request.

65. The Tribunal informed the Parties by way of an email on 8 October 2020 that it would revert the following day with its further directions in respect of the examination of Mr Dmitriev on 15 October 2020.

66. On 9 October 2020, the Tribunal directed that:

(i) The examination of Mr Dmitriev be fixed to take place on 15 October 2020 between 9.30 am and 12.00 noon Stockholm time.

(ii) The Respondent arrange and pay for a virtual platform for the hearing on 15 October 2020.

(iii) The Claimant submit Mr Dmitriev's witness statement by close of business that day, 9 October 2020.

(iv) The Claimant make a copy of the hearing bundle available to Mr Dmitriev on a confidential basis but desist from providing Mr Dmitriev with a copy of the transcript of the September 2020 Hearing or otherwise to discuss the submissions or evidence evinced at that hearing with Mr Dmitriev.

67. In accordance with the Tribunal's directions, the Claimant submitted Mr Dmitriev's witness statement on 9 October 2020.

68. The examination of Mr Dmitriev proceeded, as scheduled, on 15 October 2020. In addition to the members of the Tribunal and the Administrative Secretary, the following persons attended the hearing:

(i) the Claimant's counsel: Mr Kirill Udovichenko, Mr Dmitry Andreev, Ms Anna Kostina and Ms Maria Petrenko (MZS); Mr Johan Sidklev and Ms Shirin Saif (Roschier);

(ii) the Claimant's representatives: Mr Daniil Yarnykh and Mr Mikhail Demin;

(iii) the Claimant's witness: Mr Igor Krasnov;

(iv) the Claimant's translator: Ms Olga Korneeva;

(v) the Respondent's counsel: Ms Jennifer Younan, Mr Marc Jacob, Ms Anna Guillard Sazhko and Mr Andrei Solin (Shearman & Sterling);

(vi) the Respondent's representatives: Mr Michael Siroyezhko (Ministry of Justice of Ukraine); and

(vii) the court reporter and representatives from the IT Department of the Respondent's counsel.

III. BACKGROUND FACTS

69. The backdrop to this Arbitration is the long-running political tension that has characterised the relationship between Ukraine and the Russian Federation following the collapse of the USSR and Ukraine's declaration of independence in 1991.

70. Prominvestbank ("**PIB**") is the lender to a number of State-owned and strategic private entities in Ukraine. At the onset of the global financial crisis in 2008, PIB's financial position was precarious, and the National Bank of Ukraine ("**NBU**") introduced provisional administration, appointed a provisional administrator and granted an emergency liquidity line to PIB. For a longer-term solution to PIB's financial position, the Ukrainian Government considered either the nationalisation of the bank, or selling it to a private investor.

71. On 30 December 2008, and in circumstances that Ukraine describes as obscure,[13] the provisional administrator appointed to PIB by the NBU approved the acquisition by VEB of a significant majority equity stake in PIB.

72. VEB describes itself as a non-profit development institution (*Institut Razvitiya*). It is established pursuant to a Russian federal law, Federal Law No. 82-FZ dated 17 May 2007 (as amended on 28 November 2018) "On State Development Corporation 'VEB.RF'" (the "**VEB Law**"). It is organised in the form of a State Corporation (*Gosudarstvennaya Korporaciya*), and is registered as such in the Russian Unified State Register of Legal Entities. As its counsel has submitted,[14] the Russian Government is the founder and ultimate controller of VEB, and its business purpose and functions are described in the VEB Law as follows:

> **Article 3. Business Purposes and Functions of VEB.RF**
>
> 1. VEB.RF shall act to facilitate the long-term socio-economic development of the Russian Federation, create the conditions for sustained economic growth, improve investment

[13] Respondent's Memorial, Part II.A.2.

[14] Claimant's Rejoinder, ¶ 31.

> efficiency and expand investment in the Russian economy by implementing projects domestically and abroad, including inward investment projects aimed at developing infrastructure, industrial production, innovation and special economic zones, protecting the natural environment, enhancing energy efficiency, promoting exports and helping Russian industrial products (goods, work, services) to expand into foreign markets and by carrying out other projects and/or transactions as part of investment, foreign economic, advisory and other activities provided for by this Federal Law (VEB.RF's projects).
>
> 2. VEB.RF may engage in entrepreneurial activities only to the extent that such activities serve and fulfil the purposes specified in Article 3(1) hereof. VEB.RF's profits generated by its activities shall be transferred to VEB.RF's funds and used solely for the purposes specified in Article 3(1) hereof.[15]

73. Following on from Articles 3.1 and 3.2, Articles 3.3 and 3.4 of the VEB Law list the financial and other investment activities that VEB can perform to fulfil the purpose set out in Article 3.1 of the VEB Law.

74. The measures complained of by the Claimant in this Arbitration followed the onset of the military crisis that has gripped Ukraine since early 2014, and which has resulted in allegations of invasion, annexation of Crimea and establishment of the allegedly independent 'People's Republics' in Donetsk and Luhansk in Eastern Ukraine. It is not for this Tribunal to address such political matters; nevertheless, the Tribunal observes that this military crisis has been declared by multilateral bodies and institutions such as the UN, the OSCE and the EU's European Council as illegal attacks on the territorial integrity of Ukraine by the Russian Federation, and has resulted in the imposition of US and EU sanctions against the Russian Federation and individuals and entities associated with it.

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[15] VEB Law, Articles 3.1 and 3.2, Exhibit C-003.

75. The Claimant's claims in this Arbitration pertain to the measures taken against it in Ukraine against the backdrop of Ukraine's political dispute with the Russian Federation. In particular, the Claimant alleges that throughout the period 2015 to 2019, Ukraine took various deliberate and successive steps to oust it from the country and put an end to its business there.[16] The Claimant alleges that these steps breached the standards of treatment to which it was entitled under the Treaty, and included: revoking PIB's licences to engage in various financial and investment activities; prohibiting Ukrainian State and State-owned entities from doing business with PIB by way of a Sanctions Law adopted by the Ukrainian parliament; imposing restrictions on the amounts of deposits that PIB could hold; compelling the closure of branches in Eastern Ukraine; using criminal investigation powers to harass PIB and its employees; banning transfer of all funds from PIB to VEB; frustrating, through its courts, attempts to enforce loans against State-owned borrowers; supporting a smear campaign against PIB in the Ukrainian media; and failing, through its law enforcement function, to protect PIB from violent acts of vandalism that damaged its property.

76. The Respondent denies the Claimant's allegations of breach of the Treaty, and argues that the measures the Claimant complains of must be evaluated taking into account that, even if the losses the Claimant alleges it suffered were caused by acts or omissions of the Respondent, they were taken in response to ongoing breaches by the Russian Federation of its international obligations owed to Ukraine.[17] Accordingly, the Respondent contends that the measures were thus taken for valid cause, were temporary in nature, and proportional to the injury caused by the Russian Federation, which excludes any responsibility of Ukraine under international law.

77. The merits of the Claimant's substantive claims and the Respondent's defences are not addressed in the present Partial Award because the Respondent has raised a number of preliminary objections, some of which, pursuant to its Procedural Orders No. 2 and No. 4, the Tribunal has directed be determined in a bifurcated preliminary phase of this arbitration.

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16 Request for Arbitration, ¶¶ 30-69.

17 Answer, ¶¶ 18-23.

78. The preliminary objections that are to be determined in this phase of the Arbitration comprise the following:[18]

(i) that the Claimant, being an organ or agent of the Russian Federation, cannot bring an arbitration under Article 9 of the Treaty;

(ii) that the Claimant did not observe the necessary pre-arbitral steps enshrined in Article 9 of the Treaty, thereby making its claims inadmissible; and

(iii) that the Claimant's attempt to import other standards of treatment through the MFN clause in the Treaty is unavailing.

79. The Tribunal proceeds to consider and determine each of these bifurcated preliminary objections in turn below. In so doing, it summarises the Parties' respective arguments before proceeding to analyse and determine the issue itself. In summarising the Parties' respective arguments, the Tribunal confirms that it has reviewed and considered all of the arguments and evidence presented by the Parties, whether or not they are mentioned in the summaries of the Parties' positions that follow.

IV. CAN THE CLAIMANT BRING AN ARBITRATION UNDER ARTICLE 9 OF THE TREATY

A. THE RESPONDENT'S POSITION

80. The Respondent's position is that the Claimant's claims cannot be brought pursuant to the dispute resolution mechanism in Article 9 of the Treaty. In support of this objection, the Respondent argues that (i) Ukraine's consent under Article 9 of the Treaty does not extend to arbitrations initiated by States, and (ii) the present dispute is an inter-State dispute because the Claimant is part of the Russian State.[19]

81. As an alternative argument, the Respondent contends that if the Tribunal were to find that the Claimant is not part of the Russian State, Article 9 of

[18] Pursuant to its Procedural Order No. 4, the Tribunal ordered that the Respondent's preliminary objection to the effect that the Claimant has not alleged facts sufficient to make a *prima facie* showing of a denial of justice be addressed in the next phase of this arbitration, should it occur.

[19] Respondent's Memorial, ¶¶ 204-274; Respondent's Reply ¶¶ 11-131; Respondent's Skeleton Argument, ¶¶ 19-39.

the Treaty is not open to the Claimant because it is an agent of the Russian State or exercises essentially governmental functions.[20]

82. *First*, the Respondent submits that Article 9 of the Treaty is not a State-to-State arbitration clause. The translation of Article 9 relied on by the Respondent provides relevantly as follows:

> 1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes, which concern the amount, terms of and procedure for payment of compensation provided for in Article 5 hereof or with the procedure for effecting a transfer of payments provided for in Article 7 hereof, a notification in writing shall be handed in, accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.
>
> 2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:
>
> a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;
>
> b) the Arbitration Institute of the Chamber of Commerce in Stockholm,
>
> c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).

[20] Transcript, 9 September 2020, pp. 50-57.

[…][21]

83. The Respondent's position is that the proper interpretation of Article 9 of the Treaty, in accordance with the Vienna Convention on the Law of Treaties ("**VCLT**"), is that the provision concerns disputes between States and non-State investors for the following reasons:

(i) The heading and text of Article 9 provides for the resolution of disputes between a "Contracting Party and the investor of the other Contracting Party". The Treaty is further characterised by a division and asymmetry between Contracting Parties and investors, as can be seen from virtually all substantive provisions in the Treaty which differentiate between States, as the obligors, and non-States, as the obligees, of treaty protection (e.g. Articles 2 to 8 of the Treaty).[22]

(ii) Article 9 contrasts with Article 10, which concerns "Disputes Between the Contracting Parties". The latter provides a distinct mechanism that caters for the resolution of disputes between the Contracting Parties. The existence of a bespoke State-to-State arbitration clause in Article 10 affirms that the procedure in Article 9 is not intended to apply to disputes between the two signatory States. As opined by the Respondent's expert, Professor Benvenisti, "[i]ncluding public actors among the private investors would render meaningless the fundamental difference between the two dispute settlement mechanisms that the Treaty envisions."[23]

(iii) In relation to the object and purpose of the Treaty, investment arbitration exists to reduce the level of sovereign risk faced by non-State foreigners, and not foreign nations. As distinct from the regime of diplomatic protection, the home State of the investor has no legal interest in the settlement of investment disputes between the investor and the host State. According to Professor Benvenisti, "the [Treaty] departs from the traditional regime of international law of diplomatic protection, whereby the state party has discretion whether or not to protect its national who had been injured by the other state,

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21 Russia-Ukraine BIT, Article 9, Exhibit RL-82.

22 Respondent's Memorial, ¶¶ 217, 227; Respondent's Reply ¶ 92; Respondent's Skeleton Argument, ¶ 21.

23 Expert Report of Professor Benvenisti, ¶¶ 72-73.

and offer the national direct rights vis-à-vis the host state" and the "object and purpose [of the Treaty] is meaningless if the injured party is the state party itself".[24]

(iv) As a matter of principle and policy, foreign governments pressuring States through investment claims aggravates international conflicts. Furthermore, permitting parallel proceedings by States under both Articles 9 and 10 of the Treaty would be "inefficient, vexatious and a recipe for procedural chaos".[25] Moreover, Article 10 provides for State-to-State arbitration and there is also the possibility of domestic litigation, which ensures that any claims of the Russian State would not fall into a "legal black hole".[26]

84. According to the Respondent, the definition of "Investor of a Contracting Party" in Article 1(2) of the Treaty does not change the analysis above, but rather only adds further qualifications regarding the non-State investor. In the Respondent's submission, Article 1(2) therefore imposes further preconditions within the overarching scheme of Article 9 that a putative non-State claimant must meet.

85. The Respondent further argues that Article 1(2) of the Treaty does not include, and deliberately excludes, "States" as a category of qualifying investors, in addition to natural and juridical persons.[27] This is in contrast to the precursor treaty, the Agreement on Cooperation in the Field of Investment Activities among the members of the Commonwealth of Independent States of 24 December 1993 (the "**CIS Investment Agreement**"), which is referred to in the preamble of the Treaty.

86. The CIS Investment Agreement expressly provided for a third category of investor in addition to natural and legal persons as follows:

> Investors of each Party in other States participating in this Agreement (hereinafter - "investors of the Parties"), are:

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24 Expert Report of Professor Benvenisti, ¶ 76.

25 Respondent's Skeleton Argument, ¶ 24; see also Second Expert Report of Professor Benvenisti, ¶ 25.

26 Respondent's Reply, ¶ 110.

27 Respondent's Memorial, ¶ 225; Respondent's Reply, ¶¶ 97-98.

> juridical persons established in accordance with the legislation of one of the Parties and authorised to make investments;
>
> natural persons - nationals of the Parties and permanently residing in their territory nationals of other States as well as stateless persons;
>
> States - participants of this Agreement as well as state and administrative units located within their territory as represented by juridical persons and natural persons authorized by them in accordance with the legislation of the Parties.[28]

87. *Second*, the Respondent contends that VEB is an organ of the Russian State, and not an autonomous entity.

88. In this regard, the Respondent submits that whether VEB is tantamount to the Russian Federation is a question of international law which depends on the substance of its relation to the Russian State and not its form according to domestic law. Professor Benvenisti further opines that international law is cautious and stringent in ensuring that States "do not trespass the fundamental distinction between the public and the private and do not mask their sovereign acts by putting on a false private appearance".[29] He notes, for instance, that international law doctrines permit the lifting of the corporate veil to treat a company like its owner in appropriate cases.[30]

89. Accordingly, with reference to principles of international law, including the rules of attribution for State responsibility, the Respondent argues that whether VEB is a State organ according to principles of international law is a factual matter of the degree of VEB's attachment to, dependence on, or control by the Russian State.[31]

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28 CIS Investment Agreement, Article 2, Exhibit RL-79.

29 Expert Report of Professor Benvenisti, ¶ 52.

30 Expert Report of Professor Benvenisti, ¶¶ 53-54.

31 See Expert Report of Professor Benvenisti, ¶¶ 8, 32, 36-42, citing *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment on the Merits, 27 June 1986, 1986 ICJ Rep. 14, pp. 52–53, ¶¶ 109–110, Exhibit RL-90; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

90. In the Respondent's submission, VEB is an organ of Russia and indistinguishable from the Russian State based on its structural, financial and functional characteristics, which include, *inter alia*, that:

(i) Russia set up VEB under a *sui generis* legal regime that ensures exclusive State control in all relevant respects at all times.[32]

(ii) VEB has no shareholders or participants, and only the Russian Federation can control it or benefit from its activities or acquisitions;

(iii) VEB's Supervisory Board, which makes all important operational and other decisions, is made up of senior Russian Government officials. It is chaired by the Russian Prime Minister, and the Russian Government appoints and dismisses all members.[33] The Supervisory Board also controls the Management Board of VEB, with the chairman of the Management Board being appointed and dismissed by the Russian President.[34] The three former chairmen of VEB have held long State careers or been reported to have close ties with the Russian President.[35]

(iv) VEB is a non-commercial, non-profit governmental entity that pursues State goals relating to the socio-economic development of the Russian Federation.[36] The Russian Government approves VEB's Memorandum on Financial Policies, which governs VEB's

(Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, 2007 ICJ Rep. 43, ¶¶ 391–393, Exhibit RL-103.

32 See Explanatory Note to Draft Federal Laws "On the Development Bank" and "On Amendments to Articles 7 and 13 of the Federal Law 'On Banks and Banking Activities' in Connection with the Adoption of the Federal Law 'On the Development Bank'", Exhibit R-20.

33 See VEB Law, Article 10, Exhibit C-003.

34 See VEB Annual Report, 2018, pp. 62-63, Exhibit R-179.

35 See VEB Website, "About us", Profile of Igor Shuvalov, Exhibit R-4; Chamber of Commerce and Industry of the Russian Federation Website, "Vladimir Dmitriev Biography", Exhibit R-18; *The Guardian*, "Who is Sergei Gorkov, the powerful Russian banker who met Jared Kushner?", 3 June 2017, Exhibit R-172; *American Interest*, "Vnesheconombank; Who Are These Russian Bankers?", 28 June 2017, Exhibit R-175.

36 See VEB Law, Article 3(1), Exhibit C-003.

operations and main objectives, and also establishes the procedure for preparing this Memorandum.[37]

(v) VEB performs public activities of the Russian Federation, including acting as:

(a) the financial crisis manager, international creditor negotiator, foreign debt manager and State pension manager of the Russian Federation;[38] and

(b) the State financier for political prestige projects such as the 2014 Sochi Winter Olympics.[39]

(vi) VEB has reportedly been involved in matters of Russia's foreign affairs, including:

(a) granting USD 8 billion in loans to Russian companies to finance the acquisition of two big Ukrainian steel producers, the Industrial Union of Donbass and Zaporizhstal;[40]

(b) supporting the financially stricken (and subsequently insolvent) flag carrier of Hungary, Malev Hungarian Airlines between 2007 and 2010;[41] and

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37 Memorandum on Financial Policies of State Corporation "Bank for Development and Foreign Economic Affairs (Vnesheconombank)", approved by Ordinance of the Government of the Russian Federation No. 1510-r, 23 July 2018, Exhibit C-004; see also VEB Law, Articles 4(6) and 4(7), Exhibit C-003.

38 See VEB Website, "International Conference of VEB: Modernisation of Russian economy: the role of development institutions", 8 December 2009, p. 3, Exhibit R-88; VEB Annual Report, 2014, pp, 59, 61, Exhibit R-122.

39 See VEB Annual Sustainability Report, 2013, p. 68, Exhibit R-111; *Quartz*, "Sanctions, spies, and oligarchs: Putin's pet bank and its meeting with Jared Kushner", 27 March 2017, Exhibit R-169.

40 See *American Interest*, "Vnesheconombank, Who Are These Russian Bankers?", 28 June 2017, Exhibit R-175. See also *Reuters*, "UPDATE 1-Russia eyeing state aid for VEB bank after report of $23 bln bailout", 13 November 2015, Exhibit R-157; *Foreign Policy*, "Why Is Putin's 'Private Slush Fund' Courting Jared Kushner?", 7 April 2017, Exhibit R-171; *Financial Times*, "Russians circle Ukraine group", 5 January 2010, Exhibit R-92.

41 See *Reuters*, "UPDATE 1-Russia eyeing state aid for VEB bank after report of $23 bln bailout", 13 November 2015, Exhibit R-157; *Reuters*, "Russia's VEB takes over Hungarian airline Malev", 24 January 2009, Exhibit R-56; VEB, Press Release, "VEB and Hungarian Government Agree to Settle Malev Airlines' Bank Debt", 3 February 2017, Exhibit R-167.

(c) providing financial support to the Syrian Government in 2013 to acquire missile batteries, notwithstanding international sanctions imposed on Syria.[42]

(vii) VEB does not develop competitive banking products or services offered by commercial banks, such as opening accounts for the public.

(viii) As a *sui generis* governmental entity, VEB enjoys special privileges and immunities, including:

(a) being exempt from important banking regulations, including as regards information disclosure and financial stability;[43]

(b) not requiring a banking licence, nor a licence for other regulated activities;[44]

(c) not being subject to liquidation provisions but only being able to be reorganised by federal legislation which would also determine the distribution of the remaining assets base;[45] and

(d) being exempt from paying profit tax or VAT as concerns any banking operations.[46]

(ix) VEB is dependent on funding from the Russian State, including drawing on extraordinary public funds and deposits such as from the Russian Central Bank and National Wealth Fund.[47]

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42 See *Interpreter*, "Russia: Syria's Banker and Arms Supplier", 13 November 2013, Exhibit R-116; Richard Blumenthal, Press Release, "Senators Call On Treasury Secretary To Sanction Russian Banks That Are Helping Syrian Regime", 13 September 2013, Exhibit R-114.

43 See, VEB Law, Article 4(3), Exhibit C-003.

44 See Federal Law "On Banks and Banking Activities", No. 395-1, 2 December 1990, Article 13, Exhibit R-6.

45 See VEB Law, Article 5, Exhibit R-53.

46 See Tax Code of Russian Federation (Part Two), No. 117-FZ, 5 August 2000, Articles 149(3), 251 and 270, Exhibit R-41.

47 See VEB Law, Article 3(8), Exhibit C-003.

91. According to the Respondent, in view of the above, "VEB veers between being a second budget for the Russian Federation and a slush fund for President Putin's projects."[48]

92. Moreover, according to the Respondent, that VEB is "not a bank but a limb of the Kremlin is an open secret that has been widely reported".[49] The Respondent also notes that PIB's annual reports state that it "is ultimately controlled by Russian Federation Government"[50] and that "[t]he Russian Federation, acting through the Russian Government, controls the Parent bank [i.e. VEB]".[51]

93. The Respondent further contends that VEB is not unique in its legal personality and registration status; in Russia, all federal executive bodies (other than the Government acting as such) are distinct legal persons and registered in the Unified State Register of Legal Entities, including the Ministry of Internal Affairs, the Ministry of Finance and the Central Bank of Russia.

94. *Third*, at the September 2020 Hearing, the Respondent developed a further argument in the alternative that the Claimant is not an investor for the purposes of the Treaty because it is an agent of the Russian State or exercises essentially governmental functions. In this regard, the Respondent relies on the test formulated by Aron Broches, the first Secretary-General of ICSID, in the early 1970s:

> [I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy

48 Respondent's Reply, ¶ 36.

49 Respondent's Skeleton Argument, ¶ 38; see also Transcript, 9 September 2020, pp. 36-37.

50 PIB Financial Statements, 2010, p. 6, Exhibit R-90.

51 PIB Consolidated Financial Statements, 2013, p. 54, Exhibit R-110.

> company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.[52]

95. The Respondent claims that the Claimant is an agent of the Russian State or exercises essentially governmental functions because:[53]

(i) the Claimant has no shareholders and only the Russian State could ever control it or benefit from its activities;

(ii) the Russian State set up the Claimant under a bespoke domestic law whereby senior Russian ministers make up the supervisory board, chaired by the Russian Prime Minister, which takes all important decisions and appoints the management board (whose chairman is appointed by the Russian President);

(iii) the Claimant is allocated and wholly dependent on State funds;

(iv) the Claimant is a non-profit, non-commercial *sui generis* entity tasked with effectuating the public, political and social objectives set by the Russian Government;

(v) the Claimant enjoys numerous special privileges and legal exemptions, including with respect to taxation, liquidation and banking regulations; and

(vi) there was no commercial dimension to the "financially disastrous" PIB transaction, which was instructed by Mr Putin to increase Russia's leverage over Ukraine.

96. Additionally, the Respondent alleges that the Claimant has withheld from production a number of documents relating to the acquisition of PIB that are relevant and material to its first objection.[54] On this basis, the Respondent invites the Tribunal to draw the adverse inference that the acquisition of PIB

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52 Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Hague Recueil des Cours*, 1972, 331 at pp. 354-355, Exhibit RL-142.

53 Transcript, 9 September 2020, pp. 55-56.

54 Respondent's Reply, ¶¶ 77-83; Transcript, 9 September 2020, pp. 16-20.

was "at the behest of the Russian Government and a political transaction bereft of any business sense".[55]

97. For the above reasons, the Respondent submits that the Claimant cannot avail itself of the dispute resolution mechanism in Article 9 of the Treaty and, therefore, the Tribunal does not have jurisdiction over the Claimant's claims.

B. THE CLAIMANT'S POSITION

98. The Claimant argues that the Tribunal has jurisdiction *ratione personae* based on the following three alternative arguments:[56]

(i) any legal entities, irrespective of their affiliation with the State, are investors protected by the BIT;

(ii) the Claimant is not part of the Russian Government; and

(iii) the principles of good faith and estoppel prevent the Respondent from arguing the opposite in this Arbitration.

99. *First*, the Claimant submits that it is a protected investor according to the definition in Article 1(2)(b) of the Treaty. The translation of Article 1(2)(b) relied on by the Claimant provides as follows:

> 2. "Investor of a Contracting Party" means:
>
> […]
>
> b) any body corporate created in accordance with the legislation in force within the territory of this Contracting Party, provided that that the said body corporate has legal capacity under the legislation of its Contracting Party to make investments within the territory of the other Contracting Party.[57]

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55 Respondent's Reply, ¶ 82; see also Transcript, 9 September 2020, p. 20.

56 Claimant's Counter Memorial, ¶¶ 7-68; Claimant's Rejoinder, ¶¶ 3-54; Claimant's Skeleton Argument, ¶¶ 2-23.

57 Russia-Ukraine BIT, Article 1(2)(b), Exhibit C-001.

100. The Claimant submits that Article 1(2)(b) of the Treaty lists two conditions that an investor must meet: (i) incorporation in the home State, and (ii) legal capacity to invest in the host State. The Claimant's position, as supported by its international law expert, Dr Kriebaum,[58] is that the two conditions are exhaustive and there is no additional requirement in the Treaty for an investor to be a private, non-State entity.

101. According to the Claimant, its position is consistent with the application of the VCLT rules of treaty interpretation as follows:

(i) The plain meaning of Article 1(2)(b) of the Treaty is clear: it includes any legal entity irrespective of its ownership, control or affiliation with the State. In this regard, international tribunals consistently adopt the plain meaning of the word "any" and reject attempts to limit a treaty's terms by imposing extraneous criteria.[59]

(ii) Article 10 of the Treaty does not provide any relevant context for the interpretation of Article 9, as the former concerns disputes where the Contracting Parties act *iure imperii*, for example, diplomatic protection claims, claims seeking a binding interpretation of a term in the BIT, or requests for declaratory relief. Therefore, Article 10 does not apply to individual claims brought by State-affiliated investors. However, the treatment of a specific investment could become the basis for both an investor-State arbitration under Article 9, as well as an inter-State arbitration under Article 10.

(iii) The object and purpose of the Treaty support the protection of State-affiliated investors. The BIT would not serve its purpose "to create favourable conditions for the expansion of economic cooperation between the Contracting Parties"[60] if it failed to protect investments made by entities affiliated with the Contracting Parties. By contrast, Dr Kriebaum notes that there are only three investment treaties in existence that expressly exclude State-owned entities from the scope

58 Expert Report of Dr Kriebaum, ¶ 17.

59 For example, *Beijing Shougang et al. v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, ¶ 412, Exhibit CLA-038; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶¶ 325–328, Exhibit CLA-037.

60 Russia-Ukraine BIT, Preamble, Exhibit C-001.

of protection, all of which expressly refer in the respective Preambles to the purpose of encouraging *private* investments.[61]

(iv) Nor does the CIS Investment Agreement provide any relevant context, as the Contracting Parties neither ratified this treaty nor relied on it in the drafting of the Treaty. There is thus no basis to suggest that the Contracting Parties deliberately removed States from the Treaty's definition of investor.

(v) The object of investor-State dispute settlement as a means to depoliticise disputes is best served if the broadest group of investors, including State-affiliated entities, have access to the dispute resolution mechanism under Article 9 of the Treaty, contrary to the Respondent's position that State-affiliated entities should be excluded on this basis.

102. In the Claimant's submission, Article 1(2)(b) of the Treaty applies as *lex specialis* and should not be supplemented with concepts found in general international law, such as attribution of conduct to States or piercing of the corporate veil. The Claimant also submits that international tribunals and courts have consistently treated State-affiliated entities, including State organs and publicly funded institutions, as protected investors.[62]

103. Based on its interpretation of Article 1(2)(b) of the Treaty, the Claimant argues that it meets all of the conditions to qualify as a protected investor, given that the Respondent does not deny and the Claimant's expert in Russian law, Professor Asoskov, has confirmed that:

(i) the Claimant is a legal entity registered in the Russian register of legal entities;[63] and

(ii) the Claimant has legal capacity to invest into the territory of any foreign country, including in Ukraine.[64]

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61 Expert Report of Dr Kriebaum, ¶¶ 31, 71-75.

62 For example, *L'Etat d'Ukraine c. Société OAO Tatneft, Cour d'Appel de Paris*, Judgment, 29 Novembre 2016, ¶ 15, Exhibit CLA-154.

63 Expert Report of Professor Asoskov, ¶¶ 18-38.

64 Expert Report of Professor Asoskov, ¶¶ 39-42.

104. *Second*, the Claimant argues that, even if the Treaty excluded sovereign investments from protection, it would nonetheless qualify as an investor because it is not part of the Russian State. The Claimant submits that the Respondent's characterisation of the Claimant is flawed, including in respect of the application of Russian law. The Claimant submits that it is fundamentally different to a Russian State organ for the following reasons:

(i) The Claimant is not part of the system of Russia's State organs and does not have any sovereign power or protection that a State organ would have.[65] The Claimant does not exercise any governmental functions, except in providing limited services to the Russian Government as an agent or fiduciary manager on the basis of civil law contracts or powers of attorney.[66]

(ii) The Claimant is a State Corporation, which is a generic and not *sui generis* type of legal entity used in the public sector of the Russian economy. The Claimant's assets and liabilities are separate to those of Russia.[67]

(iii) The Claimant's corporate governance is similar to that of joint stock companies and includes a Supervisory Council, Management Board and Chairman (the CEO).[68] All of the Claimant's managers have a fiduciary duty to act in good faith and reasonably in the interest of the Claimant rather than in the interests of Russia.[69]

(iv) There is no basis to pierce the corporate veil and treat the Claimant as part of Russia. The Claimant has consistently disclosed that Russia is its ultimate controller and has never used its separate corporate identity for fraud or abuse.

105. Additionally, and in response to the Respondent's alternative argument developed in the September 2020 Hearing, the Claimant maintains that it did not exercise any governmental function when investing in PIB.

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65 See Expert Report of Professor Asoskov, ¶ 83

66 See Expert Report of Professor Asoskov, ¶¶ 89-94.

67 See Expert Report of Professor Asoskov, ¶¶ 14, 78, 113-117.

68 See Witness Statement of Mr Krasnov, ¶¶ 41-44; Expert Report of Professor Asoskov, ¶¶ 95-97.

69 See Expert Report of Professor Asoskov, ¶¶ 104-106.

According to the Claimant, the acquisition of PIB was not political but was instead commercial in nature, with the motive to develop Russian-Ukrainian economic ties and generate profit from crediting joint ventures between Russian and Ukrainian companies.[70] The Claimant submits that it followed standard internal protocols when approving the investment project and used borrowed funds to finance the transaction.[71]

106. This is in contrast to cases where the Russian Government instructs the Claimant to make an investment, which involve instructions executed in the form of an official decree and funds provided by the Russian Government to make the investment, as well as a guarantee to reimburse any losses associated with the investment. The Claimant states this did not happen in respect of the acquisition of PIB.[72]

107. The Claimant objects to the Respondent's reliance on media reports in respect of the Claimant's activities, on the basis that media reports are not sufficient or reliable evidence to discharge a party's burden of proof as they "often contain a third party's opinion, speculation or prediction that is difficult to identify or sever from the facts."[73]

108. The Claimant further denies that there are any grounds for the Tribunal to draw adverse inferences as to the nature of the Claimant's acquisition of PIB.[74] The Claimant contends that it undertook diligent efforts to locate documents responsive to the Respondent's requests but has reasonable grounds to believe the documents have been lost.[75]

109. *Third*, the Claimant argues that the Respondent's attempt to equate the Claimant to Russia is contrary to the principles of good faith and estoppel.[76]

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70 Transcript, 9 September 2020, pp. 110-114.

71 See Witness Statement of Mr Krasnov, ¶¶ 72-76.

72 See Witness Statement of Mr Krasnov, ¶¶ 27-28, 72.

73 Claimant's Rejoinder, ¶ 37.

74 Claimant's Rejoinder, ¶¶ 46-51.

75 Claimant's Rejoinder, ¶ 47; Transcript, 9 September 2020, pp. 116-117.

76 Claimant's Counter-Memorial, ¶¶ 56-68; Claimant's Rejoinder, ¶¶ 40-45.

110. In this regard, the Claimant submits that the Respondent's authorities have consistently treated the Claimant as a legal entity rather than a Russian State organ, including in the following situations:

(i) Ukrainian regulators designated the Claimant as a legal entity in the list of PIB's shareholders and imposed tax on the Claimant's profits as a business entity rather than as a State organ under the Russia-Ukraine Double Tax Treaty;[77]

(ii) Ukrainian courts refused to equate the Claimant to Russia in domestic proceedings prior to this dispute; and[78]

(iii) when the present dispute arose, the Respondent instructed its Ministry of Justice, which is responsible for disputes with private persons, to liaise with the Claimant.[79]

111. Additionally, the Claimant submits that the Respondent cannot argue in good faith that Article 1(2)(b) of the Treaty excludes State organs or State-affiliated entities given the Respondent has itself pursued investment claims against Russia through its own State entities, which had essentially the same characteristics that would make them State organs according to the Respondent's arguments.[80]

C. THE TRIBUNAL'S ANALYSIS

112. To examine the Respondent's first objection, the Tribunal begins with the terms of Article 9 of the Treaty, which provide as follows:

> 1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes, which concern the amount, terms of

77 See Witness Statement of Mr Krasnov, ¶¶ 35-36.

78 See Witness Statement of Mr Krasnov, ¶¶ 37-38.

79 Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027.

80 *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, PCA Case No. 2017-16; *Oschadbank v. Russian Federation*, PCA Case No. 2016-14; *State Enterprise "Energorynok" (Ukraine) v. The Republic of Moldova*, SCC Arbitration V 2012/175, Final Award, 29 January 2015, Exhibit CLA-158.

> and procedure for payment of compensation provided for in Article 5 hereof or with the procedure for effecting a transfer of payments provided for in Article 7 hereof, a notification in writing shall be handed in, accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.
>
> 2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:
>
> a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;
>
> b) the Arbitration Institute of the Chamber of Commerce in Stockholm,
>
> c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).
>
> 3. The award of arbitration shall be final and binding upon both parties to the dispute. Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation.[81]

113. Although the Parties have submitted different translations of the Treaty, which appear respectively at Exhibit C-001 (submitted by the Claimant) and Exhibit RL-82 (submitted by the Respondent), the differences in translation do not appear to be material to the first of the Respondent's objections. The

[81] Russia-Ukraine BIT, Article 9, Exhibit RL-82.

Tribunal has considered both translations but quotes in this section from the Respondent's RL-82.

114. In interpreting those terms of Article 9, the Tribunal has regard to Article 31 of the VCLT, which provides as follows:

> 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 connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> […][82]

115. In accordance with Article 31 of the VCLT, the starting point, though not necessarily the end point, of an interpretation of Article 9 will be the ordinary meaning of its terms. Article 31 of the VCLT does not entitle the Tribunal, much less require it, to ignore that ordinary meaning, and the Tribunal cannot adopt the Respondent's submission that there is no such thing as an inherent or dictionary meaning to the BIT[83] if it is being offered to suggest that the Tribunal can ignore the ordinary meaning of the Treaty.

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82 VCLT, Article 31, Exhibit RL-77.

83 Transcript, 9 September 2020, p. 24.

In the words of the Respondent itself in another context: "we should all start with the text when we want to interpret a treaty".[84]

1. The "ordinary meaning" of Article 9

116. The terms of Article 9 do have an ordinary meaning, and these require us to ascertain the meaning of an "investor of the other Contracting Party", which in turn leads us to the definitions contained at Article 1(2) of the Treaty.

117. Article 1(2)(b) provides that an "Investor of a Contracting Party" can be:

> [A]ny legal entity, set up or instituted in conformity with the legislation prevailing on the territory of the given Contracting Party, under the condition that the said legal entity is legally capable, under the legislation of its respective Contracting Party, to carry out investments on the territory of the other Contracting Party.[85]

118. Thus, the definition of investor contains two express qualifying requirements, namely that: (i) it be a legal entity incorporated in accordance with the law of its home State; and (ii) it have the legal capacity, again pursuant to the laws of its home State, to carry out investments in the territory of the host State of the investment.

119. It is plain that the Claimant fulfils those two express requirements. In this regard, the Claimant has relied on evidence of (i) its incorporation and registration as a Russian legal entity, namely as a State Corporation,[86] and (ii) its legal capacity according to Russian law to invest in projects in Russia

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84 Transcript, 9 September 2020, p. 76, at which the Respondent was offering its interpretation of a different term of the Treaty, specifically Article 3, which is relevant to its third preliminary objection.

85 Russia-Ukraine BIT, Article 1(2)(b), Exhibit RL-82.

86 VEB Law, Article 2(1), Exhibit C-003; Certificate of state registration of a non-commercial organisation under the principal state registration number 1077711000102, issued on 14 December 2018 by the Ministry of Justice of the Russian Federation, Exhibit C-005; Expert Report of Professor Asoskov, ¶¶ 18-38.

and abroad, including in the territory of Ukraine.[87] The Respondent has not directly contested that the Claimant fulfils these two express requirements.[88]

120. The express terms of Article 1(2)(b) do not go further. They do not impose any requirement or restriction in respect of the ownership or control of any legal entity that otherwise satisfies the two conditions set out therein. Nor is there an adequate basis to read in such requirements or restrictions by reference to the earlier CIS Investment Agreement, which specifically referred to "States" within its definition of "Investors of each Party". In particular, to recall, Article 2 of the CIS Investment Agreement provided as follows:

> Investors of each Party in other States participating in this Agreement (hereinafter - "investors of the Parties"), are:
>
> juridical persons established in accordance with the legislation of one of the Parties and authorised to make investments;
>
> natural persons - nationals of the Parties and permanently residing in their territory nationals of other States as well as stateless persons;
>
> States - participants of this Agreement as well as state and administrative units located within their territory as represented by juridical persons and natural persons authorized by them in accordance with the legislation of the Parties.[89]

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87 VEB Law, Articles 3(1), 3(3) and 3(4), Exhibit C-003; Memorandum on Financial Policies of State Corporation "Bank for Development and Foreign Economic Affairs (Vnesheconombank)", approved by Ordinance of the Government of the Russian Federation No. 1510-r, 23 July 2018, ¶ 2, Exhibit C-004; Expert Report of Professor Asoskov, ¶¶ 39-42.

88 Respondent's Memorial, ¶¶ 19, 96, 251. In short, the Respondent does not contest the interpretation of Article 1(2)(b), but contends that it adds to, and does not alter, the intrinsic requirements of Article 9 itself. The Tribunal notes, however, the opinion expressed by Professor Benvenisti in his Second Report at paragraph 20, although this does not appear to alter the fact that the Respondent has not itself directly contested that the Claimant fulfils the two express requirements that appear in the definition at Article 1(2)(b).

89 CIS Investment Agreement, Article 2, Exhibit RL-79.

121. The Tribunal does not, however, consider the text of the CIS Investment Agreement to be of any material assistance in interpreting the clear terms of the Treaty. Although it is referred to briefly in the recitals of the Treaty, the CIS Investment Agreement was not ratified, and it is not apparent whether and how it was used in the drafting of the Treaty.

122. Moreover, in comparing the express terms of the CIS Investment Agreement's definition of investor, and the definition of investor in the Treaty, a variety of potential explanations exist for the differences that emerge. It is true that the exclusion of any express language that would include a reference to States could be interpreted as evincing an intention to exclude States from the definition of investor. Equally, however, it could be said that the express reference to States became unnecessary in the Treaty because the Treaty introduced a reference to "*any* legal entity" that otherwise fulfils the requirements of the definition, whereas the CIS Investment Agreement did not include the word "any" in its reference to "juridical persons".

123. In short, the Tribunal would expect exceptions to jurisdiction to be spelt out explicitly in the terms of a Treaty. In the absence of such exceptions within the provisions of Article 1(2)(b), the Tribunal does not consider it can read such an exception into the language of the Treaty by reference to the prior, unratified, CIS Investment Agreement.

124. The Tribunal next considers whether the ordinary meaning of the terms of Articles 9 and 1(2)(b) should be interpreted differently in context.

2. The meaning of Article 9 in "context"

125. In considering the context of Article 9, attention needs to be given to its relationship with the State-to-State arbitration mechanism that appears at Article 10 of the Treaty.

126. Article 10 provides as follows:

> 1. Disputes between the Contracting Parties as to the interpretation and application of this Agreement, shall be resolved by way of negotiations.

> 2. In the event a dispute cannot be resolved through negotiations within six months as of the notification in writing of the origin of a dispute, then at the request of either Contracting Party, it shall be passed over for consideration, to the arbitration tribunal.
>
> […][90]

127. This leads to the following question: does the existence and terms of Article 10 impact the interpretation of Article 9, and if so how?

128. In this regard, the Respondent's position is not that the Claimant has wrongly invoked Article 9 to commence arbitration where it would not otherwise be able to bring an arbitration under the Treaty. Rather, the Respondent's position is that the Claimant could have done so under Article 10, although the Respondent noted that the type of claim that could be brought would typically relate to diplomatic protection claims, claims for an interpretation of a provision in the BIT, or an application for declaratory relief.[91]

129. In particular, the Respondent made the following submission at the September 2020 Hearing:

> THE CHAIRMAN: Does that mean, on your submission, that a state could bring a claim under article 10 in connection with an investment?
>
> MS YOUNAN: It could, Mr President. Obviously how you frame that claim would be slightly different. So it could bring it if it was bringing a diplomatic protection claim on behalf of the investor. It could bring a claim in relation to the investment for an interpretation of a particular provision of the treaty, or an application, but obviously the state would have

90 Russia-Ukraine BIT, Article 10, Exhibit RL-82.

91 Transcript, 9 September 2020, p. 32.

> to be able to frame some kind of damage to be able to claim relief in that instance.[92]

130. Accordingly, on the Respondent's case, the type of claims that the Claimant, as a State, could bring under Article 10 would be different from the claims that could be brought under Article 9. And such a difference appears to be borne out both by the terms of Article 10, and the case law and commentary that exists on such State-to-State arbitration clauses that has been submitted in these proceedings.[93]

131. The terms of Article 10 refer specifically to disputes "between the Contracting Parties as to the interpretation and application" of the Treaty, without reference to such a dispute arising "in connection with" an investment as provided for in Article 9. This goes to the heart of the delineation between Article 9 and 10: the former is stated to relate to disputes "in connection with" a particular investment; the latter is not. In other words, on the terms of Articles 9 and 10 of the Treaty, the delineation could be about the subject matter of a claim as much as it could be about the identity of the claimant – i.e. the delineation, in the circumstances of this case, could be about *what* rather than *who*. Such a delineation, which is faithful to the language of both provisions, gives meaning, and a different role, to each.

132. The case law and commentary on State-to-State arbitration supports such a delineation. Thus, State-to-State arbitrations such as *Peru v. Chile*, and *Ecuador v. United States* are examples of State parties to a treaty seeking a pure interpretation of their treaty at the same time as a national of one of the State parties was bringing an investor-State arbitration seeking compensation in respect of a particular investment.[94] Similarly, such a delineation is well illustrated by the series of arbitrations that arose under the NAFTA in the *Cross-Border Trucking Services* case, and the differences in relief that were sought in the different State-to-State and investor-State

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92 Transcript, 9 September 2020, pp. 32-33.

93 See, for example, Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", *Harvard International Law Journal*, Volume 55, No. 1, Exhibit CLA-203.

94 Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", *Harvard International Law Journal*, Volume 55, No. 1, p. 8, Exhibit CLA-203.

arbitrations respectively that took place in relation to that same dispute.[95] In particular, Mexico brought a State-to-State arbitration seeking a declaration that the United States had breached its national and MFN treatment obligations with respect to Mexico and potential Mexican investors by failing to lift a moratorium on processing applications by Mexican-owned trucking firms. Subsequently, following the outcome of the State-to-State arbitration in which Mexico obtained a declaration of breach, and in the face of the United States failing to lift the moratorium, the National Chamber of Cargo Transporters then brought an investor-State claim on behalf of various Mexican trucking companies seeking compensation in relation to individual investments.

133. Case law and commentary indicate that a State party to a treaty could also bring a diplomatic protection claim for a treaty violation under Article 10 on behalf of a particular national and its investment. An example of such a claim is Italy's State-to-State arbitration claim against Cuba, which it purported to bring on behalf of itself and several Italian investors (i.e. it contended that it had "double standing").[96] The tribunal in that case accepted that such a diplomatic protection claim could be brought notwithstanding the existence of a separate investor-State arbitration clause, although it ultimately decided against Italy on the merits of that claim.[97] Nevertheless, it would follow from the Respondent's own objection in this Arbitration that a diplomatic protection claim would not be available in relation to the Claimant's claim here given the identity between the Russian Federation as a contracting State and VEB that the Respondent asserts: in short, on the Respondent's case, such a claim would be an impermissible attempt at diplomatic protection by the Russian Federation of itself. Indeed, if in the Respondent's view the Claimant could bring the same claim for

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95 Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", *Harvard International Law Journal*, Volume 55, No. 1, p. 9, Exhibit CLA-203, citing *In re* Cross-Border Trucking Services (Mex. v. U.S.), Case No. USA-MEX-98-2008-01, North America Free Trade Agreement Chapter 20 Arb. Trib. Panel Decision, Final Report, 6 February 2001 and *CANACAR v. United States*, United Nations Commission on International Trade Law and NAFTA (Chapter 11), Notice of Arbitration, 2 April 2009.

96 Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", *Harvard International Law Journal*, Volume 55, No. 1, p. 7, Exhibit CLA-203.

97 Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", *Harvard International Law Journal*, Volume 55, No. 1, p. 7, Exhibit CLA-203.

compensation in relation to its specific investment under Article 10, then it is difficult to see what purpose is served by its present preliminary objection.

134. Thus, it appears to be the Respondent's own position that the role of Article 10, and the type of claims that could be brought under it, are quite different from those that could be brought under Article 9. Accordingly, in considering the context of Article 9, and in particular the different role of Article 10, the Tribunal sees no reason to alter its interpretation of the ordinary meaning of the terms at Article 9, which on their face entitle "any" entity authorised by its own law to invest in the other contracting State to bring a claim thereunder "in connection with" its investments.

135. The Tribunal moves on to consider next whether such an interpretation of Article 9 is inconsistent with the object and purpose of the Treaty.

3. The meaning of Article 9 taking into account the "object and purpose" of the Treaty

136. It is the Respondent's submission that:

> […] BIT protection and investment arbitration exist to reduce the level of sovereign risk faced by non-State foreigners. Departing from the diplomatic protection regime, the home State has no legal interest in the outcome of the dispute.[98]

137. In this way, the Respondent suggests that it is of the nature of investment arbitration under a BIT that a claim can only be brought by a non-State foreign investor.

138. However, this statement of principle is not borne out either by State practice generally, or by the indications of the object and purpose of this Treaty in particular.

139. As a matter of State practice generally, both Parties' experts on public international law have referred to the OECD study that screened 1,813 investment treaties, and that found that only three of them explicitly exclude

[98] Respondent's Skeleton Argument, ¶ 23.

State-owned enterprises from the definition of qualifying investor.[99] Both the fact that almost all BITs do not distinguish between investors on the basis of ownership (State or otherwise), and that a small number of contracting States did consider it necessary explicitly to exclude State-owned enterprises, suggests that there is no evidence of a general investment treaty principle limiting protection to non-State foreign investors. Furthermore, in each of the three treaties that do explicitly exclude State-owned entities from their protection, the preambles of those BITs similarly refer explicitly to the purpose of those respective treaties as only stimulating "private" investments. As discussed below, there is no similar limitation expressed in the preamble of the Treaty.[100]

140. Moreover, Dr Kriebaum has referred to the State practice of the Swiss Government, as reflected in an official opinion of the Swiss Federal Department of Foreign Affairs, which specifically considered the question of whether States and public entities qualify as protected investors under Swiss BITs, and opined that Swiss BITs *do* protect States and State entities investing abroad except when they act *iure imperii* and therefore enjoy State immunity.[101] While the meaning and interpretation of Swiss investment treaties cannot directly assist us in the interpretation of the Treaty, they do indicate that there is no general State practice that would implicitly exclude State-owned and controlled entities from the protection of investment treaties.

141. The possibility of foreign investors who have a State affiliation benefitting from investment treaty protections is not surprising. Foreign investments by entities owned and controlled by States are commonplace around the world, particularly in those regions in which mixed economies – featuring significant State participation in economic activity – prevail. There is no inherent reason why investment treaties in those regions of the world that are designed to encourage both private and public investment would

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99 OECD, State-Owned Enterprises in the Development Process, 2015, Exhibit R-149 / Exhibit UK-032. See Expert Report of Professor Benvenisti, ¶ 63 and Expert Report of Dr Kriebaum, ¶¶ 75-76.

100 Expert Report of Dr Kriebaum, ¶ 31. See also Switzerland-Panama BIT, Exhibit UK-014 and Panama-Germany BIT, Exhibit UK-015.

101 Expert Report of Dr Kriebaum, ¶ 69, citing Département fédéral des affaires étrangères, Direction du droit international public, Avis de droit du 20 novembre 2007, Accords de promotion et protection des investissements. Qualité d'investisseur octroyée à un Etat et traitement à donner à ses investissements, JAAC 2008, 183-188, Exhibit UK-028.

implicitly (rather than explicitly) exclude some of those investments from their ambit and protections.

142. This brings us to the object and purpose of our present Treaty, which was concluded by two contracting States in which State participation in economic activity was and continues to occur regularly. Against this backdrop, and unlike other conventions and treaties that refer specifically to the encouragement of "private" investment, the Treaty does not. Rather, and notably, it refers to the "intention to create and maintain favorable conditions for mutual investments" and "the desire to create favorable conditions for the expansion of economic cooperation between the Contracting Parties".[102]

143. Thus, the preamble to the Treaty at issue in this Arbitration gives no basis upon which to conclude that its object and purpose is exclusively to encourage *private* economic cooperation and exclude State-sponsored investment. In this respect, the preamble to the Treaty can be contrasted with the preamble to the ICSID Convention, which does refer specifically to private investment in the following terms:

> **Considering** the need for international cooperation for economic development, and the role of *private* international investment therein;

144. Notwithstanding this difference, as noted above, an eminent commentator on the ICSID Convention, Aron Broches, has stated that: "for the purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' *unless it is acting as an agent for the government or is discharging an essentially governmental function*."[103]

145. As this commentary pertains only to the ICSID Convention which is not at issue here, there is no basis upon which to enquire as to the capacity in which a State-owned and/or controlled entity is acting for the purposes of determining whether it is a qualifying investor in these proceedings. Moreover, the Tribunal notes that the application of what has been referred

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102 Russia-Ukraine BIT, Preamble, Exhibit RL-82.

103 Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Hague Recueil des Cours*, 1972, 331 at p. 354-355, Exhibit RL-142 (emphasis added).

to elsewhere as the "Broches test" appears to have been limited to only a small number of ICSID cases.[104] Indeed, in one of the few cases in which the "Broches test" has been applied, *CSOB v. Slovakia*,[105] the application of the test appears not to assist the Respondent in its preliminary objection in this case. In that case, the Tribunal had to consider whether CSOB, a Czech State-owned bank, was acting as an agent of the Czech Republic, and was discharging essentially governmental functions in respect of events that were alleged to be relevant to the dispute. The tribunal in that case emphasised that the term "juridical persons" as employed in Article 25 of the ICSID Convention was "not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies". In doing so, the tribunal clarified that the critical element under the "Broches test" was the *nature* of the entity's activities, not their *purpose*. In so clarifying, the tribunal found that even though CSOB had been an agent for the Czech State "for much of its existence" and that it was indeed "promoting the governmental policies or purposes of the State", the transactions at issue in the arbitration – namely loan receivables – were "commercial or private" rather than governmental *in nature*.[106] On that basis, the tribunal dismissed Slovakia's objection in that case.

146. Although this Arbitration does not implicate the ICSID Convention at all, and although the Treaty here is not stated to have as its object and purpose the promotion and protection of *private* investment, the decision in *CSOB v. Slovakia* is nevertheless noteworthy. If CSOB's right to bring a claim under the ICSID Convention was not undermined by a finding that it *was* a government agent and *was* indeed promoting government policies because the transactions – in that case loan receivables – were commercial *in nature*, then *a fortiori* that would be the case in relation to the purchase of a shareholding in a bank – as is the case here, whether or not in furtherance of government policy – under a treaty that is not stated to promote and protect only private investment.

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104 See, for example, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, Exhibit UK-034; *Beijing Urban Construction Group Co. Ltd. V. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, Exhibit UK-039.

105 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, Exhibit UK-034.

106 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, ¶¶ 20, 25, Exhibit UK-034.

147. More generally, the Tribunal observes that neither the Respondent nor its public international law expert were able to point to examples of an investment treaty tribunal denying jurisdiction in an investor-State case that did not implicate Article 25 of the ICSID Convention because the Claimant investor was characterised as an organ or agent of a State party or otherwise exercising essentially governmental functions.

148. For his part, the Respondent's expert of public international law, Professor Benvenisti, referred extensively in his reports to case law in which the International Law Commission's Articles on State Responsibility have been relied upon by arbitral tribunals for the purposes of determining whether the acts of a particular entity should be attributed to a State party to a treaty. However, these cases all apply the Articles on State Responsibility to the question of whether a *State respondent* should be held responsible for the actions of an entity that may or may not attract State responsibility. No examples have been referred to of the Articles on State Responsibility being invoked to deny a *claimant* jurisdiction to bring an investor-State claim because it is a State party. This absence was acknowledged by Professor Benvenisti, who described it as a "certain discrepancy",[107] and the Tribunal finds this to be notable. For it suggests that there is no overriding practice to the effect that any entity whose actions can be attributed to those of the State cannot bring an investor-State treaty arbitration.

149. Put simply, an evaluation of the object and purpose of the Treaty does not alter the Tribunal's view as to the ordinary meaning of Articles 9 and 1(2)(b) of the Treaty. It follows that the Tribunal's interpretation of Article 9, taking into account the ordinary meaning of its terms, evaluated in context, and in the light of the object and purpose of the Treaty, is that it accommodates a claimant's claims in connection with its investments, whether or not that claimant is owned and controlled by the State, is an "arm" of the State,[108] an agent of the State or is otherwise exercising essentially governmental functions. For these reasons, the Tribunal dismisses the Respondent's first preliminary objection.

150. In the light of its interpretation of Article 9 of the Treaty, the Tribunal does not need to address the issue of the status and role of the Claimant at this

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107 Transcript, 10 September 2020, pp. 58, 81.

108 The Respondent uses the word "arm" in this context, which the Tribunal understands to be used synonymously with the word "organ".

stage of the proceedings. This notwithstanding, as the Parties have made extensive submissions on the issue, and as it may be relevant at a later stage in these proceedings, the Tribunal considers that it would be helpful and transparent for the Tribunal to offer certain observations on the status and role of the Claimant on the basis of its consideration of the evidence presented to the Tribunal so far.

151. To recall, the Parties' positions can be summarised as follows:

(i) It is the Respondent's position that the Claimant is an arm of the Russian State, and further or alternatively, an agent of the Russian State and/or an entity that exercises essentially governmental functions.

(ii) It is the Claimant's position that, although the Russian Government is its founder and ultimate controller,[109] the Claimant is not included within the system of Russia's State organs, and does not exercise any governmental function except in the limited cases when the Ministry of Finance engages the Claimant as a financial agent on the basis of a commercial agreement.

152. In considering these contrasting positions at this stage of the arbitration, the Tribunal considers that whether or not the Claimant should be characterised as an organ of the Russian Federation is a question of international law, not Russian law, though the Claimant's features under Russian law may be relevant to that determination under international law. In this regard, the Tribunal accepts the opinion of Professor Benvenisti, and notes the case law on which his opinion relies in this regard.[110]

153. This conclusion is also reflected in the International Law Commission's Articles on State Responsibility.[111] Article 4 of the Articles on State Responsibility provides as follows:

> 1. The conduct of any State organ shall be considered an act of that State under

[109] Claimant's Skeleton Argument, ¶ 18.

[110] Expert Report of Professor Benvenisti, ¶¶ 25-42, citing, *inter alia*, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 405(a), Exhibit RL-122.

[111] *Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001(2) ILC Y.B. 31, Exhibit RL-160.

> international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ *includes* any person or entity which has that status in accordance with the internal law of the State.[112]

154. As the commentary on paragraph 2 of Article 4 confirms:

> Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, *it is not sufficient to refer to internal law for the status of State organs*. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.[113]

155. It follows from the evidence of Professor Benvenisti, the case law he relies on, and the Articles on State Responsibility, that the internal law of the Russian Federation may be relevant in the characterisation of the Claimant as a matter of international law, but it will not be determinative of that characterisation. With this in mind, the Tribunal proceeds to consider not only the legal form taken by the Claimant as a matter of Russian law, but also other factors that may be relevant to understanding its status and role. These include the present evidence on the extent to which the Claimant is controlled by the Government of the Russian Federation, and the extent to which the Claimant can be said to fulfil a governmental function. Furthermore, the Tribunal considers the present evidence on the record of this Arbitration as to why the Claimant made the investment that is the subject matter of this Arbitration.

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112 *Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001(2) ILC Y.B. 31, p. 40, Exhibit RL-160 (emphasis added).

113 *Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001(2) ILC Y.B. 31, p. 42, ¶ 11, Exhibit RL-160 (emphasis added).

156. On the first of these issues, there appears to be little room for debate as to the Claimant's legal form, although the Parties have debated whether that form is *sui generis* or not. The Claimant is a State Corporation that is established under a Special Federal Law, which replaces its corporate charter and other constituted documents.[114] As such, it is a non-profit legal entity, that features the State as its founder throughout its existence, and that has no shareholders or other interested stakeholders.

157. The Claimant is registered as a State Corporation on the Unified State Register of Legal Entities, and has featured thereon since June 2007, when it was established as a legal entity by way of reorganisation of its legal predecessor, the USSR Bank for Foreign Economic Affairs.[115] As such a State Corporation, it owns its own assets, whether contributed to its authorised capital by its founder (the Russian Federation) or acquired otherwise.[116] In addition, the Claimant may be a party to any transactions governed by civil law, and itself act as a claimant or defendant in court proceedings. In particular, Article 3 of the Law on VEB lists the numerous types of commercial transactions governed by civil law to which the Claimant may be a party, and these include sale and purchase agreements, loan agreements, guarantees, assignments of claims and service agreements.[117]

158. The Claimant is one of six such State Corporations, with the others being the State Corporation for the Promotion of the Development, Manufacture and Export of HighTech Products Rostec, the State Corporation for Space Activities Roscosmos, the Support Fund for the Reform of the Housing and Utilities Sector, the State Atomic Energy Corporation Rosatom, and the Deposit Insurance Agency.[118]

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114 See Expert Report of Professor Asoskov, ¶¶ 65 and 67, citing the Civil Code of the Russian Federation, Article 52(1), Exhibit AA-002.

115 See Certificate of state registration of a non-commercial organisation under the principal state registration number 1077711000102, issued on 14 December 2018 by the Ministry of Justice of the Russian Federation, Exhibit C-005; Witness Statement of Mr Krasnov, ¶ 10.

116 See Expert Report of Professor Asoskov, ¶ 66, referring to the Law on Non-Profit Organisations, Article 7.1(1), Exhibit AA-003, and the VEB Law, Article 3, Exhibit AA-001 / Exhibit C-003.

117 See Expert Report of Professor Asoskov, ¶ 35, referring to the VEB Law, Article 3, Exhibit AA-001 / Exhibit C-003.

118 See Expert Report of Professor Asoskov, ¶ 73.

159. According to Professor Asoskov, the Claimant has never been part of the structure of federal executive organs that are organised into the following three categories: federal ministries; federal services (e.g. the Federal Tax Service or the Federal Customs Service), which are responsible for governmental control and supervision; and federal agencies (such as the Federal State Property Management Agency), which are responsible for providing public services and managing federal property. In presenting the structure of federal executive organs, Professor Asoskov has relied in particular on clauses 3, 4 and 5 of Russian Federation Presidential Decree No. 314 of 9 March 2004 "On the System and Structure of Federal Executive Organs",[119] and this presentation of Russian law has not been contested by the Respondent.

160. Moreover, Professor Asoskov opines that the goals and functions of State organs are inseparably linked with the concept of State power under Russian law, and that the Claimant's key functions are listed in the Law on VEB as the entry into commercial transactions, rather than the exercise of any coercive state power.[120] Professor Asoskov opines further that the only function as an agent of the Government of the Russian Federation performed by the Claimant is pursuant to a civil law contract, specifically an agency agreement, which is discrete and limited and to which it is remunerated for specific services such as repayment of foreign national debt owed by the former USSR, repayment of state loans to the Russian Federation, the issuance and performance of state guarantees and the management of accumulated pensions and payment funds.[121] In performing these specific functions as an agent of the Russian Federation, Professor Asoskov opines that the Claimant may not exercise any coercive governmental powers (for example, issuing any binding regulations in respect of specific individuals or legal entities to take or refrain from taking any actions), with those coercive powers to be exercised by Russian State organs. Rather, its functions are those of only an agent, i.e. to hold negotiations, enter into civil-

119 Expert Report of Professor Asoskov, ¶ 82 *et seq*, and Exhibit AA-030.

120 Expert Report of Professor Asoskov, ¶¶ 84-94.

121 Expert Report of Professor Asoskov, ¶ 89 *et seq*, referring to the Letter by the Ministry of Finance of the Russian Federation No. 04-07-06/46601 "Re. agency agreement with VEB.RF", 1 June 2020, Exhibit AA-033, the Russian Federation Governmental Resolution No. 814, 12 July 2018, Exhibit AA-034, and he Russian Federation Governmental Resolution No. 503, 14 June 2013, Exhibit AA-035.

law contracts on behalf of its principal, or bring an action in court.[122] Again, the Respondent has not taken issue with much of Professor Asoskov's presentation on matters of Russian law.

161. Looking beyond the Claimant's legal form under Russian law, there can be no reasonable doubt, on the basis of the evidence submitted to date, that the government exerts comprehensive control over it, both as a matter of law and fact.

162. With no other shareholders or participants that are stakeholders in the Claimant, there is no other participant – other than the government – that can control its activities. Indeed, it appears that the legal form of a State Corporation was chosen in order to ensure State control over its activities. Thus, the Explanatory Note to the Draft VEB Law stated in explicit terms that:

> […] it is suggested to establish this type of a State financial development institution in the form of a state corporation, *ensuring control* over its activity by the Government of the Russian Federation and other state authorities.
>
> […]
>
> The Development Bank will be established using the assets of the Russian Federation and will be *fully controlled* by the state at all stages of its formation and operation.[123]

163. This "ensur[ed]" and "full[]" control is reflected in the organisational structure of the Claimant. According to the VEB Law, the Claimant's Supervisory Board is its "supreme governing body",[124] which determines the main areas of the Claimant's activities, takes decisions to approve

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122 Expert Report of Professor Asoskov, ¶ 92.

123 Explanatory Note to Draft Federal Laws "On the Development Bank" and "On Amendments to Articles 7 and 13 of the Federal Law 'On Banks and Banking Activities' in Connection with the Adoption of the Federal Law 'On the Development Bank'", Exhibit R-20.

124 VEB Law, Article 10(1), Exhibit C-003.

transactions involving the Claimant and appoints and dismisses the members of the Claimant's management board.[125]

164. The Chairman of the Supervisory Board must be the Prime Minister of the Russian Federation as a matter of law,[126] and as a matter of fact the other members of the supervisory board are senior Government officials, including Deputy Prime Ministers and Ministers. Indeed, the only member of the Supervisory Board that is neither a Prime Minister, Deputy Prime Minister or Minister is the Chairman of the Management Board of VEB, who in turn is appointed and dismissed by the President of the Russian Federation.[127]

165. As for the Management Board, in addition to its members being appointed and dismissed by the Supervisory Board, its powers comprise preparing and submitting for consideration by the Supervisory Board any proposals in respect of VEB's key business areas and the scope of its investment and financing activities.[128]

166. In this way, all key decisions made by the Claimant are taken by senior members of the Government of the Russian Federation, and those appointed by them. Furthermore, the Claimant's assets and funds feature contributions by the Russian Federation and its Federal Budget,[129] and this State funding has been reflected by government resolutions by which it allocates State funds to the Claimant.[130]

167. This structural and financial governmental control appears to reflect the policy function of VEB as a "State financial development institution", to quote the Explanatory Note to the Draft VEB Law.[131] Although Article 6(1)

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125 VEB Law, Article 12, Exhibit C-003.

126 VEB Law, Article 15(2), Exhibit C-003.

127 VEB Law, Article 15(2), Exhibit C-003.

128 See VEB Law, Article 14, Exhibit C-003.

129 See VEB Law, Article 5, Exhibit C-003.

130 See the Resolution of Government of Russian Federation "On Approval of the State Programme of the Russian Federation 'Management of State Finance and Regulation of Financial Markets'", No. 320, 15 April 2014, Exhibit R-138.

131 See ¶ 162 above, and Explanatory Note to Draft Federal Laws "On the Development Bank" and "On Amendments to Articles 7 and 13 of the Federal Law 'On Banks and Banking Activities' in Connection with the Adoption of the Federal Law 'On the Development Bank'", Exhibit R-20.

of the VEB Law states that government authorities "may not interfere in VEB.RF's activities aimed at achieving its business purposes specified in this Federal Law unless otherwise provided for by this Federal Law or any other federal laws", the policy function of VEB as a development bank appears – on the basis of the evidence presently before the Tribunal – to be closely aligned with Russian Government policy.

168. This is reflected in Article 3(1) of the VEB Law, which has been referred to above but bears repeating again at this stage of the analysis. Entitled "Business Purposes and Functions of VEB.RF", Article 3(1) provides that:

> VEB.RF shall act to facilitate the long-term socio-economic development of the Russian Federation, create the conditions for sustained economic growth, improve investment efficiency and expand investment in the Russian economy by implementing projects domestically and abroad, including inward investment projects aimed at developing infrastructure, industrial production, innovation and special economic zones, protecting the natural environment, enhancing energy efficiency, promoting exports and helping Russian industrial products (goods, work, services) to expand into foreign markets and by carrying out other projects and/or transactions as part of investment, foreign economic, advisory and other activities provided for by this Federal Law (VEB.RF's projects).[132]

169. This policy function appears, as a matter of fact, to be determined by the Russian Government. Thus, pursuant to Article 4(6) of the VEB Law, the Government approves the Memorandum on the Financial Policies of VEB, which governs its operations.[133] Furthermore, as a matter of fact, in 2018 the Supervisory Board of VEB approved a two-page "VEB.RF's Business Model 2024", which on its face appears to indicate that VEB is to carry out the goals determined by decree of the Russian President, and which was itself entitled "National goals and strategic objectives of development of the

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132 VEB Law, Exhibit C-003.

133 VEB Law, Article 4(6), Exhibit C-003.

Russian Federation for the period until 2024".[134] Moreover, this apparent alignment of the policy goals of the Russian Federation and VEB appears to have existed throughout the relevant period. Thus, in 2008, the Russian Federal Law "On Additional Measures for Supporting the Financial System of the Russian Federation" indicated that the Claimant was to act as "a key instrument of the state crisis management policy" to refinance Russian corporates' foreign debts incurred prior to the end of December 2008.[135] In the years that followed, the Claimant described itself as the Government's "tool in the implementation of anti-crisis measures".[136] More recently, the Claimant has described itself as a "key instrument" of Russian Government policy whose activities are strategically important for the national economy, and that it "accomplish[es] the objectives formulated by the Russian President and Government".[137]

170. The function of the Claimant as a "key instrument" for "accomplish[ing]" Russian Government policy has also been confirmed by contemporaneous statements made by Mr Vladimir Dmitriev, the former Chairman of its Management Board, as well as by his testimony in these proceedings. Thus, in interviews given by Mr Dmitriev to the Russian media in June 2009, he described by way of example how the Claimant's acquisition of a bigger stake in its Belarussian affiliate in 2007 was designed to "ensure the synergy to the Russian-Belarusian relations".[138] In an interview he gave a year later, in June 2010, he stated the following in relation to the Claimant's ownership interest in both Belarussian and Ukrainian banks: "VEB is tightly woven into the fabric of interstate relations in the SCO [Shanghai Cooperation Organisation] space."[139] In explaining how the Claimant was tightly woven into the "fabric of interstate relations", Mr Dmitriev testified, during his examination of 15 October 2020, that the "purpose and the mandate of VEB

134 VEB Website, "VEB.RF's Business Model 2024", Exhibit R-28; and Decree of the President of Russian Federation "On the National Goals and Strategic Objectives of Development of the Russian Federation for the Period Until 2024", No. 204, 7 May 2018, Exhibit R-181.

135 Federal Law "On Additional Measures for Supporting the Financial System of the Russian Federation", No. 173-FZ, 13 October 2008, Exhibit R-58; see also VEB Annual Report, 2008, pp. 38-39, Exhibit R-55.

136 VEB Website, "International Conference of VEB: Modernisation of Russian economy: the role of development institutions", 8 December 2009, Exhibit R-88.

137 VEB Annual Report, 2018, Exhibit R-179.

138 See the interview of Mr Dmitriev in *Business* newspaper, PIB Website, "News and Releases", 8 June 2009, p. 2, Exhibit R-86.

139 Ukrrudprom, "It's impossible to satisfy everyone", 3 June 2010, p. 2, Exhibit R-209.

is to promote Russian industrial export to other countries".[140] He also testified that its purpose was to promote the Russian rouble as a "regional reserve currency".[141]

171. The Claimant's role as a "key instrument" to "accomplish" government policy appears to explain the privileged position and immunities that it benefits from as a matter of Russian law. Both the VEB Law itself, and the Russian Federal Law "on Securities Market", set out various significant exemptions for the Claimant from laws on banks and banking activities in related financial and securities market regulations.[142] VEB is also exempt from paying profit tax and from paying VAT in relation to any banking operations.[143] Similarly, the VEB Law stipulates that Russian insolvency and bankruptcy laws do not apply to VEB.[144] Moreover, the Criminal Code of the Russian Federation identifies employees of VEB as "public officials" with the result that they can incur liability in respect of "crimes against a power and interest of the State Service".[145]

172. Against this general background, it remains to evaluate the evidence that has been presented in these proceedings to date as to why the Claimant purchased an equity stake in PIB.

173. In this regard, Mr Dmitriev emphasised during his testimony that the Claimant's acquisition of PIB was driven by commercial considerations and motivations. He testified that: "[i]t is purely commercial and financial interest by acquiring a bank which, not later than after a year, became one of the leading banks in Ukraine."[146]

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140 Transcript, 15 October 2020, p. 46.

141 Transcript, 15 October 2020, p. 46.

142 VEB Law, Article 4(3), Exhibit C-003; Federal Law "On Securities Market", No. 39-FZ, 22 April 1996, Articles 39(2) and (3), Exhibit R-35. In addition, VEB does not aim at developing competitive banking products or services offered by commercial banks. For example, VEB does not open accounts for the public but only for persons listed in the VEB Law; see Respondent's Memorial, ¶ 42.

143 Tax Code of Russian Federation (Part Two), No. 117-FZ, 5 August 2000, Articles 251, 270 and 149(3), Exhibit R-41.

144 VEB Law, Article 19, Exhibit C-003.

145 Criminal Code of the Russian Federation, No. 63-FZ, 13 June 1996, Chapter 30, Exhibit R-36.

146 Transcript, 15 October 2020, p. 43.

174. Although he acknowledged the financial distress in which PIB found itself in 2008, he did not accept that this deprived the Claimant of a commercial motivation in acquiring it. He testified further that: "PIB was purchased as a bank with [a] very strong financial position in the banking system of Ukraine. We knew about the problems, but we knew as well that those problems could be overcome. And of course we were driven by the fact that the price which we paid for PIB is much less than the price which was offered to PIB in the beginning of 2008 by one of the foreign banks, where the price which was negotiated was in the range of $1.5 billion/$2 billion. And you know the price for which we bought the bank."[147] According to the Claimant, it expended approximately USD 900 million between 2008 and 2011 to acquire PIB's shares and increase PIB's share capital.[148]

175. Thus, Mr Dmitriev maintained that there was indeed a commercial driver for making the acquisition. But he also acknowledged that this commercial motivation was accompanied by the intention that the acquisition would fulfil the Claimant's policy function as set out in Article 3 of the VEB Law. Thus, he testified that: "…our decision was driven by commercial motives and commercial intentions. But we, on the other hand, contemplated from the fact that the mandate for VEB is to support Russian industrial export, which we could achieve through acquiring the bank in Ukraine, which was one of the leading banks in the banking system."[149] Along the same lines, he testified that the Claimant acquired PIB: "to serv[e] bilateral economic relationships between Russia and Ukraine",[150] and that the Claimant "considered acquisition of PIB as an opportunity of enhancing economic relationships between our countries".[151]

176. In this way, according to the testimony of Mr Dmitriev taken as a whole, commercial and policy motivations came together in the acquisition of PIB. In this regard, the Tribunal has considered in particular the extract from the minutes of the Supervisory Board of the Claimant that took place on 24

147 Transcript, 15 October 2020, p. 50.

148 Request for Arbitration, ¶ 24(a).

149 Transcript, 15 October 2020, p. 49.

150 Transcript, 15 October 2020, p. 40.

151 Transcript, 15 October 2020, p. 37.

December 2008, at which the acquisition of a 75% shareholding in PIB was decided on.[152]

177. Although the minutes do not explicitly record the reasons for the acquisition, they do make clear that the only speakers at that meeting were Mr Dmitriev, as the Chairman of the Management Board of the Claimant, and Mr Putin, as the Chairman of the Supervisory Board, who was also at that time the Prime Minister of Russia. Mr Dmitriev confirmed during his testimony that he and Mr Putin made a joint presentation of the merits of proceeding with the acquisition.[153] In the light of these facts, the Tribunal finds that it would be unrealistic to conclude that Russian governmental policy considerations did not form part of the decision to acquire a significant shareholding in PIB. In arriving at this observation on the basis of the record to date, the Tribunal considers that it is unnecessary to draw the adverse inferences that the Respondent has called for at this stage of the Arbitration, as the present record as it stands has provided adequate indication of the governmental policy considerations involved in the Claimant's acquisition of its investment.

178. Having made these observations as to the status, role and purpose of the Claimant in making the investment that is the subject matter of the present claim on the basis of the evidence presently before it, the Tribunal notes that it remains to be seen whether and how they may be relevant to the merits of this dispute. Those questions do not arise at this stage of the Arbitration, and the Tribunal does not pre-judge the answer to them.

V. DID THE CLAIMANT FULFIL THE PRECONDITIONS TO THE LAUNCH OF ARBITRAL PROCEEDINGS UNDER ARTICLE 9 OF THE TREATY

A. THE RESPONDENT'S POSITION

179. The Respondent argues that the Claimant is precluded from recourse to arbitration as a result of its failure to comply with the mandatory pre-conditions for recourse to arbitration (in some of its submissions, the

152 Minutes of the meeting of VEB's Supervisory Board, 24 December 2008, Exhibit C-092.

153 Transcript, 15 October 2020, p. 58.

Respondent has referred to this failure as a "refusal" by the Claimant to comply).[154]

180. Based on the terms of Article 9 of the Treaty, the Respondent submits that it only consented to arbitrate disputes under Article 9 of the Treaty if three cumulative steps were fulfilled:

(i) the Claimant must notify the Respondent in writing that an investment treaty dispute exists and provide detailed comments;

(ii) the Claimant must try to settle the investment dispute amicably as far as possible through negotiations; and

(iii) at least six months must have passed with the dispute yet to be resolved.

181. In particular, the Respondent submits that the Claimant should have, after properly notifying the dispute, attempted to settle that dispute through negotiations for at least six months before commencing contentious proceedings. The Respondent relies on the decisions of various investment tribunals to argue that States can limit their consent as they see fit, including by way of "obligatory procedural prerequisites demanding amicable settlement efforts before contentious proceedings can be commenced";[155] that what is required is "a genuine effort at pursuing negotiations with a view to a mutually agreeable solution";[156] and that "unilateral protestations, advocacy or the mere passage of time are insufficient".[157]

182. The Respondent claims that the Claimant has failed to comply with the pre-arbitral requirements of Article 9 of the Treaty in two respects.

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154 Respondent's Memorial, ¶¶ 275-312; Respondent's Reply ¶¶ 132-177; Respondent's Skeleton Argument, ¶¶ 40-47.

155 Respondent's Skeleton Argument, ¶ 43, citing, for example, *Almasryia for Operating & Maintaining Touristic Construction Co. LLC v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, ¶¶ 39–43, Exhibit RL-138.

156 Respondent's Skeleton Argument, ¶ 43.

157 Respondent's Skeleton Argument, ¶ 43, citing, for example, *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 108, Exhibit RL-123; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment on Preliminary Objections, 1 April 2011, 2011 ICJ Rep. 70, ¶¶ 150-151, 157–158, Exhibit RL-119.

183. *First*, the Respondent submits that the Claimant refused to present a valid notification of dispute, even after Ukraine drew its attention to the requirement.

184. The Respondent denies that the Claimant's letter to various Ukrainian Government officials dated 14 September 2018 ("**Notice of Dispute**") [158] constituted a valid dispute notice for the purposes of Article 9 of the Treaty. The Respondent argues that the power of attorney for Mr Krasnov, who signed the Notice of Dispute and purported to act on the Claimant's behalf, was "expressly limited to representing the Claimant in 'foreign state courts and other dispute resolution bodies'", but "did not purport to extend to out-of-court settlements, negotiated agreements or general interest representation vis-à-vis governments and the executive branch."[159]

185. According to the Respondent, the Ministry of Justice of Ukraine in its response to the Notice of Dispute "pointed out that the supposed notification was deficient because it did not appear that Mr Krasnov was authorised to liaise with Ukraine".[160] However, the Claimant decided not to furnish any authorisation to conduct negotiations and sign settlement agreements with its response to the Ministry of Justice of Ukraine.[161]

186. Whilst Mr Krasnov's power of attorney expressly covered "foreign state courts and other dispute resolution bodies", the Respondent argues that his Ukrainian counterparts were neither courts nor dispute resolution bodies, and nor did Mr Krasnov's authority purport to cover negotiating and concluding settlements with foreign governments. Similarly, the Respondent claims Mr Krasnov had no apparent authority to represent and bind a Russian State organ that requires Supervisory Board approval for important issues and is controlled by the most senior Russian State officials.

187. The Respondent denies that its objection in this regard is "formalistic", as characterised by the Claimant.[162] The Respondent points to requirements in the Russian Civil Procedure Code and the Russian Commercial Procedure that a representative's authorisation must specifically refer to the power to

158 Letter from VEB to various Ukrainian officials, 14 September 2018, Exhibit C-026.

159 Respondent's Memorial, ¶ 290.

160 Respondent's Memorial, ¶ 291.

161 Respondent's Memorial, ¶ 292; Respondent's Skeleton Argument, ¶ 45.

162 Request for Arbitration, ¶ 102.

reach an amicable settlement, and notes that Russian courts dismiss claims for want of a valid written authorisation if such document fails to explicitly state the specific powers claimed to be within the scope of a representative's power of attorney. The Respondent also refers to the position taken by the Russian Federation in international fora to the effect that procedural preconditions must be taken seriously and are strict and obligatory.[163]

188. *Second*, the Respondent argues that the Claimant merely paid lip service to the negotiation prerequisite and had no genuine interest in resolving its claims by negotiation. To recall, the English translation of Article 9 of the Treaty relied on by the Respondent provides as follows:

> 1. […] The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.
>
> 2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:
>
> a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;
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> b) the Arbitration Institute of the Chamber of Commerce in Stockholm,
>
> c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).

163 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment on Preliminary Objections, 1 April 2011, ICJ Rep. 2011, ¶¶ 150–151, Exhibit RL-119; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 8 November 2019, ¶¶ 66–67, Exhibit RL-139.

[…][164]

189. In submitting that this requirement was not satisfied, the Respondent points to the fact that no negotiations took place between the Parties with respect to the Claimant's claims. The Respondent argues that "it would defeat the purpose of an amicable settlement requirement if it did not require at least a sincere effort to settle amicably."[165]

190. The Respondent further contends that the Claimant failed to show that it attempted to defuse the matter insofar as possible and that any negotiations were futile. Instead, the Claimant's efforts to negotiate were limited to sending two letters in which it set out its allegations but did not substantively engage with the concern expressed by Ukraine regarding the scope of authorisation of Mr Krasnov's power of attorney. The Respondent emphasises that the Claimant's second letter ignored the problem identified by the Ministry of Justice of Ukraine in its reply, following which the Claimant filed for arbitration without waiting for a further response.

191. In the Respondent's submission, established case law confirms that protestations and advocacy are not negotiations, and nor can an amicable settlement requirement be satisfied by the mere passage of the negotiation timeframe after "firing off a self-serving letter".[166]

192. Accordingly, the Respondent submits that the Claimant chose to disregard the mandatory pre-requisites for launching arbitration under Article 9 of the Treaty.

B. THE CLAIMANT'S POSITION

193. As a preliminary observation, the Claimant submits that, according to Swedish law which is applicable to procedural matters in this arbitration, the Respondent's Second Objection concerns an issue of admissibility rather than jurisdiction.[167]

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164 Russia-Ukraine BIT, Article 9, Exhibit RL-82.

165 Respondent's Reply, ¶ 170.

166 Respondent's Memorial, ¶ 309.

167 Claimant's Counter-Memorial, ¶ 70.

194. The Claimant submits that it has satisfied the admissibility pre-requisites of Article 9(1) of the Treaty by: (i) notifying the Respondent of the dispute; and (ii) attempting negotiations with the Respondent.[168]

195. *First*, the Claimant refers to its Notice of Dispute dated 14 September 2018, which – as the terms of Article 9(1) require – was "accompanied with detailed comments" that set out the basis of its claims.[169]

196. Furthermore, the Notice attached a power of attorney authorising Mr Krasnov to represent the Claimant "in any … bodies for resolution of disputes", "do any other legal actions and formalities" and "sign … and submit documents of any kind". According to the Claimant, Mr Krasnov had the requisite authorisation to act for the Claimant in any foreign legal disputes, as he had both:

(i) express authority based on the power of attorney which covered any alternative dispute resolution, including arbitration, negotiations and any pre-action correspondence with the parties to a legal dispute, such as sending the Request for Arbitration to the Respondent; and

(ii) apparent authority based on his position as Senior Vice-President and the head of the Claimant's legal department, which made him the key person to represent the Claimant in any legal affairs, including in pre-action correspondence with the counter-party to any legal dispute.

197. The Claimant argues that there was no reasonable basis for the Respondent to doubt that the Claimant had authorised the Notice of Dispute, particularly given that it was issued on the Claimant's official letterhead and was the subject of a press release by the Claimant which was widely covered by the Ukrainian media.[170]

198. The Claimant argues further that the provisions of Russian codes of procedure relied on by the Respondent are, in the Claimant's submission,

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168 Claimant's Counter-Memorial, ¶¶ 69-109; Claimant's Rejoinder, ¶¶ 55-65; Claimant's Skeleton Argument, ¶¶ 24-31.

169 Letter from VEB to various Ukrainian officials, 14 September 2018, Exhibit C-026.

170 See Press Release from UNN, Exhibit C-114; Press Release on Forum UA, Exhibit C-115; Press Release on Channel News 24, Exhibit C-116; Press Release on Espreso TV, Exhibit C-117; Press Release on Novoe Vremya, Exhibit C-118.

irrelevant as they do not apply in the present circumstances.[171] Moreover, the Claimant notes that international tribunals have consistently rejected attempts by respondent States to contest the validity of notices based on alleged defects in the signatory's authority.[172]

199. The Claimant also submits that the response from the Ministry of Justice of Ukraine dated 22 February 2019 merely alleged that "a document confirming the authority of [Mr Krasnov] … is not attached to such Notice",[173] which appeared to indicate that a copy of Mr Krasnov's power of attorney was somehow not received at all, rather than that the version received was somehow inadequate. In any event, the Claimant then re-attached Mr Krasnov's power of attorney in its subsequent correspondence of 28 March 2019.[174]

200. *Second*, the Claimant submits that it satisfied the requirements of Article 9(1) of the Treaty, which it argues does not contain an obligation to hold negotiations over the dispute but rather requires that the Parties "should merely attempt to settle the dispute by negotiations, and only where it is at all possible."[175]

201. In this regard, the Claimant contests the English translation of Article 9 relied on by the Respondent. The translation that the Claimant relies on differs from the Respondent's in the following respects:

> 1. […] The parties to the dispute shall ~~**exert their best efforts**~~ **attempt** to ~~**settle**~~ **resolve** that dispute **where possible** by way of negotiations.
>
> 2. In the event **that** the dispute ~~**cannot be**~~ **is not** resolved ~~**through negotiations**~~ within six months ~~**as**~~ of the date of the written notification ~~**as mentioned in Item 1 hereof above**~~ **referred**

171 See Expert Report of Professor Asoskov, ¶¶ 135-136.

172 For example, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 56, Exhibit CLA-011; *Generation Ukraine v Ukraine*, Award, 16 September 2003, ¶16.1, Exhibit CLA-003.

173 Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027.

174 Letter from the Claimant to the Ministry of Justice of Ukraine dated 28 March 2019, Exhibit C-028.

175 Claimant's Counter-Memorial, ¶ 101.

> **to in point 1 of this Article**, ~~**then**~~ the dispute shall be ~~**passed over for consideration to**~~ **referred to be considered by**:
>
> […]

202. In particular, the Claimant submits that the authentic texts of Article 9 in Russian and Ukrainian do not feature the phrases "exert their best efforts" or "through negotiations" but do include the phrase "where possible" which is absent in the Respondent's translation.

203. According to the Claimant, the requirement in Article 9(1) of the Treaty is to "attempt" negotiations "where possible" but not to pursue negotiations for the entire duration of the "cooling-off" period or until a deadlock is reached.[176] In the Claimant's submission, even based on the stricter language according to the Respondent's translation, it would be sufficient if one Party invites the other Party to negotiations, even though the latter declines the invitation or chooses not to respond.

204. The Claimant refers to its offers to the Respondent on two occasions to engage in settlement discussions, both of which were ignored. Accordingly, the Claimant asserts that it was entitled to proceed to arbitration following the expiry of the "cooling-off" period.

205. Furthermore, the Claimant contends that any further attempts to negotiate would have been futile. The Claimant notes that the Respondent waited for almost six months after receipt of the Notice of Dispute before its Ministry of Justice issued a response dated 22 February 2019 which raised, for the first time, a concern with Mr Krasnov's power of attorney.[177]

206. Accordingly, the Claimant submits that it was clear that the Respondent did not wish to engage in good faith negotiations and the Claimant was not obliged to make any further attempts to settle the dispute amicably before commencing the present Arbitration.

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176 Claimant's Skeleton Argument, ¶ 32.

177 Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027.

C. THE TRIBUNAL'S ANALYSIS

207. To examine the Respondent's second objection, the Tribunal begins again with the terms of Article 9 of the Treaty. In the Tribunal's view, the differences in the Parties' respective translations of the Treaty do not appear to be material to the Respondent's second objection. The Respondent has confirmed this,[178] and the Tribunal has considered both translations but quotes in this section from the Respondent's translation at Exhibit RL-82, which provides as follows:

> 1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes, which concern the amount, terms of and procedure for payment of compensation provided for in Article 5 hereof or with the procedure for effecting a transfer of payments provided for in Article 7 hereof, a notification in writing shall be handed in, accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.
>
> 2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:
>
> a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;
>
> b) the Arbitration Institute of the Chamber of Commerce in Stockholm,
>
> c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of

178 Transcript, 9 September 2020, pp. 69-70.

> the United Nations Commission for International Trade Law (UNCITRAL).
>
> […][179]

208. Accordingly, the Treaty imposes two pre-conditions to the launch of arbitration proceedings, namely:

(i) The sending of "a notification in writing" of a dispute, which is "accompanied with detailed comments" on the dispute; and

(ii) "The parties" then "exert[ing] their best efforts to settle that dispute by way of negotiations", with the right to arbitrate only arising in the event that dispute "cannot be resolved through negotiations within six months as of the date of the written notification".

209. As with other terms of the Treaty, the Tribunal finds that these provisions are to be interpreted by reference to international law, and in particular Article 31 of the VCLT, i.e. by reference to the "ordinary meaning" of the terms, interpreted in "context", and taking into account the "object and purpose" of the Treaty.

210. The Tribunal sees no reason why the contracting States would have intended the substantive interpretation of Article 9 to be governed by a different legal framework. Although Article 9 contains the arbitration clause, which is understood to be separable, it does not follow that the interpretation of its terms, contained as they are in an international treaty, should be governed other than by international law.

211. In any event, while the Claimant has submitted that Swedish law should govern the interpretation of the procedural preconditions to arbitration, it has not demonstrated that such application of Swedish law would lead to a different outcome. In this regard, the Claimant placed reliance on a judgment of the Swedish Supreme Court addressing a partial annulment application in one of the early Energy Charter Treaty arbitrations, *Petrobart v Kyrgyzstan*, in which the seat of the arbitration was Stockholm. In that judgment, the Swedish Supreme Court held that: "the relevant arbitration proceedings are governed by Swedish law" and thus "procedural issues shall be resolved under Swedish law, although the arbitration proceedings

179 Russia-Ukraine BIT, Article 9, Exhibit RL-82.

involve foreign law".[180] In so holding, however, there was nothing in the Supreme Court's decision that suggested that an application of Swedish law to the interpretation of a notice or negotiating precondition to the right to invoke arbitration would differ materially from an application of the VCLT.[181]

212. Applying the tenets of treaty interpretation that are derived from the VCLT to the two preconditions to arbitration set out in Article 9, the Tribunal considers that the terms interpreted in context and in the light of the object and purpose of a treaty are intended broadly to ensure that a State respondent party is reasonably informed of the existence and subject-matter of a dispute, so that it is pre-warned of the prospect and scope of an international arbitration against it. Furthermore, the purpose of a 6-month negotiating period, often referred to as a "cooling-off" period, is intended to afford both parties a mutual opportunity to avoid the prospect of future arbitration.

213. Having made these broad introductory observations as to the meaning and purpose of these pre-conditions to arbitration, the Tribunal proceeds to consider whether those pre-conditions were fulfilled in this case by reference to:

(i) The relevant facts, i.e. the steps taken by, and the conduct of, both Parties prior to the launch by the Claimant of these proceedings; and

(ii) An evaluation of whether those facts adequately fulfil these pre-conditions.

214. The relevant facts can be summarised as follows:

(i) On 14 September 2018, the Claimant sent a notice of dispute to various Government officials of Ukraine, including the President and Prime Minister of Ukraine, which was signed by Mr Igor Krasnov in his capacity as the "Senior Vice President, Head of the

180 Judgment of the Supreme Court of Sweden, March 2008, Case No. T 2113-06/NJA 2008 s. 406, p. 5, Exhibit CLA-79.

181 Although a submission was made during the hearing that the Supreme Court's decision has been interpreted as meaning that a negotiating precondition to arbitration is "probably" ineffective, the Claimant confirmed that there is nothing on the face of the Supreme Court's judgment itself to this effect; see Transcript, 9 September 2020, p. 149.

Legal Directorate of Vnesheconombank" ("**Notice of Dispute**").[182] The Notice of Dispute included:

(a) an enclosed detailed statement regarding the dispute between the Parties;

(b) an enclosed notarised copy of the power of attorney of Mr Igor Krasnov dated 7 June 2017; and

(c) an invitation to "contact [the Claimant] forthwith and start the negotiations on the amicable settlement of the dispute in accordance with article 9(1) of the 1998 Agreement."

(ii) The Ministry of Justice of Ukraine responded by way of a letter dated 22 February 2019, which was received by the Claimant on 12 March 2019:[183]

(a) acknowledging that it received the Notice of Dispute on 1 October 2018;

(b) advising that "the Ministry of Justice of Ukraine is the body representing the state of Ukraine during the settlement of investment disputes that arise between the State of Ukraine and foreign persons"; and

(c) stating that there are no grounds to believe that the Claimant had notified Ukraine of a dispute under Article 9 of the Treaty "since a document confirming the authority of [Mr Krasnov] to sign and deliver the Notice of a dispute between [the Claimant] and Ukraine is not attached to such Notice".

(iii) On 28 March 2019, in a response from the Claimant to the Ministry of Justice of Ukraine co-signed by Mr Krasnov and the Vice

182 Letter from VEB to various Ukrainian officials, 14 September 2018, Exhibit C-026.

183 Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027.

President of Legal Assistance Department, V.M. Golosov, the Claimant stated that:[184]

(a) according the text of the power of attorney enclosed with the Notice of Dispute, Mr Krasnov is "authorised to represent the interests of the Bank in all foreign state courts and other dispute resolution bodies and has the right to carry out all procedural actions on behalf of the Bank and to exercise the powers of party to a dispute, as well as to sign, receive and transmit documents of various kinds, which are necessary for the performance and/or documentation of the respective actions";

(b) neither the BIT nor other applicable sources of international law contain any requirements as to the form of a power of attorney for a representative of an investor signing a notice or other document notifying the commencement an investment dispute;

(c) "the Ministry of Justice of Ukraine has no grounds to assume that [Mr] Krasnov was not authorised to act on behalf of the Bank or to sign the Notice, or that, having signed the Notice, [Mr] Krasnov exceeded the powers granted to him under the Power of Attorney"; and

(d) the Claimant, without prejudice to its rights, was "still ready to consider proposals for the peaceful settlement of this dispute, if any will come from Ukraine", although this letter "does not grant to Ukraine the right to additional time for the settlement of this dispute by negotiations."

(iv) Prior to and following the Claimant's issuance of the Notice of Dispute, certain events took place in Ukraine which can be summarised as follows:

(a) On 2 May 2018, a number of Ukrainian companies and individuals obtained an arbitral award against the Russian Federation ("**Everest Award**") for approximately USD 140

[184] Letter from the Claimant to the Ministry of Justice of Ukraine dated 28 March 2019, Exhibit C-028.

million, which they sought to recognise and enforce in Ukraine. The Kyiv Appellate Court granted the request for enforcement on 25 September 2018.

(b) On 5 September 2018, the Kyiv Appellate Court attached a number of assets in Ukraine, including the property of PIB and shares in PIB owned by the Claimant. The attachment order was contested by the affected parties and, on 25 January 2019, Ukraine's Supreme Court varied the order such that it only attached those shares in Ukrainian banks that were registered in the name of the Russian Federation.

(c) In March 2019, the State Bailiff commenced execution proceedings against the Russian Federation in respect to the Everest Award and again attached the Claimant's PIB shares on the basis that they belonged to the Russian Federation.

(d) In June 2019, the State Bailiff valued the Claimant's PIB shares and announced plans to sell them at a public auction to satisfy Russia's debt arising from the Everest Award. The auction sale was scheduled to take place on 28 August 2019.

(v) On 20 June 2019, approximately nine months following the issuance of the Claimant's Notice of Dispute, the Claimant commenced the present Arbitration by way of submission of its Request for Arbitration to the SCC, and followed that soon after with a request for the appointment of an Emergency Arbitrator to impede the auction sale scheduled to take place before the end of August 2019.

215. Having considered these facts, the Tribunal turns to consider specifically:

(i) Whether the Claimant's Notice of Dispute was adequate; and

(ii) Whether the Respondent can rely on the absence of active negotiations between the Parties subsequent to the Respondent's receipt of the Notice(s) of Dispute to establish that the pre-conditions to arbitration were not fulfilled.

1. Was the Claimant's Notice of Dispute adequate?

216. The Tribunal finds that the Claimant's Notice of Dispute dated 14 September 2018 amply fulfilled the requirements of such a notice set out in Article 9 of the Treaty. It amounted to "a notification in writing", and provided "detailed comments" on the subject matter of the dispute in the form of a detailed attachment to the Notice which specified the facts, allegedly wrongful actions and the violations of the Treaty that those actions were alleged to have entailed.[185] It was sent by Mr Igor Krasnov, who was both a Senior Vice President and the Head of the Legal Directorate of the Claimant. And it was sent to and received by appropriate recipients within the Government of Ukraine, namely the President, the Prime Minister, the Minister of Foreign Affairs, the First Vice Prime Minister and Minister of Economic Development and Trade, the Head of the National Bank of Ukraine, and the Chargé d'Affaires of Ukraine to Russia, with the Ministry of Justice subsequently acknowledging receipt of the Notice. As such, there can be no reasonable doubt that it provided the Respondent with adequate notice of the dispute that the Claimant considered had arisen, and a pre-warning that this would result in arbitration if not resolved amicably. In so doing, it fulfilled the first precondition for launching arbitration proceedings not less than six months later.

217. Furthermore, the Tribunal cannot adopt the Respondent's submission that the Notice of Dispute could not be considered sufficient because it was not accompanied by an adequate Power of Attorney. The terms of the Treaty do not require a Notice of Dispute to be accompanied by a Power of Attorney. Moreover, there is no overwhelming practice – to the Tribunal's knowledge – of such notices being accompanied by powers of attorney, and it is not apparent why the Respondent would have any reasonable doubt that the sending of the Notice of Dispute by the Claimant had been properly authorised given that:

(i) it was sent on the Claimant's headed-paper;

(ii) it was sent and signed by Mr Krasnov, the Head of the Claimant's Legal Department and a Senior Vice President of the Claimant; and

185 See Letter from VEB to various Ukrainian officials, 14 September 2018, Exhibit C-026.

(iii) it was accompanied by a power of attorney signed by the Chairman of the Management Board of the Claimant, and which authorised Mr Krasnov as signatory of the Notice to "represent the interests of [the Claimant] in all foreign state courts *and other dispute resolution bodies*", to "perform ... all procedural actions" in a case, and to "perform other legal actions and formalities, *as well as to sign, receive and transmit documents ... which are required for the performance and/or documentation of actions*, which I.S. Krasnov is authorised to perform by the present power of attorney".[186]

218. In the light of all of these indications and confirmations of authority, the Tribunal has difficulty in understanding the Respondent's belated response received in mid-March of 2019 in which it stated that "a document confirming the authority of [Mr Krasnov] to sign and deliver the Notice of a dispute … is not attached to such Notice."[187] Even though the Tribunal has already found that such a power of attorney was not required, precisely such an authority to "sign documents" that were "required for the performance" of "actions" was attached to the Notice of Dispute.[188]

219. Moreover, and in any event, the Tribunal is constrained to observe that if the Respondent could still have had a reasonable doubt that the Notice of Dispute was properly authorised, despite the indications and confirmations to the contrary, it would have expected the Respondent to indicate such a doubt in a timely fashion. It did not do so, but rather waited instead until the expiry of almost the entire six-month "cooling-off" period to request further proof of authority. Such conduct appears less consistent with a genuine concern that the Notice of Dispute was properly authorised, and more indicative of a party hoping to generate impediments to progress in the dispute resolution process. While this is relevant to the Tribunal's evaluation of whether adequate efforts were made to make use of the

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186 Letter from VEB to various Ukrainian officials, 14 September 2018, Exhibit C-026 (emphasis added).

187 Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027.

188 Although the Respondent's submissions question the authority of Mr Krasnov to participate in negotiations, in fact its complaint at the time contained in its response to the Notice of Dispute was that authority to sign the Notice of Dispute had not been provided; see the final sentence of the Letter from the Ministry of Justice of Ukraine to VEB, 22 February 2019 (received on 12 March 2019), Exhibit C-027. In any event, the Tribunal does not discern any meaningful difference between authority to sign and send a Notice of Dispute inviting negotiations, and authority to participate in such negotiations.

opportunity to negotiate an amicable settlement following the Notice (which is considered below), the Tribunal has no hesitation in finding that the belated questions raised about the authorisation of the Notice of Dispute do not affect the adequacy and validity of the Notice of Dispute when the Claimant originally sent it.

2. Can the Respondent rely on the absence of active negotiations between the Parties to establish that the pre-conditions to arbitration were not fulfilled?

220. Although the Parties' respective translations of the Treaty feature greater differences in that part of Article 9 that refers to attempts at negotiation, the Tribunal again considers the differences not to be material to the question before it.

221. In both English translations, the Treaty effectively imposes a duty to attempt to negotiate a settlement of the dispute that has been notified. As settlement requires an agreement of the parties which neither is obliged to reach, the essence of that duty is to provide opportunity for settlement: that is all; that is enough. And it is a duty that is imposed on both the investor and the host State of the investment. In the memorable words of the tribunal in *Louis Dreyfus*, it "takes two to tango".[189]

222. For the reasons explained below, the Tribunal finds that the duty was adequately fulfilled by the Claimant, and that the Respondent's own conduct made plain that it would not be reasonable to expect the Claimant to have made further efforts in the circumstances.

223. Very simply, the Claimant offered to meet and negotiate with the Respondent's representatives in a Notice of Dispute that the Tribunal has found to have been adequate. In terms, the Claimant invited the Respondent to "[p]lease contact us forthwith and start the negotiations on the amicable settlement of the dispute in accordance with article 9(1) if the [Treaty]."[190] The making of such an invitation alone can fulfil an investor's obligation to afford a reasonable opportunity to negotiate, unless the invitation is

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189 *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶ 79, Exhibit CLA-230.

190 Letter from the Claimant to various Ukrainian officials, 14 September 2018, Exhibit C-026.

accepted by the Respondent State party and then not reasonably progressed by the investor.

224. In the event, the Respondent did the opposite of accepting the invitation to negotiate. It made no response whatsoever until only a few weeks before the expiry of the six-month negotiating window, and then raised questions as to authority that were unwarranted in the circumstances. If the Respondent had had a genuine interest in exploring a negotiated resolution, it could have raised its questions as to authority sooner. That the Respondent did not show such an interest is perhaps unsurprising given the Respondent's view – as expressed in its first objection – that the Claimant was an arm or agent of a State with which it found itself in a broader political dispute.

225. As already observed, the duties imposed with regard to negotiations by Article 9 were mutual. Furthermore, they cannot be reasonably interpreted as imposing an obligation to engage in an exercise in futility. The Respondent's own conduct indicates that any further efforts expended by the Claimant would have been precisely that. Indeed, not only was the Respondent notably unresponsive to the invitation to negotiate contained in the Claimant's valid Notice of Dispute but, as has been recalled above, steps were being taken following the Notice within Ukraine that were themselves the opposite of "cooling-off".[191] An obligation to act in a constructive matter during a "cooling-off" period applies to all parties to a dispute. One party cannot be required to do more to "cool down" the dispute when its counterparty is contributing to the dispute 'warming up'.

226. Ultimately, nine months elapsed between the Claimant's Notice of Dispute, in which it invited negotiations, and the launch of this Arbitration. That eventual launch took place against the backdrop of other steps being taken on the ground in Ukraine that led to the Claimant's successful application for emergency measures against the Respondent. The Tribunal finds that this amounted to more than the adequate opportunity to negotiate a settlement that is required by Article 9.

227. For these reasons, the Tribunal finds that all of the pre-conditions to arbitration were adequately fulfilled by the Claimant by the time it launched

[191] See ¶ 214(iv) above.

arbitration in June 2019, and that the Respondent's second preliminary objection must also be dismissed.

VI. THE SCOPE OF THE TREATY PROTECTIONS AT ARTICLE 3 OF THE TREATY

228. The final preliminary objection that is addressed in this Partial Award, is not strictly in the nature of an objection to jurisdiction or admissibility. Rather, it is a question that goes to the substantive scope and limits of one of the protections that the Claimant relies on in bringing its claim. For this reason, the Tribunal begins by summarising the Claimant's position on this issue, before turning to the Respondent's position.

A. THE CLAIMANT'S POSITION

229. The Claimant's position is that Article 3(1) of the Treaty allows an investor to rely on any standards of investment protection found in the host State's other investment treaties, such as FET, FPS and "umbrella" clause protection.[192]

230. The English translation of Article 3(1) relied on by the Claimant provides as follows:

> Each of the Contracting Parties shall, in respect of investments made by investors of the other Contracting Party and of activities relating to such investments, ensure in its territory a regime that is no less favourable than the one provided to its own investors or investors of any third state, and which excludes the application of measures of a discriminatory character that might prevent the management and disposal of investments.[193]

231. The Claimant's submission is that Article 3(1) contains three standards: that is, in addition to the national treatment and MFN standards, the final phrase "and which excludes the application of measures of a discriminatory

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192 Claimant's Counter Memorial, ¶¶ 111-144; Claimant's Rejoinder, ¶¶ 66-84; Claimant's Skeleton Argument, ¶¶ 38-48.

193 Russia-Ukraine BIT, Article 3(1), Exhibit C-001.

character that might prevent the management and disposal of investments" (referred to by the Claimant as a "non-discrimination clause" or the "Contested Phrase") operates as another standard of investment protection, rather than as a restriction on the scope of the national treatment and MFN clause that precede it.

232. The Claimant justifies its interpretation of Article 3(1) based on the following textual considerations:

(i) The English translation relied on by the Claimant separates the Contested Phrase with a comma and a conjunction "and", making it clear that the Contested Phrase operates as another standard of investment protection that the host State's "regime" must comply with.

(ii) The English translation relied on by the Respondent also does not suggest that the Contested Phrase operates as a restriction on the MFN clause because it also separates the MFN clause and the Contested Phrase with a comma, denoting distinct features of the "regime".

(iii) If the Contracting Parties had intended for the Contested Phrase to restrict the scope of the MFN clause, they would have placed the Contested Phrase *before* rather than *after* the MFN clause (e.g. "the regime, precluding the application of discriminatory measures…, shall be no less favourable…"); this is how contracting States commonly draft a restriction on MFN treatment in an investment treaty.

(iv) The Contested Phrase operates as a non-discrimination clause which bans any kind of discrimination in management and disposal of investment, not necessarily based on nationality. In this regard, its wording closely resembles a non-impairment standard, which is considered to be one of the aspects of the FET standard.

233. Furthermore, given that the object and purpose of investment treaties is to promote investments, the Claimant argues that an interpretation providing for additional protection rather than imposing limitations for investments should be preferred.

234. Moreover, the Claimant emphasises that the Treaty contains an express list of exclusions from the MFN treatment in Article 3(3). If Article 3(1) restricted the scope of the MFN clause only to discriminatory measures, it would be unnecessary for the Contracting Parties to add Article 3(3) and expressly exclude the importation of positive benefits and privileges therein.

235. The Claimant also submits that the Respondent's interpretation of the Contested Phrase is contrary to the position adopted by the Respondent in other investment treaty cases.[194] Accordingly, the Claimant argues that the Respondent cannot in good faith change its position with respect to the interpretation of Article 3(1) of the Treaty solely to enable its objection to the Claimant's importation of other treaty protections in this arbitration.

236. Finally, the Claimant considers that, contrary to the Respondent's reading of the drafting history of Article 3(1), the draft text of the Treaty relied on by the Respondent suggests that the Contracting Parties intended the MFN treatment to be as broad as possible.[195] According to the Claimant, the deletion of the FET clause from the draft text of the Treaty does not mean that the contracting States rejected its application to protected investors, but to the contrary indicates they contemplated the importance of it. In particular, the Claimant suggests that the contracting States may have deleted the FET clause because it was redundant in view of FET protection being available to investors via the MFN clause.

B. THE RESPONDENT'S POSITION

237. The Respondent objects to the Claimant's reliance on additional standards of protection imported from treaties other than the Treaty, namely FET, FPS and an "umbrella" clause (i.e. observance of contractual undertakings), by way of the MFN provision in Article 3(1).[196]

238. The Respondent disagrees with the Claimant's interpretation that the final lines of Article 3(1) form an independent guarantee. Instead, the Respondent argues that the final lines characterise and qualify the national and MFN

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194 For example, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award, 29 July 2014, ¶ 558, Exhibit CLA-001.

195 See ¶¶ 243-244 below.

196 Respondent's Memorial, ¶¶ 331-349; Respondent's Reply ¶¶ 178-232; Respondent's Skeleton Argument, ¶¶ 48-56.

treatment protections that are referred to earlier in the Article, and that this is confirmed by the additional English translation of the Article submitted by the Respondent as Exhibit RL-161. According to this additional translation, Article 3(1) is translated into English from the Russian original text as follows:

> Each of the Contracting Parties shall provide on its respective territory to investments made by investors of the other Contracting Party, as well as to activities connected with such investments, a regime no less favorable than the regime granted to its own investors or investors of any third State, precluding the use of discriminatory measures, which could interfere with the management and disposal of investments.

239. In the Respondent's submission, this translation makes clear that the final phrase of Article 3(1) is not a self-standing standard of investor protection, but rather a phrase that qualifies the national and MFN treatment standards that appear earlier in the provision.

240. Based on the Respondent's interpretation of Article 3(1), it is not a universal provision applicable to all and any matters related to foreign investments but is rather a narrow guarantee that investors of one Contracting Party will suffer no discrimination in the management and disposal of their investments vis-à-vis investors from the other Contracting Party or from any third State. Put simply, according to the Respondent, the MFN treatment in Article 3(1) of the Treaty is afforded only in respect of "discriminatory measures, which could interfere with the management and disposal of those investments". Accordingly, the Respondent contends that Article 3(1) can only incorporate standards of protection from other treaties if, and to the extent that, such standards have as their subject matter non-discrimination in the sphere of management and disposal of investments.

241. The Respondent argues that the MFN protection in the Treaty does not enable the importation of FPS and "umbrella" clause protections from the UK-Ukraine BIT because those standards concern different and unrelated subject matters as compared with the protection against discrimination. Similarly, the Respondent argues that the Claimant's reliance on the FET standard from the UK-Ukraine BIT to allege a breach of its legitimate expectations, including by way of Ukraine's alleged failure to act "in a

consistent manner" and without arbitrariness,[197] is in excess of what is permissible according to the text of Article 3(1) of the Treaty.

242. The Respondent further disagrees that limitations of the scope of MFN treatment are contained only in Article 3(3). The Respondent's submission is that Article 3(3) determines the specific contexts in which the MFN clause, the scope of which is defined in Article 3(1), does not apply. In other words, according to the Respondent, Articles 3(1) and 3(3) work as a double-barrel test.

243. Moreover, the Respondent submits that its interpretation of Article 3(1) is supported by the *travaux préparatoires* of the Treaty, as a draft of the Treaty reveals that the Parties agreed to exclude an earlier express reference to FET protection. In particular, the draft of the Treaty, which was prepared by the Ministry of Economy of the Russian Federation and sent to the Ukrainian Embassy in Moscow on 30 September 1997, contained an earlier version of Article 3(1) that read as follows:

Article 3

Regime of investments

> 1. Each Contracting Party will provide on its respective territory a regime for the investments made by investors of the other Contracting Party, and also with respect to the activity involved in making such investments *which regime shall be fair and equitable*, precluding the use of discriminatory measures, which could interfere with the management and disposal of those investments.[198]

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197 Request for Arbitration, ¶ 84.

198 Letter No. 24-40 p/o (T) of Ministry of Economy of Russian Federation to Embassy of Ukraine in the Russian Federation dated 30 September 1997, attaching Draft of the Agreement between the Government of the Russian Federation and the Government of Ukraine on the Encouragement and Mutual Protection of Investments, Article 3(1), Exhibit R-37 (emphasis added).

244. Both the heading of the draft provision, and the express reference to FET protection, were changed and removed from the final text of Article 3(1) of the Treaty.

245. As further evidence of the Parties' intention to exclude the FET standard from the scope of protections available under the Treaty, the Respondent relies on the following:

(i) both Ukraine and Russia concluded other bilateral investment treaties around the same time, in 1998, which contained FET clauses;[199] and

(ii) at the time Ukraine and Russia concluded the Treaty, both States already had bilateral investment treaties with third countries that contained general FET clauses.[200]

246. Accordingly, the Respondent argues that the Claimant's FET, FPS and "umbrella" clause claims cannot proceed to the merits phase.

C. THE TRIBUNAL'S ANALYSIS

247. In relation to this third preliminary objection, the differences in the English translations of the Treaty relied on by the Parties have taken on greater importance. For this reason, in relation to this last preliminary objection, the Tribunal says a few words about each of the translations relied on by the Parties in turn.

248. The Claimant's chosen translation was certified, and was used in another treaty arbitration involving the Respondent, i.e. it was not prepared for the purposes of this Arbitration. Specifically, it was the version previously used by the English High Court in the case of *Tatneft v. Ukraine*,[201] and it translates Article 3(1) of the Treaty as follows:

> Each of the Contracting Parties shall, in respect of investments made by investors of the other

199 For example, Ukraine-Spain BIT, Article 3(1), Exhibit RL-80, and Russia-Japan BIT, Article 3(3), Exhibit RL-81.

200 For example, the UK-Ukraine BIT, Exhibit CLA-002, and the UK-USSR BIT, Exhibit RL-78.

201 *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm), 13 July 2018, ¶ 43, Exhibit CLA-168.

> Contracting Party and of activities relating to such investments, ensure in its territory a regime that is no less favourable than the one provided to its own investors or investors of any third state, and which excludes the application of measures of a discriminatory character that might prevent the management and disposal of investments.[202]

249. For its part, the Respondent initially relied on the UNCTAD translation of the Treaty. Thus, although it was not relying on a certified translation, it was relying on a translation prepared by a reliable source, and that was also not prepared for the purposes of this Arbitration. The translation relied on by the Respondent translates Article 3(1) of the Treaty as follows:

> Each Contracting Party shall provide on its respective territory a regime for the investments made by investors of the other Contracting Party, and also with respect to the activity involved in making such investments which regime shall be no less favorable than the one granted to its own investors or investors of any third state, precluding the use of discriminatory measures, which could interfere with the management and disposal of those investments.[203]

250. Because of the "battle of the forms" that arose between the Parties' initially-relied-upon translations, the Respondent subsequently offered a further, certified translation of Article 3(1) of the Treaty, that appeared at Exhibit RL-161, and that also contained comments by the translator on the earlier translations of Article 3(1) relied on by the Parties. In this third translation, Article 3(1) is translated into English from the Russian original text as follows:

> Each of the Contracting Parties shall provide on its respective territory to investments made by investors of the other Contracting Party, as well as to activities connected with such investments, a regime no less favorable than the regime

202 Russia-Ukraine BIT, Article 3(1), Exhibit C-001.

203 Russia-Ukraine BIT, Article 3(1), Exhibit RL-82.

> granted to its own investors or investors of any third State, precluding the use of discriminatory measures, which could interfere with the management and disposal of investments.

251. A suggestion was made by the Respondent at the hearing that this third translation constituted an expert report by an expert translator that the Claimant had chosen not to call for cross examination.[204] For its part, the Claimant indicated that it had not understood this exhibit to amount to an expert report.[205] The Tribunal shared the Claimant's understanding, and notes that, not only was the translator not presented as an expert available for examination until the hearing, but the description by the translator of the assignment that he was set by counsel for the Respondent is not consistent with his performing the role of an expert witness. He has not described his exercise as being that of an expert witness, nor does his document contain the usual and necessary affirmations consistent with it amounting to independent expert evidence. The Tribunal, therefore, does not treat it as an independent expert report.

252. Nevertheless, the Tribunal notes that the Claimant did not dispute this last certified translation of Article 3(1) before the hearing. Furthermore, it did not contest its accuracy during the hearing,[206] and acknowledged that in one aspect at least (its omission of the conjunction "and" linking the first part of the Article with the final part of the Article) it was indeed more consistent with the Russian and Ukrainian original texts than the translation that the Claimant had submitted. For these reasons, and although it has had regard to all the translations of Article 3(1) that have been placed on the record by the Parties, the Tribunal has had regard in particular to the English translation of Article 3(1) of the Treaty that appears as Exhibit RL-161, as being an uncontested and accurate English translation of the Treaty.

253. In approaching the interpretation of Article 3(1) of the Treaty, the Tribunal notes that MFN clauses are not boilerplate provisions. They are often specifically negotiated and, as a result, they take many different forms. In the words of a leading commentary on *The Law of Treaties*, "although it is customary to speak of *the* most favoured-nation clause, there are many

204 Transcript, 9 September 2020, pp. 76-80.

205 Transcript, 9 September 2020, pp. 81, 152.

206 Transcript, 9 September 2020, p.152.

forms of the clause, so that any attempt to generalise upon the meaning and effect of such clauses must be made, and accepted, with caution."[207] Indeed other well-known commentators have gone further and noted that "even where the words used in two treaties are the same, they may not bear the same meaning" because the words used in the treaty must be "interpreted in their context and in the light of the object and purpose of the treaty" which "may vary to such an extent that even identically worded provisions take on different meanings".[208]

254. The varying forms and meanings of different MFN clauses is reflected in the investment treaty case law. Thus, the different wording of the MFN clauses that appeared in the different treaties relevant to the cases of *White Industries v. India* and *Paushok v. Mongolia* led tribunals to interpret those MFN clauses quite differently.[209] In this Tribunal's view, that is unsurprising and, in the same way, this Tribunal is not tasked with determining a general meaning of MFN clauses. Rather, its task is to interpret the particular meaning of the MFN clause that appears specifically in the Treaty at issue here, which – as both sides in this Arbitration acknowledge – was the subject of specific negotiation.

255. In doing so, for a number of reasons, the Tribunal cannot adopt the interpretation contended for by the Claimant.

256. To recall, it is the Claimant's case that the last phrase of Article 3(1), which it has labelled as the "Contested Phrase", constitutes a self-standing standard of protection that is additional to the MFN provision that appears earlier in the article.

257. In particular, it divides, labels and explains Article 3(1) as follows in its Skeleton for the September hearing:

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207 See *Draft Articles on most-favoured-nation clauses with commentaries*, 1978(2) ILC Y.B. 16, p. 20, ¶ 13, citing A.D. McNair, *The Law of Treaties*, Oxford, 1962, p. 273, Exhibit RL-159.

208 Christopher Greenwood, "Reflections on 'Most Favoured Nation' Clauses in Bilateral Investment Treaties", in D. D. Caron et al. (eds.), *Practising Virtue*, 2015, Exhibit RL-189.

209 *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶¶ 11.1.1-11.2.9, Exhibit CLA-183, and *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶¶ 562-573, Exhibit RL-120.

> Article 3(1) of the BIT provides that "*[the host state] shall, in respect of investments made by investors of the [home state] and of activities relating to such investments, ensure in its territory a regime that is no less favourable than the one provided to its own investors or investors of any third state, and which excludes the application of measures of a discriminatory character that might prevent the management and disposal of investments*" (the "**Contested Phrase**").
>
> Article 3(1) allows an investor to rely on standards of investment protection found in the host state's other investment treaties, such as the FET, FPS and umbrella protection. As follows from the VCLT's rules of treaty interpretation, the Contested Phrase operates as another standard of investment protection rather than as a restriction on the scope of the national treatment and MFN clause that precedes it.[210]

258. The Tribunal considers this to be an unavailing interpretation of the ordinary meaning of the terms of Article 3(1) in two ways.

259. First, it appears to require the Claimant to place emphasis on the existence of a conjunction "and" at the beginning of the "Contested Phrase" in order to contend that the latter operates as another and additional standard of investment protection that the host state's "regime" must comply with. However, as a matter of accurate translation of the provision, this is problematic for the Claimant because, as the translation that appeared last at Exhibit RL-161 indicates, and as the Claimant itself confirmed during the hearing, [211] such a conjunction does not appear in either of the Russian or Ukrainian original texts of the Treaty.

260. Secondly, and regardless of whether the conjunction "and" appears or is necessary in the original texts of the Treaty, the Claimant's interpretation results in a redundancy in Article 3(1) that would make little sense. For the uncontested part of Article 3(1) manifestly comprises both an undertaking

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210 Claimant's Skeleton Argument, ¶¶ 38-39 (emphasis in original).

211 Transcript, 9 September 2020, p. 151.

to provide a regime "no less favorable than the regime granted to its *own* investors or investors of *any third State*". As such, that uncontested provision is an undertaking not to discriminate by providing both national treatment and MFN treatment. That being so, it makes little sense for the final, contested, phrase of the article additionally and separately to comprise a non-discrimination undertaking, because that would make the final phrase duplicative of the protection offered in the first phrase.

261. It is therefore far more coherent to interpret the final phrase as related to, and qualifying of, the first phrase in the provision; i.e. particularising what type of discrimination would fall foul of the protection offered in the first phrase of the article. Understanding the article in this way also makes more sense of the dependent nature of the contested phrase (i.e. in using the present participle ("precluding") to specify and qualify the non-discrimination standard that is being established by the first phrase). It is also more consistent with the title of Article 3, which announces that it comprises only "National Regime and Most Favoured Nation Treatment".

262. In response to this more natural reading of Article 3(1), the Claimant further argues that the "Contested Phrase" could not reasonably be understood as a qualification and limitation on the earlier part of the article because the qualifications on protection in the article are set out separately in Article 3(3).

263. To recall, Article 3(3) of the Treaty provides as follows:

> The most favoured nation treatment provided in accordance with point 1 of this Article shall not extend to privileges granted or to be granted by a Contracting Party:
>
> a) in connection with involvement in a free-trade zone or in a customs or economic union, a monetary union, or an international agreement providing for similar associations, or in other forms of regional cooperation in which any Contracting Party is or may become a participant;

> b) by virtue of an agreement on the avoidance of double taxation or other agreements on matters of taxation.[212]

264. In this way, Article 3(3) limits the protection offered in Article 3(1) in two particular ways. But such limitation does not tell us anything about the better way of interpreting Article 3(1) itself, which determines the general scope of the protection in Article 3. Put another way, either of the Parties' interpretations of Article 3(1) could be consistent with the terms of Article 3(3), and so it does not assist us in choosing between them. Very simply, Article 3(3) does not alter the Tribunal's view of the better way of interpreting Article 3(1).

265. The Tribunal's view as to the narrower scope of protection set out in Article 3(1) is confirmed by consideration of the *travaux préparatoires* and the drafting history of the Article. Both Parties have acknowledged the drafting history of the Article, and that it appeared in the following form in an earlier draft:

> **Article 3**
>
> **Regime of investments**
>
> 1. Each Contracting Party will provide on its respective territory a regime for the investments made by investors of the other Contracting Party, and also with respect to the activity involved in making such investments which regime shall be fair and equitable, precluding the use of discriminatory measures, which could interfere with the management and disposal of those investments.
>
> 2. The regime, referred to in Item 1 of this Article, will be no less favourable than one granted in connection with investments and investment activities of its own investors and investors of any third state.

212 Russia-Ukraine BIT, Article 3(3), Exhibit C-001.

[…][213]

266. Thus, the earlier draft of Article 3: (i) featured a broader title, which was not focused specifically on National and MFN treatment; (ii) included an express reference to the FET standard; and (iii) tied MFN treatment specifically to the FET protection included in the draft article itself.

267. The paradox of the Claimant's interpretation of the final terms of Article 3 is that, even though the contracting States removed the express reference to FET, according to the Claimant they intended nevertheless to retain such a protection by making a general reference to MFN treatment. Indeed, if the Claimant's interpretation of the meaning of Article 3 were accepted, it would import FET and other treaty protection standards in an unlimited manner which would make the protection broader than the earlier draft, even though that earlier draft contained express reference to FET. The Tribunal does not consider such an interpretation to be persuasive in circumstances in which express reference to FET protection was removed by the contracting States.

268. Finally, the Tribunal notes that, according to the Claimant, another tribunal hearing claims under the Treaty may have reached a differing view on the scope of protection offered by Article 3 in the case of *Naftogaz v Russia*. While a brief report of that decision has been published (and is relied on by the Claimant),[214] the Tribunal is unwilling to alter its own view as to the better interpretation of the Treaty on the basis of a non-binding decision of another tribunal that it has not had the opportunity to see itself.

269. For all these reasons, the Tribunal accepts the Respondent's interpretation of Article 3(1). It finds that the Article does not import other standards of protection, such as FET. Rather, it amounts to a non-discrimination standard that only and specifically precludes the application of measures of a discriminatory character that could interfere with the management and disposal of the investment in question.

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213 Letter No. 24-40 p/o (T) of Ministry of Economy of Russian Federation to Embassy of Ukraine in the Russian Federation dated 30 September 1997, attaching Draft of the Agreement between the Government of the Russian Federation and the Government of Ukraine on the Encouragement and Mutual Protection of Investments, Article 3, Exhibit R-37.

214 Extract of the UNCTAD Investment Policy Hub, information on *Naftogaz and others v. The Russian Federation*, PCA Case No. 2017-16, Exhibit C-128.

VII. DISPOSITION

270. Taking into account the above considerations, the Tribunal decides as follows in respect of the Respondent's preliminary objections:

(i) the Respondent's first preliminary objection that the Tribunal has no jurisdiction *ratione personae* is **dismissed**;

(ii) the Respondent's second preliminary objection that the pre-conditions for access to arbitration in Article 9 of the Treaty have not been met is **dismissed**; and

(iii) the Respondent's third preliminary objection that Article 3(1) of the Treaty cannot import other standards of protection, such as the FET, FPS and 'umbrella' clause standards, is **upheld**.

271. All costs and expenses of the Parties and the Tribunal incurred in connection with this stage of the proceedings are reserved for subsequent determination.

Place of arbitration: Stockholm, Sweden

Name: Paolo Michele Patocchi

Name: Loretta Malintoppi

Name: Constantine Partasides QC

Date: 31 January 2021